IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001176

First-tier Tribunal No: HU/16571/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 October 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Davinder Singh
(ANONYMITY ORDER NOT MADE)

Appellant

and

The Secretary of State for the Home Office

Respondent

Representation:
For the Appellant: Mr Nicholson, Counsel instructed by JJ Law Chambers
For the Respondent: Mr Melvin, Senior Presenting Officer

Heard at Field House on 16 June 2023

DECISION AND REASONS

Appellant's immigration history and History of the appeal

1. The appellant is a citizen of India, born on 15 June 1980. He claims to have entered the UK illegally in 1998. He came to the attention of the UK authorities when he was arrested in 2005. He was convicted of numerous offences between 2005 and 2008 and on 19 December 2008 a deportation order was signed. He was subsequently reported to have left the UK voluntarily in 2011. He was convicted of further offences in 2016 and 2019. On 21 July 2019 he submitted representations to the Secretary of State who on 17 October 2019 refused his human rights claim and decided to maintain the deportation order. He has remained unlawfully in the UK at all times.

2. Mr Singh appealed against the decision and his appeal was determined on 2 November 2021 by First-tier Tribunal Oxlade who found that the Secretary of State had not addressed her mind to whether Mr Singh was a

persistent offender because he had “shown a particular disregard for the law”. The judge concluded that the decision was legally flawed and allowed the appeal on that basis, noting that the Secretary of State was likely to make a new decision. The appeal was allowed on human rights grounds.

3. I set aside the decision on the basis that there had been a material error of law for the reasons in the decision dated 31 October 2022 appended to this decision at Annex A.

4. The appeal was adjourned for re-making on the Article 8 ECHR issue with none of the findings preserved. There has been a considerable passage of time since the decision and appeal, and it is accepted that the appellant’s family circumstances will have changed in the intervening period.

Decision under appeal

5. The decision to which this appeal relates is a decision made on 17 October 2019 that Section 32(5) of the UK Borders Act applies and that the appellant is liable to automatic deportation as a foreign criminal.

6. The Secretary of the State considers Mr Singh’s deportation to be in the public interest because he is a “persistent offender” having 14 convictions for 36 offences. None of the Exceptions apply to him because it would not be unduly harsh for his two British citizen children and stepchild to return to India with Mr Singh and his Indian national spouse or for them to remain in the UK without him. He is not socially nor culturally integrated into the UK. There are no very compelling circumstances over and above the exceptions which would render his deportation from the UK a disproportionate breach of Article 8 ECHR.

Summary of the appellant’s case

7. It is the assertion of the appellant that his deportation from the United Kingdom as a result of the decision would be a disproportionate breach of his Article 8 ECHR rights and would thus be unlawful under Section 6 of the Human Rights Act 1998.

8. Mr Singh’s position is that he has been living in the UK continuously since 1998. He did not leave the UK in 2011. He is not a “persistent offender” because there was an 8-year gap in his offending. He has a subsisting and genuine relationship with three British citizen children, and it would be unduly harsh for all his children and particularly his eldest child who I refer to as child A who has autism spectrum disorder (“ASD”) and significant needs either to leave the UK and return to India and or to remain in the UK without his father.

Evidence before the Tribunal

9. The evidence before me consisted of the original respondent’s bundle pages A1 to I14 which enclosed the decision under appeal, the appellant’s

convictions and the representations and enclosures in support of his human right's claim. The respondent also adduced a notification of removal to the DWP dated 27 October 2014 and copy of internal CID notes in respect of the appellant's wife's application on 20 July 2020 accompanied by a rule 15 2A application. The respondent submitted a skeleton argument dated 6 December 2022 and supplementary skeleton argument dated 15 June 2023.

10. I also had before me the appellant's original appeal bundle consisting of 226 pages, a supplementary bundle of 88 pages, a psychological bundle of 19 pages, a letter dated 6 December 2022 enclosing school reports and photos and a supplementary bundle for the hearing on 16 June 2023 consisting of 39 pages. I was also provided with outline submissions prepared on behalf of the appellant by Mr Nicholson.

Oral evidence of the appellant

11. The appellant gave his oral evidence in English. He adopted three witness statements dated 18 October 2019, an undated statement submitted in support of the hearing on 4 February 2020 and a more recent witness statement dated 13 June 2023.

12. The evidence of the appellant from his written statements and oral evidence, in summary, is as follows:

13. He entered the UK illegally in 1998 at the age of 18. He first came to the attention of the Secretary of State in 2003. He married his wife on 8 October 2011 and has never left the UK since then. They lived as a family unit at their home in Reading where she has remained. He separated from his wife for a period, during which time she became pregnant by her new partner, although he was not very clear on the dates or the length of the separation, initially stating that it was for a year or a year and a half, and later acknowledging that it might have been between 2015 and 2018. He was incarcerated for three weeks in December 2016 and on 18 March 2019 he was sentenced to a further period of imprisonment. Since being released from immigration detention in April 2020 he has been living with his wife and children in a family unit. This is a period of over three years. He regrets his previous criminal behaviour.

14. He has memory problems. He previously had drug and alcohol problems. He came off drugs in prison. He stays clean by keeping busy with the children, taking them to school, going to the park and running. He no longer drinks.

15. He admits giving different identities to the police when he was apprehended by them and that he previously had a disregard for the law.

16. He is very close to his wife and children and is an integral part of the family. His children rely on him for physical, emotional and psychological support. He is particularly close to A. He is able to calm down A when the child presents with challenging behaviour. A has significant special needs

and requires a lot of support. A is starting a specialist school in September 2023.

17. At the date of the appeal hearing the appellant was dropping off and collecting A from his primary school. He takes him to the park, to the Sikh temple, to visit his uncle and to all of his hospital and medical appointments. When A's behaviour becomes challenging and he gets angry, he becomes distressed. He throws things and scratches himself. The appellant holds him and hugs him to calm him down.

18. The second child who I will refer to as "B" has also been diagnosed with autism and is becoming more difficult to look after as he gets older. The children do not have extensive wider family in the UK. They only have a few friends from school.

19. The appellant worked cash in hand as a plumber. After he went to prison, he was no longer able to support his wife and she claimed benefits for rent and food. The family is now in receipt of Universal Credit. He does some odd jobs.

20. He and his wife speak Punjabi to each other. The children understand Punjabi but do not speak it. They speak English. His wife is learning English and speaks it a little.

21. The children's primary school is about ten minutes' walk away and A's specialist school is about 30 minutes' drive.

22. Afterschool activities include basketball, gymnastics and swimming. The youngest child who I will refer to as "C" is starting out of school tuition. C does not know that the appellant is not her biological father. She believes the appellant to be her father.

23. All three children visited the appellant when he was in detention, and he telephoned them several times a day.

24. The appellant described A's birthday which was shortly before the hearing. In the morning A was very happy. He went to school and received gifts from his school friends. In the afternoon the family planned to share the birthday cake. Suddenly A's mood changed, and he became very angry and started throwing things and exhibiting challenging behaviour. It took over an hour to calm him down. It is only the appellant and his wife who can calm him down. He does not like strangers.

Jajwinder Kaur's evidence

25. The witness gave her evidence in Punjabi through a court appointed interpreter. She confirmed that she understood the interpreter and there were no problems with interpretation. She also gave some of her evidence in English and it was apparent that she has a moderate level of English.

26. She adopted her witness statements dated 18 October 2019, 3 February 2020 and a more recent statement dated 13 June 2023.

27. Her evidence from her statements and oral evidence is as follows. She came to the UK as a visitor on 18 October 2010. She met the appellant and formed a relationship with him, and they were married on 8 November 2011. They had two children together. A was born in 2012. B was born in 2014. After B was born there were marital problems as a result of the appellant's drinking. He left for a period and she formed a relationship with a British national of Indian origin because she did not want to bring up her two young children by herself. At first things went well, but his behaviour changed after she became pregnant with C. He wanted her to claim benefit for him and they separated. Her daughter was born on 14 March 2016. She then obtained a residence permit.

28. The appellant got in contact with her in 2018. He wanted to see the children and apologised for his behaviour. She allowed him to visit the children because she wanted the children to have a father in their lives particularly as A was so close to his dad. The meeting went well, and she realised how important the appellant was to the family. After that, the couple talked and agreed to give the relationship another try. She still loved him, and he was the father of her two children and he was prepared to step up and be a father for her youngest child. Since then, the couple have been in a relationship. There have been no further matrimonial problems, and everything was going well until the appellant was arrested in March 2019.

29. Whilst the appellant was in prison, she struggled to look after the three children. She received some financial support from her sister in the USA. She has no siblings in the UK, nor any close family. The other tenant who was living in the house used to help out with the rent. It was very difficult for her to manage with the three children. A was particularly difficult to look after because of his speech and language difficulties.

30. When she took the children to see the appellant in detention, they became very upset.

31. She does not want her children to grow up in India because the education system is very different to the UK and her children will struggle. They have already gone through a difficult time without their father. They missed him a lot. They have no knowledge of life in India. A will not get the extra care and attention he needs. At primary school he had specialist help including one to one assistance. He does not understand the world around him and school needs to be predictable and consistent. He is sensitive to noise. He has been offered a place at the Avenue specialist school and there will be weekly meetings at the school to discuss his progress and needs. His father is particularly close to him and can manage A much better when he is finding things difficult. She cannot manage all three children on her own.

32. B has also been diagnosed with autism and C is being assessed.

33. All three children love their father very much. It is in the children's best interests to remain in the UK with their mother and father.

34. In her oral evidence she also recounted what happened on A's birthday. Her evidence was on the whole consistent with the appellant's. The child was very happy in the morning. He went to school and received gifts. When he came home, he went with his father to collect the cake she had ordered. He was happy and excited. When she told him it was time to switch off the TV because they were going to cut the cake, he said "no" very rudely. She asked him to turn the volume down and she put the remote control near the cake. A is very particular about where things are kept and because the remote control had been placed out of position, he got very upset and made a big scene. He threw himself around and needed to be restrained. It took him several hours to calm down and be put to bed.

35. The children do not like strangers and do not like people to come to the house. A does not like other children touching his toys.

36. She confirmed that A's behavioural issues are increasing as he gets older. There was an incident in a maths lesson where he had a meltdown. He did not listen and started harming himself by scratching his face and arms. A can manage the toilet but is afraid of the bathroom. Sometimes he washes himself and sometimes he need help.

37. She also confirmed that as B is getting older it is becoming harder to look after him. He does not sit still.

38. It is difficult to manage the two children. If one wants to do something, the other will be in opposition. They cannot go out unaccompanied. She cannot take them all to the park on her own. A recent trip to the park with both parents was disrupted when one of the children became challenging. She would not be able to manage all three children on her own. It is not possible for her to seek employment because of the number of times the school calls her to due to an incidents. She frequently has to pick up A from school. She needs her partner to help her especially as A gets bigger and bigger. Her husband also helps C to do her homework.

39. She confirmed that the appellant was present at A's birth in 2012. She does not have any photographs. There is a photograph album, but she was not aware that she needed to bring it to court. She was not aware that the Secretary of State's position was that her husband was in India in 2011. Her husband did not return to India in 2011.

40. She clarified that she separated from the appellant about 4 to 5 months after B was born because there were lots of fights over his drinking problem and agreed that he would have moved out about February or March 2015. He attended A's birthday party in June 2018 and after that they gradually saw each other more often because the children enjoyed it and then he moved back into the Reading address full time. She does not

remember the exact date, but he was living in a family unit with them until he was arrested.

41. The Reading address is a three-bedroom house. She initially rented it with another tenant, a Mr Imam who would come and go because he had family in France. In cross examination she confirmed that the family now rents the whole house after the tenant moved out.

42. She clarified that she tries to speak to the children in English. They understand Punjabi and speak English.

43. She does not receive any child maintenance or support from C's father. C is not in contact with her father or his wider family.

44. She clarified that when she completed the 2020 application she spoke to the CAB over the phone because of Covid restrictions and explained that her husband had recently come out of prison and was living with them. She told the CAB that she was not divorced from her husband. She denied stating that she was estranged from her husband. She confirmed that she is in a genuine and loving relationship with her husband. He is not just there to assist with the childcare. He loves his children and has changed.

45. She does not have any medical problems and nor does her husband. In re-examination, she explained that she gets pins and needles in her legs and sometimes has heavy painful periods.

Submissions

46. Mr Melvin asked me to dismiss the appeal. He relied on the original refusal letter, the skeleton argument and the up-to-date skeleton argument. He asked me to place little weight on the medical report which stated that Mrs Kaur has mental health problems because this was not the evidence of the witnesses. He submitted that the witnesses are unreliable and have exaggerated their children's problems and the extent of the difficulties. The appellant stated that it took an hour to calm A down. She said it took 3 hours. There is no confirmation of a diagnosis of ADHD and no reports of the children suffering episodes or having problems at school contrary to the evidence of Mrs Kaur. A's behaviour has improved. The best interests of the children are outweighed by other matters.

47. He submitted that the appellant falls under the category of "persistent offender" even though there is no evidence of any further offending since his release from prison. There have been 30 offences over 14 years with a gap when he may or may not have been outside the UK.

48. There is no tangible evidence that the appellant entered in 1998 as he claimed. He was first encountered in 2005. He conceded that the evidence relating to the voluntary return in 2011 was deficient in that the documents which one would expect to see are missing. However, there was little in the way of supporting evidence to demonstrate that the

appellant remined in the UK between 2011 and 2014 including tenancy agreements gas bills etc.

49. He submitted that the couple are not in a genuine relationship but are together because of the children. The couple separated in early 2015 when the appellant moved out. There was, on their own evidence, no relationship between 2015 and 2018. The appellant was released to the Reading address in April 2020 post Covid. It is difficult to accept that the internal Home Office transcript was incorrect. In July 2021 when the appellant's wife submitted her application for further leave, she said she was not in a relationship with her husband. Mr Melvin had not able to access a copy of the application.

50. In respect of the issue of "unduly harsh", he relied on the refusal notice in which it is said that there is provision for autism in India. The family can relocate together notwithstanding that the children are British citizens. The appellant and his wife can work. They are aware of Indian culture and customs. The children have a basic understanding of Punjabi and can learn it. They have grown up in an Indian household and are aware of the language and customs of India. They are young enough to adapt to life in India and will learn more about their cultural background. They will have access to schooling and their welfare will not suffer. There is treatment for ASD in India.

51. In addition he submitted that it is not unduly harsh for the children to remain in the UK without their father. Their mother was able to look after then for a considerable period with the assistance of friends and family when she was separated from the appellant and whilst he was in prison. She coped without the assistance of social services. No evidence has been presented to show that the appellant's presence in the UK is needed to prevent the children from being ill-treated or that their health or development will be impaired. Mr Melvin submitted that both of the younger children are said to have improved in their reports. B has settled in well into Year 3 of his school and is making a "super" effort. C is making good progress educationally. Any negative emotional impact does not meet the threshold and the children will have their mother's support.

52. There is no disproportionate breach of Article 8 ECHR.

53. Mr Nicholson's submissions are set out in the record of proceedings. He relied on his skeleton and drew my attention to Dr Hung's report. A would suffer intense distress if he were removed to India because he cannot tolerate change. A child with autism need lifelong support. He submitted that the children's problems are likely to get worse than better and the children will need greater care. Mrs Kaur coped with difficulty between 2015 and 2018. In 2015 there were two children aged 3 and 1. Her third child was not born until 2016. The children are now aged 11, 8 and 6. They are bigger and less easy to control. The tantrums are more intense and difficult to deal with. If one child has a meltdown, one parent needs to be there to control that child whilst the other parent can provide space and

calm for the remaining children. It is vital for there to be as many able-bodied people as possible. It would be catastrophic to take one parent out of the equation. The appellant and his wife did not exaggerate the problems. He addressed me on Mr Melvin's submissions. He pointed out that the latest CPIN on India 2023 has nothing at all about the provision of autism in India.

The Law

54. Section 117A of the Immigration Act 2014 applies where a court of UK Tribunal is required to determine whether a decision under the Immigration Acts breaches the person's right to respect for private and family life under Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. By Section 11A(2) the court or Tribunal in considering the public interest question is required to have regard in all cases to the considerations listed in Section 117B and in cases concerning the deportation of foreign criminals to the considerations listed in Section 117C.

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

55. The maintenance of effective immigration control is in the public interest. Pursuant to Section 117C(1) it is in the public interest to deport foreign criminals. The will of Parliament as expressed in primary legislation requires the automatic deportation of foreign criminals, into which category the appellant fits.

56. In relation to the test of unduly harsh, I repeat Lord Popplewell's words at [10] to [12] of AA(Nigeria) v SSHD [2020] EWCA Civ 1296;

> [10] In relation to what is meant by "unduly harsh" in section 117C(5), the authoritative guidance is now that given by Lord Carnwath JSC in KO (Nigeria) and by this court in HA (Iraq) (Court of Appeal). The former addressed this issue notwithstanding that the main question in that case was not the meaning of "unduly harsh" but whether it involved consideration of the seriousness of the offence. At [23] he said:
>
> > "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6) , taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1) , that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2017] 1 WLR 240 , paras 55 and 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."
>
> [11] At paragraph [27] he said:
>
> > "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563 , para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
> >
> > > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
>
> [12]As explained in HA (Iraq) (CA) at [44] and [50] to [53], this does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness".”

57. In its judgement in HA (Iraq) v SSHD [2022] UKSC 22, the Supreme Court rejected the Secretary of State's submission that the Court of Appeal had erred in

rejecting the "notional comparator test" which according to the Secretary of State was contained in Lord Carnforth's judgement in KO (Nigeria) v SSHD [2018] UKSC 53. The Court of appeal's judgment was upheld by the Supreme Court.

58. The applicable test for undue harshness is now expressed in HA (Iraq) v SSHD [2022] UKSC 22 at [43] and [44] where it is said:

> "In these circumstances I consider that it is appropriate for the MK self-direction to be adopted and applied, in accordance with the approval given to it in KO Nigeria itself.
>
> Having given that self -direction and recognised that it involves an appropriately elevated standard 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"

59. In MI (Pakistan) v SSHD [2021] EWCA Civ 1711, the Court of Appeal noted:

> "Fourthly as Peter Jackson LJ emphasized in considering harm "there is no hierarchy as between physical and non-physical harm and there can be no justification for treating emotional harm as intrinsically less significant than physical or other harm. A failure to appreciate this is likely to result in a failure to focus on the effect of a parent's deportation on the particular child".

Findings of Fact – Facts not in dispute

60. I start by making findings of fact of those issues which are not in dispute.

61. The appellant entered the UK illegally and has never been lawfully in the UK.

62. The appellant was first encountered by immigration in 2005 when he was arrested for shoplifting and immigration offences. On 5 October 2009 he was released on immigration bail and absconded.

57. The appellant has 14 convictions for 36 offences between 2005 and 2019. Those offences are set out in more detail below.

58. The appellant married Jajwinder Kaur at a ceremony at the Gudwara on 11 October 2011. He has two biological children with her. The eldest child A, a boy, was born in the UK on 15 June 2012 and is a British citizen. He is now 11. The second biological child B, also a boy, was born in the UK on 12 October 2014 and is now eight years old. He is a British citizen. There is a further child C, a girl, who is not the appellant's biological child but was born as a result of a relationship between the appellant's wife and another partner. C was born on 14 March 2016. She is now seven and is a British citizen by birth by virtue of her father's status.

59. Jajwinder Kaur is an Indian national. She entered the UK on 18 October 2010 a visitor with her then partner. She overstayed her visa and remained illegally in the UK. She applied for a residence permit on the basis that she was a carer of a British citizen child and was granted a residence permit along with the two elder children on 19 February 2018

expiring on 19 August 2020. On 22 July 2020 she made a further application. She currently holds further leave to remain in the UK until 9 August 2023 under the ten-year route on the basis of her relationship with her children.

60. It is agreed that the appellant has a genuine and subsisting relationship with all three children.

61. The respondent accepts that A has Autism Spectrum Disorder "ASD" and that he has an Education Health and Care Plan "EHCP". He is on the Special Educational Needs ("SEN") register. It is also accepted that he will attend the Avenue Special Needs School from September 2023.

62. B has also been diagnosed with ASD. He has special needs in respect of speech, language and reading.

63. It is accepted by the respondent that C has special educational needs.

64. It is accepted by the respondent that it is in the best interests of all three children to be raised by both of their parents in the UK.

65. The appellant is a plumber by trade. The family is in receipt of Universal Credit, child benefit, carer's allowance and disability living allowance.

Facts in dispute

"Persistent offender"

66. Mr Nicholson did not robustly submit that the appellant cannot be categorised as a "persistent offender". He did not repeat the arguments before the First-tier tribunal that the decision is unlawful because the Secretary of State had not turned her mind to whether the appellant has shown a "particular disregard for the law".

67. Mr Nicholson's primary submission is that it becomes more difficult to categorise an individual as a "persistent offender" as more time elapses since the last offence.

68. In this appeal, the appellant has not offended since he was released from detention in April 2020 which means that three years have now passed without any offending.

69. The appellant was first apprehended shoplifting on 24 February 2005 and was sentenced the following day. Over the next few years, he was convicted of numerous further shoplifting offences. In March 2006 he was sentenced to 12 weeks imprisonment because some of the offences had been committed whilst he was on bail and subject to a conditional discharge. He also failed to surrender to custody. On 14 June 2006, shortly after leaving prison, he was convicted of possessing heroin and imprisoned for four months. On 25 October 2007 he was convicted of possession of class A drugs and imprisoned for three months. On 29 January 2008 he

was convicted for possessing heroin and cocaine and was imprisoned for a further five months. During this period, the appellant was manifestly a frequent user of heroin and cocaine leading to associated criminal offences. He was in and out of prison. I have no hesitation categorising him as a “persistent offender” during this time. He was clearly aware that he was breaking the law over and over again. He committed offences when he knew he was on bail and subject to a conditional discharge and his offending was frequent. His offences included theft and kindred offences, offences relating to court and prisons and drug offences. He manifestly displayed a particular disregard for the law.

70. There is then a break in his offending between 2008 and 2016. The Secretary of State asserts that he was not in the UK from 2009. I will deal with that later.

71. In any event his next conviction was on 18 August 2016 for possessing a class A drug, cocaine, driving a vehicle with excess alcohol driving without a licence and whilst uninsured as well as failing to stop after an accident. He was initially disqualified from driving and subject to a community order. Those sentences were varied due to further offences.

72. On 8 December 2016 he was convicted of driving whilst disqualified, resisting a constable, driving whilst uninsured, possessing a class A drug methadone and committing an offence when a community order was in force. Again, he was sentenced to a community order, an unpaid work requirement and rehabilitation requirement. On 18 March 2019 he was convicted of driving a vehicle with excess alcohol, obstructing/resisting a constable, using a vehicle whilst uninsured and driving whilst disqualified. He was sentenced to 16 weeks imprisonment and the sentences for his original offences were varied to an eight-week prison sentence.

73. I am satisfied that the number and nature of the offences in 2016 onwards are sufficient to characterise the appellant as a “persistent offender” despite the gap in offending between 2009 to 2016. Between 2016 and 2019 the appellant was still using class A drugs and committing driving offences. He was aware that these offences were illegal and yet he chose to keep on offending by drink driving which is particularly dangerous to the community because of the risk of innocent individuals being harmed.

74. These offences manifestly also demonstrated a particular disregard for the law as they involved committing offences whilst on a community order, resisting arrest, repeatedly driving whilst disqualified, uninsured and without a licence after being previously convicted of the same offences. He also used several aliases when stopped by the police which he admitted in his oral evidence. He also candidly admitted that in the past he had no disregard for the law of the UK.

75. Further, the appellant has had no regard for immigration law. He entered the UK unlawfully. He later absconded when released from detention and he has always remained in the UK without leave. He admits working

illegally in the UK. He has produced little independent evidence of rehabilitation apart from the lack of further offending.

76. Given the nature of the offences, particularly the drink driving and drugs offences and the period over which the appellant has carried on offending as well as his attempts to resist arrest, I find that that the appellant remains a “persistent offender” despite not having offended for the last three years. No doubt, if more time elapses without any further offending and there is greater evidence of rehabilitation, there will come a time when he can no longer be categorised as a “persistent offender”.

77. As such I find that the appellant a “foreign criminal” for the purposes of section 117C (3) of the 2002 Act and his deportation is required unless he can meet one of the statutory exceptions.

When did the appellant arrive in the UK and did he leave the UK in 2011 and return in breach of a deportation order?

78. I next turn to the question of whether the appellant left the UK in 2011 as asserted by the Secretary of State. There is some vague reference to information received from an unspecified source that he voluntarily departed from the UK on 23 October 2011. The respondent made an application pursuant to Rule 15(2A) to adduce a produced a “Notification of removal to the DWP” stating that he made a voluntary departure on 23 October 2011. Mr Nicholson did not object to this evidence being admitted and I found that it was in the interests of justice to admit it. There is a reference in this document to him leaving the UK under the Facilitated Returns Scheme. I am in agreement with Mr Melvin that had the appellant left the UK under the Facilitated Returns Scheme the respondent should have been able to produce some kind of paper trail of internal Home Office notes detailing communication between the appellant and the respondent, attempts to obtain any Emergency Travel Documentation, details of the assistance provided under the scheme and flight numbers etc. In the absence of this evidence, an unsubstantiated assertion that he left is not sufficient to persuade me on the balance of probabilities that he left the UK in 2011.

79. Further the fact that he had entered into a marriage with his wife weeks earlier is not consistent with him leaving the UK in 2011. A was born the following year in 2012. The appellant’s name is on A’s birth certificate, and he is said to be the informant. At that point the couple are said to be living in Southwell. The appellant is also named on B’s birth certificate in 2014, by which point the couple are said to be living together at the Reading address where they still reside.

80. Mr Melvin submitted that the witnesses are not reliable. The appellant has been convicted of crimes of dishonesty and his dealings with the UK authorities do not display integrity. He has had a serious drug problem in the past and has more recently had a drink problem. He has given aliases to the police. His wife asked him to leave in 2015 because of his

problematic alcohol use. I am not persuaded that he is a particularly honest witness and I bear these factors in mind when assessing his evidence. Nevertheless, although he may have indicated to the respondent that he intended to leave voluntarily in 2011 (potentially to avoid deportation), I find on the balance of probabilities that he remained in the UK because he conceived two children with his wife in the following years. I am not persuaded that his wife would lie about him being present at the birth of the children. There would be no reason for her to do so. I also take judicial note that a father must attend the Registry office to be named on the birth certificate. I also find it likely that the appellant would have been working in the UK to support his wife since she had no immigration status of her own and no permission to work or entitlement to benefits. It is not in dispute that he was in the UK from 2016 as his more recent convictions date from this time. Any absence of documentation is likely to be as a result of his illegal status.

81. There is no supporting evidence of the appellant's entry and residence in the UK from 1998. He has not provided any supporting evidence nor any details of where he was living and his circumstances when he first arrived, and he is recorded as giving different dates of arrival to the authorities. I find that he did not arrive in 1998. I infer that he was already in the UK prior to February 2005 when he was arrested. I therefore find on the balance of probabilities that the appellant entered the UK unlawfully in 2003 or thereabouts and that he has remained living in the UK since then for a period of about 20 years.

Genuine and subsisting relationship

82. Mr Melvin submitted that the appellant is not in a genuine and subsisting relationship with his wife. This is primarily on the basis of some internal Home Office casenotes in respect of her application for further leave to remain in 2020 which records that she is living with her husband. It is said that the couple are not divorced but they are estranged, and that the appellant's wife is allowing him to remain in the property because he is destitute and on bail. The appellant's wife claims she did not say this, and that she gave her instructions to the CAB over the phone because of Covid and there must have been an understanding. It is possible that the CAB misunderstood her instructions in these circumstances particularly as she is not fluent in English. It is also possible that she did not want to reveal that she was back together with her husband for the purposes of her immigration application. When her initial application was made, she was a single parent.

83. Nevertheless, as of the date of the hearing, I accept that the couple are in a genuine and subsisting relationship and have been so since 2019. There is a Council tax bill showing them both resident at the Reading address dated 1 April 2019. There are bank statements with money passing between the couple, letters from schools confirming that the appellant drops off and picks up children, medical letters confirming their joint attendance at appointments, family photographs and their witness

statements and oral evidence. Although the appellant's wife may have been economical with the truth in her latest immigration application (and I make no definitive finding on this), this does not mean that she has not been truthful about other matters. She has given a detailed account of what happened in her relationship and her evidence in respect of her relationship and family life with her husband and children came across and natural and unrehearsed. The couple gave consistent accounts about what happened on A's birthday. I do not find that the appellant is just living with his wife to assist with the children. I find that they are in a relationship and are committed to each other. In any event, I am not assessing whether it would be unduly harsh for the appellant's wife to return to India with her husband or remain in the UK without him. Manifestly, if the couple had no children, as an Indian national with no major health issues or strong family ties to the UK, it would not be unduly harsh for the appellant's wife to return to India with him. In this appeal the focus is not on the appellant and his wife but on their children.

The children

Child A

84. When making findings in respect of Child A I have had regard to the copious and detailed evidence from various specialists who have worked with A since 2017 including the Autism Assessment Clinic at the Child and Adolescent Mental Health Team ("CAMHS"), an educational psychologist, a paediatric consultant, a speech and language specialist, his SENCo co-ordinator as well as to the EHCP prepared by the local authority. I give considerable weight to this evidence as the letters and reports have been carried by independent professionals with the aim of identifying A's needs and not for the purposes of these proceedings.

85. A letter from the autism assessment clinic at the CAMHS team at the Berkshire Healthcare NHS Foundation Trust confirms that A was diagnosed with ASD in May 2017. He was subsequently referred to the Educational Psychology service to identify his needs and recommend appropriate provision. Dr Ruth Arnell, an educational psychologist wrote a report dated 30 October 2018 having observed and assessed A as well as speaking to the school SENCo and his mother. At this point A was 6 years and 3 months old and in Year 2 at school.

86. Dr Arnell records that "he displays some traits which would be expected from a child with this diagnosis, such as restrictive patterns of behaviour: responding to routine and visual support, difficulties with social and communication interaction skills".

87. She goes on to say "School life is therefore very challenging for A because he does not easily understand the world round him and he needs school to be predictable and consistent. He therefore requires the support of adults who are understanding of the needs of a child with autism and the impact

that all of this has on his ability to take part in everyday classroom based activities".

88. She concludes "In my opinion A will require a high level of support to access learning activities and a highly differentiated curriculum, clear structures and routines supported by visual prompts/ schedules, support to progress his speech and language skill, and to develop his attention, communication and engagement..."

89. She refers to A liking things to be in "what he considers the right place" which is consistent with his mother's oral evidence. This is confirmed throughout the remainder of the professional reports which refer to him needing routine and displaying compulsive and obsessive behaviour such as being unable to continue with an activity if a door is left open or a chair is not straight. This chimes with the description of him becoming very distressed when the remote control was not placed in the "right place".

90. The educational psychologist also referred to A's "fleeting attention span", stated that he had no awareness of danger as well as a limited understanding of language and limited speech. She states:

> "He presents with significant difficulties within the area of communication and interaction his verbal skills both expressive and receptive are well below what would be expected for a child of his age. His verbal comprehension nonverbal reasoning ability as on the 1st percentile which is very low".

91. This evidence indicates that by the age of 6 A had significant needs.

92. He attended the CAMHS clinic for follow up with the paediatric consultant with both parents on 19 January 2019. At this stage he was still 6 years old. He was said to be speaking in small sentences and not mixing with other children at school. He is recorded as receiving regular speech and language therapy in his primary school where he was receiving one to one support. The school had an ASD special unit and was noted to have applied for an ECHP.

93. A was reported to get very angry, have temper tantrums be hyperactive, find it difficult to sit still and have poor concentration.

94. The paediatric consultant who examined A described him as having "significant needs" and referred him to CAMHS for an assessment on the ADHD pathway because of showing traits of ADHD.

95. In January 2019, his speech and language therapy plan was for him to learn to be able to take turns in games and identify 20 verbs. In June 2019 at the age of seven he had made progress, but his overall skills were still very poor. He is described as being easily distracted, finding interaction with other children hard and carrying out repetitive play. He could still not use full sentences and was more likely to use single words. The report also pointed out that as he progresses up the school A will find it more difficult.

96. In May 2019 he was referred by the school to the local authority for a EHCP which was completed later in 2019. The final plan is dated 2 October 2019. The plan was made after a comprehensive assessment including input from his school, the SENCo, his mother and other professionals.

97. The report describes a child with ongoing significant needs. At the age of seven his reading, writing and numbers were at the age of a three and a half to a five-year-old

98. His school reported to the local authority:

> "When highly anxious or confused A can lash out at adults and children and cause injuries to others and himself. He is often in a state of high anxiety and exhibits certain compulsive/obsessive behaviours such as becoming unable to continue if a door is left open or a chair is not straight. He feels safe when he is carrying an object of his choosing and will react violently towards the person who tries to remove it from him"

99. The EHCP concludes:

> "if the day is unpredictable or it doesn't go the way A would like, this causes him an immense amount of anxiety which is displayed through violence, screaming, scratching and aggression. He is extremely strong in these situations and it is difficult to keep him safe".

100. The overall picture is of a child who is very behind in speech and language, cannot communicate properly and who needs 1 to 1 support at his primary school all day to assist him to learn and keep him safe. The picture painted by his teachers is of him becoming distressed and aggressive if he cannot express himself, does not get his own way or where there is a disruption to his routine. When he becomes distressed, he will lash out, scratch become violent, run away and hurt himself. He cannot tolerate sounds, busy places and noise. He does not like delay. He becomes frustrated when things are not being done in a particular way. This evidence which was given independently from these proceedings is entirely consistent with the description given by his parents. His needs are significant, and he requires extensive additional and specialist support.

100. A Year 4 SEND support plan prepared in Autumn 2020 demonstrates that A's needs are ongoing. He still struggles to communicate, is working several years below his peers and is reported to become very anxious and stressed when routines change. His latest school report for Year 6 it is noted that his interaction with peers is very limited as are his language skills and that he was starting to refuse help from his 1-1 support worker.

101. I also have before me an expert report from Dr Isabelle Hung a clinical psychologist who assessed the family in August 2021. She had sight of the educational psychology report and school related documents and observed the family over a period of one hour and 45 minutes. Mr Melvin is critical of the report because it describes the appellant as being suicidal and his wife's poor mental health which is not borne out by the remainder of the evidence.

102. I accept that it is likely that the appellant exaggerated his own mental health problems to the expert or at least expressed in a colloquial way that he felt “suicidal”. I accept that there is no other supporting evidence before me of the appellant’s own state of mind and I disregard the references in the report to him being suicidal.

103. Nevertheless, I am satisfied that the expert has over 15 years of working in clinical psychology and that she regularly works with individuals with OCD and autism. Her expertise is set out in the qualification section, and she confirms that she understands her duty to the court. I accept that she is qualified to make general comment on autism and to make comments on her observations of the family from a clinical perspective. Much of her report relies on the extensive professional evidence I have referred to above and I did not find her report to go beyond this when evaluating the children. I give weight to her expert evidence on the children.

104. She observed that A used very few words and no full sentences. This is entirely consistent with the earlier reports and demonstrates that in 2021 he still had very poor communication skills. She also noted that he did not play with his brother or sister, demonstrated rigid obsessive behaviour and became upset when his toy was removed and he thought his father was leaving. There is nothing controversial in these observations.

105. The expert prepared an addendum report in March 2023 confirming that there had been no improvements since her previous report and that in fact B had been diagnosed with autism.

106. Mr Mevin’ submission is that A is improving and that his parents have exaggerated his needs. I do not agree. Any improvements in his speech and language are minimal and from a very low baseline and his parents’ description of the way in which he behaved on his birthday was entirely consistent with the reports prepared by independent professionals. I also note that there is evidence that A is not safe at school because he has no awareness of danger, that he has caused injuries to himself and others and that there is evidence of A’s attendance being below 90% due to frequent bugs and temperatures which is consistent with his mother’s evidence. In year 6, unlike his siblings, he had only 92% attendance.

107. There is also evidence that things will get harder as he falls more and more behind his peers. The level of A’s ongoing needs is also demonstrated by the fact that he has been offered a place at a specialist school. As a matter of common sense, it is more difficult to restrain an older child who is bigger and stronger than a younger one.

108. The expert states that “autism is a lifelong condition which means that the individual is likely to have a range of communication difficulties, social interaction difficulties and repetitive behaviours. Individuals with autism therefore become easily distracted and respond poorly to change”. There is no reason to reject this opinion.

109. The view of the expert from the reports and her observations is that A has “severe autism”. She states that A will need lifelong support with personal care, life administration and day to day activities. I accept her opinion because it is entirely consistent with the remainder of the expert evidence.

110. From the documentary evidence I find that the appellant has attended some courses with Parenting Special Children. He is also involved with dropping off and picking up the children from school. I find that the appellant has a very close bond with all three of his children and has an active and hands on role as a parent. I accept that A is very attached to his father and that the appellant is able to restrain and calm A down when he becomes distressed.

Child B

111. B attended pre-school in January 2018 and then primary school in September 2019. B was referred to CAMHS Autism Assessment Team on 15 February 2019 for ASD pathway assessment and was informed that there was a long waiting list.

112. His school report in July 2019 states that he is making good progress and is a happy child with close family, although he has some difficulty sharing. In a letter from the primary school dated June 2019, it is aid that both parents drop off and collect the child and attend school meetings.

113. B was observed by the expert who noted that he also showed poor language skills and little social interaction although she fairly commented that his nursery report stated that he is shy and can communicate although is slow to speak and that the nursery did not have concerns about social interaction. The expert did comment that since starting school B has immediately been identified as having special needs which indicates that he does have needs as it is difficult to get into the SEN register and that the nursery may have missed something. Her view is that, if B has autism, it is to a lesser extent than his brother however he is still likely to need long term support to help him understand certain relationships such as employment, romantic relationships and friendships. The view of the expert is that he requires two parents to meet his needs.

114. B was initially assessed remotely by the ASD Diagnostic Assessment Clinic on 17 July 2020. He is reported to have behavioural problems including tantrums particularly around sharing. He does not like loud noises. He is reported to have high levels of anger. B’s latest school report states that he appears to find it hard to express a variety of emotions and can sometimes get frustrated. In October 2021 he was further assessed by the Clinic. He was diagnosed with autism and found to have difficulties with social interaction, social communication, restrictive repetitive patterns of behaviour interests and activities. Recommendations included putting support in place in school.

115. I find that these reports accurately reflect B’s difficulties and needs. Although as Mr Melvin submits, he has made progress at school, I find that

he does have significant difficulties which I accept are likely to become more pronounced as he gets older. I accept that he also dislikes change and that he has temper tantrums which his parents need to manage between them. I accept the expert view that he will need lifelong support with relationships.

Child C

116. C started nursery in May 2019 and settled in well. The expert noted no signs of any developmental problems or delay. She commented that she needs a father. Her autumn 2022/23 school report states that she has SEN needs including social emotional and mental health and speech language and that communication and that speech and language are areas of concern. She has a support plan in place and has also been referred for an ASD assessment.

Unduly harsh

Unduly harsh for the children to live in the country to which the person is to be deported.

117. I first note that a consideration of undue harshness will entail a consideration of what is in the best interests of all three children and that this is a primary but not determinative consideration.

118. As a general rule it is in the best interests of all children to grow up having a loving and meaningful relationship with both parents and I am satisfied that it is in the best interests of all three children for them to remain in the UK where they can continue to live with their mother and father (in the case of C stepfather) as well as continue in the education system. I also find that it is in all three children's best interests for their father to remain in the UK with them so that he can continue his meaningful and supportive role in all of their lives.

119. However, this is not determinative of the appeal, and I go onto consider the issue of undue harshness. I remind myself of the elevated nature of the test which is set out above.

120. All three children are British. All three children have grown up in the United Kingdom. Their first language is English. None of them speak, read or write Punjabi. Although they have some cultural connection with India because their parents are both Indian nationals, they have never visited India. The appellant's parents are deceased.

121. The decision letter focuses on the availability of treatment for autism in India and refers to the "Action for Autism" website and a school in New Delhi. It is said that A can access appropriate treatment.

122. However, when considering the question of "unduly harsh", I have regard to the impact on A of the change itself. A's needs are ongoing. I find that even very minor changes are distressing for A. He struggles to

communicate in English. I have set out the evidence in support of this at length above. Relocating to India would involve huge change. It would involve moving to a new continent with new weather, sounds and smells, a new home, a new school and a new language. Having considered all of the evidence in the round I find that this change would be deeply distressing for A and would set back any small progress he has made with the significant input he has had in the UK. This is the view of the expert who states that the distress of the change "would be so intense that it is likely to have wide ranging, lifelong consequences" to A (and B). I have no hesitation that such a change would be detrimental to A's physical, emotional and psychological wellbeing in the short and long term.

123. It is not simply a matter of assisting A to adjust to a new environment. He has very significant needs. Hours of one-to-one support and specialist intervention have been put into place to assist him to follow commands, put together short sentences and engage with the education system on a basic level and to assist him manage his inability to manage change and lessen his distress. I find that he would struggle in India to communicate in Punjabi even on the most basic level especially in speaking, reading and writing. Even if he could access specialist support for ASD which is unlikely to happen immediately on arrival because of the lack of state facilities and the expense of private facilities, the level and quality of help that this British child receives to assist him to live and mature with dignity would simply not be available in India or would take a very long period to put in place. I find that the extent of the change in itself would be so distressing in itself that it would cause him emotional damage and lead to repeated violent behaviour and would hinder further progress, if not set him back. On this basis alone ,I find that it would be a bleak prospect and unduly harsh for this child to relocate to India and remove him from the routine and support that he has in the UK. I also find that it would be very difficult for B to deal with the change although to a lesser extent than to A.

124. I make these findings on the basis of the independent evidence all of which I find supports the expert's conclusions that change is distressing for A, that he already has profound language difficulties in English and to move to a new country where a different language is spoken would be very disorientating and would mean that he accumulates more delay with his peers and that he would fall further behind. He would also be away from adults who know how to manage his challenging behaviour.

125. I also find that there would be a knock-on effect on the remainder of his family. If one child with significant need's increase it is a matter of common sense that his parents will need to devote more time to looking after that child and that will be detrimental to the other children. They would also have to live with their brother's increased challenging behaviour and distress which will be difficult for them. I also find that that the situation would be very difficult for their parents who would need to try and access specialist support for not just one but two children.

126. I have no hesitation in finding that it would be unduly harsh for all three children to live in India with their mother and father.

Unduly harsh for the children to remain in the UK without the appellant

127. I turn to whether it would be unduly harsh for the children to remain in the United Kingdom without the appellant.

128. I have found that change is detrimental to A as set out above. I find that were his father to leave the household, having been part of the family unit for three years now, this would be another significant change with which A would not be able to cope. The evidence, which I accept, is that he was distressed when his father was absent from his home between 2015 and 2018. He was much younger then and even less aware of the world around him. His mother's evidence is that he was so happy to have his father back in his life from 2019 and that he, out of all of the children, is particularly close to his father. He was even more distressed when his father went to prison becoming upset after the few visits and the regular phone calls. He has now had the stability and routine for the last three years of his father taking him to school to the park, to the Temple and to medical appointments and fully participating in family life. His father also plays an crucially important role in restraining and comforting him when he has episodes of violent and aggressive behaviour and meltdowns. A is now older and after a period of greater stability, he would be more aware of his father's absence in his life were his father to return to India. I accept that were his father to go to India, (which would in effect be a permanent separation because of the family's financial circumstances), this change would be another significant change which he would find it difficult to cope with and that it would be extremely distressing for him because of his diagnosis of ASD. I find that this would lead to his experiencing more stress and anxiety which in turn would lead to more meltdowns and challenging behaviour. I find that this would be an intolerable burden on A's mother.

129. I find that A's mother cannot cope on her own with all three children. The evidence is that she coped with some difficulty during the period that she separated from A but at this stage her two eldest children were very young and would have required similar care to other very young children of the same age. At the outset of the period, she only had two children and she had a partner. She received financial support from friends, but she did not receive much physical support.

130. Her evidence to the expert is that she rarely left home whilst her husband was in prison apart from taking the children to school and I do not find this to be implausible in the context of her being a single mother of three young children, one of whom is severely autistic. However, as the children have become older their needs have become more apparent. A's needs have increased significantly over the years as he has become older and the difference between he and his peers has become more pronounced.

This is apparent from the professional reports and the expert report. All of the evidence from the professionals refer to the additional steps that she and her husband need to be taking at home to ensure consistency with the approach from school to assist A with his anxiety, learning, focus and attention. I find that even this on its own without the additional problems of dealing with violent outbursts and meltdowns is exhausting. In the case of A he also behaves unpredictably and needs restraining. As he grows larger and stronger, the appellant's wife as a female will find it hard to physically manage him. B's needs are also increasing as he gets older. I also note the expert's comments that A and B's needs will be more complex as they reach puberty and have to deal with managing sexual urges. I accept the expert view that the appellant's wife requires his support to manage.

131. I accept the appellant's wife's evidence that it is impossible for her to deal with two older children when they are both having meltdowns at the same time and that she needs the assistance of her husband. She also has a third child. As time goes on A's needs are likely to increase even further as are B's. If she is focused primarily on A, the other children risk having their needs neglected. As a matter of common sense, this is an acutely stressful situation for any parent.

132. As Counsel pointed out because of the children's needs this family does not operate like other families with similarly aged children. There are no playdates or spontaneous trips because of the difficulty of A coping with change and the children' dislike of having other people in the house, touching their toys and A's sensitivity as well as B's increasing needs. Life has to be carefully managed. It is not realistic to suggest that family friends or social services will step in to fill any gap by the absence of the appellant. Friends and social services would not be present at the home for 24 hours a day. They would not have the same emotional bond with A and B as their father does nor his experience of calming situations down. There was insufficient evidence before me to find that any potential support from friends would be able to replicate the quality and quantity of attention and care provided by the appellant to his own children. I also take into account that A does not like changes and does not like strangers and B has poor social skills.

133. Without additional help, I find that the children's mother will struggle significantly to cope which in turn will have a negative impact on her emotional wellbeing and ability to parent all three children adequately and meet their needs.

134. On this basis I find that it would be unduly harsh for all three children to remain in the UK without the appellant. I find that he can satisfy Exception 2 of section 117C(5) of the 2002 of the Act. This is dispositive of the appeal, notwithstanding the fact that he built up his private life and family life in the UK when he lived unlawfully in the UK and cannot meet the requirements of the immigration rules. I find that the public interest does not require the appellant's deportation from the UK where he meets one of

the Exceptions. I therefore am satisfied that it would be a disproportionate breach of the appellant's protected family life rights pursuant to Article 8 ECHR to deport him from the UK.

135. Since I have allowed the appeal on this basis, I see no need to go onto consider whether there are "very compelling circumstances".

Notice of Decision

136. The appeal is allowed on human rights grounds.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 September 2023

ANNEX A

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001176
HU/16571/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2022	.....

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

DAVINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr David Clarke, Senior Home Office Presenting Officer, instructed by the GLD
For the Respondent: Mr Bazini, Counsel, instructed by Gills Immigration Law

DECISION AND REASONS

Introduction

1. This is an appeal with permission against the decision of First-tier Tribunal Judge Oxlade sent on 2 November 2021 allowing Mr Singh's appeal against a decision made on 26 September 2019 to refuse his human rights claim and maintain a deportation made against him.

Background

2. Mr Singh is a citizen of India born on 15 June 1980. He claims to have entered the UK illegally in 1998. He came to the attention of the UK authorities when he was arrested in 2005. He was convicted of numerous offences between 2005 and 2008 and on 19 December 2008 a deportation order was signed. He was subsequently reported as having left the UK voluntarily in 2011. He was convicted of further offences in 2016 and 2019. On 21 July 2019 he submitted representations to the Secretary of State who on 17 October 2019 refused his human rights claim and decided to maintain the deportation order. He has remained unlawfully in the UK at all times.

137. The Secretary of the State considers Mr Singh's deportation to be in the public good because he is a "persistent offender" having 14 convictions for 36 offences. None of the exceptions apply to him because it would not be unduly harsh for his two British citizen children and stepchild to return to India with Mr Singh and his Indian national spouse or for them to remain in the UK without him. He is not socially nor culturally integrated into the UK. There are no very compelling circumstances over and above the exceptions which would render his deportation from the UK a disproportionate breach of Article 8 ECHR.

138. Mr Singh's position is that he has been living in the UK continuously since 1998. He did not leave the UK in 2011. He is not a "persistent offender" because there was an 8-year gap in his offending. He has a subsisting and genuine relationship with two British citizen children, and it would be unduly harsh for his eldest child who has autism spectrum disorder and significant needs either to leave the UK and return to India and or to remain in the UK without his father. Mr Bazini for Mr Singh also argued that the Secretary of State's decision that Mr Singh is a persistent offender is flawed because the Secretary of State failed to turn her mind to or explain why Mr Singh had "shown a particular disregard for the law".

The decision of the First-tier Tribunal

139. The judge heard oral evidence from Mr Singh and his wife.

140. The judge set out in detail the reasons for the Secretary of State's decision from [5] to [14], the oral evidence from [24] to [38] and the legal submissions from [39] to [62]. The judge's findings appear in two short paragraphs at [67] and [68]. In these, the judge found that the Secretary of State had not addressed her mind to whether Mr Singh was a persistent offender because he had "shown a particular disregard for the law". The judge concluded that the decision was legally flawed and allowed the appeal on that basis, noting that the Secretary of State was likely to make a new decision. The appeal was allowed on human rights grounds.

Grounds of appeal

141. The grounds of the appeal are relatively brief.

Ground 1 -Material misdirection of law

The judge has allowed the appeal on the basis that the Secretary of State did not discharge the burden in establishing that Mr Singh has "shown a particular disregard for the law". In fact, the decision letter refers to Mr Singh's "apparent disregard of UK immigration law". The Secretary of State was entitled to take into account Mr Singh's disregard of immigration law when considering whether it is appropriate to deport the appellant pursuant to 398(c) of the immigration rules as a "persistent offender". The judge made this finding on the basis that no arguments were made by the Secretary of State in respect of it.

Ground 2 – Failure to give adequate reasons for findings of fact on material matters/failure to make findings of fact

142. The judge has failed to make any other further factual findings before allowing the appeal on human rights grounds.

Permission to appeal

143. Permission was granted by First-tier Tribunal Judge Curtis on 2 December 2021 on the basis that it is arguable that the judge misdirected herself in law because the Secretary of State was arguably not limited to taking into account criminal offending only when deciding whether an individual has "shown a particular disregard for the law". The judge failed to consider this issue and failed to give adequate reasons why Mr Singh was not a persistent offender. The grant of permission was not limited.

Discussion and Analysis

Ground 1

144. Mr Clarke submitted that the law has now been clarified in Binaku(s.11 TCEA; s117C NIAA; para 399D) [2021] UKUT 00034 where it is said that an Article 8 ECHR appeal must be decided through the prism of Part 5 of the Nationality Immigration and Asylum Act 2002 and the immigration rules had no application in this exercise. It is a moot point whether Chege("is a persistent offender") [2016] UKUT 187 (IAC) is still correct. He also submitted that SC(Zimbabwe) v SSHD [2016] EWCA Civ 1246 which endorsed those parts of Chege in terms of the definition of persistent offender did not endorse the Tribunal's approach in terms of considering the lawfulness of the Secretary of State's decision. Mr Bazini resisted this argument pointing to the fact that the Binaku argument had not been raised in the grounds and in any event the approach in Binaku was criticised by the Court of Appeal in HA(Iraq)[2020]EWCA Civ 1176.

145. I deal with Ground 1 as originally pleaded although the issues above may well be relevant to any re-making.

146. Mr Bazini submitted that Ground 1 was relevant to the disposal of this appeal. He submitted that if the judge made a lawful finding that the

Secretary of State's decision was unlawful because the Secretary of State had not turned her mind to whether Mr Singh was a persistent offender because he had "shown a particular disregard for the law", then Mr Singh was not a persistent offender and the appeal could be remitted to consider Mr Singh's Article 8 ECHR claim only, outside of the "foreign criminal" framework of Part 5 section 117C. Mr Clarke submitted that the deportation decision did not fall away because the appeal was against a decision to refuse a human rights claim.

147. The regime set out at 117C of the Nationality, Immigration and Asylum Act 2002 applies to "foreign criminals". The definition of a foreign criminal is set out at 117D(2) and includes "persistent offenders". The Upper Tribunal considered the issue of the definition of "persistent offenders" in Chege, the headnote of which states:

> 1. The question whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it.
>
> 2. The phrase "persistent offender" in s.117D(2)(c) of the 2002 Act must mean the same thing as "persistent offender" in paragraph 398(c) of the Immigration Rules.
>
> 3. A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.

14. In the body of the decision, the Upper Tribunal in Chege considered the wording of 398(c) of the immigration rules and decided that a persistent offender must not only have committed persistent offences but must in accordance with the wording at 398(c) "shown a particular disregard for the law". This was defined as follows:

> "27. Therefore a "particular disregard" for the law appears to connote a specific, or deliberate, decision to take no notice of it or to turn a blind eye to it. On that basis, the phrase "particular disregard" signifies that the offences committed by the individual concerned must either be of a nature that demonstrates a certain state of mind or attitude to the laws of this jurisdiction - knowledge by the individual concerned that he was breaking the law, or recklessness as to whether he was breaking the law - or committed in a way that demonstrates that state of mind or attitude. That makes sense in the context of a decision whether or not the removal of that person from the jurisdiction would be conducive to the public good.
>
> 28. This would not necessarily mean that intention or recklessness has to be an ingredient of the offence which the prosecution had to

> prove. Or, for example, it could readily be inferred from the fact that someone has committed numerous separate offences of simple possession of drugs on regular occasions over a period of some months that he was well aware that he was breaking the law (and, indeed, that he was determined to go on doing so). An intention to break the law could also be inferred from the very nature of certain offences - for example, driving whilst disqualified, or breaches of a restraining order. On the other hand, such an inference as to the offender's cavalier attitude to the laws of this country may be more difficult to draw merely from the commission of several strict liability offences, such as certain road traffic offences, even if they are committed over a significant period of time." (My emphasis)

15. Paragraph [30] and [31] of Chege continued:

> "30. That interpretation of "particular disregard" not only fits with the natural meaning of the language used, but is consistent with a policy that those foreign nationals who demonstrate by their offending behaviour that they are not prepared to abide by the laws of this country should be removed, unless their removal would breach the UK's obligations under international conventions. Where, as in the present case, the nature and pattern of the offences committed by the offender over a very long period of time self-evidently demonstrates the requisite state of mind or attitude, it is unnecessary for the Secretary of State to spell this out in her decision or to give any further explanation of why she has formed the view that the requirements of this limb of paragraph 398(c) are met. If the requisite state of mind or attitude to the laws of this country is not self-evidently demonstrated by the nature and frequency of the offences, but reliance is placed on the particular facts of the offending, the Secretary of State would probably need to explain her reasons more fully. (My emphasis).
>
> 31. Where the foreign offender does not fall within sub-paragraph (a) or (b) of Paragraph 398, it is a necessary precondition of the matter being considered by the Tribunal under s117Cthat the Secretary of State has formed a view that he falls within sub-paragraph (c), as in this case she did. We endorse the view expressed by the Vice-President of the Upper Tribunal in the unreported decision of *Secretary of State for the Home Department v Bennett* (DA/01409/2014), promulgated on 2 September 2015, that if the Secretary of State has not formed that view, it is not open to the Tribunal to substitute its own view on the matter, and the restrictive provisions of paragraphs 399 and 399A of the Rules would not apply in such a case.

16. At [20] the judge identifies that the first issue for her to decide is:

> "whether or not the respondent had discharged the burden of showing that she had made the decision in accordance with the rules, namely, whether the Respondent had found that the persistent offender has "shown a particular disregard for the law". Mr Bazini's point was that there was nothing in the respondent's decision to show that the Respondent had turned her mind to it (Issue 1)."

148. The judge then at [49] and [50] records Mr Bazini's submission in the following way:

> "In respect of issue 1 the rule says that the Secretary of State has to have a concluded that he caused serious harm or that the persistent offender shows a particular disregard for the law. The paragraph makes it clear that that the Secretary of State has to take a view, it is not just whether they are a persistent offender but whether that offender has shown a particular disregard for the law and only in those circumstances is it conducive to the public good.
>
> "The case of Chege says the Secretary of State has to come to a view but if you look at the reasons for refusal at page 31 all the respondent says it is conducive to the public good because you are a persistent offender, because you have amassed 14 convictions for 36 offences. That may well be – but she does not anywhere say that there has a been a persistent disregard for the law - it is not a decision that an immigration judge can take without the Secretary of State having first done so and Miss Walters has not addressed this argument at all – despite the fact that it was raised at the beginning of the hearing and indeed it was also raised it is said by Mr Bazini in his grounds of appeal before the Upper Tribunal.

149. The judge continues at [51]:

> "I asked what the effect would be if I found that indeed it was the case and he said it would result in the deportation order falling away".

150. At [68] the judge reaches her conclusion on issue 1 (the Chege point) stating:

> "I was in agreement with this submission and allowed the appeal on this basis."

151. Mr Clarke argued that it is clear from the decision letter that the Secretary of State had formed the view that Mr Singh had had a particular disregard for the law. The judge failed to follow Chege even if Chege was not correctly decided. The judge has given inadequate reasons for finding that the Secretary of State had not done so. The judge has failed to read the whole decision. The judge was entitled to take into account Mr Singh's disregard of immigration law and has not looked at the decision properly. Mr Bazini's submission was that a reference to a "disregard for the law" in connection with Mr Singh's immigration history does not suffice because it is not connected to his criminal offending; the judge has directed herself correctly in respect of Chege; the judge has given adequate reasons and was entitled to make this finding and that it was not irrational for her to have formed this view given the wording of the refusal letter. Mr Bazini also submitted that since the Presenting Officer did not address this issue in her submissions at the First-tier Tribunal it was not open to the judge to go behind the submissions of the appellant's representative.

152. I deal swiftly with the last submission. Regardless of whether the Presenting Officer had not made specific submissions on issue 1, it was

manifestly for the judge to decide the issue for herself which is why the issue has been set out as “Issue 1”. Further it is not explained why the judge did not invite the Presenting Officer to make submissions on this point.

153. I turn to whether the judge misdirected herself in law when finding that the Secretary of State had not addressed whether Mr Singh had “shown a persistent disregard for the law”.

154. The refusal letter itself sets out Mr Singh’s immigration history and history of offending in some detail. It then states:

> “Your deportation is conducive to the public good and in the public interest because you are a persistent offender. This is because since your first conviction in 2005 to your current conviction in 2019 you have amassed 14 convictions for 36 offences. Therefore, in accordance with paragraph 398 of the immigration rules the public interest requires your deportation unless an exception to deportation applies.”

155. Here there is a specific mention of paragraph 398 of the immigration rules. Elsewhere in the decision the Secretary of State refers to Mr Singh entering the UK illegally at the age of 23, returning to India in 2011, re-entering the UK in breach of a deportation order and having been present illegally in the UK at all times. In the section headed “private life” it is stated “Your persistent criminal offending and apparent disregard of UK immigration law is considered to be an indication of lack of integration and your incarceration resulted in your exclusion from society”. Later in the section entitled “very compelling circumstances” the decision letter refers to the nature of the criminal offences fully engaging the public interest in securing removal which include Mr Singh driving a motor vehicle with excess alcohol and obstructing/resisting a constable in the execution of duty as well as driving whilst disqualified and driving whilst uninsured. The letter also refers to the quantity of offences. It also refers to the failure of Mr Singh to rehabilitate himself and the fact that he returned to the UK in breach of the deportation order, returning clandestinely and living in the UK illegally. It then states “your actions demonstrate that you have little regard for the law and are prepared to break the law if it suits you”.

156. Mr Bazini submitted that the references to disregard for the law are in relation to Mr Singh’s immigration history only and that these cannot be taken into account when evaluating whether he has “shown a particular disregard for the law” which are only in relation to his criminal offending and to which his immigration status has no relevance. The judge was correct to find that the Secretary of State had not turned her mind to the issue because at no point in the decision did the Secretary of State specifically refer to “shown a particular disregard” for the law in connection with the criminal offending.

157. I am satisfied that the judge misdirected herself in respect of the guidance in Chege at paragraph 30 above. It is clearly stated that where the very nature of the offences demonstrates a particular disregard for the law (and

in fact the example is given of driving whilst disqualified and repeated drug offences, as is the case here), there is less onus on the Secretary of State to set out her thinking in detail and explain why the offender has shown a particular disregard for the law. On 18 August 2016 Mr Singh was convicted of possessing a class A drug cocaine, driving a vehicle with excess alcohol driving without a licence and whilst uninsured as well as failing to stop after an accident. He was disqualified from driving. On 8 December 2016 he was convicted of driving whilst disqualified, resisting a constable, driving whilst uninsured, possessing a class A drug methadone and committing an offence when a community order was in force. On 18 March 2019 he was convicted of driving a vehicle with excess alcohol, obstructing/resisting a constable, using a vehicle whilst uninsured and driving whilst disqualified. These offences manifestly demonstrate a disregard for the law as they involve committing offences whilst on a community order, resisting arrest, repeatedly driving whilst disqualified, uninsured and without a licence after being previously convicted of the same offences.

158. I am satisfied that the judge has misdirected herself in law by failing to follow the guidance at paragraph 30 in Chege. I am also satisfied that the reasons given for the judge's finding that the Secretary of State had not addressed her mind to the issue of whether Mr Singh had shown a particular disregard for the law are not tolerably clear in light of the explicit references to him disregarding UK law, the reference to paragraph 398 of the immigration rules and the nature and quantity of his offences. It is not sufficient for the judge to simply state that the presenting officer did not make submissions on this point without explaining her reasons.

159. I also do not agree with Mr Bazini that the references to disregard of the law in the decision letter can be compartmentalised into referring to immigration offences only. The decision letter should be considered holistically.

160. I am satisfied that Ground 1 is made out.

161. The question of whether immigration offences can be taken into account when considering the issue of shown particular disregard for the law needs more clarification. It was not addressed in Chege and I do not deal with it here. I also do not address whether the Tribunal's guidance at paragraph 31 remain the proper approach.

162. Additionally, having found that the Secretary of State did not turn her mind to "shown a particular disregard for the law", the judge then allowed the appeal clearly envisaging that the deportation decision would fall away and the Secretary of State would go on to make a new "lawful" decision. This demonstrates a public law approach to the decision under appeal rather than treating it as a statutory appeal pursuant to the 2002 Act.

163. The judge made no findings on whether Mr Singh did in fact meet the definition of a "persistent offender". The result is that the Tribunal has not

resolved whether Mr Singh is a foreign criminal and whether his case falls to be considered under Part 5 117C of the 2002 Act.

Ground 2

164. Mr Bazini did not strenuously defend the submissions in respect of Ground 2 stating briefly that the judge had made findings of fact. He accepted that the judge did not attempt to address Article 8 ECHR in any structured way.

165. In my view the judge has not determined the appeal. She allowed the appeal because she accepted Mr Bazini's submission that the decision to deport fell away because the Secretary of State's decision was legally flawed as her wording at [68] above indicates.

166. The decision under appeal was a "decision to refuse a human rights claim" against which a right of appeal arises pursuant to section 82(1) of the 2002 Act. The only basis on which the judge could allow the appeal was pursuant to section 84(2) of the 2202 Act which states:

> "(2)An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998."

167. It is not possible to allow an appeal on the basis that the decision was not in accordance with the law. This has been clarified in Charles(Human rights appeal; scope) [2018] UKUT 00089. The judge was obliged to consider whether the public interest in removing Mr Singh; who had remained in the UK unlawfully at all times, absconded and committed various offences; justified the interference in his family and private life which entailed carrying out the Article 8 ECHR balancing exercise and applying section 117B and if applicable, section 117C of the 2002 Act, which are the statutory provisions through which all Article 8 ECHR appeals and deportation appeals must be decided in accordance with Binaku (s.11 TCEA; s117C NIAA; para 399D) [2021] UKUT 00034 which states at the headnote:

> (4) By virtue of section 117A(1) of the 2002 Act, a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8.
>
> (5) In cases concerning the deportation of foreign criminals (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights.
>
> (6) It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by the tribunal, not the provisions of the Rules.

168. The references to the structured approach in Binaku follow CI (Nigeria) [2019] EWCA Civ 2027 and NE-A(Nigeria) [2017] EWCA Civ 239 which point to the fact that a Tribunal must have regard to the relevant factors in section 117B and section 117C by virtue of Section 117A of the 2002 Act.

169. Even had the judge made a lawful finding that Mr Singh was not a "persistent offender" and therefore was not subject to the foreign criminal considerations, she should still have gone on to take into account his immigration history and criminal offending in the public interest side of the balance, including all those relevant factors at section 117B.

170. The judge having spent much time summarising the reasons for the decision, the evidence and oral evidence and legal submissions failed to undertake the fundamental task of resolving the conflicts in the evidence or make any findings of fact in relation to Mr Singh's immigration history or on the specific needs and best interests of the children. The judge did not make any findings relating to which public interest factors applied or any findings in favour of Mr Singh. The judge, since she did not address Article 8 ECHR in the structured way mandated by statute, failed to make findings on whether the public interest outweighed the interference in Mr Singh's right to family and private life and failed to provide any reasons for her ultimate decision where it is stated that "the appeal is allowed on human rights grounds". She failed to determine the remainder of the issues she identified at [21] to [23] and ultimately failed to decide whether the decision was unlawful pursuant to s6 of the Human Rights Act 1998.

171. The decision is fundamentally flawed and is unsustainable on this basis alone and must be set aside in its entirety.

172. Since no findings of fact were made none are preserved.

Disposal

173. I have noted that the judge made very few findings of fact in this appeal, and this could be a situation where the appeal might be remitted to the First-tier tribunal for findings to be made. However, the Upper Tribunal has the same powers to make findings as the First-tier Tribunal and the appeal has already been heard twice at the First-tier Tribunal. In these circumstances it is appropriate for the appeal to be re-made at the Upper Tribunal.

Decision:

174. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

175. The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

176. The appeal is adjourned for remaking in the Upper Tribunal.

Directions

(1) This appeal is reserved to Judge Owens on the first available date after 1 December 2022.

(2) The hearing is listed for a whole day on the basis that it will be necessary to hear oral evidence from several witnesses.

(3) A Punjabi interpreter is required.

(4) No later than fourteen days prior to the substantive hearing, Mr Singh is to file on the Tribunal and serve on the Secretary of State a paginated and indexed bundle of up-to-date evidence to be accompanied by the relevant rule 15(2A) Notices.

Signed R J Owens 31 October 2022
Upper Tribunal Judge Owens