Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12250/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th March 2020	**On 15th April 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

OSS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Kiai, instructed by JWCI
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction has previously been made by the Upper Tribunal. For the avoidance of any doubt that direction continues. Unless and until a Tribunal or Court directs otherwise, OSS is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction

applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

Background

2. We have been provided with a comprehensive hearing bundle prepared by the applicant's representatives, that runs to some 1033 pages. At pages 1 to 9, there is a comprehensive chronology setting out the appellant's immigration and offending history.

3. By way of summary, the appellant, a national of Jamaica, arrived in the United Kingdom as a visitor in November 1997 and secured leave to remain as a student until 30th April 1999. When that leave came to an end, he remained in the UK unlawfully. The appellant has had his claims for leave to remain on international protection and ECHR grounds considered by the First-tier Tribunal ("FtT") on a number of occasions previously. An appeal against the respondent's decision dated 3rd April 2003 to refuse a claim for asylum was dismissed for reasons set out in a decision promulgated by the FtT on 30th June 2003. The appellant's appeal against the respondent's decision of 1st March 2011 to refuse leave to remain on Article 8 grounds was dismissed for reasons set out in a decision of FtT Judge Morris promulgated on 24th June 2011. The appellant's appeal against the respondent's decision of 6th September 2012, refusing leave to remain on Article 3 and 8 grounds was allowed on Article 8 grounds by FtT Judge Herbert OBE for reasons set out in a decision promulgated on 30th October 2012. Following that successful appeal, the appellant was granted limited leave to remain for 30 months valid until 25th April 2015.

4. On 10 September 2013, the appellant was convicted at Blackfriars Crown Court of seven counts of theft and received a 12-month sentence of imprisonment. Following that conviction and sentence, the appellant was served with a notice of liability to automatic deportation on 11th October 2013. The appellant made a human rights claim, contending that his deportation would be contrary to Articles 3 and 8 of the ECHR. A deportation order was signed on 8th October 2015 and the appellant's human rights claim was refused by the respondent on 13th October 2015. The appellant's appeal against that decision was dismissed by FtT Judge Phillips for reasons set out in a decision promulgated on 20 May 2016.

5. The appellant made further representations to the respondent in March 2017 and most recently, an appeal against the respondent's decision of 3rd October 2018 to

refuse a protection and human rights claim was dismissed by FtT Judge Clarke for reasons set out in a decision promulgated on 1st May 2019.

6. The decision of Judge Clarke was set aside for reasons set out in a decision promulgated by Upper Tribunal Judge Dawson and Upper Tribunal Judge Mandalia promulgated on 18th October 2019. The Upper Tribunal concluded there were material errors of law in the decision of First-tier Tribunal Judge Clarke. The decision was set aside, and it was directed that the decision would be remade in the Upper Tribunal. The appeal was listed for a resumed hearing before us to remake the decision. We heard submissions from the parties' representatives and reserved our decision. We dismiss the appeal for the reasons that follow.

The appellant's criminal behaviour

7. The appellant's offending history is uncontroversial. We were provided with an up-to-date printout of the appellant's PNC record by Mr Lindsay. It is useful to set out the convictions amassed by the appellant.

   a. On 2nd March 2004, the appellant was convicted at Highbury Corner Magistrates Court of 'Theft – Shoplifting' and was sentenced to a 12-month conditional discharge.

   b. On 10th October 2005, he was convicted at Haringey Magistrates Court of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. Sentencing was adjourned indefinitely.

   c. On 7th March 2006 the appellant was convicted at Wood Green Crown Court of one count of 'theft from a person' and sentenced to one-month imprisonment. He was also convicted of one count of 'common assault' for which he was sentenced to 3-months imprisonment to run consecutively.

   d. On 29th June 2007, the appellant was convicted at Thames Magistrates Court of failing to surrender at an appointed time. He was fined £50.

   e. On 14th April 2008, he was convicted at Haringey Magistrates Court of possessing a knife/blade/sharp/pointed article in a public place and sentenced to an unpaid work requirement of 100 hours. On 18th July 2010 the appellant was convicted at Highbury Corner Magistrates Court of failing to comply with the requirement of a community order, from the original conviction on 14th April 2008 and the sentence was subsequently varied to a 67-hour unpaid work requirement.

f. On 13th August 2013 the appellant was convicted at North London Magistrates Court of seven counts of theft and he was committed to the Crown Court for sentencing. On 10th September 2013, the appellant was sentenced at Blackfriars Crown Court to 12 months imprisonment on each count, to run concurrently.

8. It is appropriate at this stage to record the sentencing remarks of His Honour Judge Pillay that put in context the seven counts of theft for which the appellant was sentenced on 10th September 2013.

> "… In essence the method that you adopted was similar in all these cases; what would happen is that you would target, and I use that word advisedly, a victim; you would observe and keep watch over that victim. Having so identified your target, you would then move in effectively, either distracting the victim or bumping accidentally, supposedly into the victim and in that process very adeptly you would then remove their phones or their wallets. In fact the bulk of your thieving involved the theft of iPhones and Blackberry's or high-value mobile phones, apart from the one occasion involving [Mr R], when you robbed him, or not robbed but stole from him his wallet and freedom pass.
>
> As I have said the circumstances which attend these offences were all very similar. Two of the worst instances were on 1st September of last year, when you in effect stole the phone from [Mr M]. He was prepared to challenge you in order to retrieve his phone and he gave chase and in due course you pulled out a small black item and said, "I'm going to stab you". It is true to say that [Mr M] did not see any blade but did see something which appeared to be a hand knife and therefore, taking the logical view that it might have been a knife…. and you managed to get away. And indeed went on to commit a number of offences until about August of this year, when [Mr R] fell under your observation; he was 89 years of age, he is partially sighted. And indeed, what you did was remove his wallet and freedom pass from him before making good your getaway. Needless to say in due course you were caught but CCTV camera *(sic)* and as a consequence you were identified and the full extent of your criminality became aware and available, and you no doubt when confronted with that evidence, no doubt the benefit of it being CCTV capturing your misdeeds *(sic)*, you entered pleas of guilty, when the matter first came before the Magistrates Court.
>
> You were born in 1959 and you have some six appearances before these courts, only two of which are relevant. In 2004 for shoplifting you were given a conditional discharge and in 2006 for theft from a person and common assault, you were given a total sentence of four months in all. That did not appear to deter you from this kind of criminality.
>
> As I have already observed, when people's mobile phones are stolen, with it brings an awful lot of hardship, because their contact details and lists are destroyed and lost, their personal photographs perhaps are lost, their personal details are lost, all of it no doubt producing anguish and anxiety in your victims.
>
> … Here, I have got to take the view, or take into account the fact that there was serial offending over a relatively short space of time. Secondly, on one of these occasions there was at least a threat of a weapon being used, on the second

> occasion, the last one in fact, 8th August, you actually attacked an 89-year-old man before taking the items from him. And having regard to the aggravating features that I have already referred to in my judgement this calls for a custodial prison sentence … Doing the balancing exercise that I must perform, the least sentence I can pass on any one of these offences is one of 12 months in custody. This will be on each offence. It will run concurrent one with the other, making a total of 12 months in all …"

9. In addition to the convictions that we have referred to, the PNC record discloses 4 cautions. On 28th January 2003, the appellant was cautioned for possession of cannabis. On 24th December 2003 he was cautioned for shoplifting. On 5th June 2007, the appellant was cautioned for possession of a Class A drug and on 21st November 2015, he was cautioned for common assault.

The issues

10. The issues to be determined in the appeal before us are set out in the appellant's skeleton argument in the following terms:

    a. Whether deportation of the appellant would be in breach of Article 8. The applicant claims that he meets the requirements for the exception to deportation set out at paragraph 399(a) of the Immigration Rules and/or Exception 2 set out at s117C of the Nationality, Immigration and Asylum Act 2002;

    b. Whether deportation of the appellant would be in breach of Article 3 because of the suicide risk;

    c. Whether deportation of the appellant would be in breach of Article 3 because of the appellant's mental health and the risk of destitution.

11. In the error of law decision promulgated on 18th October 2019, the following findings of Judge Clarke were preserved:

    a. For the purposes of s 117C of the Nationality, Immigration and Asylum Act 2002, Exception 1 does not apply. That is, the appellant has not been lawfully resident in the United Kingdom for most of his life; and the appellant is not socially integrated in the United Kingdom; [paragraph 95]

    b. The appellant has a genuine and subsisting relationship with JH, albeit they do not live together and do not meet the definition of 'partner' under the immigration rules; [paragraph 97]

    c. The appellant is involved in the children's lives in that he has contact with them every other day and this has been the practice since the youngest child was born. The appellant will play, bath and put them to bed. He also takes the eldest child to nursery; [paragraph 100]

d. The effect of the appellant's deportation on JH would not be unduly harsh. JH is a British citizen and will continue to receive all the benefits that flow from being a British citizen. JH is currently living with her 2 sons on her own and the appellant's deportation will not interfere with those living arrangements. JH's family live in Cornwall but there is no credible reason why they cannot help JH from time to time. Furthermore, there is no credible evidence that the help and support JH receives from the appellant's family, would cease simply because he is deported; [paragraph 107]

e. It would not be unduly harsh for JH to go to Jamaica on account of her asthma; [paragraph 110]

f. The appellant was brought up by his grandmother who is now deceased, and his aunt came to the UK as part of the Windrush generation and has lived here since then. Nevertheless, there is no credible evidence that the appellant does not have extended family in Jamaica that could help him, JH and the children to settle in Jamaica; [paragraph 109]

The appellant as a vulnerable witness

12. The appellant relies *inter alia* upon the expert evidence of Dr Joanna Curwen, a Consultant Psychiatrist, who has been involved in the treatment of the appellant since 2014. In her letter of 1st February 2019, Dr Curwen expressed the opinion that it would be too traumatic for the appellant to give evidence at the hearing of his appeal that was listed on 18th February 2019, given its adversarial nature.

13. The appellant also relies upon a report prepared by Dr Alicia Griffiths, a Clinical Psychologist instructed by the appellant's representatives, to give her expert clinical opinion upon various matters. In her report of 26th February 2020, at section 5.5, Dr Griffiths also expresses the opinion that she does not believe the appellant is able to give oral evidence at the hearing of his appeal. The appellant had told her that he would not feel able to give evidence and it would be too painful for him to talk to other people about his case. In her opinion, the appellant's ability to give evidence is compromised by the difficulties related to his symptoms of depression with psychotic features. She expresses the opinion that the appellant is likely to struggle with an adversarial Tribunal and particularly anything involving a direct nature of questioning. She states that his capacity to tolerate any heightened emotion when having to respond to detailed questions, is limited. In her opinion, the appellant would find it incredibly challenging if he were asked to give evidence and she believes he would be very scared and preoccupied with worry about being arrested. In her opinion, the impact of giving oral evidence and being questioned could reinforce negative beliefs and trigger feelings of entrenched shame. Dr Griffiths states that if the appellant must give evidence, adjustments need to be made so the

evidence is heard at a very slow, steady pace, with frequent breaks alongside a lot of reassurance.

14. On behalf of the appellant, Ms Kiai indicated at the outset that the appellant would not be giving evidence. His evidence is set out in two witness statements that have been prepared by the applicant with the assistance of his representatives. In reaching our decision, we have carefully considered the content of each of those witness statements. We make it clear that in considering the appellant's evidence we have had regard to the Joint Presidential Guidance Note No.2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance, and our assessment of the appellant's evidence has been considered in the round, taking due account of the medical evidence.

The evidence

15. The Tribunal has been provided with a comprehensive bundle that is relied upon by the appellant running to some 1033 pages. Tab A of that bundle includes a comprehensive chronology and the witness statements relied upon by the appellant. We pause to note that the appellant's witness statements are dated 5th February 2019 and 5th April 2019. The witness statement of the appellant's partner is dated 30th January 2019. Those witness statements and the letters from the appellant's aunt and others that support his appeal, all pre-date the hearing of the appeal before FtT Judge Clarke, and the error of law decision of the Upper Tribunal

16. In the error of law decision promulgated on 18th October 2019, the Upper Tribunal directed *inter alia* that "*the appellant shall file and serve any further evidence that he seeks to rely upon, within 21 days of this decision being sent to the appellant*". At a Case Management Review Hearing on 12th November 2019, the Upper Tribunal directed *inter alia* that "*the appellant shall file and serve any further evidence to relied upon at the resumed hearing of the appeal, including any expert evidence, by 4pm on 17th January 2020*". No further witness statement by the appellant or his partner has been filed with the Tribunal. The evidence that we have from the appellant and his partner is therefore precisely the same evidence that was before the FtT previously, and we have no evidence that causes us to revisit the preserved findings.

17. We have been provided, in Tab B, with the expert evidence relied upon by the appellant. That includes a report dated 26th February 2020 prepared by Dr Alicia Griffiths. We also have letters from Dr Joanna Curwen, the most recent dated 15th November 2019 and reports prepared by the independent social workers, the most

recent dated 14th January 2020 and completed by Nezlin Veronica Newell. The appellant's bundle also includes what is described as a "General report on country conditions for deportees on return to Jamaica" by Luke de Noronha in Tab D, at pages 624 to 644 and a letter from Luke de Noronha, dated 11th February 2019, in Tab B, at pages 137 to 142.

18. At the outset of the hearing before us, Ms Kiai made an application to adduce further evidence that was not included in the extensive bundle already before the Tribunal. She sought permission to rely upon a 'Speech and Language Therapy Summary Report' from the Barnet, Enfield and Haringey Mental Health NHS Trust dated November 2019 relating to the appellant's eldest son, ("JIS"). The report confirms that [JIS] attended a Social Communication Emotional Regulation Transactional Support ("SCERTS") review Speech and Language Therapy appointment, designed to help determine the SCERTS level and an appropriate target for the child in order to provide strategies for home practice. The report confirms [JIS] presents with social communication difficulties that can sometimes be explained by a diagnosis of autism spectrum disorder. The author expresses the opinion that a Paediatrician is required to carry out in-depth case history, observation, and a review of progress and skills, and to consider the information. Ms Kiai also sought to rely upon a letter from the Paediatric Audiology and Audio Vestibular Medicine Team, Royal Free London NHS Foundation Trust dated 18th December 2019, confirming that a referral has been received in respect of [JIS] and he has been accepted onto their waiting list. Ms Kiai informed the Tribunal that the appellant's representatives were unaware of the ongoing investigations in respect of the health of the eldest child, and that the two documents were only provided by the appellant and his partner to her this morning. Mr Lindsay objected to the further evidence being admitted on the morning of the hearing. Despite the absence of a reasonable explanation for the failure to disclose the evidence earlier, we reluctantly gave permission for the short report and letter to be relied upon. The two documents are brief. The health of the eldest child and issues regarding his speech and language are already referred to in the reports of the independent social workers. In our judgement, it is in the interests of justice for us to have as much evidence as possible regarding the health of the children, in circumstances where we must have regard to the best interests of the children and are considering the impact that deportation of the appellant will have upon his very young children.

19. Ms Kiai also informed us that the appellant and his partner had been unable to arrange childcare and had attended the hearing with their three very young children.

The appellant's partner had attended and, if required, would adopt her witness statement and be tendered for cross examination. Ms Kiai indicated that the only additional question that she proposed to ask the appellant's partner, was to confirm that their eldest son remains under investigation in respect of his speech and language difficulties. We informed Ms Kiai, that would not be necessary because we have admitted the further evidence which confirms that further investigation is continuing. Mr Lindsay confirmed that if the evidence of the appellant's partner is limited to that set out in her witness statement, he did not require her to be tendered for cross examination.

20. We heard submissions from both Mr Lindsay and Ms Kiai that are set out in our record of proceedings and which we have carefully considered. We should record that after hearing submissions from Mr Lindsay, and during the course of submissions being made by Ms Kiai, it was submitted that notwithstanding the absence of any further witness statement from the appellant's partner, we should attach significant weight to what was said by the appellant's partner as set out in the report of the independent social worker Nezlin Newell. We pointed out to Ms Kiai that that is 'hearsay evidence', and if the appellant's partner had intended to elaborate on her evidence, there had been ample opportunity for her to file a further witness statement. The concession by Mr Lindsay that he did not require the appellant's partner to be tendered for cross examination was clearly upon the basis that the evidence of the appellant's partner is set out in her witness statement. Ms Kiai invited us to adjourn the hearing for a short time, for her to prepare a very short witness statement from the appellant's partner. She was quite prepared, if necessary, for the appellant's partner to be called to give evidence and tendered for cross examination, so that Mr Lindsay had a fair opportunity to test her evidence. She submits it is in the interests of justice for all the evidence to be before the Tribunal, and the appellant's representatives had assumed the further evidence of the appellant's partner could be incorporated into the report of the independent social worker, and a witness statement was not therefore necessary.

21. We refused the application. We acknowledge the Upper Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial and whether or not the evidence was available to a previous decision maker. We have already referred to the directions previously made by the Upper Tribunal following the error of law decision. The appellant has had ample opportunity to file and serve any evidence upon which he intends to rely, in accordance with the directions made. There is no good reason for the failure to comply with the directions. There is

nothing to preclude a party from advancing their case on the basis of what is said in another document, albeit hearsay in form, but as we drew to counsel's attention when she was making her submissions, it is rather surprising in an appeal where the Tribunal is presented with a bundle spanning some 1033 pages over two lever arch files, that the appellant's representatives have failed to file an updated statement from either the appellant or his partner in particular. We note there is no statement from the appellant's partner even to confirm that she has read the content of the report of the independent social worker, and that report accurately reflects what she said to the independent social worker. Neither have we been provided with the contemporaneous notes made by the independent social worker to establish that the report impartially records everything that was said by the appellant's partner, rather than only that information that the author of the report considered to be relevant. In our judgement, it would be unfair to admit yet further evidence from the appellant's partner after we had already heard submissions made on behalf of the respondent. We will of course have regard to what is said in the report of the independent social worker, but the weight to be attached to the evidence attributed to the appellant's partner in that report, will be a matter for us.

22. It is of course entirely impractical for us to refer in this decision to all the evidence that is set out in the extensive bundle prepared by the appellant's representatives. We do however make it clear that in reaching our decision we have had regard to all of the evidence whether that evidence is expressly referred to or not, in this decision.

The Legal Framework

23. Section 32 of the UK Borders Act 2007 ("the 2007 Act") defines a foreign criminal, a person not a British citizen who is convicted in the UK of an offence and, *inter alia*, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33. Insofar as is relevant that is:

> "(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention.

…

(7) The application of an exception—

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4.".

24. Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a 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 HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. So far as is material to this appeal, the following provisions set out in s117C are relevant:

"Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

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

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

(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."

25. The Immigration Rules set out the approach to be followed by the Secretary of State where a foreign criminal liable to deportation claims that the deportation would be contrary to the United Kingdom's obligations under Article 8 ECHR. So far as relevant to this appeal, the immigration rules state:

Revocation of deportation order

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

…

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

…

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years.

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

Findings and conclusions

26. In his witness statements, the appellant refers to his relationship with [JH] and confirms that they met in December 2014 and he proposed to her in January 2015. They married on 19th September 2015. He states that if he were to be separated from [JH], he does not know how he would cope. He accepts that they do not live together but are still together and *"just taking things slowly"*. There are now three children of that relationship. The eldest, "JIS" was born on 7th December 2016 and is now 3 years old. "JES" was born on 1st March 2018 and is now 2. The youngest child, "JAS" as born on 20th August 2019 and is now 6 months old. In his witness statement dated 5th February 2019, the appellant states:

> "24. Although I don't live with [JH] and the boys, I spend all my waking hours with them. I only don't live with them because of my bail conditions and as [my aunt] still needs my help. I'm an active father. I bathe the boys, change them, I push them to the park, I go to the doctor with them. [JIS] has just started nursery and I drop him off and pick him up. I look after [JES] whilst [JIS] is at nursery.
>
> 25. I couldn't live without looking after the boys, there is so much I want to offer them, to guide them. I am watching, guiding and helping [JH] too. The age difference sometimes worries me, I have said this to her more than once. I am doing my best and want to do my best. [JH] says age is a number. I was worried about meeting her mum and her dad, but they both like me, as does her brother and sisters. They are warm and loving people and they have never made me feel funny about things. This assured me that I should not worry about the age gap as I've been accepted by [JH] and her family."

27. In his witness statement the appellant claims [JH] and his sons would not be able to manage without him, and they could not go to Jamaica with the appellant if he is deported. He states that [JH] has never left the UK, she does not have a passport and Jamaica is dangerous and he could not provide for them. The appellant also claims that his mental health would deteriorate in Jamaica. He states that his sons are a protective factor and he relies on his family for support.

28. The appellant's partner's evidence is set out in her witness statement dated 30th of January 2019. In her witness statement, the appellant's partner states:

> "4. [JIS] started nursery on the 14 January 2019. [The appellant] and I take it in turns to take him to and pick him up from nursery. The nursery staff know [the appellant] as [JIS's] father and they know that he is involved in his son's life. [The appellant] is just as much an involved parent as I am. We share the care.

> 5. When [the appellant] was released from detention, I would go and see [the appellant] every other day. He would come to my house, he would check on the children, play with them, take them to the park and make sure that we had all eaten. We take it in turns to cook. [The appellant is also very active in getting the boys to bed, he will bathe them, tuck them in bed and read them a story. As [the appellant] is still subject to his bail conditions, something he takes very seriously and would not want to breach, he would then go home to sleep so as to comply with his bail conditions."

29. There is a preserved finding that the appellant has a genuine and subsisting relationship with his partner, [JH], albeit they do not live together. Whether a person has a genuine and subsisting parental relationship with a child turns upon the particular facts of the case. There is a preserved finding that the appellant is involved in the children's lives in that he has contact with them every other day, and this has been the practice since the youngest child was born. In the report of the independent social worker, Nezlin Newell, it is said that the appellant stated that the immigration proceedings cause him to feel incapable as a parent, as he can only offer practical support to the children rather than financial support. He confirmed to the social worker the care and support that he provides to his children. [JH] described the appellant to be a doting father and that their sons [JIS] and [JES] adore their father.

30. The birth of the youngest child post-dates the appellant's witness statements, but we are prepared to accept that the love and care the appellant expresses towards the two older children, applies equally to the youngest child. It is in our judgement clear that the appellant, albeit not living with his partner and children, has significant involvement in the day-to-day lives of the children and there is nothing in the evidence before us to suggest that he has anything other than a full parental relationship with his children. On the evidence before us, we find the appellant has a genuine and subsisting parental relationship with each of his three children.

31. The issue for us to determine is whether (a) it would be unduly harsh for the children to live in Jamaica; and (b) it would be unduly harsh for the children to remain in the UK without the appellant.

<u>The best interests of the children</u>

32. S55 of the Borders, Citizenship and Immigration Act 2009 requires the respondent to make arrangements for ensuring that her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. The children are all British citizens, and although the children are very young and not in education, there is at

least some evidence that [JIS] presents with challenging behaviour at times due to difficulties in communicating his needs. The independent social worker refers to speech delay that leaves [JIS] feeling frustrated and unable to express his emotions, and that manifests itself in aggressive outbursts at times. The independent social worker notes the children are entitled to a number of resources and services at no cost to the family. Although there has been no diagnosis confirming [JIS] is autistic, we are satisfied from the limited medical evidence before us that his health is being monitored and the appellant and his partner are being assisted to identify and put in place strategies to improve his speech and language skills. We find it is in the best interests of the children that they remain in the UK. It is in the best interests of the children to continue to have a good and stable relationship with both their parents, who are their primary carers. This is a primary consideration although it is not the primary consideration and can be outweighed by other factors; ZH (Tanzania) v SSHD [2011] UKSC 11.

Would it be unduly harsh for the children to live in Jamaica?

33. In considering whether it would be unduly harsh for the children to live in Jamaica, we remind ourselves that there is a preserved finding that it would not be unduly harsh for [JH] to go to Jamaica on account of her asthma. More importantly, there is a preserved finding that there is no credible evidence that the appellant does not have extended family in Jamaica that could help him, [JH] and the children to settle in Jamaica. As there is no further evidence from the appellant and/or his partner in this respect, the position remains as set out in the preserved finding.

34. In his witness statement dated 5th February 2019, the appellant claims that he would be unable to support his family in Jamaica. In her report, Nezlin Newell, at section 8, considers whether it would be unduly harsh for the children to relocate to Jamaica. She notes [JES] attends nursery and [JIS] attends school. Their parents report them to be settled and that [JIS] is receiving support around his speech and language difficulties. The independent social worker states that should the children leave the UK, they would need to re-establish the relationships they have built with the teaching staff who know and understand the children's educational needs and have made provisions to support [JIS] in particular. The independent social worker refers to the support network available to the family in the UK including godparents who actively provide support to the children. The independent social worker reports that leaving the UK would mean a loss of the current support networks the family have in the UK. The independent social worker states:

> "[JIS], [JES] and [JAS] are three young boys' of dual heritage and British by nationality. It was detailed in the previous social work report that Jamaica is a country with a number of social and economic problems and the cultural differences may make it difficult for the children and their mother to adjust to. Whilst [the appellant] is originally from Jamaica, he has not lived there for over 20 years. Hence he too is likely to find it difficult to adjust.
>
> He is not aware of any direct relatives residing in Jamaica. He left Jamaica in 1997 and his grandmother who was caring for him passed away. [The appellant] has never had a relationship with his birth parents and so I concur with the previous social workers view that should the children return to Jamaica with their parents, there is no clear identified support for them as a family. This places the parents and consequently the children in a potentially vulnerable situation where they are likely to experience hardship, placing them at significant risk of harm."

35. The independent social worker does not in fact answer the question posed; "Would it be unduly harsh for [JIS], [JES] and [JAS] to relocate to Jamaica?". What is also striking about the report is that in section 4, the author confirms that a copy of the Upper Tribunal's error of law decision promulgated on 18th October 2019 was provided to her. Notwithstanding, the preserved findings set out at paragraph [26] of the Upper Tribunal's decision, the author of the report simply refers to the account given by the appellant and disregards entirely those preserved findings. For example, the author disregards entirely the preserved finding that there is no credible evidence that the appellant does not have extended family in Jamaica that could help him, [JH] and the children to settle in Jamaica.

36. We have found the report of the independent social worker to be of little assistance in this respect. In our judgement, the question whether it would be unduly harsh for the children to live in Jamaica turns upon the position that [JIS] would find himself in. We accept that [JIS] has speech delay that leaves him feeling frustrated and unable to express his emotions and that manifests itself in aggressive outbursts at times. Although there has been no diagnosis confirming [JIS] is autistic, we are satisfied from the very limited medical evidence before us that his health is being monitored and the appellant and his partner are being assisted to identify and put in place strategies to improve his speech and language skills. There is an absence of evidence to establish that any treatment required by [JIS] would be available in Jamaica. Although he would have the support of his parents, the absence of treatment will plainly have an impact upon the health and well-being of [JIS] and we are satisfied in all the circumstances that it would be unduly harsh for the children to live in Jamaica. Although we find it would be unduly harsh for the children to live in Jamaica, there is however nothing preventing the appellant, [JH] and the children living with the appellant in Jamaica, if that is the choice that is made by the family.

Would it be unduly harsh for the children to live in the UK without the appellant?

37. We have already referred to the evidence of the appellant and his partner as set out in their witness statements. In his witness statement, the appellant also states – *"... I can't see myself just talking to the boys on the phone, this is not right, this is not how the relationship between fathers and sons should be. I don't even know what Skype is."*. In his witness statement dated 5th February 2019, the appellant states:

> "35. [JH] and the boys would not be able to manage without me. I just can't see it. Her family are not local, they lived miles away in Cornwall. I would be so worried about her. There is a park behind her house where we take the boys. Criminal activity goes on there. There was a shed that was burned down and a few weeks ago when I was leaving [JH's] at night there were a number of police in the street. You read in the papers about all the stabbings and killings. It terrifies me, that without a father figure my boys could end up living this kind of lifestyle.
>
> …
>
> 37. I feel that my mental health would get worse in Jamaica. My boys are a protective factor and I rely on my family to for support. In Jamaica there would be no one to prompt me to get help …"

38. In her witness statement, the appellant's partner describes the day-to-day arrangements for the care of the children. She states:

> "3. I am terrified that [the appellant] could be deported. I often think how I would cope with two small children, doing the nursery runs and caring for my boys, all without [the appellant's] help.
>
> …
>
> 10. I rely on [the appellant] for both practical and emotional support. The practical support is everything he does for me and the boys on a day-to-day basis and it is a lot. Emotionally, he's constantly there for me and the boys. I am more likely to panic about the situation then *sic* [the appellant], so he reassures me and calms me down. He knows how to talk me so that I know that everything will be okay. Financially, it is difficult for [the appellant] to help me as he is not allowed to work or to claim benefits because of his immigration status. [The appellant's aunt] helps out with the children, she gave the money for Christmas as did [the appellant's uncle].
>
> …
>
> 28. If [the appellant] were deported the boys and I wouldn't be able to stay in contact with [the appellant] through email and phone. It's just not the same as having him here in person. [The appellant] doesn't have an email address. He's never used Skype. He wouldn't know how to use it; I have never seen him use a computer. There would also be the time difference between Jamaica and the United Kingdom. More importantly, the boys are too young to understand that a man on a screen is their father. They would lose their bond. It would also cost money for him to access this in Jamaica. I don't know how he would afford this, and I doubt whether the connection is very good or reliable."

39. The independent social worker addresses the issue in section 9 of her report. She confirms the children have a close relationship with their father although [JES] tends to cling to his mother. The appellant's partner reported that the children love going to play football with their father and the appellant tends to provide stimulation for the children to keep them actively engaged in physical activity and play. [JIS] is described as a 'daddies' boy' and is said to require a lot more attention due to his speech delay. He expresses himself through his actions. The independent social worker states the bond [JIS] has with his father is crucial to his development and should the appellant leave the UK, the children would grow up without their father and this could lead to trauma due to the separation from their care giver. The independent social worker states the children have a stable, affectionate relationship with their father who is clearly a very significant person in their life. It is said the appellant enhances the children's understanding of identity just by his presence in their life and role modelling positive behaviour towards them. The independent social worker indicates that deportation would prevent the appellant from his desire to protect, nurture and care for his children into their adult life as he would no longer be in a position to fulfil his fatherly role. The independent social worker refers to research setting out the most common effects on children who witness the forcible removal of the parent including the loss of appetite, sleep changes, crying and fear. Although the emotional changes may reduce over time, behavioural symptoms such as withdrawal, anger and aggression persist at similar or higher levels of long-term. The independent social worker states:

> "It is my view that [JIS] is at risk of experiencing some of these emotions since he has the closest relationship with his father. This is further compounded by the fact that he has a speech delay which leaves him feeling frustrated, unable to express his emotions. This manifests itself in aggressive outbursts at times.
>
> Hence, it is likely that [JIS] will continue to develop and exhibit behavioural issues if his father is to leave the UK. His siblings are also likely to be affected resulting in abandonment issues.
>
> It is fair to conclude that [the appellant] has positively contributed to his children's lives in the ways mentioned above. It also highlights the important role that fathers play in their children's lives and should therefore be considered.
>
> [The appellant's] children are British citizens. However, the fact that their father is facing removal from the UK would mean that the children are likely to suffer emotionally due to the fact that they would no longer have face-to-face contact with his *sic* father. [JH] would also struggle to care for the children alone as she relies on the daily support provided by [the appellant]"

40. Again, in expressing an expert opinion, the author has failed to have regard to the preserved findings that [JH's] family live in Cornwall but there is no credible reason

why they cannot help [JH] from time to time. The author also entirely disregards the preserved finding that there is no credible evidence that the help and support [JH] receives from the appellant's family would cease, simply because he is deported.

41. In her submissions before us, Ms Kiai, submitted that the risk of suicide is not only relevant to the Article 3 risk that the appellant is exposed to, but is also relevant to the assessment of the impact that deportation of the appellant will have upon the appellant's children, if they remain in the UK without the appellant. She submits, the appellant will be vulnerable in Jamaica and that will have an impact upon the children because there is a significant risk the appellant will commit suicide and the children will lose their father. We address the Article 3 risk separately, and although we acknowledge that prospective suicide by reason of the deportation of the appellant is capable of engaging both Articles 3 and 8, to conclude that the risk of suicide is such that it would be unduly harsh for the children to remain in the UK without the appellant, there would need to be the clearest possible evidence of a real and substantial risk that suicide would occur, which would not otherwise be preventable by appropriate medical supervision having regard to facilities which might reasonably be expected to exist in Jamaica. There is no such evidence before us.

42. Having carefully considered the evidence before us, we are satisfied that there is a close bond between the appellant and each of his three children, and a particularly strong bond between the appellant and his eldest son [JIS]. That is plainly apparent from the report of the independent social worker and the evidence of the appellant, and his partner. Despite the current living arrangements, the appellant continues to play a positive role in his children's' lives providing emotional and physical support whenever he is able to do so. In her witness statement, the appellant's partner sets out the day-to-day arrangements for the care of the children and the deportation of the appellant will clearly have an impact upon those arrangements. However, the impact upon the children, even taking into account the health of [JIS] is in our judgment, much the same as the difficulties that any young child would face when they are unable to have day to day physical contact with a parent. It is in our judgement clear that [JH] has a support network that will be able to assist during any initial transitional phase following removal of the appellant. We are quite satisfied that the help and support [JH] receives from the appellant's family, would continue and she would continue to have the support of the church community and the children's godparents, as referred to in the report of the independent social worker.

43. We must take into account the Article 8 rights of the appellant, [JH] and their children and the public interest in deportation as expressed in the immigration rules and s117C of the 2002 Act. We have carefully considered whether there is anything within the evidence and in particular, the report of the independent social worker, that establishes a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent reminding ourselves that it is an elevated threshold denoting something severe or bleak to be evaluated exclusively from the effect on the child. Having carefully considered the evidence, in our judgment there simply is not the evidence on which we can properly conclude that the deportation of the appellant would lead to his children suffering a degree of harshness beyond what would necessarily be involved for any child of a foreign criminal facing deportation. We have no doubt that the appellant's children will initially feel a sense of loss because of their close relationship with the appellant. We have no doubt that the consequences of the appellant's deportation will be harsh. The 'commonplace' distress caused by separation from a parent is insufficient to meet the test. The appellant's children will continue to receive the love, care and support that they need from their mother and the support network they have in the United Kingdom.

44. We accept that reliance upon modern means of communication is no substitute for physical presence and face-to-face contact. However, we do not believe that in the event of the appellant's deportation, contact between the appellant and his children would not be possible, albeit it is unlikely to be physical contact. It would in our judgement be entirely possible for the appellant to maintain contact with his children via regular communication. The appellant's deportation will undoubtedly mean that [JH] will have to manage three young children and it will undoubtedly be difficult for [JH] and the appellant's children in the short term, but in our judgment the evidence simply does not provide a basis upon which the appellant can establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399(a) of the Immigration Rules.

45. In NA (Pakistan) -v- SSHD [2016] EWCA Civ 662, Lord Justice Jackson held that the fall back protection set out in s117C(6) also avails those who fall outside Exceptions 1 and 2 and that on a proper construction of section 117C(3), the public interest requires the person's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. As to the meaning of "very compelling circumstances" over and above those described in Exceptions 1 and 2, Lord Justice Jackson said:

> "28. … The new para. 398 uses the same language as section 117C(6) . It refers to "very compelling circumstances, over and above those described in paragraphs 399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C , but they do so in greater detail.
>
> 29. In our view, the reasoning of the Court of Appeal in JZ (Zambia) applies to those provisions. The phrase used in section 117C(6) , in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

46. Whether there are "very compelling circumstances" is a demanding test, but nonetheless requires a wide-ranging assessment, so as to ensure that Part 5A produces a result compatible with Article 8.

47. We have noted the appellant's offending history and have set out the sentencing remarks of His Honour Judge Pillay following the appellant's convictions in August 2013. We note the appellant's sentence of imprisonment is at the bottom of the range covered by section 117C(3). That however does not undermine the seriousness of his offending reflected in the sentencing remarks and the sentence of imprisonment imposed. We also accept the appellant has not had any further convictions, but we note he accepted a caution in November 2015 for common assault.

48. The best interests of the appellant's children certainly carry weight but nevertheless, it is a consequence of criminal conduct that an offender may be separated from their children for many years, contrary to the best interests of the child. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in SSHD -v- CT (Vietnam) [2016] EWCA Civ 488 at [38]:

> "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

49. We acknowledge that the public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly, recognising that there will be cases

where the person's circumstances outweigh the strong public interest in removal. We have had regard inter alia to the appellant's length of residence in the UK, the close ties that he retains with his partner and their children, his aunt and other members of the family. We have also had regard to the appellant's immigration and offending history, and the family circumstances described in the report of the independent social worker. However, there are in our judgment no very compelling circumstances which make his claim based on Article 8 especially strong. It follows that in our judgement, the deportation of the appellant is in the public interest and not disproportionate to the legitimate aim.

Article 3

50. We consider whether the deportation of the appellant would be in breach of Article 3 either because of the risk of suicide, or by reason of the appellant's mental health and risk of destitution, together. The appellant claims that he would commit suicide if he were returned to Jamaica, and/or that he would be destitute and for those reason. It is claimed the decision to deport the appellant would violate his Article 3 rights.

51. On appeal to the EctHR in N v UK Application 26565/05, a case involving HIV, the Grand Chamber upheld the decision of the House of Lords and said that in medical cases, Article 3 only applies in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. The EctHR said that Article 3 could not be relied on to address the disparity in medical care between contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. In J v SSHD [2005] EWCA Civ 629 the Court of Appeal confirmed that in a foreign case, the Article 3 threshold would be particularly high and even higher where the alleged inhuman treatment was not the direct or indirect responsibility of the public authorities in the receiving state, and resulted from some naturally occurring illness whether physical or mental.

52. In AXB (Art 3 health: obligations; suicide) Jamaica [2019] UKUT 397, the Upper Tribunal considered the implications on the UK of returning a person who would commit suicide on return to Jamaica. The Upper Tribunal stated:

> "104. … where an individual asserts that he would be at real risk of committing suicide, following return to the Receiving State, the threshold for establishing Article 3 harm is the high threshold described in N v United Kingdom [2008] ECHR 453, unless the risk involves hostile actions of the Receiving State towards

> the individual: RA (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 1210; Y and Z v Secretary of State for the Home Department [2009] EWCA Civ 362 …"

53. It is now well established that what is required is an assessment of the risk at three stages, prior to anticipated removal, during removal and on arrival. We have carefully considered whether the suicide risk is such that a removal of the appellant to Jamaica would be in breach of Article 3 by reference to the test out out in J -v- SSHD [2005] EWCA Civ 629 as clarified in Y and Z [2009] EWCA Civ 362. We remind ourselves that considering whether there are strong grounds for believing that the appellant, if removed to Jamaica, faces treatment contrary to Article 3, the phrase "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful".

54. We have carefully considered the medical evidence before us. In her letter of 17th October 2018, Dr Curwen confirms the appellant has been receiving support from the North Islington Recovery Team since 2014 with psychotic depression. She states the appellant's depression is caused by the deep-rooted feelings of worthlessness and low self-esteem that he has, as a consequence of his immigration status in this country. She states the threat of deportation has exacerbated his depression and he has required more input from the team and indeed has been hospitalised due to his suicide risk. In her subsequent letters dated 1st February 2019 and 15th November 2019, she states the appellant has been "under mental health services since 2012" and has a diagnosis of Recurrent Depressive Disorder. She describes the appellant to be moderately depressed and states that in the past, he has become severely depressed, with psychotic symptoms. She confirms the appellant takes olanzapine 15mg at night and fluoxetine 40mg daily, prescribed by his GP but reviewed regularly by the psychiatric team. She states:

> "Around the times he has had hearings around his immigration status he has become severely depressed. In 2016 he was admitted to the Highgate Mental Health Centre under Section 2 of the Mental Health Act, as he was having thoughts of hanging himself or throwing himself in front of traffic. His suicidal ideas were precipitated by feelings of hopelessness after a negative hearing and although he had appealed against the decision he was very anxious that he would be unsuccessful."

55. In her letter dated 15th November 2019, Dr Curwen states she last reviewed the appellant on 9th September 2019, and he remains in low mood as a consequence of his precarious situation. Dr Curwen expresses the opinion that if the appellant were to be deported to Jamaica, she would be very concerned about his mental health deteriorating dramatically. She fears that he would become severely depressed and

attempt suicide. She states in her letters of 1st February 2019 and 15th November 2019:

> "If [the appellant] were returned to Jamaica, there is no reason to believe that he would not engage with the medical services if they were available for him to access. However, I do not know if the medical services he requires exist in Jamaica, and whether they are free at the point of delivery. [The appellant] also suffers from prostate cancer and is under a urologist at the Whittington Hospital. He requires regular monitoring and investigations. I have no idea if he would be able to access similar care in Jamaica without any money to pay for it.
>
> If [the appellant] returned to Jamaica there would be a deterioration in his condition, as he would be separated from his family who love and support him emotionally and financially, and somewhere he has no support at all. If [the appellant] were deported to Jamaica, he would be at high risk of suicide"

56. Dr Curwen also expresses the opinion that if the appellant were to be deported to Jamaica it is likely that he would not be well enough to work and as a consequence of his illness, his concentration is poor, at times he struggles with his self-care and he struggles with low confidence. Dr Curwen states that if he were to be deported to Jamaica it is likely that he would be more depressed and would really struggle to find work and also remain employed. She expresses the opinion that if the appellant were unable to access appropriate treatment in Jamaica, his mental health is likely to deteriorate further. Without medication, it is likely that his depression will be more severe, and he will experience auditory hallucinations and paranoid delusions. He would be at risk of suicide and self-neglect.

57. Dr Alicia Griffiths met with the appellant at the offices of his representatives on 30th January 2020 for 2 hours. She asked the appellant if he had thought of any plans or means to end his. He is recorded to have said:

> "I would just have to find a way; I could never live without them [my children]. They are the main reason, if I have a smile on my face, is down to my children and [JH]. I can't see nothing sometimes, but they make me so happy. Without them, I have nothing, no reason to smile."

58. Dr Griffiths states that having read both of Dr Curwen's reports dated 1st February 2019 and 15th November 2019, she agrees with her findings and diagnosis of the appellant's presenting difficulties. She believes the appellant meets the full diagnostic criteria for Recurrent Major Depressive Disorder and she agrees with Dr Curwen that the appellant's mental health is closely associated with his fears around being deported from the UK and the worries he has about being separated from his family. Dr Griffiths confirms in her report that the diagnosis is made on the basis of her clinical observations and not purely the appellant's description of his symptoms.

She is confident that she is able to differentiate those presenting with clinical presentations of depression and psychosis, and those who are not.

59. In her opinion, the appellant's mental health is likely to deteriorate further should he be deported to Jamaica. She believes the appellant would benefit from specialist psychological therapy and to achieve the maximum benefit from therapy, he should feel a sense of safety and being able to stay in the UK without the threat of removal. At paragraph 5.7 of her report, she states that leaving his partner and three children would be devastating to the appellant as they are his biggest support systems and his only reported purpose for staying alive. She believes the risk of the appellant ending his life is likely to increase significantly if he is deported to Jamaica and the appellant has described a clear intention to end his life should he be deported.

60. Dr Griffiths confirms at section 5.9 of her report that the appellant currently, has no thoughts or intention of ending his life. She states, "*.. However, he did endorse the risk item relating to current suicidal thoughts or plans and described experiencing 'thoughts that I would be better off dead, or of hurting myself in some way' nearly every day for the past two weeks*". She believes the appellant's intention to act on suicidal ideation appear reactive to the decision regarding his immigration status. She notes, at section 5.13, that the appellant described that his risk of suicide would "*definitely increase*" if he was deported because he would be separated from his partner and his three children. He described that he would end his life if he was deported. She states he did not disclose a clear plan about how he would end his life but told her he would "*have to find a way*". She expresses the opinion that due to his history the appellant's suicidal ideation should be taken seriously. He is not currently actively suicidal although he does experience thoughts of ending his life frequently. She states that although the appellant might not currently be at risk, this could easily change if he felt overwhelmed or more helpless regarding his future circumstances. She believes that his suicide risk when served with removal directions and when in transit, and on arrival in Jamaica is very high.

61. We do not consider the medical evidence, taken at its highest, demonstrates a real risk that the appellant would commit suicide in the UK. We accept the appellant's mental health is very closely associated with his fears around being deported from the UK and the worries he has about being separated from his family. In 2016, he was admitted to the Highgate Mental Health Centre under s2 Mental Health Act as he was having thoughts of hanging himself or throwing himself in front of traffic. He has been diagnosed with Recurrent Major Depressive Disorder that is directly

attributable to his reports of preoccupation, worry and uncertainty around his future. The appellant receives support from his partner and the presence of his children is of significant comfort to him. Dr Griffiths confirms the appellant is not currently actively suicidal, although he does experience thoughts of ending his life frequently. She states that although he might not currently be at imminent risk, this could easily change if he felt overwhelmed or helpless regarding his future circumstances. The appellant is receiving support and cooperates with the medical authorities in the UK. When precautionary steps have had to be taken, those steps have been taken and we find that any risk upon the appellant learning of any decision to remove him would be adequately managed in the UK by the relevant authorities. There is no evidence before us of any attempt at self-harm or suicide following the decision of the 'error of law' decision. Any risk that manifests itself during removal, is capable of being managed by the respondent and the support that the appellant will undoubtedly receive from his partner, and his family in the UK.

62. We therefore approach our assessment on the basis that it would be possible for the respondent to return the appellant to Jamaica without his coming to harm, but once there, he would be in the hands of the mental health services in Jamaica. In this context, the Article 3 threshold is particularly high. The risk here, results from a naturally occurring illness. We acknowledge that an Article 3 claim, can in principle succeed, in a suicide case.

63. There is a preserved finding that there is no credible evidence that the appellant does not have extended family in Jamaica that could help him settle in Jamaica. At paragraph 5.8 of her report, Dr Griffiths expresses the opinion that the appellant would struggle to be able to fully access appropriate medical treatment in Jamaica. She states:

> "... Firstly, [the appellant] explicitly told me that he would be homeless if returned to Jamaica. He described that people who are unwell are left to be homeless. He described that he did not think there was support or care for people like himself in Jamaica. When I asked him explicitly about support he told me he did not know about mental health services in Jamaica.
>
> [The appellant] also describe little support in Jamaica from any family. His family in the UK currently remind him of his appointments for medical services, which helps him to engage with these. Without this, I believe that [the appellant] would find it extremely challenging to engage with medical services. When asked about appointments he told me "[JH] writes them down", [JH] reminds me". Thus, he is heavily reliant on others to remind him of medical appointments. I believe that his ability to access appropriate medical services and psychological support for his symptoms would be difficult for him. Firstly, he was not able to articulate any

> knowledge of how he might go about receiving such support. Being in Jamaica is also likely to exacerbate symptoms of low mood and potential auditory hallucinations. Therefore, as his symptoms are likely to worsen, it would be even harder for him to access treatment. He also did not tell me about his prostate cancer, meaning that he might not always fully remember or be clear of the treatment he is receiving, and he requires. Without anyone overseeing his care, it seems unlikely that the kind of support that may be available to him in the UK would be provided."

64. Dr Curwen expresses the opinion that if the appellant were returned to Jamaica, there is no reason to believe that he would not engage with the medical services if they were available for him to have access to. Dr Griffiths expresses the opinion that the applicant's mental health is likely to deteriorate further should he be deported to Jamaica and the appellant would struggle to be able to fully access appropriate medical treatment in Jamaica. Miss Kiai submits we should prefer the opinion expressed by Dr Griffiths, because it is reasoned. We have carefully considered the reasons that she gives. She states the appellant told her that he would be homeless if he returned to Jamaica, and he did not think there was support or care for people like himself in Jamaica. The appellant also described that he would have little support in Jamaica from any family and without the assistance he currently has, Dr Griffiths believes the appellant would find it extremely challenging to engage with medical services. He is heavily reliant on others to remind him of medical appointments and she believes that his ability to access appropriate medical services and psychological support for his symptoms, would be difficult for him. In our judgement, the difficulty with that reasoning is that Dr Griffiths 'opinion is based upon what she had been told by the appellant himself. In her report, she identifies, at section 1.3, that she was provided with a copy of the error of law determination promulgated on 18th October 2019. In reaching her opinion and setting out her reasons, she disregards entirely the preserved finding that there is no credible evidence that the appellant does not have extended family in Jamaica that could help him to settle in Jamaica. In our judgement, treatment would be available to the appellant and with the availability of family support, the reasons given by Dr Griffiths fall away. We find the opinion expressed by Dr Curwen to be correct. If returned to Jamaica, there is no reason to believe that the appellant would not engage with the medical services available for him.

65. At paragraph 5.9 of her report Dr Griffith confirms that she is unable to comment fully on whether the medical services the appellant requires, exist in Jamaica. She believes that an important issue is the appellant's ability to access such treatment. She believes that if the medical services are available as they are in the UK, without his family to remind him of appointments, and with being isolated and alone, the

appellant would significantly struggle to engage with much-needed medical services.

66. There is scant evidence before us regarding the availability of treatment for mental health in Jamaica. We have considered the content of the World Health Organization Assessment Instrument for mental health systems in Jamaica – 2009, that is in the appellant's bundle. The report confirms that the mental health service is divided into national and regional health authorities. Mental health is integrated into general health care with all regions having most of the essential mental health components and psychotropic medication. The report confirms that in Jamaica, epidemiological studies show that the most prevalent disorder is that of Major Depressive Disorder. The 2009 report confirms that mental health education and promotion is a stated priority for both the national and regional authorities. The report confirms that during the last two years (i.e. 2007/8 or 2008/9) there had been an active mental health promotion targeting all sectors.

67. The appellant relies upon a generic report by Dr Luke de Noronha which is said to offer accurate and balanced country information regarding deportees in Jamaica. We have also been provided with a letter from Dr Luke de Noronha dated 11th February 2019. The author candidly accepts that he is not qualified to speak confidently on mental health provision in Jamaica but makes the bold assertion that the appellant will not be able to receive the same level of mental health support as he does in the UK. Without any qualification to do so, he expresses an opinion that it is likely the appellant's condition will worsen, and suggests the appellant clearly demonstrates risks above and beyond most cases. The report makes a number of very general claims, and we attach little weight to the opinions expressed

68. When pressed regarding the availability of treatment in Jamaica, Miss Kiai referred us to an article, that appears at page 811 of the appellant's bundle, dated 4th September 2017 headed 'Jamaica's healthcare system in dire need of help', published on a website; 'www.caribbeannationalweekly.com'. The author of the article and their credentials is not identified. The article states "*Jamaicans in the Diaspora seems (sic) to be perennially concerned about the reported violent crime rate in Jamaica. While this may be justified, it is ironic when one visits Jamaica one finds the general public going about their business, enjoying life, as if there is really "no problem" on the island. However, there is a problem in Jamaica that is just as concerning as the reported crime rate. This problem relates to Jamaica's healthcare system. Healthcare in Jamaica is one area that is not keeping up with the strides the nation has accomplished since independence in 1962*". The article states

the main problem is the existing medical infrastructure has outgrown its efficiency to the expanding and ageing population. It is said that the root of the problem of the inefficiencies of the public health facilities, is cost.

69. In the respondent's decision of 17th October 2018 the respondent acknowledges that medical facilities in Jamaica may not be of the same standard as those in the UK, but the respondent does not consider that the level of care is such that the appellant's removal to Jamaica would result in a breach of Article 3. The respondent refers to psychiatric treatment on an inpatient or outpatient basis being available at the Bellevue Hospital, a public facility, in Kingston. It is said the hospital also provides rehabilitative and re-integrative services to patients and employs psychiatric social workers. The University Hospital of the West Indies in Kingston is also said to provide mental health services, including psychiatry. It is said that under the National Health Fund JADEP programme, people aged over 60 can obtain medicines for psychiatric conditions free of charge.

70. As we have already said, any risk that manifests itself during removal itself, is capable of being managed by the respondent and the support that the appellant will undoubtedly receive from his partner, and his family in the UK. Having considered all the evidence we are quite satisfied that medical treatment and assistance would be available to the appellant in Jamaica, albeit not to the standard available in the UK. The appellant is a Jamaican citizen and would have access to such services including medical and mental health provision. The 'suicide risk' is not in our judgement such that the removal of the appellant to Jamaica would be in breach of Article 3.

71. As to the general Article 3 claim and the claim that the appellant would face destitution, we note Dr Griffiths states she is not sure if the appellant would be well enough (or able) to work in Jamaica. The appellant described to her that he would be vulnerable to facing nothing other than destitution in Jamaica. She believes the appellant might struggle within a working environment if he is deported to Jamaica and his low mood and hopelessness has increased.

72. Our attention was drawn by Miss Kiai to an article by Tanya Golash-Boza regarding 'transnational coping strategies and gendered stigma among Jamaican deportees. The focus of that report is why deportees engage in transnational practices as coping strategies to deal with financial and emotional hardship, and the consequences that flow. Our attention was also drawn to a paper by Christopher Charles, published on 9th October 2010 regarding the reintegration of deportees in Jamaica.

73. The appellant has previously worked in the UK and would have some familial support in Jamaica. We have had regard to the report of Mr De Noronha, regarding the situation for deportees in Jamaica. We are unable to find that the appellant would be destitute or homeless in Jamaica albeit it might take him some time to find employment. He is currently supported financially by his partner and his aunt in the UK, and we find that they would give him some financial assistance on his return, at least in the short term until he finds a means of supporting himself, albeit we appreciate, they are likely to have little income to spare at the moment. We accept there are parts of Jamaica where crime is at high levels, but the appellant would be able to relocate to safer areas. We have already found the medical treatment and social services would be available to the appellant in Jamaica. Although we accept that difficult conditions pertain in Jamaica, they do not reach the high threshold to enable the appellant's appeal to succeed on Article 3 grounds.

74. In our final analysis, we find the appellant's and his partner's and children's' protected rights, whether considered collectively or individually, are not in our judgement such as to outweigh the public interest in the appellant's deportation.

75. It follows that we dismiss the appeal.

Decision

76. The appeal is dismissed.

Signed Date 13th March 2020

Upper Tribunal Judge Mandalia