Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22641/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 30 May 2022	**On 22 June 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AK (TUNISIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The appellant did not appear and was not represented
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Tunisia born in 1983. This is his appeal against a decision of the Secretary of State dated 23 October 2018 to refuse a human rights claim he made on 5 July 2018 in the form of a response to a notice served under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Secretary of State issued the so-called "section 120 notice" to the appellant in a decision dated 20 June 2018 to deport him from the United Kingdom, on the basis that he was a "foreign criminal" for the purposes of the UK Borders Act 2007 ("the 2007 Act").

2. The appellant's appeal was originally heard by First-tier Tribunal Judge Oxlade under section 82(1) of the 2002 Act on 21 October 2019, and allowed in a decision promulgated on 24 October 2019. However, by a decision dated 6 January 2020 Upper Tribunal Judge Coker found the decision of Judge Oxlade to

involve the making of an error of law and set the decision aside, directing that the matter be reheard in this tribunal. Judge Coker's decision may be found in the **Annex** to this decision. The appeal was transferred to me, and it is in those circumstances that I remake the decision, under section 12 of the Tribunals, Courts and Enforcement Act 2007.

Anonymity

3. On 27 July 2015, a district judge sitting in the Family Court granted the appellant, his wife, L, and their son, T, born on 30 July 2010, anonymity in the context of proceedings for a child arrangements order in respect of T. That order remains in force and accordingly I make a direction for anonymity in these proceedings so as to respect the anonymity order already in force as above.

Procedural background

4. These proceedings have a lengthy procedural background. The resumed hearing was delayed as a result of the pandemic. When the matter was eventually listed before me on 23 April 2021, the appellant did not attend. I was informed by the presenting officer appearing for the Secretary of State that it appeared the appellant had recently been arrested for further offences. He was not represented. I adjourned the proceedings and gave written directions for the matter to be resumed. My directions of the same date said:

> "8. The appellant is strongly encouraged to seek independent legal advice. The appellant is directed to serve any evidence he can about the relationship he has with his son, and any other evidence he wants to rely on to show why he should not be deported. **He should serve this evidence at least 14 days before the adjourned hearing date.** The date of the adjourned hearing should be in the notice of hearing which is attached to these directions."

I gave directions for the Secretary of State to keep the tribunal appraised of the appellant's custody status, and also for the sentencing remarks from the appellant's sentencing hearing before the Crown Court at Basildon on 17 March 2017 to be served on the tribunal, for the reasons set out below.

5. The matter resumed before me on 2 November 2021. I was told by Ms Cunha, a Senior Home Office Presenting Officer who appeared on behalf of the Secretary of State, that on 14 August 2021, the appellant had been sentenced to 30 months' imprisonment (in fact, as set out below, the appellant had not been sentenced to a period of custody of that length on that date for that period, but he had been sentenced on 22 September 2021 to a number of sentences to which I shall return below). The tribunal had not been notified of the appellant's custody status, in a breach of my directions dated 23 April 2021. It was common ground that it would have been unfair to proceed in the absence of the appellant. I adjourned the proceedings again. I issued directions which included the following:

> **"Message to the appellant, Mr AK:** I strongly encourage the appellant, Mr AK, to seek independent legal advice. Mr AK may serve any evidence he can about the relationship he has with his son and the impact on his son of his deportation, and any other evidence he wants to rely on to show why he should not be deported. **Mr AK should serve this evidence at least 14 days before the next**

> **hearing**. The date of the next hearing should be in the notice of hearing which will be attached to these directions."

6. On 10 January 2022, the matter was listed to be heard before me at the Royal Courts of Justice, with the appellant to be produced from prison. The appellant was not produced. HMP Huntercombe later informed the tribunal that "due to an oversight", no transport had been booked to bring the appellant to court. I adjourned the proceedings again. I issued directions which included the following:

> **"<u>Message to the appellant, Mr AK:</u>** I strongly encourage you to seek independent legal advice. Even if you do not have legal representation, you can still represent yourself (as you have previously in your immigration appeal hearings). Please provide any evidence the relationship you have with your son, and the impact of your deportation on him, and any other evidence you want to rely on to show why you should not be deported, as soon as possible. **You should send this evidence to the Upper Tribunal at least 14 days before the next hearing, and send a copy to the Home Office**. The date of the next hearing should be in the notice of hearing which will be attached to these directions, as well as the address to send your evidence to. If you do not attend the next hearing, it may go ahead in your absence."

7. The emphasis in the above extracts was original.

8. On 30 May 2022, the matter was again listed to be heard before me at the Royal Courts of Justice, with the appellant to be produced. I was informed on the morning of the hearing by my clerk that, according to the detention suite at the Royal Courts of Justice, the appellant had refused to leave his cell at HMP The Mount, where he currently resides.

Proceeding in the appellant's absence on 30 May 2022

9. The Tribunal Procedure (Upper Tribunal) Rules 2008 make provision for the tribunal to proceed in the absence of a party, in the following terms:

> "38. Hearings in a party's absence
>
> If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

10. I was satisfied that the appellant had been notified of the hearing. On 30 March 2022, a notice was sent to the appellant at HMP The Mount setting out the details of the hearing and its location at the Royal Courts of Justice. The notice of hearing featured the following warning:

> "If a party or his representative does not attend the hearing the tribunal may determine the appeal in the absence of that party."

11. When assessing "the interests of justice" for the purposes of rule 38(b), the tribunal's overriding objective must inform that assessment. The overriding objective may be found at rule 2(1): it is to deal with cases fairly and justly. That includes, pursuant to the indicative examples at paragraph (2) the following relevant considerations: sub-paragraph (c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings"; sub-paragraph (d), "using any special expertise of the Upper Tribunal effectively"; and sub-paragraph (e), "avoiding delay, so far as compatible with the proper consideration of the issues." Where, as here, and appellant is a litigant in person, particular allowances must be made in case management decisions in order fully to enable their participation.

12. I considered that it was in the interests of justice to proceed, for the following reasons:

    a. There had been no application to adjourn the proceedings;

    b. The appellant's non-attendance was due to his refusal to leave his cell at his prison, despite having been issued with a notice of the hearing which warned him of the potential consequences of his failure to attend;

    c. I had issued multiple case management directions each with passages directed at the appellant personally, imploring him to engage with the proceedings. The directions issued on 10 January 2022 warned the appellant that, if he did not attend the hearing, it may go ahead in his absence;

    d. Had I adjourned of my own motion, in light of the appellant's apparent total non-engagement with the proceedings in this tribunal to date, there was no reason to conclude that the position would be any different at a future adjourned hearing;

    e. The proceedings were becoming stale. The hearing before the First-tier Tribunal took place around two and half years ago, and the Upper Tribunal has been seized of the appeal for well over two years. Further delay would be inimical to the overriding objective;

    f. I would be able to ensure that the appellant would enjoy a fair hearing, even in his absence.

Factual background

13. Although Judge Coker set aside the decision of Judge Oxlade without expressly preserving any of her findings of fact, I consider that the error of law identified by Judge Coker did not impugn any of the findings of fact reached by Judge Oxlade. Judge Coker found that Judge Oxlade had failed to engage with the question of whether the appellant's deportation would be unduly harsh on T. She had simply made no findings on that issue, but had reached a range of findings concerning the extent of the appellant's relationship with T at that time, disagreeing with the position adopted by the respondent in the refusal letter. There is no reason not to adopt Judge Oxlade's findings as my own, certainly insofar as they represented the position as at 21 October 2019. Accordingly, I will gratefully adopt Judge Oxlade's findings of fact for the purposes of the summary of the factual background to these proceedings that follows.

14. The appellant met L, a British citizen, while she was on holiday in Tunisia in 2006. They married and L returned to the United Kingdom alone. The appellant

subsequently applied for entry clearance but his application was refused. He entered the country clandestinely in, it is thought, 2007, and in 2009 was reunited with his wife. T was born in August 2010. He is a British citizen. Shortly before T's birth, the appellant assaulted L, and was later sentenced to 42 days' imprisonment in respect of her battery and failing to surrender to custody. Thereafter the appellant committed a number of further offences. On 17 March 2017, before the Crown Court at Basildon he was given suspended sentences for criminal damage, further battery of L, the possession of a bladed article in public, and affray. On 27 July 2017, the appellant was granted 30 months' leave outside the rules, on account of his relationship with T.

15. On 12 June 2018, the appellant pleaded guilty to 6 counts; three counts of theft (shoplifting), for which he was given concurrent terms of six months' imprisonment, the possession of heroin, for which he was sentenced to 7 days' imprisonment concurrent to the above sentences, and was resentenced for the offences he committed in 2017, for which he had originally received only suspended sentences of imprisonment. For those offences, he was sentenced to a further six months' imprisonment, consecutive to the other six month sentences to which he was sentenced on the same day. Thus the appellant was then sentenced to a total of 12 months' imprisonment.

16. The above offences cumulated in the Secretary of State refusing the appellant's human rights claim made in response to the section 120 notice she issued on 20 June 2018, by a decision dated 23 October 2018. That is the decision that is under challenge in these proceedings. It contends that the appellant's deportation is conducive to the public good because he is a "persistent offender" having, by that stage, received six convictions for 19 offences, resulting in an aggregate sentence of 12 months for the most recent convictions he received. The letter noted that the appellant's conviction is dated 17 March 2017 arose from an incident of domestic violence L and T "including stabbing your son". The public interest required the appellant's deportation.

17. The decision dated 23 October 2018 concluded that the appellant did not enjoy family life with L, as their relationship was not genuine or subsisting. It also concluded that there was no evidence the appellant enjoyed a genuine and subsisting parental relationship with T. The letter accepted that it would be unduly harsh to expect T to accompany the appellant to Tunisia and that, in any event, the Family Court order dated 27 July 2015 requires T to remain living with L, and that T could not be removed from England and Wales without the prior written agreement of either L, or of the family court. As far as the appellant's private life was concerned, he would not face "very significant obstacles" to his integration in Tunisia; he spent his youth and formative years in the country, and lived there until he was 24 years of age. He maintained family ties to the country and may be eligible for financial support from the Secretary of State's Facilitated Returns Scheme ("the FRS"). There were no other very compelling circumstances that defeated the strong public interest of the appellant's deportation.

18. The appellant's handwritten grounds of appeal to the First-tier Tribunal raised a number of issues. The grounds included a statement that the appellant sought to claim asylum, and set out a number of reasons why he contended that his life would be at risk upon his return in Tunisia. As Judge Oxlade noted at [19], that was not a claim that was pursued further by the appellant at that stage. Had the appellant chosen to pursue the asylum limb of his grounds of appeal, it is unlikely the First-tier Tribunal would have enjoyed the jurisdiction to entertain an appeal

advanced on that basis, as it would have been likely to amount to a "new matter" requiring the consent of the Secretary of State. There is no suggestion that the Secretary of State has either been invited to consent, or has consented, to that issue being considered under section 85(5) of the Tribunals, Courts and Enforcement Act 2007. The protection-based grounds of appeal therefore play no part in my analysis of the issues in these proceedings.

19. Judge Oxlade heard evidence from the appellant, who represented himself, and from L. The proceedings before the judge were conspicuously fair; although the appellant and L had attended without witness statements, the judge arranged for them to be provided with writing materials and paper for them to draft a statement there and then. The judge's decision outlines the evidence she heard at some length. It is not necessary to recite that evidence here. It will be sufficient to summarise her operative findings which have not been challenged and which may form the basis of the starting point for my own findings of fact.

20. There was an issue before Judge Oxlade as to whether the appellant had "stabbed" T during the altercation with L that led to the imposition, on 17 March 2017, of suspended sentences for criminal damage (one month's imprisonment, suspended for 24 months), battery (six months' imprisonment, suspended for 24 months), and the possession of a bladed article in public (15 months' imprisonment, suspended for 24 months). Sentencing the appellant on 12 June 2018 to the offences summarised at paragraph 15, above, HHJ-Owen Jones said:

> "On the 17th March last year [2017], the court dealt with you in my judgment extremely leniently, particularly as you had pleaded guilty to 2 counts of criminal damage. You are then, after a trial, convicted of two counts of battery, once again your wife and you drag and hit her, and also stabbed your son. You are in possession of a knife and you committed and afraid."

21. Before Judge Oxlade the appellant vehemently denied having stabbed T, and whether he had done so was an issue that the judge had to resolve. She was not provided with the sentencing remarks of the judge on 17 March 2017, but reached a series of findings at [59] to [61] that the appellant had not stabbed his son. She had earlier noted the evidence of L that during an altercation T's lip had been caught when the appellant sought to pick him up when he had been writhing, but it had been a pure accident. The findings reached by Judge Oxlade were not expressly challenged by the Secretary of State before Judge Coker, however Judge Coker plainly had in mind that some clarity on the issue would be required. To that end, she directed the Secretary of State to obtain the sentencing remarks from the Crown Court on that occasion. I gave similar directions in my case management directions dated 23 April 2021, 2 November 2021 and 10 January 2022. Nothing has been provided by the Secretary of State, despite over four judicial directions issued by two judges of this tribunal. I therefore take Judge Oxlade's findings on this issue as the starting point for my own findings on that issue. I observe for my own part that the sentence imposed by the Crown Court on 17 March 2017 appears to be consistent with the appellant having not intentionally stabbed T.

22. The operative findings reached by Judge Oxlade in relation to the relationship between the appellant and T were that they were in a genuine and subsisting relationship: [58], [62] to [65]. Judge Oxlade based those findings on the appellant's awareness and involvement in T's health problems, including by taking him to hospital, and providing other assistance. He had given

unchallenged evidence before the First-tier Tribunal that he gave money to L in order to pay for T's school uniforms and winter clothes, and would buy him what he needed. The judge recognised that, as the appellant had been in detention, the practical outworking of his support T had been curtailed, but noted the extent of the telephone contact between the appellant and T. L and T had visited the detention centre infrequently, but Judge Oxlade ascribed little significance to that, in light of the fact T had to work seven days a week across two jobs, and also given T did not like the detention centre, and did not understand why his father was there.

23. The above findings have not been impugned and I therefore adopt them as the starting point for my own findings of fact.

Further offending

24. Since the decision of Judge Oxlade, the appellant has been sentenced to further offences:

a. 27 April 2020: pleaded guilty to possession of a Class A drug (heroin); one day's "detention";

b. 12 October 2020: pleaded guilty to theft (shoplifting); community order, exclusion requirement, rehabilitation activity requirement. This was varied on 15 October 2021 to 2 months' imprisonment;

c. 18 May 2021: convicted at trial going equipped for burglary; 2 months' imprisonment, consecutive;

d. 22 September 2021: pleaded guilty to going equipped for theft; five months' imprisonment, consecutive. Pleaded guilty to possession of cannabis; no separate penalty;

e. 15 October 2021: pleaded guilty to possession of a bladed article in public; nine months' imprisonment. Pleaded guilty to dangerous driving; six months' imprisonment, consecutive. Pleaded guilty to driving while uninsured; no separate penalty. Pleaded guilty to failing to provide a specimen for analysis; no separate penalty. The appellant was also disqualified from driving for 37 months concurrent, with an extension period of 3 months, and must take an extended retest before being allowed to drive again. Pleaded guilty to going equipped for theft; three months' imprisonment, concurrent. Pleaded guilty to possession of an offensive weapon in public; six months' imprisonment consecutive, plus forfeiture and destruction of the knife. Thus the appellant was sentenced to a total of 21 months' imprisonment on this occasion.

Legal framework

25. Section 32 of the 2007 Act provides:

"32 Automatic deportation

(1) In this section "foreign criminal" means a person–

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3) Condition 2 is that–
>
> > (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
> >
> > (b) the person is sentenced to a period of imprisonment.
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good."

26. Section 38 of the 2007 Act provides, where relevant:

> "(1) In section 32(2) the reference to a person who is sentenced to a period of imprisonment of at
>
> least 12 months–
>
> […]
>
> > (b) does not include a reference to a person who is sentenced to a period of imprisonment of at least 12 months only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than 12 months…"

27. Article 8 of the European Convention on Human Rights ("the ECHR") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

28. Part 5A of the 2002 Act makes provision for certain statutory considerations to which a court or tribunal must, in particular, have regard when considering the "public interest question" in proceedings concerning whether a decision such as that under consideration in these proceedings would breach a person's right to respect for private and family life under Article 8 ECHR. Section 117C is relevant in cases concerning "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."

29. "Foreign criminal" is defined for the purposes of section 117C in these terms:

"(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender."

30. It is for the appellant to demonstrate that his prospective removal would engage the protection of Article 8 ECHR. It is for the respondent to establish that any interference with the rights guaranteed by Article 8(1) is justified on grounds permitted by Article 8(2).

31. The standard of proof is the balance of probabilities standard.

Discussion

32. I approach my analysis pursuant to the following structure. First, I will consider whether the appellant is a "foreign criminal". Secondly, I will determine the factual and evidential matrix upon which I will assess the applicability of the exceptions in section 117C of the 2002 Act. Thirdly, I will consider whether either of the exceptions apply, and whether the appellant's deportation would be proportionate for the purposes of Article 8(2) ECHR.

33. I accept that the appellant's deportation would engage his private life rights under Article 8(1) ECHR, in light of the length of his residence here. For the reasons given below, I do not accept that the appellant continues to enjoy a

genuine and subsisting relationship with T (still less with L). Nevertheless, I will consider the application of the statutory public interest considerations contained in Part 5A of the 2002 Act in any event.

The appellant is a "foreign criminal" under section 117D on the basis of being a persistent offender

34. The appellant is not a "foreign criminal" for the purposes of the automatic deportation provisions contained in the 2007 Act. This is because he has not been subject to a single sentence of imprisonment that exceeds 12 months; while he has been sentenced to aggregate terms exceeding that length of time, he has not been sentenced on a single occasion to a term of imprisonment for 12 months or longer. Accordingly, pursuant to section 38(1)(b) of the 2007 Act, the appellant is not a "foreign criminal" for purposes of that Act.

35. However, the appellant may be a "foreign criminal" for the purposes of section 117D(1)(b) of the 2002 Act if he is a "persistent offender". It is on that basis that the Secretary of State has refused his human rights claim. In *Chege v Secretary of State for the Home Department* [2016] Imm AR 833, this tribunal gave guidance on the meaning of the term that was endorsed by the Court of Appeal in *SC (Zimbabwe) v Secretary of State for the Home Department* [2018] 1 WLR 4474. At [53], the tribunal in *Chege* held:

> "53. Put simply, a 'persistent offender' is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. Whilst we do not accept Mr Malik's primary submission that a "persistent offender" is a permanent status that can never be lost once it is acquired, we do accept his submission that an individual can be regarded as a 'persistent offender' for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts."

36. This is not an issue upon which Judge Oxlade reached any findings of fact; at [49], she said that there was no issue as to the appellant being a person to whom the automatic deportation provisions applied, and proceeded on that basis. I respectfully disagree with her analysis in that respect, for the reasons set out above. The appellant did not cross-appeal against that finding, but that is hardly surprising as he is a litigant in person, and to do so requires a party to adopt a purposive reading of rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, in light of the discussion at [31] of *Secretary of State for the Home Department v Devani* [2020] EWCA Civ 612. It follows that I do not adopt Judge Oxlade's finding of fact in this respect, and will perform my own analysis of whether the appellant may properly be categorised as a "persistent offender" under section 117D(1)(b). For the purposes of this appeal against the refusal of the appellant's human rights claim, nothing turns on the Secretary of State's initial erroneous reliance on the 2007 Act provisions; in the decision under challenge in these proceedings, the Secretary of State relied on the appellant's persistent offending to refuse the human rights claim, and it is on that basis that I shall approach the issues.

37. I have no hesitation in concluding that the appellant is a persistent offender. Not only was his offending persistent in the period leading up to the decision of Judge Oxlade, he has continued to offend. There is a pattern to his offending which appears to involve acquisitive crimes or going equipped for burglary, coupled with the possession of a bladed article or offensive weapon in public, and being found in the possession of controlled drugs. His offending has continued to escalate; not only has the pace of the offending continued (if not increased), the cumulative total lengths of his custodial sentences have increased.

38. Since the appellant is a persistent offender, he can only demonstrate that the public interest does not require his deportation by establishing either that one of the statutory exceptions contained in section 117C of the 2002 Act applies, or that there are very compelling circumstances, over and above the exceptions, for the purposes of section 117C(6).

Exceptions to deportation not engaged

39. Exception 1 is not capable of being engaged. The appellant has not been lawfully resident in the United Kingdom for most of his life, and nor is there any evidence that he is socially and culturally integrated. In a statement dated 21 July 2016 prepared for the Secretary of State in support of an earlier human rights claim, the appellant said that he was homeless and destitute, and had resorted to living on the streets. He had no regular source of income. None of the evidence in the case before Judge Oxlade demonstrated that, as at 21 October 2019, the appellant was socially and culturally integrated. There has, of course, been no update to the position.

40. There is no evidence that the appellant would face very significant obstacles to his integration in Tunisia. While the appellant's handwritten grounds of appeal to the First-tier Tribunal made a number of assertions that contended his life would be at risk upon his return, they are unsubstantiated. At page 22 of his application to the Secretary of State dated 13 April 2016 he stated that his parents still resided in Tunisia. The appellant lived in Tunisia until he was around 24 years old. He will be familiar with the language, the culture and the customs. He will enjoy the full panoply of rights granted to Tunisian citizens by that state, and will be able to look to his family to provide any assistance necessary. I agree with the Secretary of State's decision in which she states that the appellant has demonstrated considerable personal fortitude in arriving in this country, and living here without leave for a number of years. While his return to Tunisia may present initial practical obstacles, they will not be "very significant obstacles" for the purposes of Exception 1.

41. I turn to Exception 2.

42. Judge Oxlade found that the appellant and L did not have a genuine and subsisting relationship. There is no evidence that in the time since the appeal before the First-tier Tribunal that has changed. It follows that the appellant does not have a "qualifying partner" for the purposes of Exception 2.

43. Judge Oxlade accepted that the appellant enjoyed a genuine and subsisting relationship with T. For the reasons given above, I adopt that finding as my starting point. However, there has been no evidence to demonstrate that the relationship enjoyed at that stage has continued. I have invited the appellant on multiple occasions to provide further evidence. He has not so much as asserted

that the relationship continues. He declined to attend the substantive hearing of his appeal to speak to his position; it is not even clear that the appellant continues to maintain that he has a relationship of any sort with his son. There is no evidence that the relationship between the appellant and T in 2019 has continued to the present day. L did not attend the substantive hearing before me. I take into account the fact that the appellant is in custody and without legal representation. However, that would not prevent him from writing to the tribunal, as he has done previously. He made a human rights claim from custody in July 2018. He drafted the grounds of appeal to the First-tier Tribunal by hand. He provided a handwritten statement to the First-tier Tribunal. I have sought to encourage him in the course of three sets of directions addressed directly to him to provide evidence of precisely this nature. He could have attended the resumed hearing to give evidence on these issues. The is a man who is not unfamiliar with the courts.

44. I find that there is no evidence that the genuine and subsisting relationship between the appellant and T that existed in late 2019 has continued. The appellant has spent much of the time since the hearing before Judge Oxlade in custody, despite his evidence before her (summarised at [40]) that he was planning to stay away from his "associates" and get a job to which he could travel to by bus. Whatever aspirations the appellant had at that stage appear, unfortunately, to be divorced from the reality of his continued, persistent offending.

45. Against that background, I consider the best interests of T. The refusal letter accepted that it would be unduly harsh to expect T to travel to Tunisia, in light of his relationship with L, and her status as his primary carer, and the Family Court order. The best interests of T are to remain with his mother in this country.

46. While ordinarily it would be axiomatic that the best interests of a child are served by the presence of both parents, there is no basis upon which I am able to conclude that the circumstances of this appellant are such that it is in T's best interests that he, the appellant, remains in the country. There is no evidence that the appellant has any role at all in the life of T.

47. I now address whether it would be "unduly harsh" on T for the appellant to be deported. The term "unduly harsh" was considered at length by the Court of Appeal in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, which expounded the Supreme Court's judgment in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. There is no notional objective standard of "due" harshness which serves to calibrate all assessments of whether the harsh impact on a child of deportation would be "undue": see [39] to [49]. As to what the term does mean, see [51]:

> "The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment [in *KO (Nigeria)*], approving the UT's self-direction in [*MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC)], and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including

> medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

48. The "battery of synonyms and antonyms" in *MK (Sierra Leone)* approved by the Court of Appeal (and in *KO*) was at [46] of *MK*:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher."

49. Even if I were to put to one side the fact that the appellant has failed to provide any updating evidence or even confirmation that the position in 2019 continues to be the position today, there is no evidence that the impact on T remaining in the country without the appellant would be "unduly harsh". The findings reached by Judge Oxlade for the purposes of establishing that the appellant enjoyed a genuine and subsisting relationship with T in late 2019 went no further than establishing the existence of the appellant's relationship with T; they did not address the issue of whether the appellant's deportation would be unduly harsh on T. And nor did there appear to be any evidence before Judge Oxlade in her detailed summary of the evidence which would have merited that conclusion; hence the error of law found by Judge Coker.

50. Returning to the present day, I take into account that the deportation of the appellant would deprive T of the opportunity to return the relationship between them to the state it was in at the time of the hearing before Judge Oxlade. This young person who will shortly be approaching his teenage years will grow up without a father in this country. That is a significant omission in the life of any young person. However, I do not consider the impact of the appellant's deportation to pose the prospect of anything remotely approaching "unduly harsh" for T. While I have accepted that there will necessarily be a generic, albeit relatively minor, level of harshness for T, it does not reach the elevated threshold necessary to merit a conclusion that the appellant's deportation would be unduly harsh on T.

51. It follows, therefore, that the appellant is unable to satisfy the requirements of Exception 2. In Article 8 ECHR terms, he does not enjoy family life with T or L.

52. I will conclude by conducting a "balance sheet" analysis of the factors telling in favour of the appellant's deportation, and those mitigating against it. That analysis will determine whether there are "very compelling circumstances" over and above the exceptions, for the purposes of section 117C(6), in addition to ensuring that the overall conclusion I reach is proportionate for the purposes of Article 8(2).

53. Factors in favour of the appellant's deportation include:

    a. The deportation of foreign criminals is in the public interest;

    b. The more serious the offence committed by a foreign criminal, the greater the public interest in the deportation of the criminal. This appellant is a persistent offender who has committed crime after crime,

with no signs of remorse, and an escalation in the seriousness of his offending and in its frequency. There is a considerable public interest in the deportation of this appellant. There is every sign that he will simply continue to offend if he is not removed;

c. The appellant does not meet either of the statutory exceptions to deportation. The appellant would not face very significant obstacles to his integration in Tunisia. There is no reason to conclude that he no longer has family there. His deportation would not be unduly harsh on either T or L.

54. Factors militating against the deportation of the appellant include:

a. His deportation will place considerable hurdles in the way of resuming the relationship he and T enjoyed in the past;

b. The appellant has lived here for 15 years and will have developed a private life during that time, albeit a private life that attracts little weight, as his residence has been largely unlawful, save for a relatively brief period when he held limited leave to remain.

55. I take into account the flexibility inherent to Part 5A of the 2002 Act and do not approach its provisions as a straightjacket. Weighing the factors militating in favour of the appellant's deportation against those mitigating against it, I have come to the firm conclusion that the appellant's deportation is in the public interest. He has committed many offences and is a persistent offender. He is not socially and culturally integrated. As the Secretary of State's decision states, his deportation is conducive to the public good. There are no reasons to conclude that his deportation would have a significant adverse impact on T or L. He has been abusive towards L in the past, and commenced his offending conduct by committing offences of violence against her in the home they then shared. The deportation of foreign criminals such as this appellant is in the public interest. There are no very compelling circumstances over the exceptions to deportation contained in section 117C of the 2002 Act. The public interest requires the appellant's deportation, which will be proportionate for the purposes of Article 8(2) ECHR.

56. This appeal is dismissed.

Notice of Decision

The appeal against the Secretary of State's refusal of the appellant's human rights claim is dismissed on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 31 May 2022

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Stephen H Smith Date 31 May 2022

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision (Upper Tribunal Judge Coker)

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22641/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6th January 2020

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AK
(Anonymity order made)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr AK in person

ERROR OF LAW AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the respondent in this determination identified as AK. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. First-tier Tribunal Judge Oxlade allowed AK's appeal against the refusal of his human rights claim, such claim being refused following the making of a deportation order. The First-tier Tribunal judge found that AK was not in a subsisting relationship with his wife but that he had a genuine and subsisting relationship with his son T, a British Citizen who was born in the UK in late August 2010, who lived with his mother who is his primary carer.

2. AK has been convicted of a number of offences, the last of which led to a sentence of imprisonment of 12 months. In the light of that conviction a deportation order was signed, the Secretary of State not accepting that AK met the criteria of Exception 1 or 2 as set out in s117C Nationality, Immigration and Asylum Act 2002. The Secretary of State accepted it would be unduly harsh for the child to relocate to Tunisia, AK's country of nationality.

3. Although the First-tier Tribunal judge found there to be a genuine and subsisting relationship between AK and his son, she failed to make a finding on whether it would be unduly harsh on the child for AK to be deported. There is nothing in the decision which indicated that she had considered the impact on the child of the deportation of AK.

4. The Secretary of State was granted permission to appeal accordingly and I am satisfied that the First-tier Tribunal judge failed to make a finding on whether it would be unduly harsh on the child for AK to be deported and has erred in law such that the decision is set aside to be remade, findings of fact regarding the relationship between AK and his son retained.

Conclusions:

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

I set aside the decision

Consequential Directions

1. This appeal to be listed for resumed hearing, time estimate 2 hours, on the first available date after 16th March 2020.

2. The Secretary of State to file and serve a copy of the sentencing remarks and PNC no later that 14 days before the resumed hearing.

3. AK, or his solicitors, to file and serve such further evidence as he seeks to rely upon to include (if so advised) witness statement of his wife, his son's teacher and any other person upon whom he seeks to rely.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

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

Date 6th January 2020

Upper Tribunal Judge Coker