Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19821/2019

THE IMMIGRATION ACTS

Heard at : Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On : 25 November 2022	**On: 16 February 2023**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MJT
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ashraf of Ashraf Law
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born on 17 January 1985. He arrived in the United Kingdom on 6 September 2001, aged 16 years, together with his mother and was granted leave to enter as a visitor for six months. He applied for leave to remain as a student on 25 February 2002 but his application was refused on 1 October 2002. His appeal against that decision was dismissed on 14 July 2008 and he was served with a removal notice as an overstayer on 8 January 2009.

2. On 28 April 2009 the appellant applied for leave to remain outside the immigration rules. His application was refused on 12 October 2009 with no right of appeal. He applied on 21 March 2012 for leave to remain on family/private life grounds and was granted leave on 30 April 2013, valid until 31 October 2015.

3. On 20 May 2013 the appellant was convicted of driving otherwise than in accordance with a licence and using a vehicle whilst uninsured and he was fined £110.

4. On 14 October 2015 the appellant applied for further leave to remain and was granted leave on 4 February 2016, valid until 21 August 2018. On 17 August 2018 he applied for further leave to remain on family/ private life grounds. The application was made primarily on the basis of his relationship with his British son Q by his former partner SW, born on 19 April 2007. It was submitted in the application that he had continuous contact with his son and played a significant role in his life. Consideration of that application was deferred owing to the appellant's criminal offending and the subsequent consideration of deportation proceedings.

5. On 4 April 2019 the appellant was convicted of wounding with intent to do grievous bodily harm and sentenced to six years and six months imprisonment. Details of the appellant's crime were referred to in the remarks of the sentencing judge where it was said that he was involved in an unprovoked attack with a knife inflicting two stab wounds to a man, OF, in a public place, which led to OF requiring emergency treatment in hospital. As a result of the appellant's conviction he was served with a stage 1 decision to deport on 1 October 2019.

6. On 12 November 2019 the respondent signed a deportation order against the appellant under section 32(5) of the UK Borders Act 2007 and made a decision to deport him and to refuse his human rights claim made on 17 August 2018. In that decision the respondent noted that the appellant's application was supported by his former partner SW who had provided a letter of support in which she stated that their son Q was autistic and that the appellant played an important role in his life which assisted her as she suffered from idiopathic intracranial hypertension (fluid on the brain) which restricted her sight. The respondent noted that the appellant had a further four children in the UK with different partners but had provided no details of any family life with those children and had not mentioned them in his application form. Whilst it was accepted that the appellant had a parental responsibility for Q, the respondent noted that the appellant did not live with Q and SW, and that SW was the primary carer. The respondent considered that Q's daily family and private life would not be affected by the appellant's deportation. The respondent noted that the appellant lived with his parents and claimed to support them with regard to their health and well-being, but there was no evidence of dependency. The respondent considered that there would be no very significant obstacles to the appellant's integration in Jamaica. The respondent considered that there were no very compelling circumstances outweighing the public

interest in his deportation and that the appellant's deportation would not, therefore, be in breach of his Article 8 human rights.

7. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 30 March 2021 by Judge Chowdhury. The judge noted that the appellant had a daughter R who was born on 3 January 2005, a son O born on 3 November 2006, a son Q born on 19 April 2007, a daughter OM born on 15 September 2008 and another daughter X. The two sons, O and Q were both autistic and it was claimed that the appellant had played an active role in the lives of all of his children and provided respite for the mothers of the two autistic children. The appellant gave oral evidence before the judge, as did his brother, his mother and the mothers of O, Q and X. The judge also had statements from four mothers and the report of an independent social worker. She noted that the appellant was in the process of appealing the criminal conviction and maintained his innocence, despite the conviction having been in April 2019 and any appeal being out of time. The judge considered that the appellant could not succeed under exception 1, the private life exception, on the basis of integration into the UK or in Jamaica. The judge found it highly unlikely that the children would be able to visit the appellant in Jamaica. She found, however, that the appellant played a pivotal role in his children's lives, that his duty of care towards his children appeared to be consistent and that his role in Q's life in particular was vital. The judge noted that the appellant's OASys report showed there to a low probability of re-offending. She concluded that the appellant's case fell within section 117C(6) of the Nationality, Immigration and Asylum Act 2002 and that he had demonstrated that the effects of his deportation on his children, in particular the two autistic children, went beyond being unduly harsh. She found that the appellant's deportation would be disproportionate and she accordingly allowed the appeal in a decision promulgated on 9 June 2021.

8. Permission to appeal to the Upper Tribunal was sought by the respondent and granted and, following a hearing on 27 October 2021, Upper Tribunal Judge Hanson concluded in a decision promulgated on 4 November 2021 that Judge Chowdhury had made material errors of law in her decision allowing the appeal and he accordingly set aside her decision and directed that the case be listed for a resumed hearing in the Upper Tribunal. UTJ Hanson's decision is attached at the end of my decision, as Annex 1.

9. The matter then came before me, following the issue of a transfer order.

Hearing and Submissions

10. Mr Ashraf advised me that the appellant's partner was present at the hearing, as was his mother, sister and brother, but none were giving oral evidence owing to the focus of the re-making being on the children. The only witnesses were the appellant and the mothers of O and Q. Mr Ashraf also advised me that the appellant had completed his sentence and been released from prison in July 2022.

11. In accordance with UTJ Hanson's directions, the appellant had produced, for the hearing, a consolidated appeal bundle containing updated witness statements from the appellant, from the mothers of O and Q, and from the appellant's mother, sister and brother, an addendum independent social worker's report and letters of support from the prison. A supplementary bundle was also produced relating to the period of time following the appellant's release from prison, including his updated witness statement, photographs of him with his children, further letters of support and a further addendum independent social worker's report. At the hearing I was also provided with a brief email from the mother of X explaining her absence from the hearing and a letter of support from a youth worker and ambassador for Manchester City Council, Kemoy Walker.

12. The appellant, in his oral evidence, said that he had five children and that he saw them all except for R. O was a very anxious child. He was 16 years of age and suffered from autism. O did not like interacting in public and preferred to stay at home with him or his mother. He saw him regularly, every other weekend and sometime during the week after school. Sometimes he (the appellant) would go to O's house and sometimes he would take him to the park or to his house. The appellant said that he lived with his mother which was a commutable distance from O's house. He said that O was very anxious about him being deported. O had visited him in prison but was worried he would not see him again if he was deported. O would not see his siblings if he (the appellant) was deported as it was him who brought the children together and they had not seen each other whilst he was in prison. When asked about the conditions of O's autism the appellant said that O would act out and get aggressive but he was able to comfort him and calm him down. O was calmer now than when he, the appellant, was in prison. His other son Q also visited him in prison. He also saw him every other weekend. Q did not speak to other people and could not interact with people. He had difficulty eating and showering and needed a lot of support. He and Q's mother shared the load as there were certain things he could do and certain things she could do. She had health problems and could not see very well as she had fluid on her brain which affected the ways she could look after Q. As for his other children, he did not see OM very much as she lived in Birmingham. She had come to Manchester two or three times since he came out of prison and he had been there. He would see X together with O. He had three daughters. X was nine years of age. She had visited him in prison. He saw her very regularly. He had nowhere to live in Jamaica and no money, so his children could not come to visit him there if he was deported.

13. When cross-examined by Mr McVeety, the appellant said that both his sons were diagnosed with autism before he went to prison. He did not live with them. He did not think that O's mother was in a relationship but he believed that Q's mother had a boyfriend. When asked why he was not mentioned in any of the education, health and care plans for his sons the appellant was not able to say why that was. He had not seen the reports. He lived 20 to 25 minutes away from O depending on the traffic and 10 to 15 minutes away from Q by car. If there was an emergency he would get to them as quickly as he could. When asked if he still maintained that he was not guilty of the crime for which

he had been convicted the appellant said that he deeply regretted what happened to the victim but he did not accept that he did it.

14. GW, the mother of O, then gave evidence before me and adopted her statement. She said that Q had been diagnosed with autism and he attended a special school. He would get angry through frustration at not being able to express himself. He would have outbursts and knock her out of the way as he was a big boy and was over six feet tall. He had counselling at school approximately once a week, but since it was confidential she did not know what was discussed. He did not require counselling as much as previously as he was much better now that the appellant was out of prison and had even become a student leader. It was lovely that the siblings saw each other now as they had not seen each other for four years, whilst the appellant was in prison. GW said that she did not have contact with the other mothers so would not be able to get the children together as that was the appellant's responsibility. The siblings were close. She struggled a lot when the appellant was in prison. She could not leave O alone and he had to go everywhere with her. If there were two parents she could get a break. O did not see his father a lot whilst he was in prison as it was far away. O needed his routine, as part of his autism, and his father had always been part of his life. He needed physical help and emotional support and she could not provide that all by herself. It would ruin O's life if the appellant was deported and she would have to deal with the aftermath.

15. When asked by Mr McVeety in cross-examination why the appellant was not mentioned in the educational reports from school, GW said that that was because the appellant never went to the meetings. They co-parented but going to school was her role. The school knew that the appellant was involved in O's life, but she was the one who went to the meetings in relation to the education health care plan. GW said that she did not have a partner. When I asked GW why the appellant made no mention of O in his application of 17 August 2018 she said that there was a period of time when she and the appellant did not get on and were not on speaking terms, although he still used to see O.

16. Finally I heard from SW, the mother of Q, who adopted her statement and explained that Q was unable to communicate as well as other children and that she had to wash him, cook for him and dress him. He was 15 years of age and attended a special school for autistic children. SW said that the appellant had Q every other weekend. When the appellant was in prison she used to struggle as Q was becoming more aggressive. He used to call his father every day and he kept asking when he was going to see him. He visited him in prison every two months, aside from during the pandemic. SW said that it was very difficult for her to look after Q because of her own medical condition, as she was unable to drive and Q was at home a lot, whereas when the appellant was there he could take Q out and do things with him. She did not think that Q would be able to cope if the appellant was deported. The appellant was able to calm him down. If the appellant was deported Q would not be able to go to Jamaica to see him. She could not afford to take him. Q got on very well with his paternal siblings but did not see them when the appellant was in prison.

17. When cross-examined, SW said that Q used to stay over with his father before he went to prison and would speak to him very day or two days. She confirmed that she was the only one involved in Q's care plan as the appellant was working and could not attend the meetings. He was not named as a parent in the plans because Q lived with her and she was the main carer, and also he did not go to the meetings. SW confirmed that she had a partner but he did not live with her.

18. Both parties then made submissions.

19. Mr McVeety submitted that the 'unduly harsh' family life exception to deportation had not been met. The appellant did not live with any of his children and his name did not appear in any of the educational and care plan documents, which suggested that he was not as involved in their lives as he claimed. There was no medical evidence to suggest that the children were adversely affected by the appellant's absence. The mothers were the main carers. The appellant had been in prison for four years. Although the appellant provided help, the day to day burden fell on the mothers. The appellant was simply someone who may step in when needed and spend weekends with the boys, but he lived too far away to be involved when the boys had temper tantrums. The disruption to the children's lives had been caused by the appellant, not the Secretary of State. The children could adapt to a new routine. There was no evidence of undue effects on the children when the appellant was in prison. On the contrary, O's school review showed that there were no significant changes in his behaviour and that he was getting on well in school. It could not be said that the appellant was a co-carer. The mothers could assist the children to get used to the new scenario if the appellant was deported. The appellant did not, therefore, meet the unduly harsh test. The independent social worker reports relied on skype meetings and the oral testimony of the mothers but she had not seen the reports from the school or any medical records. Mr McVeety submitted that the Tribunal should exercise caution when considering the independent social worker's reports, as with any expert reports, as consistent with the case of HA (expert evidence, mental health) Sri Lanka [2022] UKUT 111. Mr McVeety submitted that if it was found that the unduly harsh test was met, it could not be said that there were very compelling circumstances. Although the OASys report assessed the risk of re-offending as low, the risk to others was high and it was relevant that the appellant still denied his involvement in the crime despite having been caught on CCTV. There was a strong and overwhelming public interest in deporting people who used knives. None of those people who had provided letters of support had referred to the impact of the crime on society or on the victim.

20. Mr Ashraf submitted that the appellant had accepted the decision of the Court which found him guilty but there had been many cases of miscarriages of justice and it took courage for him to accept the decision when he had not committed the crime. It was not just a matter of the appellant in any event, but the impact on other people if he was deported. There were two autistic children who were effectively in single parent families. If the appellant was deported they would not be able to see him as they could not afford to travel to Jamaica. Q's mother had a lot of personal medical issues. Mr Ashraf relied on the

educational care plans and the independent social worker's reports and submitted that the appellant had provided reasons why his name was not in the school reports. The OASys report and supporting letters from prison staff painted a very positive picture of the appellant and showed that he posed a low risk of re-offending. He had engaged well with the probation services. There were innocent children involved and the appellant was the person who kept all the siblings together. It would be unfair on the children if they were put on the back foot again, especially when the risk of re-offending was so low. Mr Ashraf submitted that the case of HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 provided for some flexibility. It should also be taken into consideration that the appellant's step-father suffered from dementia and that the appellant looked after his parents.

Discussion and Findings

21. The material issue in this case is the impact of the appellant's deportation on his children, in particular his two autistic sons, and the first relevant consideration is therefore whether it would be unduly harsh on those children to remain in the UK without the appellant.

22. In HA (Iraq), the Supreme Court rejected the suggestion that Lord Carnwath, in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53, had intended to lay down a test involving a notional comparator approach when considering the level of harshness to children of foreign national offenders. The Supreme Court considered that the comparison made by Lord Carnwath was between the level of harshness which was "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which was connoted by the requirement of "unduly" harsh, and endorsed the self-direction in MK (section 55 – Tribunal options) [2015] UKUT 223 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.*" .

23. It was Mr McVeety's submission that the evidence did not demonstrate that that level of harshness had been met in respect to the appellant's two autistic sons. He submitted that that was because there was no medical evidence to indicate the impact upon them of his removal from their lives in the UK and that the evidence that had been produced did not carry weight since the appellant had not been mentioned at all in any of the education, health and care plans and the independent social worker's reports were limited in nature to skype calls and an acceptance of the evidence of the mothers.

24. I agree with Mr McVeety that the evidence in this case is somewhat sparse in that there is no medical evidence for the appellant's sons in relation to their autism. It is also unhelpful that the evidence that has been submitted, in the form of education, health and care plans for Q and O, makes no mention of the appellant as a parent or a carer, as Mr McVeety indicated. A further matter I

raised at the hearing was that the application made for the appellant on 17 August 2018 under Appendix FM only mentioned his son Q and did not mention his other children.

25. However, these concerns are only really relevant if there are doubts about the reliability of the rest of the evidence before me since, if the situation is as described by the boys' mothers, I am satisfied that the unduly harsh test is met. I find that, ultimately, I am persuaded by the evidence which is before me that the reasons presented for the adverse impact of the appellant's deportation are genuine and material. Both GW and SW explained that the reason why the care plans made no mention of the appellant was that they were the ones who attended the care meetings and that the boys lived with them not the appellant. I do note that the information contained in the care plans focussed very much on the boys' circumstances and behaviour at school rather than their lives at home in terms of family and relationships outside school. I note that GW and SW's evidence was that the schools were aware of the appellant's role as a parent and indeed I have regard to a letter dated 13 July 2018 submitted with the appellant's application of 17 August 2018 from Q's school, Grange School, at page E104 of the respondent's appeal bundle, which confirms that the appellant supported and attended the school and that he was a parental contact at the school. Therefore I do not attach the weight that Mr McVeety did to the lack of mention of the appellant's name in the care plans. Neither do I give weight to the fact that the appellant had not read the care plans. Whilst it may seem, objectively, that a truly involved parent would read these reports, I find that that is making certain assumptions which may have no proper basis and that the real issue is the extent of the appellant's presence in the lives of his sons which, according to the two mothers, is significant.

26. The evidence of the two mothers, SW and GW, was persuasive and I found both to be credible and reliable witnesses. I accept that the appellant played a significant role in the lives of Q and O prior to his imprisonment and that he has continued to play a significant role since his release. I have given careful consideration to the obvious matter of him having been in prison for four years and to have therefore had a very limited presence in their lives. However both mothers confirmed that their sons visited the appellant in prison when they were able to and that is indeed borne out by the prison visit records in the appellant's supplementary bundle, which also confirm visits from the appellant's daughters X and OM. Both mothers gave evidence that the appellant would speak to their sons regularly, almost daily, from prison and that he had a calming effect on them.

27. SW's evidence was particularly compelling since she suffered from a medical condition, idiopathic intracranial hypertension, which restricted her sight and her ability to take Q out of the house. Although there is, once again, no medical evidence to confirm that, I have no reason to doubt her oral testimony. SW referred in her statement at [9] to having been in hospital with that condition prior to the appellant's imprisonment and to have temporarily lost her vision. She stated that the appellant held the fort so that there was no disruption to Q's life, as he did not cope well with changes to his routine. She

stated that as a result of her condition she could not drive and was anxious taking Q out in public and she explained that the appellant had helped her before his imprisonment and that she had struggled whilst he was in prison. She referred to having problems washing Q as he was getting older, to the likelihood that Q would need help with intimate washing and bathing for the rest of his life, and to her need for the appellant to perform that role.

28. The importance of the appellant in the lives of his two sons Q and O is also supported by the reports from the independent social worker, Ms Meek. I agree with Mr McVeety that the weight to be given to her reports has to be considered in the context that they were prepared on the basis of the oral testimony of those interviewed, through telephone and skype meetings. That is certainly the case with the first two reports, dated 30 January 2021 and 22 December 2021. Ms Meek interviewed the appellant's two daughters, X and OM, and their mothers, as well as the mothers of Q and O, for the first report, but not Q and O themselves. The interviews were carried out by telephone because of the lockdown restrictions. Although she set out in detail the difficulties that SW and GW faced in looking after their sons and the impact upon the boys of him being away from them, Ms Meek did not actually have the benefit of observing the family members and her report was simply based upon what she was told.

29. However the third report is, I find, of much more assistance because on that occasion, on 18 September 2022, the interviews were conducted via a video call whereby Ms Meek was able to observe the appellant, who had since been released from prison, together with O and Q, and she also spoke to O and Q as well as the appellant. At [2.5] of her report, Ms Meek said that it was clear to see the relationship that the appellant had with both children and to see that they were comfortable in his company. She said that, in her professional opinion, the appellant had a close relationship with his children. She referred to the mothers having spoken of his closeness to the children and the impact that his absence had on them emotionally and physically whilst he was in prison and of the challenging behaviour the boys displayed as a result of their father's absence. Ms Meek emphasised that the boys needed "*stability and clear routines and boundaries*" and needed to know what was happening and when, and that the appellant's long-term absence "*could potentially impact on the children's physical and emotional well-being*". She said that the boys were getting older and were turning into men and that "*they need their father in their lives physically to support with this, their worries, their aims in life, their ability to function out in the outside world*". She concluded as follows:

> "[the appellant] has an understanding of their limitations and needs as a result of their autism, he has always been able to support the boys and their mothers, his absence as we know from previous reports impacted on his children and their mothers emotionally and physically. Both boys have been observed with their father and spoken with for this report, they both demonstrate an attachment with their father and a clear worry should their father be deported. It is therefore unequivocally in the best interests of his children that [the appellant] remains in this country with his children."

30. Of course the best interests of the children is only a starting point and is not in itself sufficient to reach the 'unduly harsh' threshold. However Ms Meek's observation of the appellant's interaction with his sons is significant, as is her opinion on the impact on the boys of his absence when he was in prison and the impact his removal would have on them. The boys' medical condition is plainly a particularly significant matter as they clearly have a need, as a result of their condition, for the stability brought by their father's physical presence.

31. In addition to that there is the evidence of the appellant's role in bringing all the siblings together. That was emphasised by SW and GW in their evidence, both of whom confirmed that the appellant would frequently have all of his children together prior to his imprisonment but that did not happen when he was in prison since the mothers had no contact with each other, and that his release had then brought the siblings together again. That is also confirmed in the letter in the supplementary bundle at page 97, dated 6 October 2022, from the sister of the appellant's current partner. She refers to the appellant having attended her daughter's birthday party in 2014 with three of his children, O, Q and X, and she attests to the appellant's close relationship with his children and to the fact that he had all his children at the weekends so that they could "*engage and maintain a strong sibling relationship*". She states that his relationship with his children would suffer greatly if he was removed from their lives and many burdens would be left on the mother's shoulders. Although the author of that letter was not available to be cross-examined, I find no reason to disregard her evidence.

32. Having had regard to all that evidence I do conclude that the appellant's deportation would give rise to an unacceptable level of harshness for his two sons, so as to amount to their separation being 'unduly harsh', in accordance with the test mentioned above. Whilst the appellant clearly has a relationship with two of his daughters and whilst it is in their best interests too for him to remain in the UK, it is the medical condition of his two sons, their close relationship with their father, and the impact on them of his removal which makes this case one where the high threshold has been reached. Clearly the fact that the boys and their mothers coped without the appellant for the four years when he was in prison is a particularly significant and material consideration. However there is evidence, which I accept, that the mothers struggled to cope with the boys in his absence, that there was continuing albeit limited contact during prison visits except during the period of lockdown, that the boys were deprived of relationships with their siblings during the appellant's absence and that the boys have greatly benefitted from the appellant's presence in their lives since his release from prison. I accept the evidence of their anxiety at the prospect of him being separated from him and accept that his removal would effectively cut their ties owing to the cost of travelling to Jamaica and the difficulties that such a trip would involve because of their autism. For all of these reasons I find that the appellant has met the second exception to deportation under section 117C(5) of the NIAA 2002.

33. However the appellant, having been sentenced to a period of imprisonment for over four years, falls within section 117C(6) of the NIAA 2002 and has to demonstrate very compelling circumstances over and above those

described in exception 2. Judge Chowdhury's finding that the private life exception in section 117C(4) is not met has been preserved. Clearly there is a weighty public interest in the appellant's deportation as he committed a serious offence which led to his victim being hospitalised for several days and which could have been fatal. It is also significant to consider that the appellant continues to deny his guilt. Mr Ashraf sought to downplay that by suggesting that there could have been a miscarriage of justice, but I cannot go behind the verdict of the criminal court and the appellant's conviction and I reject any suggestion that I do so. I note that the appellant's crime was committed in a public place and that the appellant was found guilty by a jury who had the benefit of hearing and viewing all the evidence including CCTV footage.

34. Nevertheless, whilst not downplaying the seriousness of the crime, I make several observations about the appellant's criminal offending including the fact that it was a single incident involving a person with whom there was a previous adverse history, as the OASys report records, and that, as the sentencing judge remarked, it was out of character for the appellant. The sentencing judge referred to the appellant as a person who had lived a decent life in the UK for nearly 20 years, who had settled domestic circumstances and was a family man. Further, the OASys report refers to the appellant as posing a low risk of re-offending, albeit that it assessed the likelihood of serious harm if he re-offended as high. A letter accompanying the OASys report, at page 161 of the appellant's appeal bundle, refers to a low probability of proven reoffending and provides various positive comments on his NOMIS record. Those positive comments are reinforced in the various letters of support from prison staff, at pages 163 and pages 222 to 228 of the main bundle and pages 93 and 94, the latter in particular being highly complimentary about the appellant and providing very positive comments about his rehabilitation.

35. In terms of rehabilitation and the positive contributions the appellant has made since his release from prison, I have had regard to a letter from a youth work leader and ambassador for Manchester City Council, Kemoy Walker, which speaks of the valuable work he undertook in prison as a listener, the opportunities available to him to work for the local community and the training being offered to him in safeguarding, mental health and youth work, and the contributions he would be able to offer to the community. I also have regard to the evidence of the support the appellant provides to his mother and step-father with whom he resides and resided prior to his imprisonment, noting the various medical concerns of his step-father evidenced at the end of the supplementary bundle. I also consider the fact that, whilst the appellant has not met the exception to deportation in terms of his private life, he has spent a large proportion of his life in the UK, having resided here for over 21 years, and his close family members are all in the UK. All of these matters I take as weighing in the appellant's favour when considering the public interest in his deportation.

36. Bringing all of these together it seems to me that there are very weighty matters in the appellant's favour which reduce the public interest in his deportation. Whilst I have found that the impact of deportation on the appellant's sons would be unduly harsh it seems to me that, given their need

for routine and familiarity as a result of their autism, and considering that they have now established a routine and become accustomed to the appellant's continuous presence in their lives, withdrawing that support would go beyond undue harshness. When adding to that the difficulties the mothers of those sons would encounter as the boys grow older and enter adulthood without the presence of their father, and the loss of opportunity for the siblings to be together, I have to conclude that there are very compelling circumstances outweighing the public interest in the appellant's deportation and that the appellant has met the requirements of section 117C(6) of the NIAA 2002. In the circumstances I find that the appellant succeeds in his appeal on Article 8 human rights grounds.

DECISION

37. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by allowing the appellant's appeal on 8 human rights grounds.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 2 December 2022

ANNEX 1

ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19821/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC **Decision promulgated**
On 27 October 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MJT
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Mr McVeety, a Senior Home Office Presenting Officer.
For the Respondent: Mr Ashraf of Ashraf Law.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of the First-tier Tribunal promulgated on the 9 June 2021 in which a judge of that Tribunal ('the Judge') allowed the appellants appeal against the refusal of an application for leave to remain on human rights grounds made following service of an order for his deportation from the United Kingdom.

Background

2. The appellant, a citizen of Jamaica born on 17 January 1985, is subject to an order of his deportation from the United Kingdom following his unanimous conviction by a jury sitting at the Manchester Crown Court on 4 April 2019 for the offence of wounding with intent to cause the victim grievous bodily harm on 4 February 2018 at the Salford Events Hall. In his sentencing remarks His Honour Judge Field QC, stated:

> "You are a young man who has, it is clear, lived a decent life in this country for nearly 20 years since you arrived here, taking advantage of educational opportunities and no doubt working hard. All of that, together with what I have learned about your settled domestic circumstances, the fact you are a family man, all of that makes it almost inexplicable that you should become involved, as you did, in a cowardly and unprovoked attack with a knife, inflicting two stab wounds to [OF]'s chest, serious injuries that led to him requiring immediate emergency treatment at hospital for which a hemothorax and a pneumothorax, both of which were a consequence of this the wounds that you had inflicted, he had a drain inserted into his chest and was detained in hospital for a number of days but he appears to have made a good physical recovery, although I hear this afternoon that, unsurprisingly, the psychological wounds remain apparent. He was on this occasion, a blameless victim.
>
> I agree with what has been said by counsel that the injury in this case, it could have been fatal, but in the context of section 18 of the Offences Against the Persons Act 1861, a section of the statute that deals with injuries of the utmost gravity, in that context, it is (all these were injuries) at the lower end of the scale. As for your blameworthiness, that was high because you used a knife, it was not just the use of the knife that makes your blameworthiness high, it was the fact that you had equipped yourself with a knife for this purpose and, therefore, there was a significant degree, in my judgement, of premeditation; this was not an impulsive act.
>
> My starting point, therefore, is a prison term of six years duration and my range of sentences between five and nine years. There were, of course, other aggravating features. This offence took place at the Salford Events Hall, a very public place, on that night as the closed circuit television footage showed, there are a lot of people there to have a good time and among these people were the close friends of [OF] in front of whom this offence took place. I must also take into account, as I do, the ongoing effect on [OF] of what happened to him. Insofar as mitigation is concerned, because I take account of the fact that you are to be treated as a man of no previous convictions, I disregard for this purpose the road traffic matters, and I also accept that this was an isolated incident."

3. The appellant was sentenced to 6 ½ years imprisonment.

4. The Judge's findings are set out from [35] of the decision under challenge which is a section in which the Judge sets out the law and evidence given by the appellant and witnesses, including a Social Worker's report, from which the following findings can be extracted:

i. "*I have considered a great length and given substantial weight to the disturbing fact that this Appellant maintains his innocence given that he was properly convicted of an offence of wounding or*

causing grievous bodily harm with intent, which is the most serious form of assault other than an attempted murder. The public interest in deporting such a man can only increase, more than already, the great weight attached to it." [44].

ii. Great weight is attached to the deportation of foreign criminals [47].

iii. "… *I do not find that the Appellant's circumstances go over and above Exception 1 in 117C, on the balance of probabilities. He is fit and there appears nothing to stop it building his life in Jamaica, the determination of* ***Bossade [2015] UKUT 00415(IAC)*** *is relevant where it was stated at paragraph 57 that the test is not met by simply showing that a person has no family ties in the country to which they were deported. The Appellant is aware of Jamaican culture because he has been brought up within his family and Jamaican community in the UK*." [49].

iv. That the appellant had an extensive role in the upbringing of his children prior to his imprisonment and continues to do so [51].

v. The respondent accepted the children suffered distress and there will be a degree of emotional and behavioural fallout [52].

vi. "*I find it is highly unlikely that the children will be able to visit Jamaica collectively to see their father, if only because of the prohibitive costs involved. An additional difficulty is the fact that two of the children are autistic and I accept, as is noted in the independent Social Worker's report that there is societal stigma surrounding special needs in that country*." [65]

vii. The Judge finds striking consistency in all the mothers testaments, and that although the appellant appears to have a number of relationships with various women "*His duty of care towards his children appears to be consistent. His role, especially in Q's life is vital, particularly because of his mother's mental health and physical disabilities. Her dependence on the Appellant in raising Q is, I find, very compelling. I also find it is vital to Q's development (in particular, but also for [O'C] that his father has a continued presence in his life.*" [66].

viii. "*After considerable deliberation of all the factors including the great weight to be attached to the public interest and the maintenance of his innocence in light of his conviction for a most serious offence. I find his case falls within section 117C(6). On balance and on the totality of the evidence the Appellant has demonstrated the effects of his deportation or his children go beyond, in my findings, being unduly harsh. His circumstances, more particularly of his two autistic children and of a disabled mother are I find especially compelling*." [72].

5. The Secretary of State sought permission to appeal on the following grounds:

<u>Material misdirection/inadequate reasoning/failure to resolve a conflict</u>

i. The appellant (A) who is a citizen of Jamaica made himself liable for automatic deportation when he received a prison sentence of 6

½ years for a knife attack in a nightclub. He refuses to accept culpability and continues to maintain his innocence.

ii. The length of the sentence dictates that to avoid deportation A must show there are very compelling circumstances, over and above those described in Exceptions 1 and 2 of Section 117C of the NIA Act 2002.

iii. The appellant has five children, all living separately with their respective mothers. The FTJ has found it would be unduly harsh (UH), in particular for two of these to remain in the UK without him. These two are autistic, although it is not known to what extent.

iv. In support of his decision, the FTJ finds that "this Appellant has had an extensive role in the upbringing prior to his imprisonment and continues to do so."[51] what has not been explained is how the appellant has managed to do this from prison for the last 2 years and if he is able to do this remotely form there, why the children would know any difference regardless of where he is. At [58] one of the mothers re-iterates that A is a massive figure in her child's life, despite being in prison, but again, no further detail is given. It is not clear what is A doing, nor why he couldn't continue to do the same from Jamaica. As to the changing behaviour of the boys, no consideration has been given that this could be for other reasons. These are teenagers, at that transitional age where changing behaviour is not unusual.

v. To put all the changes down to the appellant's absence, when it is claimed he is still actively involved is a conflict of findings and inadequately explained.

vi. Neither is the suggestion that without the appellant, the children would not be able to see each other. It is not credible that between them, the mothers would be incapable of arranging a meeting. If they were shielding, due to the pandemic, the recent lifting of restrictions would allow them to now be in contact more easily.

vii. No reasons are given for the UH findings. The FTJ simply repeated the self-serving evidence supplied by the mothers themselves, either in person or through the social worker. It is not clear why a long-distance relationship would be problematic, as that is the exact situation now. The appellant has been separated from the various children for 2 years, through his own actions, so deportation would not change the current setup. Nowhere has the FTTJ explained what UH outcomes would arise. All that has been shown is that the family members would continue as they currently do.

viii. The two children are in the constant care of their mothers with extra support from Social Services and a care plan in place. A does not appear to be significant in the care plan for [Q] and has now anyway been separated from both since being convicted in 2019.

ix. KO (Nigeria) [2018] UKSC 53 provides that the more serious the offence the greater the public interest in removal or and while it is natural that the family members would wish for A to remain in the UK, their preferences are not sufficient to outweigh the very

significant interest in his deportation, since the FTJ finds A disturbingly *"maintains his innocence, given that he was properly convicted of an offence of wounding or causing grievous bodily harm with intent, which is the most serious form of assault other than attempted murder. The public interest in deporting such a man can only be increased, more than already, the great weight attached to it."*

x. It is submitted that, when taken in the context of criminal deportation, no unduly harsh consequences have been shown, nor the required 'very compelling circumstances over and above' in line with S117C(6) which would make deportation a disproportionate interference with the Article 8 rights of the appellant, or family members. The FTTJ has given inadequate reasons for finding otherwise. By allowing the appeal, the FTTJ has made an error of law.

xi. Reliance is placed on HA (Iraq) v SSHD [2020] EWCA Civ 1176 –

34. Thirdly, at para. 33 the Court says:

> "Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health was a natural love between parents and children, will not be sufficient."

35. Fourthly, at para. 34 the Court addresses the relevance of the best interests of any children affected by the deportation of a foreign criminal. It says:

> "The best interests of children certainly carry great weight, as identified by Lord Kerr in *H (H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deportation foreign criminals. …"

6. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

2. The grounds assert that the Judge erred in making findings not open to on the evidence/in failing to give adequate reasons for findings made, in particular that the appellant circumstances are very compelling over and above the exceptions to deportation.

REASONS FOR DECISION

3. It is arguable that the judge fails to give adequate reasons for her finding over and above the exceptions to deportation.

4. The grounds of appeal disclosing arguable error of law. The grant of permission is not limited.

Error of law finding

7. In assessing the merits of this claim I have had regard to the judgment of McCombe LJ at [28] to [33] of Lowe v The Secretary of State for the Home Department [2021] EWCA Civ 62 (25 January 2021) in which he cautioned when considering whether the First-tier Tribunal erred in law the Upper Tribunal making its own evaluative judgment as to whether the requisite high threshold was met.

8. The main submissions made on behalf of the named respondent (original appellant) by Mr Ashraf is that the decision reflects the ethos of the Rules and has been arrived at having looked in appropriate detail at the needs of the two autistic children and the family as a whole. It was submitted the evidence given at the hearing by the witnesses was consistent with each other, including that relating to the difficulties experienced as a result of the appellant's imprisonment. It is submitted the oral and written evidence was before the Judge and that the decision made is within the range of those available to the Judge on that evidence. It was submitted the Judge was not required to do more than she did in the body of the determination and that the content of the findings disposes of the deportation appeal.

9. The Judge in the decision sets out the relevant legal provisions from [30] of the decision under challenge.

10. Paragraph 398(a) of the Immigration Rules states "the deportation of a 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 four years." This is the relevant provision in light of the appellant's conviction and sentence to a period of 6½ years imprisonment.

11. Although the Judge sets out paragraph 399 that only applies if paragraph 398 (b) or (c) is engaged, which it is not.

12. The statutory provisions specifically relating to deportation are set out in section 117C of the 2002 Act, which provides at section 117C(6) "In the case of the 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.

13. The effect of section 117C and the equivalent Rules has now been considered in detail by the Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 and HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176.

14. The Judge found the appellant unable to rely upon Exception 1 which applies where the foreign criminal has been lawfully resident in the United Kingdom for most of his life, is socially and culturally integrated into the UK, and there would be very significant obstacles to his or her integration into the country to which it is proposed they should be deported. No such obstacles were identified. This is a sustainable finding which is not challenged.

15. Exception 2 applies where a foreign criminal has a genuine and subsisting relationship with a qualified partner, or a genuine subsisting parental relationship with a qualified child, and the effect of foreign criminals' deportation on the partner or child would be unduly harsh.

16. In relation to Exception 2, it does not appear to have been in dispute before the Judge that the issue at large was only the question of whether it would be unduly harsh for the appellant's children to remain in the United Kingdom if he was deported. It does not appear from the determination to have been suggested before the Judge that the children will be able to go to Jamaica with the appellant and their mothers.

17. In MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) the Upper Tribunal directed itself as follows (at para. 46):

> "… '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."

18. That self-direction was followed in the later case of MAB (USA) v Secretary of State for the Home Department [2015] UKUT 435 and was quoted with approval by Lord Carnwath in his judgment in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; but which must now be read as being subject to two passages from the judgment in HA (Iraq).

19. First, at paras. 51-52 which read:

> "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, approving the UT's self-direction in MK (Sierra Leone), 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.
>
> 52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving IT (Jamaica), if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context … The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who

> are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders."

20. Second, at para. 55, the Court of Appeal cautioned against treating KO (Nigeria) as having established a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent".

21. In this paragraph the Court also stated:

> "As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold 'acceptable' level. It is not necessarily wrong to describe that as an 'ordinary' level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, 'ordinary' is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of 'undue' harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being 'is this level of harshness out of the ordinary?' they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

22. In relation to Exception 2 the Judge correctly states the starting point is the best interests of the children. The Judge refers to the evidence between [51–64] before setting out what are the only real findings in this section between [65–66].

23. The Judge thereafter refers to the sentencing remarks and letters attesting to the appellant’s character and evidence from HMP Risley before setting out the key finding at [72] in the following terms:

> 72. After considerable deliberation of all the factors including the great weight to be attached to the public interest in the maintenance of his innocence in light of his conviction for a most serious offence. I find his case falls within section 117C(6). On balance, along the totality of the evidence, the Appellant has demonstrated the effects of his deportation on his children go beyond, in my findings, being unduly harsh. His circumstances - and more particularly of his two autistic

children and of a disabled mother are I find especially compelling.

24. There are a number of concerns arising out of this decision when read as a whole. What purport to be the Judge's findings are, in reality, the conclusions set out by the Judge. Reciting the evidence and then coming to a conclusion without actually making any reasoned findings as to why the relevant provisions are met has resulted in the challenge predicated upon the failure of the Judge to adequately explain in the body of the determination how such conclusions have been property arrived at on the evidence.

25. To answer the underlying question identified by the Court of Appeal it was necessary for the Judge in the body of the determination to identify the harshness that it was found would result in the appellant's deportation and to have considered why that harshness fell outside the range of 'acceptable harshness'.

26. It was also necessary for the Judge, having identified the degree of harshness to have provided adequate reasons for why that harshness was of a sufficiently elevated degree to outweigh the public interest. It is accepted the Judge refers to the public interest and to the evidence before her, but a reader of the determination is unable to establish how the Judge dealt with the competing interests that were raised and that she was required to properly determine, supported by adequate reasons.

27. Whilst the Judge uses words which she feels conveys the degree of harshness the question is still what is the actual degree of harshness found by the Judge which cannot be determined from the decision. It is also not clear how the appellant's removal from the United Kingdom will contribute to any actual degree of harshness found, what available mitigating factors exist such as a Care Plan, Social Services support, school support, etc, that will reduce the impact of some or all of the consequences or how they have been factored into the finding that the elevated threshold has been met.

28. It is not clear how, despite referring to the nature of the offending and the appellant's refusal to accept his responsibility for the same, despite his conviction by a jury, the applicable very high level is satisfied as the appellant is a 'serious offender' and not in the 'lower' or 'mid-range offender' bracket.

29. I find there is merit in the Secretary of State's challenge that if one considers the determination in detail it is clear the Judge has erred in law in a manner material to the decision to dismiss the appeal for the reasons set out in the grounds seeking permission to appeal and the grant of permission to appeal. I set that decision aside.

30. The following directions shall apply to the future conduct of this appeal:

a) The Judge's finding in relation to the appellant's name, date of birth, nationality, length of time in the United Kingdom, family composition, criminal history and conviction, the children of whom it is accepted he is the natural father, the diagnosis of two such children suffering from autism spectrum disorder (but not the extent of such disorder), and the finding the appellant cannot succeed under Exception 1 of section 117C of the 2002 Act, shall be preserved findings.

b) List for a Resumed Hearing before Upper Tribunal Judge Hanson sitting at Manchester, face-to-face, on the first available date after

3 December 2021 time estimate of one day, subject to the availability of Mr Ashraf and Mr McVeety, to enable further consideration to be given to the one relevant issue of whether it will be unduly harsh upon the children to remain in the United Kingdom if the appellant is deported.

c) A production order shall be issued to enable the appellant to attend the hearing from HMP Risley.

d) The appellant shall no later than 4 PM Friday, 26 December 2021 file with the Upper Tribunal and send to the Senior Home Office Presenting Officers Unit and to Mr McVeety direct, an updated, consolidated, indexed, and paginated bundle containing all the documentary evidence that he seeks to rely upon in support of his appeal. Witness statements in the bundle shall be signed, dated, contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

e) It will be of benefit to the effective management of the appeal if Mr McVeety, upon receipt of the appellant's bundle, is able to confirm which witnesses he would like to attend for the purposes of cross-examination and those whose attendance he does not require, who shall be excused.

f) No interpreter being required none shall be provided by the Upper Tribunal.

Decision

31. The Judge materially erred in law. I set the decision aside. This appeal shall be case managed in accordance with the directions set out above.

Anonymity.

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

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

Signed……
Upper Tribunal Judge Hanson

Dated 2 November 2021