Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14662/2019**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre (remote hearing)
On 11th January 2021 & 9th July 2021

Decision & Reasons Promulgated
On 25th November 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

JL
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Grütters, Counsel instructed by Collingwood Immigration Service**
For the Respondent: **Senior Home Office Presenting Officer Mr McVeety (11th January 2021) and Mr Bates (9th July 2021)**

DECISION AND DIRECTIONS

1. The Appellant is a national of China born in 1977. He has lived in this country for some 23 years, but the Secretary of State now intends to deport him. That is because the Appellant was sentenced to 3½ years imprisonment for grievous bodily harm in July 2018. Because he is a foreign criminal, the public interest

requires his deportation: s32 Borders Act 2007. A notice to that effect was served against the Appellant on the 14th August 2019.

2. The Appellant appealed against the decision to deport him on human rights grounds. He submitted that it would be 'unduly harsh' for his three children if he were to be deported, thus invoking one of the Article 8 'exceptions' to automatic deportation set out at s33(2)(a) BA 2007 read with s117C(5) Nationality, Immigration and Asylum Act 2002. By its decision dated the 3rd February 2020, the First-tier Tribunal (Judge Place) agreed, and the appeal was allowed.

3. The Secretary of State was granted permission to appeal against the decision of Judge Place on the 10th March 2020 and on the 11th January 2021 the matter came before me. The central complaint was that the decision below was inadequately reasoned. In particular it was submitted that the First-tier Tribunal failed to identify what features of this case rendered the consequences of deportation 'unduly harsh' for these children. The Secretary of State submitted that:

    - "nothing remarkable has been highlighted"
    - "it has not been shown that any harm will befall the children" and that
    - the children missing their father "is a usual outcome where a parent is deported and [is] nothing out of the ordinary".

    In was submitted that the First-tier Tribunal misdirected itself to, or failed to apply, the proper threshold for the determination of what constitutes 'unduly harsh' consequences for the children.

4. Before me on the 11th January 2021 Senior Presenting Officer Mr McVeety acknowledged that the Secretary of State's grounds had to be read in light of a trio of Court of Appeal decisions handed down in the hiatus between permission being granted and this appeal being listed. In these decisions, HA (Iraq) and RA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176, AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 and KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385, the Court clarify and refine the principles to be applied, post KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, when considering whether deportation might have unduly harsh consequences. I therefore began my decision by setting out the applicable legal framework with reference to those decisions. I reproduce that, and my decision to set the decision of Judge Place aside, below. At the hearing on the 6th July 2021 I heard further evidence, from the Appellant, his wife (W) and his eldest daughter (C1). I heard submissions from the parties and I reserved my decision, which I now give. I apologise for the delay.

Legal Framework

5. The effect of section 32 of the United Kingdom Borders Act 2007 is that the Appellant is a 'foreign criminal', and that the Secretary of State must make an order for his deportation, subject to the 'exceptions' set out at section 33:

> (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) …
>
> (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.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
>
> …

6. There are seven exceptions set out at section 33. This case is only concerned with exception 1 (a):

> (1) Section 32(4) and (5)—
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
>
> ….
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention.

7. In his grounds of appeal to the First-tier Tribunal the Convention right relied upon by the Appellant was Article 8 ECHR. Appeals raising Article 8 are governed by Part 5A of the Nationality, Immigration and Asylum Act 2002 (introduced by section 19 of the Immigration Act 2014). Part 5A mirrors Part 13

of the Immigration Rules, setting on a statutory footing the 'public interest' considerations to be taken into account when assessing proportionality in Article 8 cases. The section with particular relevance to this appeal is s117C:

> ***117C Article 8: additional considerations in cases involving foreign criminals***
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

8. In NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 the Court of Appeal held that this scheme requires decision makers to address a "two-part test". First, they should consider whether either exception 1 or 2 can be met (ie apply s117C(4) and (5)). Then, they should complete the exercise by moving on to consider whether there are "very compelling circumstances over and above" those matters. The Court further addressed a

difficulty in the drafting in s117C: that on a plain reading sub-section (6) only appears to apply to the most serious offenders, but not to those who attract medium sentences – that is to say sentences of between 12 months and 4 years. Resolving that contradiction the Court held that the section is to be read as extending the test of "very compelling circumstances over and above" to medium offenders who have failed to meet either of the Article 8 'exceptions' provided for at s117C(4) or (5).

9. A series of cases since NA (Pakistan) have offered further clarification of what the test at s117C(6) requires of decision makers in all cases. In Akinyemi v Secretary of State for the Home Department [2017] EWCA Civ 236 the Court of Appeal held that it is not to be read literally. "Over and above" does not necessarily mean that one of the other exceptions needs to be met and then some *additional* compelling factor identified: it simply denotes that the threshold is a high one, and that some degree of detriment 'over and above' is required. In Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225 the test was held to be a wide ranging and holistic one, which must properly reflect the United Kingdom's obligations under Article 8. The rules represent a complete code which are designed in all cases to result in a conclusion compatible with Article 8: HA (Iraq) (*supra*). This means that at all stages, and at s117C(6) in particular, decision makers must apply the principles derived from Strasbourg jurisprudence: HA (Iraq), Unuane v United Kingdom (*Application no. 80343/17*). It also means that in all cases the decision maker must recognise the substantial weight to be attached to the public interest in the deportation of foreign criminals: HA (Iraq), KO (Nigeria), SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550.

10. The 'exceptions' at s117C(4) and (5) are then no more than "shortcuts" for claimants wishing to establish that their Article 8(1) rights outweigh the public interest. As Lord Justice Underhill explains in HA (Iraq) [at 60]:

> Although the two-stage exercise described in *NA (Pakistan)* is conceptually clear, it may occasionally make the analysis unnecessarily elaborate. There may be cases where a tribunal is satisfied that there is a combination of circumstances, including but not limited to the harsh effect of the appellant's deportation on his family, which together constitute very compelling reasons sufficient to outweigh the strong public interest in deportation, but where it may be debatable whether the effect on the family *taken on its own* (as section 117C (5) requires) is unduly harsh. (An equivalent situation could arise in relation to Exception 1: there might, say, be significant obstacles to the appellant's integration in the country to which it is proposed to deport him, but it might be questionable whether they were *very* significant.) In such a case, although the tribunal will inevitably have considered whether the relevant Exception has been satisfied, it is unnecessary for it to cudgel its brains into

> making a definitive finding. The Exceptions are, as I have said, designed to provide a shortcut for appellants in particular cases, and it is not compulsory to take that shortcut if proceeding directly to the proportionality assessment required by article 8 produces a clear answer in the appellant's favour.

11. The particular "shortcut" relied upon here by the Appellant is exception 2: he contends that it would be "unduly harsh" for his children should be removed from the United Kingdom. In KO (Nigeria) the Supreme Court was asked to resolve a legal controversy that had arisen about what should be taken into account when assessing what is meant by this term. At his [23] Lord Carnwath said this:

> 23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in Page 11 the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.

12. In HA (Iraq) the Court found it necessary to identify exactly what Lord Carnwath is, and is not, saying here [at §44]:

> In order to establish that the word "unduly" was not directed to the relative seriousness issue it was necessary for Lord Carnwath to say to what it was in fact directed. That is what he does in the first part of the paragraph. The effect of what he says is that "unduly" is directed to the *degree* of harshness required: some level of harshness is to be regarded as "acceptable or justifiable" in the context of the public interest in the deportation of foreign criminals, and what "unduly" does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not

> primarily on how to define the "acceptable" level of harshness. It is true that he refers to a degree of harshness "going beyond what would necessarily be involved for any child faced with the deportation of a parent", but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would "necessarily" be suffered by "any" child (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category.

13. That being the case, the Court of Appeal hold that the proper approach is this. The guidance given in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) remains authoritative: it is approved in KO (Nigeria) [at §27] and in HA (Iraq) [at §45]. The Court concludes:

> 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 (I have already made this point – see para. 34 above). 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.

14. And at [§56] says this:

> 56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. 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.

Error of Law: Discussion and Findings

15. In my written decision of the 24th January 2021 I assessed the grounds of appeal against that legal background. I further had regard to the oral submissions of Mr McVeety, and the further written submissions made on the 2nd June 2020 by Senior Presenting Officer Mr Bates in response to 'Covid-19' directions made by UTJ Canavan. For the Appellant the decision of the First-tier Tribunal was

defended by Mr Grütters, who was assisted by his own written submissions of the 10th January 2021 as well as those made by Counsel Mr T. Hussain on the 25th May 2020, and by Mr E. Tuburu of Collingwood Immigration Services on the 7th April 2020.

16. As Mr McVeety realistically accepted, following the decision in HA (Iraq), subsequently applied and affirmed in KB (Jamaica) and AA (Nigeria), there was no point in the Secretary of State pursuing this appeal on the grounds that there had to be some "exceptional" factor applying to these children that lifted their position above the "commonplace". The question for the Tribunal was simply whether there was in this case an enhanced degree of harshness, sufficient to outweigh the public interest in the deportation of this medium offender. For that reason Mr McVeety withdrew his reliance on much of the Secretary of State's written grounds. His submission was simply this: that the First-tier Tribunal did not adequately explain why it had come to the conclusion that it did.

17. In response Mr Grütters acknowledged that the decision was brief, and that the Tribunal's self-direction was "succinct", but submitted that the reasons for the decision were plain to any reasonable reader. He further submitted that the decision had to be read holistically and that it would be a mistake to compartmentalise it: for instance whilst the reasoning on the 'stay' scenario (where the children remain in the United Kingdom without their father) might be minimal, the Tribunal had gone into some detail in respect of the 'go' scenario and that its reasoning there was relevant to both limbs of the test.

18. I accept Mr Grütters' submission that there is no material misdirection in the decision of the First-tier Tribunal, which plainly understood the task before it. In particular the decision appropriately notes that the Appellant is a medium offender and that as such the public interest in his deportation is not as great as it would be had he received a sentence of 4 years or above. As Lord Justice Popplewell states in KB (Jamaica), the First-tier Tribunal will not err in law if it fails to set out any greater exposition than that. I further agree that there was no merit in the submission that this decision was perverse: it is clearly not the case that the decision of the First-tier Tribunal fell outwith the range of reasonable responses.

19. I was however unable to accept Mr Grütters' submissions in respect of the only ground of appeal left standing: whether the First-tier Tribunal gave adequate reasons for its conclusions that the decision would have unduly harsh consequences for the Appellant's children should they be left in the United Kingdom without him. The Tribunal did identify a number of reasons why the children should not be expected to travel to China. None of these are in issue. Its reasoning on why it might be unduly harsh for them to remain here without their father was however rather more opaque. At its [§19] the decision records the "straightforward and unadorned" evidence that the children have since birth lived with both parents, and that JL certainly enjoys a genuine and

subsisting parental relationship with them. It finds that those relationships have been challenged, but not interrupted, by his time in prison. The 'stay' scenario is considered first at [§26], where the Tribunal notes that at the date of the appeal the children's mother had valid leave to remain, and at [§27]:

> "For the approximately 18 months that the Appellant has been in prison, [the mother] has been caring for the children single-handedly, as well, she told me, as running their business. She told me, and I do not doubt, that this had been very hard. I find, though, that it would be possible for her to continue to carry on doing so. I find that the children would be safe and adequately cared for if the Appellant would leave the country"

20. The decision then proceeds to deal with other, now uncontentious, issues, before concluding at [§33]:

> "I return to the position of the children. Although they could continue to live in the United Kingdom under the care of just their mother, they would be deprived of the physical presence of their father for the rest of their childhood, save for possible visits to China which, presumably, could only take place in the school holidays. The youngest child is just 8 years old. The Appellant would be unlikely to be allowed to re-enter the United Kingdom until he reaches adulthood. Contact could, of course, be maintained by modern means of communication, but that is no real substitute for the relationship that is formed by regularly sharing the same physical presence as their father".

21. I say at once that there is nothing in the reasoning at the Tribunal's [§33] that I disagree with. The difficulty is that it simply amounts to a statement of fact – that the children will be separated from their father for most of their childhoods. That is self evident. What the decisions in KO (Nigeria), and more particularly HA (Iraq) require, is an exploration of the *consequences* of that fact. Having directed itself at [§27] that the children would be well looked after by their mother, it was important then for the Tribunal to identify what the physical, social, emotional or moral consequences would be for the children of growing up without their dad. This it did not do, and in those circumstances I found the Secretary of State's complaint to be made out.

The Re-Made Decision

22. When the matter came back before me for 're-making' on the 9th July 2021 the Appellant had provided fresh witness statements from himself, his wife, and his daughter who is now aged 15. These were admitted into the evidence without objection by the Secretary of State.

23. At the outset of the hearing the parties agreed the following factual matrix, which incorporates unchallenged findings of fact reached by the First-tier Tribunal:

- The Appellant has lived in this country since 1997. He was 19 when he arrived
- He was here illegally between 1997 and the 20th March 2016
- He was granted limited leave to remain on the 21st March 2016 and held that leave until the 21st September 2018
- The deportation order was signed on the 14th August 2019
- The Appellant married his wife in the UK in 2004
- They have a genuine and subsisting relationship
- The Appellant's wife holds limited leave to remain until the 23rd May 2023
- The couple run their own businesses in the UK (two restaurants), and own the family home outright
- They do not have recourse to public funds
- The Appellant speaks only a little English (as of the date of his interactions with the probation service in 2019)
- The couple have three children
- The eldest is a British national, having been born here on the 28th August 2005. She is identified in this decision as 'C1'
- The second, 'C2', is a girl born on the 18th November 2009, also now naturalised as a British citizen
- The youngest, C3 is a boy born on the 23rd July 2011
- The children's main language is English although they do speak basic Mandarin
- The Appellant has always lived with his children, save for the period that he was in prison/immigration detention from September 2018 to December 2019
- The children visited him in prison and his sentence presented a challenge, but not an interference with, their collective family life

- The Appellant still has relatives in China including his parents

- There is a risk of 'double jeopardy' prosecution but it is rare

24. In respect of the Appellant's criminal convictions the following matters, summarised from an OASys report dated 28th October 2018, are uncontentious:

    - The index offence was one of wounding with intent to do grievous bodily harm contrary to s18 of the Offences Against the Person Act 1861

    - The circumstances of the offence were than on the 21st January 2018 the Appellant and two other men assaulted the victim, who was known to them. It is reported that the motivation was an unpaid debt of £500 and possible resentment that the victim had switched suppliers for his restaurant. One of the Appellant's co-defendants – his uncle - struck the victim 15-20 times about the head and face with a hammer. The Appellant was seen to kick the victim while this assault was occurring, and while he was lying on the floor. The Appellant denied this but admits to having held the victim whilst his uncle assaulted him. The assault eventually came to an end after the Appellant removed the hammer from his uncle

    - The victim had life threatening injuries and received treatment in intensive care. He lost the sight of his left eye in the attack. The Appellant and his co-defendants were initially charged with attempted murder before he pleaded guilty to the lesser offence

    - The Appellant was sentenced to 42 months in prison on the 3rd September 2018. His uncle was sentenced to 12 years

    - There were no reported problems with the Appellant's conduct whilst in prison

    - He has complied with the terms of his licence since his release in October 2019

    - The probation service report that the Appellant expressed remorse for his part in the attack, which he claimed to be entirely unpremeditated on his part. He stated that he thought he and his uncle were sim ply going to get the money his uncle was owed. He was unaware that his uncle carried a hammer with him. The probation officer who prepared the OASys report acknowledged that the Appellant may have taken part in the offence out of sense of loyalty to his uncle

    - The conclusion of the probation service was that there is a low risk of re-offending

- The Appellant has not been convicted of any other offences since his release from custody

25. The First-tier Tribunal's unchallenged findings on the 'go' scenario are preserved, that is to say it is accepted that it would be unduly harsh to expect the children to go to China with their father. The only issue for me is whether it will be unduly harsh to expect the children to remain in the United Kingdom without him, or alternatively whether there are, cumulatively, "very compelling" reasons to allow the appeal on Article 8 grounds – ie that the decision would otherwise be disproportionate.

26. The evidence about the children came from three main sources: the Appellant, his wife and his eldest daughter.

27. The Appellant's evidence in chief is set out in his witness statement dated 29th November 2019. He reiterates his family history and expresses remorse for the pain he has caused to his family, and the victim of the assault. He regards the UK as his home and no longer feels that way about China. He states that he has always been a responsible father who has taken an active role in his children's lives.

28. In response to Mr Bates' questions the Appellant confirmed that both of his parents live in China. He said that his children are all well apart from the fact that his son receives some support through school with a speech therapist – he speaks very slowly. The Appellant explained that prior to his arrest both he and his wife ran Chinese food take-aways. His wife still runs hers. She employs three people in the kitchen plus a delivery driver. She has a brother in Middlesborough who they sometimes see.

29. The Appellant's wife W has provided a signed witness statement dated the 17th November 2019. W states that theirs is a very close family. She describes the Appellant as her "soul mate" and "rock", who has been very helpful and supportive to her in bringing up the children. She regards his offence has completely out of character and has never seen him be violent. They have all been very upset by his conviction and she and the kids missed him a lot when he was in prison. He found it very difficult being apart from them. W believes that if the Appellant is deported it will completely destroy their lives. He would not be in a position to exert a positive influence over the children. They will find it difficult to maintain contact with him, and he will be absent from their lives every day.

30. In her oral evidence she said that she faced many difficulties when her husband was in prison. She had to carry on working and looking after the children at the same time. W cried as she described how the children missed their father and how she would cry because she did know what to tell them. She tried her best. She would take them to visit him in prison but at the end of visiting hours it was always very hard. She would try not to get upset in front of the kids.

Asked about the specific detail of her childcare arrangements W said that she would drop the children at school in the mornings then in the evening a lady helped her. She would stay with them until W got home from the take-away at night. If that lady had to leave early C1 would look after C2 and C3.

31. Now that the Appellant is home he looks after the kids. She has carried on working and the Appellant picks up the children, cooks for them and makes sure they have had baths etc. This prompted further questions from Mr Bates who enquired about the arrangements in place before the Appellant went to prison and faced deportation. W said that at that time her husband had his own take-away. They would take it in turns to work evenings back in those days. She acknowledged that she could pay for childcare, but said that in her view, its not the same as being cared for by your own parents. That said, she has paid for childcare – ie to the lady who helps out afterschool. W's normal working week is about 5-11pm every night. She works every day except Tuesdays, when the take-away is closed.

32. C1 signed a witness statement dated the 17th November 2019, when she was 14 years old. In that statement C1 says the following:

> "I am writing to ask that you please allow my dad to return home to our family and that he is not deported. We all miss him very much and it pains me that my family and I have to go through such a tough time, especially my mam, she has been working 24/7, which makes it hard on both me and her and more so for my siblings, as they wouldn't have the slightest idea what is happening.
>
> It has been hard without my dad with me and [I] extremely miss the things we do together. I remember talking to him when I had a tough day. My relationship with my mother wasn't the best at the time, so I was more loving and trusting towards my dad"

33. She describes being "confused and heartbroken" when he was arrested and how frightened she is about the prospect of him going back to China. She cannot imagine what her life will be like without him.

34. C1 gave oral evidence before me. She is now 16. C1 says that when her dad was in prison she was just trying to remain normal. She would go to school, do her work. She would come home and after the childminder left, would look after her brother and sister. She did all these things but she found it difficult to concentrate and lost weight – she felt people around her could not understand what she was going through. Since her dad has come home she feels really comfortable - she doesn't have to worry about any of those responsibilities now. Giving this particular evidence, C1 smiled broadly.

35. The last item of evidence on the family is a letter from J, the lady who was the children's afterschool carer for a number of years. It is undated but appears in a bundle produced in November 2019. J says that at that point she had known C1

for around 3 years, and C2 and C3 for around 2 years. J speaks warmly of the children and their achievements: in her view they are intelligent, hard-working and charming. It would appear that at the time that she wrote her letter, it was the family's intention that W, C2 and C3 would accompany the Appellant to China if he were to be deported, whilst the plan was for C1 to remain in the UK and complete her education. J speaks of how difficult that would be for C1. She says of C1: "Since her dad has been in prison, her mam has been so busy trying to keep the businesses running smoothly. Using the term Daddies Girl this is truly [C1]. Although she loves her mother deeply, her heart is with her father". J also relates an incident on father's day in 2019 when C3 was left in tears because he was unable to give his dad the card that he had made at school.

Discussion and Findings

36. The Appellant is a foreign criminal who has been sentenced to 42 months imprisonment for his part in truly horrific attack. Although he is a 'medium offender', his sentence is at the higher end of that scale, and it is the length of that sentence which best reflects the strong public interest in his deportation.

37. I begin by assessing whether the Appellant can 'short-cut' the proportionality balancing exercise by establishing that it would be unduly harsh on his three British children if he were to be deported.

38. I have no doubt at all that it would be in the best interests of these children if their dad were to be allowed to remain with them in the family home. He has, by the accounts of all concerned, been a good father and a good husband. He has worked hard to provide for his family materially, managing to establish a business and buy a property. He has always lived with his children and they are used to the daily love and support that they receive from him. It was very clear from the testimony of C1 that she loves her dad unconditionally and that she truly values his input into her life. The dedication that the Appellant and his wife have shown to these children is evidenced by what others say about them – letters from school, which I have not found necessary to summarise, indicate they are polite, hard-working, well-adjusted and charming. In making this finding I have specifically considered whether the nature of the Appellant's offending adversely impacts on his children. As far as I understand it, only C1 knows why her father went to prison. I am sure that she finds that very difficult to comprehend and process. I am also satisfied, however, that that behaviour is very far removed from her own experience of him. It is apparent from the evidence of W, and the OASys report, that this single offence was very much out of character. It is strongly in the best interest of these children that they continue to live in the stable family home with two caring and engaged parents.

39. It follows from what I have said that I find the consequences of deportation for these children to be harsh. Will it be unduly so?

40. In HA (Iraq) Underhill LJ once again approved the formulation of McCloskey J in MK (Sierra Leone) as to what 'unduly' might mean in the context of Part 5A. It denotes a much stronger emphasis than mere undesirability. Although the bar is elevated by this term it should not be interpreted in an unrealistically high way. It is not the same as the test to be met in the case of serious offenders; indeed it may be a threshold that is commonly reached by appellants' family members. The underlying question for me is whether the harshness which the deportation will cause for these children is of a "sufficiently elevated degree" to outweigh the strong public interest in it proceeding.

41. I begin with practical matters. I accept that at present, the Appellant is there for his children afterschool, to prepare food and make sure they do their homework etc. I must however also take into account the fact that he is only performing that role because he is, at present, not allowed to work. The evidence is that prior to his arrest he and his wife both ran take-away restaurants, which required them to be at work in the afternoon and evenings. Calculating back from the date of the bundle (November 2019) it seems that J has been working with the family since at least November 2016, and the Appellant did not go to prison until September 2018. As much as W protested otherwise, it is clear that this is a typical working family who have relied to some extent on paid childcare, since the nature of the family business is that the adults work in the evening.

42. In his submissions Mr Grütters asked me to find that the inevitable consequence of the Appellant's deportation would be that C1 would become a childminder for her younger siblings. The evidence does not support that conclusion. The evidence is that C1 has had to babysit for her brother and sister temporarily if J is not available or needs to leave earlier than their mother gets home. It is not that she has been, or will be, regularly expected to step in. As J says in her statement, W has worked hard to keep the businesses running, and obviously managed to do so, and to pay J, all the way through the Appellant being in prison. Her determination and will has demonstrated that Mr Grütters' bleak assessment – that it will be "nothing short of impossible" for W to cope – is misplaced. I do not accept that C1 will end up being a childminder for her siblings.

43. The practical impact of the Appellant being absent from the home will be as it was when he was in prison. His wife will continue to run her business, whilst paying for extra help with the children the six nights a week that she is working.

44. Now I turn to the more difficult aspect of this case: the emotional impact of his absence. That their father is currently spending a lot of time at home is very positive for these children: they missed their dad when he was away and now that he is home they really appreciate him being there. I accept that the small, seemingly insignificant matters of daily life, such as having a chat about what happened in chemistry, are really important to children: that their dad is there

to listen to them, and to advise them, is no small thing. They know that he will be there if they wake up with a nightmare, or will be able to comfort them if they argue with friends or feel upset about something; he will be able to share their excitement and happiness at family events such as birthdays. This is a father who has always been present in the family home and that is a matter that I attach significant weight to, since his absence will be keenly felt.

45. The children are now aged 16, 11 (almost 12) and 10. This means that for C2 and C3 in particular, their father's absence from their day to day lives will cover a formative and significant portion of their childhoods. In saying this I do not wish to diminish the impact on C1, who is by no means an independent adult. It is simply that I recognise that her siblings will face a longer period as children without him. In terms of the impact on them, at that age, it is helpful to note the evidence about how his absence – when in prison – impacted upon C1. She worried a lot and lost weight; she found it difficult to concentrate on her schoolwork. I do not think it too speculative to say that the impact on her siblings could be similar, at least in the short term. That the deportation will affect the children for a large proportion of their childhoods is a matter I attach significant weight to.

46. In terms of how close the children are to the Appellant, I fully accept the evidence given by C1 that she feels very close to her father, indeed closer than she is to her mother: I note that J describes her as a "Daddies girl". I attach significant weight to that: even though she is on the cusp of adulthood, C1 is only 16. I attach rather less weight to the evidence about the emotional attachment of C2 and C3 to their father. I have no reason to doubt that they love him, and that they are currently enjoying being with him, but I also note that he was away for a significant amount of time when they were younger, and that prior to that he always worked long hours in the evening. It seems in those circumstances that their relationship with him may be more remote than that enjoyed by C1.

47. I have weighed all of that in the balance. Having done so, and with a large measure of regret for the position that these children find themselves in, I have concluded that while the deportation of the Appellant will undoubtedly have a harsh impact on C1, C2 and C3, it will not be *unduly* so. I am satisfied that the Appellant and his wife will ensure that his relationship with the children is maintained. They obviously believe very strongly in their children's best interests and in family values. They both retain family links with China and have in fact travelled there as a family. They are a family with some financial means and I am satisfied that W would be able to take the children to China to see their father on a regular, if not frequent, basis. Although certainly no substitute for direct contact, the reality is that the children can maintain some kind of relationship with their dad by video calling him at minimal cost. The most significant detriment to these children will be the emotional impact of spending the rest of their childhoods in the UK without their father. It is however a detriment that will be substantially mitigated by the fact that their

mother, with whom they also enjoy a good relationship, is with them. They will suffer no significant material loss by his absence, since their mother is able to provide for them.

48. The Appellant has not been able to take the 'short-cut' to a favourable proportionality balancing exercise. I therefore proceed to conduct that holistic assessment taking all relevant matters into account. At this stage I must remind myself at the outset that there is a strong public interest in his deportation, because he committed a really serious crime. I understand the view expressed by the probation service that this was likely an offence committed because of a sense of misplaced loyalty to a family elder, and I see no reason to reject that opinion, but I also note the circumstances of that offence, and the fact that the victim very likely suffers ongoing psychological trauma, stemming not least from the loss of his eye. The sentence itself reflects the severity of the crime, and in passing that sentence the trial judge noted that this was an episode of extreme violence, made all the more brutal and distressing by the fact that the victim's wife witnessed the entire attack and must herself have feared for her life as well as that of her husband.

49. The nature of the attack, and the length of the sentence imposed, in my view set the bar at the very highest end of the 'medium offender' spectrum.

50. Against that I have weighed the following matters.

51. First and foremost that it would be strongly in the best interests of these children that the Appellant is permitted to remain in this country. I need not rehearse my findings on the children again, but I mark that I have taken this matter into account in my final reckoning.

52. Second, is the fact that the Appellant has lived in this country a great many years, arriving here when he was a young man of 19 years old. As I note above it is to his credit that in that time he managed to start a business and buy his own home, and of course I accept that he has established his family life here with his wife and children. Although I heard little evidence about this, I accept that it is inevitable that the Appellant has also established a significant private life during that 24-year residence here.

53. I do however also note that despite this very long residence it cannot be said that this is a case where the Appellant is to a great degree integrated into British culture whilst having disconnected from his own. In fact the evidence indicates that the Appellant has remained very embedded in Chinese culture whilst living in the UK. As late as 2019 when the probation service prepared the OASys report he needed an interpreter to communicate, and by his own admission speaks only very limited English. The sentencing remarks and the OASys report make frequent reference to the Chinese community, and it would seem that it is in that context that the Appellant has established his private life in the UK. He has maintained his connections to China not just through his use

of language and associations, but through his ongoing contact with his family who still live there. It is certainly not a case where he would not be "enough of an insider" to manage in China. I further note, and this is perhaps of greater significance to my balancing exercise, that for the vast majority of the years that the Appellant has lived here, he has had no leave to do so.

54. I have attached some weight to the conclusions in the OASys report that the Appellant presents as a low risk of reoffending, and of course I acknowledge that he has been out of prison for approaching two years now and has not reoffended. I accept that on the evidence before me it appears extremely unlikely that he would ever do so again: he knows full well that he has caused immense harm to his victim, has ruined his own life in this country and caused great distress to his family.

55. Having taken all of those matters into account, and having given the most weight that I can to the adverse impact upon the children, I am driven to conclude that there are not here such compelling circumstances that the public interest is outweighed. The reality is that the Appellant will have to leave behind his life in the UK and resume his life in China, where he will be able to be close to his parents and maintain his family life with his children and wife from a distance. He will be able to establish a private life for himself in China without difficulty. Whilst the separation from his family is harsh, that is the consequence of the Appellant's criminality and the public interest is not, on the facts before me, outweighed.

Anonymity Order

56. JL is a foreign criminal who should not ordinarily benefit from an order protecting his identity. I am however concerned that identification of JL could lead to the identification of his British children. That would be contrary to their best interests. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Presidential Guidance Note No 1 of 2013: Anonymity Orders, and the *obiter dicta* of Underhill LJ at paragraph 6 of HA (Iraq), I consider it appropriate to make an order in the following terms:

> "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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

57. The decision of the First-tier Tribunal is flawed for lack of reasons and the decision is set aside.

58. I remake the decision in the case as follows: the appeal is dismissed.

59. There is an order for anonymity.

Upper Tribunal Judge Bruce
11th November 2021