Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16948/2018

THE IMMIGRATION ACTS

Heard at Birmingham Crown Court	**Decision & Reasons Promulgated**
On 15 October 2019	**On 29 October 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

LEG
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bedford instructed by Central England Law Centre
For the Respondent: Mr D Mills Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Groom promulgated on 22 March 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Jamaica born on the 10 January 1972 who is the subject of an order for his deportation from the United Kingdom. The appellant appealed maintaining that his removed from the United Kingdom will be contrary to the United Kingdom's obligations pursuant to article 8 ECHR or any other relevant provision of the Convention.
3. An issue arose during the early stages of the proceedings before the First-tier Tribunal regarding the nature and number of offences for which the appellant had been convicted. This matter was resolved in the appellant's favour as noted by the Judge who, when setting out the appellant's immigration history and criminal record between [5 – 12], wrote:

> "5. The Tribunal set out below the facts as found based on the oral and written evidence.
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> 6. The Appellant was born in Jamaica on 10 January 1972. Whilst there is some discrepancy over the date that this Appellant entered the UK, the Respondent submits the date was 26 March 1998, however the Appellant claims it was 28 September 1997, what is agreed is that the Appellant was admitted for a period of 6 months.
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> 7. The Appellant applied for leave to remain in the UK on 29 March 2007, on the basis of his private and family life. This application followed on from his marriage to [MLC (now G)] a British citizen. Leave to remain was granted on 17 May 2013 until 17 November 2015. The reason for the delay between the date of application and date of decision was due to there being issues over the use of the Appellant's identity by another man. West Midlands Police released information to the Respondent which clarified the position. Namely that the Appellant's identity had been used by another. This information from West Midlands Police was then accepted by the Respondent.
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> 8. On 3 November 2015, the Appellant applied for further leave to remain on the basis of his family and private life. At application was considered and refused in line with his deportation.
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> 9. On 17 November 2016, the Appellant was convicted after trial, at Wolverhampton Crown Court, one count of Rape and one count of Indecent Assault. He was sentenced to 11 years imprisonment on 18 November 2016. The Appellant appealed against his conviction and sentence. On 25 May 2018, the Court of Appeal Criminal Division varied the appellant sentenced to 8 years imprisonment. Leave to appeal against the Appellant's conviction was refused.
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> 10. The Appellant was served with a Notice of Decision to Deport on 1 June 2018. The Appellant responded to the notice on 13 June 2018.
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> 11. On 7 August 2018, the Appellant was served with a deportation order and a Notice of Decision to refuse a Human Rights claim. However, since the Respondent now accepts that there has been previous misuse of this Appellant's identity and upon acting on information received

from West Midlands Police, a new Notice of Decision to refuse a Human Rights claim was made and dated 14 August 2018 and was served upon the Appellant on 17 August 2018.

12. For the purposes of this appeal, Respondent rely solely on the criminal conviction obtained by this Appellant on 17 November 2016 for Rape and Indecent Assault."

4. The appellant sought an adjournment before the Judge as he has continued to challenge his conviction for Rape and Indecent Assault claiming his case has been allocated for review by the Criminal Case Review Commission although both at the date of the hearing before the First-Tier Tribunal and of this hearing before the Upper Tribunal the appellant's conviction remains as a result of which he shall be treated as a convicted sex offender. If at some later stage the Criminal Case Review Commission believe it appropriate to return the case to the Court of Appeal and if the appellant's conviction is quashed the deportation order predicated upon the same will fall.

5. The sentencing remarks of His Honour Judge Nawaz are as follows:

> "[LG], you have been found guilty by the jury of these two very serious offences. On the evidence before the jury, on the night of 2 November 2001, you, along with two others [OC and LD], picked up, I can refer to [it is such?], [LK] as she was then known, or [KM], now [KA]. She was known, not to you, well, although she gave evidence that she had seen you once before in the company of those same two via her then boyfriend, [D]. It appears that there was a debt owed by [D] to one of the other two, and I find that that must have been in the background insofar as the commission of these offences are concerned because she was effectively, as she gave evidence to the jury, forced into that car whilst working the streets that particular night.
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> There is a degree of vulnerability so far as they are concerned; they place themselves at the mercy of anybody who happens to come along. They simply do not know who is going to come along and what they have in mind.
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> She was taken to a flat, driven there, despite, she said, protestations, then forced upstairs, her wrists being held by, not you, but she gave evidence that her perception was that you had a knife and you were flicking it, opening and shutting it. You gave evidence that you had no knife but you had a mobile telephone in your hand. It is difficult to be certain as to whether you did in fact have a knife but, again her arm was being held and she was forced up the stairs into that particular flat. No suggestion that you said anything when you had that item in your hand or that you produced it at any other time after having got into the flat.
>
> In that flat she was taken to or ordered into the bedroom, where she was then ordered to remove her clothing, and she was then subjected to a sustained attack on her person in the commission of sexual offences by you three. You three took it in turn to indecently assault her, that is placing your penis in her mouth, and then vaginally rape to ejaculation.
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> There was, I find, an element of threats and coercion, as she gave evidence, and that she did not want to engage in that activity but effectively forced into engaging into that activity. She was then dropped back where she had been collected, with a warning that she should effectively obtain the money by one

> o'clock the next morning. She managed to contact her friend. She was taken to the police station and made a statement to the police officers straightaway.
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> You were not arrested at that particular time; you were not identified. The other two were named by her, and they were arrested and they were convicted by a jury in 2003. They were at that time sentenced to a term of imprisonment of 8 years. They were older than you by 10 years, I am told. You are now 44; you were then, I think, at that time 28. You, as was your right, contested these matters, having been identified by the DNA, which had been obtained from the Durex, which had been recovered from the toilet, again which are consistent with your own evidence.
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> You indicated that you had not engaged, or you advanced before the jury the defence that you had engaged in no sexual activity with her at all, and the jury clearly disbelieve due as far as that aspect is concerned.
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> …
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> Offences of rape are always serious, and the fact that she was working on the streets at the time in effect acts as no mitigation insofar as the seriousness of the offence is concerned. Looking at the guidelines, even as they apply in 2003, the 8 years was effectively a starting point, and, as I said in argument with counsel, it seems to me that they were fortunate to have received those sentences of 8 years ordered then, given the circumstances of the offence.
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> …
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> Knowing everything that I do know about your background, I do not find that you fall into the dangerous category, and a determinative sentence is the sentence which will follow. I bear in mind, of course, the totality principle, so you stand to be sentenced for two offences they were committed on the same occasion, and what I propose to do is to deal with it on the basis of a more serious offence, which is rape, and the overall sentence will be passed in relation to that particular offence.
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> The offences fall into Category 2A as have been agreed between the defence and the prosecution, the aggravating features being, in effect, that this was a sustained attack on a complainant by a number of men with the coercion and threats that I have already mentioned. It was not a short-lived experience; it went on for a significant period of time."

6. The Crown Court sentenced the appellant to a period of 11 years imprisonment for the rape and 6 years concurrent for the indecent assault.
7. The Judge, having considered the appellant's written evidence and having had the benefit of seeing and hearing oral evidence being given by both the appellant and his wife [MG], set out findings of fact from [14] of the decision under challenge. The Judge records at [14] that it was agreed between the advocates that the appellant has a genuine and subsisting relationship with his wife and a genuine and subsisting parental relationship with the four children from his marriage.
8. Although the appellant maintained during his trial that he did not engage in any sexual activity with the victim at all, despite there being DNA evidence adduced, the Judge notes at [18], when considering the OASys report at page 136, that the appellant accepted he was present during the incident that occurred and that his version suggested that consensual sex took place with the victim and two other

men and that the victim was not raped and that he was prepared to engage in sexual activity with the victim although did not go through with it. At page 144 the author of the report is noted to have recorded that the appellant denied raping the victim and that any sexual exchanges between the four of them were consensual. At page 148 the author of the report finds the appellant to be deemed to be a risk, in particular to sex workers and other vulnerable females; but that unless there was a change in circumstances or loss of protective factors the appellant was unlikely to reoffend. At page 149 the author of the report records that the appellant is deemed to pose a high risk to the public whilst in the community.

9. At [19] the Judge notes the appellant's witness statement at [17 – 18] conflicts with both the continued challenge to his conviction and his version of events set out in the OASys assessment. The Judge records that at [17] of the witness statement the appellant expressed remorse for what had happened in his past but claims he was not the same person, and at [18] that he now has the benefit of hindsight and realises that he was young and naïve and with the wrong type of people when the rape incident took place. The Judge records that statement conflicts with the appellant's assertion that no rape incident took place and that as he continues to challenge his conviction it was said to be unclear as to why he is very sorry for what had happened in his past if he is innocent of wrongdoing as he continues to claim.
10. The appellant denies making such statements, even though this content is clearly recorded in the statement signed by him. He blames his legal adviser for including such contrary to his instructions.
11. The claim by the appellant in his witness statement he cannot return to Jamaica because he was very young when he left, had not lived there as an adult, and did not understand the culture fully, was found to contradict the fact the appellant entered the UK when he was around the age of 25 or 26 and had therefore had lived in Jamaica as an adult and would understand the culture fully [20].
12. The Judge sets out the correct legal test at [21] that the appellant was required to show there are "very compelling circumstances" set out in paragraph 399A of the Rules and section 117C(6) of the 2002 Act. The Judge notes that under section 117C(1) of the 2002 Act deportation of foreign criminals is in the public interest and that such deportation is conducive to the public good. Accordingly significant weight could be attributed to the public interest which must be balanced against the individual interests of the deportee through the prism of their human rights and relevant statutory provisions.
13. The Judge at [22] states *"As it is accepted that the Appellant has a genuine and subsisting relationship with a qualifying partner and children, I must consider whether deportation is "unduly harsh" on the qualifying family member to either live abroad or remain in the UK without the Appellant".*
14. The evidence of the appellant's wife before the Judge was that she had no intention of going to live in Jamaica with her children as three of the children are at school and settled and one of the children has been diagnosed as suffering from Chronic Fatigue Syndrome. The youngest child, at the date of the hearing before the First-Tier Tribunal, was not yet of school age. The Judge records at [25] the

evidence that since the appellant was imprisoned his wife has had to give up work to look after the children and that she described having limited support from her own mother with regards to caring for the children and for the majority of the time since the appellant was imprisoned the main responsibility for childcare has fallen to her.

15. At [26] the Judge refers to documentary evidence and letters provided by the children and from the children's school and from an Independent Social Worker (ISW) from which it is said to be apparent that the children have expressed their view that they have no desire to leave the UK to go to Jamaica. The Judge clearly took the content of this report into account when considering the best interests of the children. The Judge notes in that paragraph "*the conclusions reached by Mr Nyoni (ISW) with regards to there being a devastating effect on the family dynamics and functioning should the Appellant be deported, is equally applicable to the consequence of the enforced separation given the Appellant's conviction for Rape and Indecent Assault.*

16. The Judge draws together the threads of her findings at [27 – 28] in the following terms:

> "27. I have had particular regard to section 117C(2); the more serious the offence committed, the greater the public interest in deportation. Given the Appellant's relationship with his qualifying partner and children, I have considered whether the Appellant's article 8 rights would be breached. In doing so, I have turned to the issue of proportionality. It is for the Appellant to establish that article 8 is engaged and, if so, that the Respondent's decision amounts to a disproportionate interference in his family and/or private life. If that is established, it is then for the Respondent to show that any interference is proportionate **Ghising and others (Ghurkhas/BOCs: historic wrong) UKUT 00567.**
>
> 28. I had to assess the impact of refusing the Appellant's Human Rights claim on all of his family members. On the evidence before me it was apparent that deportation will cause interference with the Appellants ordinary family life, which had been built up prior to his conviction in 2016. This is an Appellant who has been convicted of a significant and serious offence, of which there were many aggravating features. The offence took place in 2001 and the Appellant was convicted some 15 years later on the basis of DNA evidence. Even though his sentence was reduced, 8 years is still a significant sentence in my view. This is a conviction that even at the date of this hearing, he continues to challenge. This is an Appellant who is deemed to be a high risk to the public. Given that I have also found that this Appellant's oral and written evidence is contradictory, I conclude that in his case the ordinary family life presented by him is insufficient to defeat the statutory emphasis given to deportation **AD Lee v SSHD EWCA Civ 348.** Therefore, the interference in the ordinary family life, is not disproportionate in the circumstances.
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> 29. In my judgement, there is a clear public interest in the maintenance of effective immigration controls and in the circumstances, the interests of the Appellant do not override it. I am satisfied that in this case the balance of proportionality lies in favour of dismissing the appeal.

30. Accordingly, appeal is dismissed."

17. The appellant sought permission to appeal on four grounds which was initially refused by another judge of the First-Tier Tribunal but granted by a judge of the Upper Tribunal on 17 June 2019, on a renewed application, the operative part of the grant being in the following terms:

> "1. It is arguable that the Judge did not make findings about whether the deportation would be unduly harsh despite her self-direction at [22]. I am unable to decide with certainty that this was simply a structural error which makes no difference to the outcome. Therefore for this reason only, I grant permission on grounds 1 and 3. In respect of the application of NS v SSHD [2016] EWCA Civ 662, in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UK Tribunal said that the way in which a court or tribunal should approach section 117 C remains as set out in the judgement of Jackson LJ in NA.
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> 2. The Appellant was convicted in 2016 of rape going back to 2001. Ground 2 is not arguable. It is arguable that the Judge did not understand the factual matrix and the timeline. She was an arguably entitled to attach weight to the appellant's assertion of innocence despite having been convicted of a serious offence and to his inconsistent account of the event. Furthermore the Judge was manifestly entitled to attach weight to the conclusions in the OASys report that he was a is deemed high risk to the public whilst in the community. Whilst the offence was historic the assessment of risk was not.
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> 3. Ground 4. Permission is refused on this ground. It is not clear to me that any application was made to adjourn pending consideration by the CCRC or that the alleged mistakes were brought to the judge's attention. The grounds fail to establish that the alleged mistaken facts are arguably capable of having a material impact on the outcome of this appeal."

Error of law

18. Section 117C is the most important provision for this case. The section reads:

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

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

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

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

19. The Judge finds there is an overriding public interest in the appellants deportation.
20. Mr Bedford, in his detailed submissions, referred to a number of authorities including KO (Nigeria) [2018] UKSC 53 in which that court gave consideration to how the question of whether an effective deportation is unduly harsh was to be assessed. The Supreme Court held that when looking at unduly harsh the focus was only on the position of the child. To take into account the conduct of the parent would be in direct conflict with the Zoumbas principle that the child should not be held responsible for the conduct of the parent. The way the Upper Tribunal expressed what unduly harsh meant in MK (Sierra Leone) v SSHD [2015] UKUT 223 is 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".
21. The Supreme Court noted the assumption that there was an "due" level of harshness; a level which may be acceptable or justifiable in context. "Undue" went beyond that. The relevant context was set by section 117C(1) that is the public interest in the deportation of foreign criminals. One was looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.
22. The Judge was required to consider the provisions of the Immigration Rules and section 117C of the 2002 Act as part of assessing the proportionality of the respondent's decision. Although not set out in the structured manner advocated in *Razgar* the Judge clearly took into account relevant factors. It was accepted that family and private life exists protected by article 8 ECHR. The Judge concludes that the issue in the case is that of the proportionality of the deportation decision, i.e. *Razgar* question 5.
23. The Judge noted the index offences were committed in 2001 but the reason the appellant was not convicted prior to 2016 was because the police were unaware of his identity. Whilst forensic evidence had been obtained it was not until the DNA

results that a positive connection was made between one of the parties who raped the victim and the appellant. It is also the case that the other two individuals involved in the rape were arrested and convicted in 2003 for which they were sentenced to 8 years imprisonment. It is not known whether the appellant was aware that his associates had been arrested and subsequently convicted but if he was he failed to come forward or to make himself known to the police. The fact a person commits offence but then tries to "lie low" does not mean they are any less culpable. Notwithstanding the period of time that has passed the appellant was convicted by a jury and sentenced to a considerable period of imprisonment. Whilst it may be argued by some that lack of offending in the interim period lessens the weight to be given to the appellant's actions the reality is that Parliament has dictated that it is the period of imprisonment that is the relevant factor when determining the nature of the test to be considered when assessing the proportionality of the decision.

24. The fact that during this intervening period the appellant may have assisted in the care of his children whilst his wife is working was clearly considered by the Judge who accepts there is a genuine and subsisting relationship between the appellant, his wife and the children. The nature of the bond between them is relevant to assessing the question of whether separation following the appellant's deportation will be unduly harsh when considering whether the appellant is able to succeed under an exceptions to UK Borders Act.

25. The evidence relied upon before the Judge included the witness statements which were clearly considered, the OASys, school reports and correspondence, and a report from an Independent Social Worker (ISW). I do not find it made out the Judge failed to consider any aspect of the evidence with the required degree of anxious scrutiny.

26. The report of the ISW dated 11 March 2019 was prepared after an interview with the appellant's wife for their four children at the home address on 1 October 2018, for a period of two hours. The report assesses the nature of the relationship between the family members, and the effect and impact of the appellant's removal upon his children. In Section 5 of the report it is written:

> "5 Conclusions and Recommendations.
>
> You are at liberty to consider the best interests of the child and making decisions pertaining to immigration. The duty imposed by section 55 Borders Citizenship and Immigration Act (2009) requires the decision-maker to be properly informed of the position of the child affected by the discharge of an immigration function and sets out the key arrangements for safeguarding and promoting the welfare of children. Decisions affecting children must, "*prevent impairment of children's health or development, where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development*". (Borders and Citizenship and Immigration Act 2009, London HMSO) to therefore forcibly remove LLG and potentially [T], [E], [D] and [L] from this country or advocate for anything that may potentially cause stress all is for [T], [E], [D] and [L] and their way of life, will be to go against the same principles.

I have informed you of the current circumstances of [T], [E], [D] and [L] and discussed how they could be negatively affected by their father's deportation from the UK and their relocation to Jamaica to be with him. [T], [E], [D] and [L] are British, having lived in the UK since birth. [T], [E], [D] and [L] are being educated in the UK in the event that their father is deported there. They do not want to leave their friends, extended family, half siblings and school. [T], [E], [D] and [L] have endured a long period of separation from their father and want him to return home in order to be a complete family.

The UN Convention on the Rights of the Child (UNCRC) obligates ratifying countries to respect and protect the rights of all children within their territories, regardless of a child's background or migration status. Article 12 (respect for the views of the child) states that: "*every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child's day to day home life.*" [T], [E], [D] and [L] made it clear that they do not want to live anywhere else and have no idea of what life is like in Jamaica. They do not want to be permanently separated from their father whom they have maintained stable contact during his imprisonment. [T] spoke of not having the same educational opportunities in Jamaica and would Mrs extended family, half siblings, the school and friends. [MG] did not feel it will be in her children's best interests to uproot them and relocate to Jamaica. [T], [E], [D] and [L] are settled and thriving at school and [MG] continues to try and maintain consistency and stability in the children's lives despite the challenges and uncertainty about her husband's immigration status.

Article 3 of the Convention states that: "*the best interests of the child must be a top priority in all decisions and actions that affect children*". Owing to the evidence presented above it is my assessment that it is in the best interests of [T], [E], [D] and [L] to continue their educational, emotional and physical development in the UK within a stable family unit, which would include their parents, their half siblings and extended family.

Article 8 of the European Convention on Human Rights provides the right to respect one's established family life. This includes close family ties and significant stable relationships. It is quite clear that [LEG] has a well-established network of family, friends and support networks in the UK. Therefore, it is of paramount importance that the family remain in the UK as a family unit. These attachments are associated with a positive family home environment for [T], [E], [D] and [L].

As well as those already mentioned a number of documents and acts advocate for the risks to children and young people's welfare to be minimised and that the protection of harm to their development, emotional and physical well-being is paramount. These include The Childrens Act (2004), Working Together to Safeguard Children (2015) and Every Child Matters Change for Children (2015). In accordance with the United Nations (UN) Convention on the rights of the child, the best interests of the child should be the primary consideration. I have outlined the best interests for [T], [E], [D] and [L] as children who have been born and raised in the UK. To disrupt this family life in any way will be detrimental to these children's physical and emotional health and well-being.

> I have outlined the best interests for [T], [E], [D] and [L]. In my opinion, to disrupt this family life in any way will be detrimental to these children's emotional health and well-being. It is clear that these children have established attachments with their father [T], [E], [D] and [L] have been able to form and nurture positive, social networks with their extended family and peers. [T], [E], [D] and [L] view themselves as British and have a wider group of peer friendships. [T], [E], [D] and [L] are well integrated into the English education system and are currently thriving in this environment. To uproot the family or separate them owing to the deportation of [LEG], in my experience, would have a devastating effect on the family dynamics and functioning which would in turn impact negatively on the children's developing confidence, stability and emotional well-being and prevent them from reaching their full potential."

27. The Judge clearly took into account section 55 and the best interests of the children which are not the determinative factor, albeit of paramount importance. It is not made out the Judge does not find that the best interests of the children will be to remain within a stable family environment. Much of the report of the ISW focuses upon the children leaving the United Kingdom but that is not going to occur. This is a family splitting case.
28. The ISW's evidence corroborates [LEG's] claim to have close relationships with his children. In the absence of any other cogent evidence beyond the closeness of the relationships, the conclusion that the impact upon the children would be extremely detrimental is unsupported by any evidence other than the views of the ISW. This is not a case in which any of the children have any health or medical concerns such as to make the Judge's decision unsustainable. The ISW is careful to refer to sources to support his clear view that separation between a loving parent and child can lead to difficulties for the child. However the test as explained by the Supreme Court in KO (Nigeria) is not whether these children would face harshness, the test is whether or not they would face a degree of harshness that goes beyond that which would be involved for any child faced with the deportation of a parent. The reasoning of the ISW does not explain why, although the consequences may be harsh, they would be unduly so and why it goes beyond that which would be involved for any child faced with the deportation of a parent.
29. There was no rational foundation for the Judge to conclude that the effects of deporting the appellant would be "unduly harsh" on his wife or children. Many parents have to face periods of adjustment or experience going through difficult periods and the fact the appellant is a foreign criminal parent would not be in a position to assist does not of itself mean that the effects of deportation would be "unduly harsh" on his partner and children.
30. No arguable error has been made out material to the decision to dismiss the appeal or the Judges conclusion that the appellant is unable to succeed under either Exception 1 or Exception 2 of the Rules or section 117C.
31. The length of sentence received by the appellant means that he is requires to show there are sufficiently compelling circumstances over and above those described in Exceptions 1 and 2.
32. In this appeal the Judge's conclusion the decision is proportionate is clearly a finding that the appellant had not established either an entitlement to remain on

basis of either of the exceptions nor established facts sufficient to be categorised as being sufficiently to amount to compelling circumstances over and above those set out in the exceptions. The Article 8 claim was not shown to be sufficiently strong.

33. Whilst the structure of the determination was of concern and it is arguable that it could have been laid out in a different format it is clear the Judge was aware of the required test, as the same is set out at [22]. The conclusion the decision is proportionate is the Judge's assessment that deportation would not be unduly harsh on any qualifying member of this family.

34. This is a particularly heinous offence for which the appellant received a substantial periods of imprisonment. It is settled law that neither the British nationality of the appellant's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation, per se. The appellant failed to establish this is a case which, on a proper factual analysis, would give rise to a sufficiently strong claim to outweigh the public interest in his deportation. It is accepted the impact upon the children and family will be difficult and is likely to be harsh. It is accepted the children and other family members would prefer the appellant to remain in the United Kingdom, but the desires of the family are not the requisite test. The Judge's conclusion the respondent's decision is proportionate is well within the range of findings reasonably open to the Judge on the evidence.

Decision

35. **There is no material error of law in the Judge's decision. The determination shall stand.**

Anonymity.

36. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 25 October 2019.