Upper Tribunal
(Immigration and Asylum Chamber)

Gordon (deportation; sentencing discounts) [2021] UKUT 00287 (IAC)

THE IMMIGRATION ACTS

Heard at Parliament House, Edinburgh | **Decision & Reasons Promulgated**
On 4 October 2021

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Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT
LORD MATTHEWS

Between

POLLY GORDON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr McGregor QC, instructed by Drummond Miller (Edinburgh)
For the respondent: Mr Diwyncz, Senior Home Office Presenting Officer

(1) In Scotland, as in England and Wales, the seriousness of the criminal offence that has caused the Secretary of State to decide to deport a foreign criminal should be determined by reference to the sentence of imprisonment actually imposed, rather than what it would have been but for any discount applied by reason of a guilty plea or other factor: HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176.

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(2) It will rarely be appropriate for the First-tier Tribunal to undertake a discrete examination of aggravating or mitigating features of the offence in question. Where it does so, the Tribunal must ensure that it does not engage in any "double-counting" of such a feature when striking the proportionality balance under Article 8(2) of the ECHR.

DECISION AND REASONS

A. BACKGROUND

1. The appellant, who is now 75 years old, is a citizen of the United States of America. It is not now disputed that she arrived in the United Kingdom in 1968. She has lived in this country ever since. She was granted indefinite leave to remain on 6 January 1977.

2. On 18 July 2019, the appellant was convicted at Edinburgh Sheriff Court on three counts of being concerned in the supply of a controlled drug. On 15 August 2019, she was sentenced to twelve months' imprisonment, together with a forfeiture/confiscation order.

3. As a result of that conviction, the respondent decided to make a deportation order in respect of the appellant, pursuant to section 32(5) of the UK Borders Act 2007. (Mr Diwyncz confirmed to us that this conviction, and no other, was the reason for the deportation decision). In response, the appellant submitted representations, constituting a human rights claim. On 15 January 2020, the respondent decided to refuse that human rights claim.

B. APPEAL AND DECISION OF THE FIRST-TIER TRIBUNAL

4. The appellant appealed against that refusal to the First-tier Tribunal, where her appeal was heard on 14 October 2020 by First-tier Tribunal Judge Komorowski, sitting in Glasgow. In a decision dated 22 December 2020, the First-tier Tribunal Judge dismissed the appellant's appeal. Permission to appeal against that decision was granted by the First-tier Tribunal on 18 January 2021.

5. The First-tier Tribunal Judge noted that, as regards the index offence, the appellant had been concerned in the supply of drugs for a prolonged period. At paragraph 9(iii) the judge said as follows:-

> "The sentencing judge would have imposed a sentence of 18 months' imprisonment but for the early guilty plea. The judge said the starting point of 18 months had itself been lowered because of the appellant's health."

6. At paragraph 12, the First-tier Tribunal Judge found that the appellant's risk of re-offending was "relatively low (but not trivial)".

7. Beginning at paragraph 15, the First-tier Tribunal Judge made findings regarding the appellant's health. He found that she had atrial fibrillation, colitis and a "Schatzki ring", which resulted in the appellant finding it difficult to consume solid food. The Criminal Justice Social Worker report of 9 August 2019 found that the appellant's presentation at interview "indicated a level of infirmity".

8. The First-tier Tribunal Judge concluded this section of his decision as follows:-

> "16. I find that the appellant is frail, with limited mobility, that she is unable to consume solid food, that she has suffered from shingles in the recent past, and that she takes a range of medication. I am unable to make any findings as to what difference deportation will make to the appellant's health. I presume that, given her age and infirmity, she will feel the impact of leaving her home country of that last five decades more keenly than most. I do not have material to enable more specific findings about that impact.
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> 17. In light of the material produced from the USA government websites, I find that the appellant would not have access to government programs for help with medical care. As she has not worked in the USA for over five decades, she is unlikely to qualify for any government assistance. She would have to pay for her medication. But I have no evidence as to what that medication would cost in the USA, and what the effects of her health would be of discontinuing it."

9. At paragraphs 18 to 20, the First-tier Tribunal Judge considered the appellant's past history of substance abuse and addiction to alcohol. On the evidence before him, the First-tier Tribunal Judge concluded that "the only proper course for me is to not make any findings as to her current use or abstinence, or as to the existence of any addiction".

10. At paragraphs 21 and 22, the First-tier Tribunal Judge noted that the appellant had a son and daughter in the United States, with whom he found that she still had a good relationship. However, their "inability to support her is unproven".

11. At paragraph 25, the First-tier Tribunal Judge concluded from letters of support provided in connection with the appeal, from people in the United Kingdom, that she had formed a circle of friends, including very long term friendships in this country.

12. Beginning at paragraph 27, the First-tier Tribunal Judge considered the question, posed by paragraph 399A(c) of the Immigration Rules and section 117C(4)(c) of the Nationality, Immigration and Asylum Act 2002, whether there would be very significant obstacles to the appellant's integration into the USA, were she to be deported to that country. That question was relevant under both the rules and the Act because the appellant had been lawfully resident in the United Kingdom for most of her life and was socially and culturally integrated here.

13. In answering that question, the First-tier Tribunal Judge correctly applied the guidance contained in <u>Secretary of State for the Home Department v Kamara</u> [2016] EWCA Civ 813. In essence, this guidance explains that the concept of integration is a

broad one, requiring an assessment as to whether the person concerned would be "enough of an insider" in the country of proposed return, such as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis and to build up within a reasonable time a variety of human relationships to give substance to her private or family life (paragraph 14).

14. Having found, at paragraph 29, that the appellant had lived in the USA until her early 20s and had visited the country on multiple occasions since coming to live in the United Kingdom, and that she had an adult son and daughter in the USA, the First-tier Tribunal judge continued as follows:-

> "30. There will be certain material hardships the appellant will face on her relocation. She will not be able to claim Pension Credit nor likely any US social security benefit, nor will she likely have access to free healthcare, and her ability to afford it privately will be very limited. These matters, though, are of limited (if any) relevance to her ability to re-integrate. They only have an indirect bearing to the extent that they might impede her ability to form relationships. I am not satisfied these hardships will pose any significant obstacles to reintegration."

15. At paragraph 31, the First-tier Tribunal Judge addressed the issue of whether there were "very compelling circumstances", over and above those described in Exceptions 1 and 2 (section 117C(6)). The First-tier Tribunal Judge did so because, notwithstanding that the wording of section 117C(6) is confined to a foreign criminal sentenced to a period of imprisonment of at least four years, the established case law is that such an exercise is still required, as part of the overall Article 8 ECHR assessment.

16. In the appellant's favour, the First-tier Tribunal Judge placed weight upon her (then) 51 years' lawful residence in the United Kingdom, and her possession of indefinite leave to remain for 43 years; her ill-health and frailty; her social network in the United Kingdom; and the fact that the appellant was a relatively late offender.

17. Beginning at paragraph 36, the First-tier Tribunal Judge engaged in a detailed consideration of the severity or seriousness of the appellant's latest conviction; that is to say, what we have described as the index offence of 2019. It should be mentioned at this point that some eight years previously, the appellant had been sentenced to eighteen months' imprisonment for drugs offences. In September 1987, she had been sentenced to 200 hours of community service; again, for an offence concerned with the supply of drugs.

18. At paragraph 36, the First-tier Tribunal Judge gave two reasons why he did not agree with the submission on behalf of the appellant that the latest conviction was of "relatively low severity". The first was because that conviction was "not her only conviction". The second was "because the sentence imposed does not reflect the sentencing judge's assessment of its seriousness".

19. At paragraph 37, the First-tier Tribunal Judge noted that the appellant's solicitor relied upon the judgment of the Court of Appeal of England and Wales in <u>HA (Iraq)</u>

v Secretary of State for the Home Department [2020] EWCA Civ 1176; [2021] Imm AR 59, for the submission that the First-tier Tribunal Judge should take the appellant's sentence "as a definitive indicator of its seriousness". The First-tier Tribunal Judge invited written submissions on this point, which he subsequently considered.

20. HA (Iraq) involved two separate appellants. RA had been sentenced to twelve months' imprisonment, as a result of the sentencing judge giving credit for RA's guilty plea. At paragraph 147 of the judgment, Underhill LJ noted that, if the importance of the sentence is as an indicator of the seriousness of the offence "then that is more accurately reflected in the level of sentence pre-discount". On the other hand, however, Underhill LJ noted that the statutory provisions themselves (namely, Part 5A of the 2002 Act and the Immigration Rules) "make no distinction between discounted and undiscounted sentences, which suggests that this degree of refinement is rather out of place". Underhill LJ also considered that it might "be thought wrong that the fact that RA had acted responsibly and acknowledged his guilt was not allowed to be put into the proportionality balance". These factors led him to conclude that the Upper Tribunal "should have proceeded without qualification on the basis that his sentence was at the very bottom of the relevant range".

21. At paragraph 39 of his decision, the First-tier Tribunal Judge found difficulty with the Court of Appeal's approach in HA (Iraq). The judge noted, first, that the statutory scheme refers only to the seriousness of the offence and does not explicitly require the sentence imposed to be used as a determinant of its seriousness. The latter was "a judge-made rule", albeit "no less legitimate for being such, so long as it remains tied to implementing the rules enacted by Parliament" (paragraph 39(i)).

22. At paragraph 39(ii), the First-tier Tribunal Judge reminded himself of the "two bright lines" contained in section 117C; namely, a single sentence of at least twelve months' imprisonment and, in section 117C(6), a sentence of imprisonment of at least four years which elevates the public interest in deportation of the foreign criminal.

23. At paragraph 39(iii), the First-tier Tribunal Judge considered that any refinement of these "bright lines" comes later, if it comes at all, in considering whether the circumstances militating against deportation are sufficiently compelling in terms of section 117C(6). The judge said that a relevant refinement "is how close to or far from one of the bright lines the offender's sentence falls". The judge considered that, at this point, it would also be relevant "to take account of the existence of other criminal convictions, irrespective of whether they formed part of what one would classify as persistent offending".

24. The judge then said that it was "not clear to me why some of these refinements are relevant to determining the existence of very compelling circumstances, but the refinement of the sentencing discount is not".

25. At paragraph 39(iv), the judge held that if the length of sentence was relevant only because it indicated the seriousness of the offence, then it followed that one must use

the closest indicator practically available of that sentence. This led the First-tier Tribunal Judge to regard the "judge-made rule that sentence equates to seriousness" as being better understood "as a judge-made heuristic that sentence indicates seriousness". The rationale for this view was given at paragraph 40 as: furthering consistent evaluation of seriousness between the tribunal and the criminal court; avoiding re-consideration being required of the mitigating and aggravating circumstances; deferring to the assessment of the sentencing judge who likely had a more complete picture of what those circumstances were; and deferring to the sentencing judge as likely to have had more familiarity with the gamut of criminal offenders. The First-tier Tribunal Judge agreed with the appellant's solicitor that to do otherwise would involve the "second guessing a decision of the sentencing judge".

26. All this led the First-tier Tribunal Judge to the following conclusion:-

> "41. Accordingly, I ignore the fact that the appellant's latest sentence was reduced to some extent because of the state of her health. I do not know how much longer the sentence would have been. The judge does not say. I am not equipped either with the precise information before the sentencing judge, or with the experience of criminal justice that the sentencing judge would have had, to make any assessment of that."

27. But the First-tier Tribunal Judge then proceeded as follows:-

> "42. Different considerations apply to the discount for the early plea of guilty, at least in Scotland. In this jurisdiction, the amount of an early plea discount is always explicitly recorded (*Gemmell v HM Advocate* 2012 JC 223, [2011] HCJAC 129, para. [13]). I am not sure that this is the position in England. For the relevant appellant in *HA (Iraq)*, there is no reference to what the reduction was, or what the headline sentence was, either in the Court of Appeal's judgment or the relevant decision of the Upper Tribunal appealed against (*RA (s.117C: "unduly harsh"; offence: seriousness*) Iraq [2019] UKUT 00123 (IAC). In the absence of a statement as to the reduction, one would be required to engage in a dubious exercise of reconstructing what the sentence after trial might have been. But where it is [stated], one simply reads what the judge has said.
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> 43. Another distinction is that guilty-plea discounts have been authoritatively determined, at least for this jurisdiction, to be based on the objective value of an early plea in the administrative and other costs, and the personal inconvenience, that it saves and not as an aspect of mitigation (*Gemmell v HM Advocate* 2012 JC 223, [2011] HCJAC 129, para [33]). The sentence ultimately passed, after discount, is one which the sentencing judge considers is "less than the offence truly warrants" (para [34]). It is a "statutory encouragement of early pleas" (*ibid*). The headline sentence is fixed to take account of certain "moral values", and the discount is conversely concerned with "utilitarian benefit" (para [37]). An offender who is genuinely remorseful has the headline sentence adjusted in their favour (para. [51]). An offender who is "impenitent" has the same entitlement, at the same level, of discount for an early plea as one who is remorseful (para. [37]).

Although it seems in England & Wales that an early plea discount is conceptualised in a similar way as to Scotland (*Gemmell*, para. [25]), there might be some subtle differences. In *HA (Iraq)*, Underhill LJ justified not using the headline sentence as determinative as it was relevant to the assessment of the proportionality that the offender had "acted responsibly and acknowledged his guilt" (para. [147]). That comment does not reflect how sentencing discounts are arrived at in Scotland. They are not a reward for responsibility, but an inducement for the self-interested. If the guilty plea forms part of a picture demonstrating remorse or reformation, then that will be taken into account in setting the headline sentence, not the discount. Thus using the headline sentence as indicative of seriousness will still allow such mitigating features to be included in the proportionality assessment. It will ensure a consistent assessment of seriousness and personal mitigation between immigration tribunal and criminal court.

44. I leave to one side questions as to whether, as a judge hearing an appeal in Scotland in a United Kingdom tribunal, I am bound by decisions only of the appellate courts of Scotland, or by the appellate courts of all our jurisdictions so long as they do not conflict. Whatever the correct answer to that is, I think I must be bound to assess the sentences of Scottish criminal courts according to the sentencing law and practice of Scotland, particularly as declared by the court supreme in that field, the High Court of Justiciary.

45. Accordingly, I proceed as follows. Not being a judge of a criminal court, I am ill-placed to assess where on the spectrum the appellant's offending falls, just by reference to the circumstances as they appear in the papers before me. I defer to the sentencing judge's assessment that the seriousness of the offence considered with the appellant's personal circumstances would have merited a sentence of 18 months' imprisonment. I leave aside the discount the judge thought fit to give the appellant for her early guilty plea, as I am bound to find that does not reflect the seriousness of that offence nor her personal mitigation (including any remorse)."

28. Having had regard, at paragraph 46, to the appellant's earlier sentence of eighteen months' imprisonment, the First-tier Tribunal Judge concluded his analysis of the severity of the index offence as follows:-

"47. According, I am not satisfied that the appellant's offending is at the lower end of the scale."

C. DISCUSSION

29. Mr McGregor QC makes two criticisms of the First-tier Tribunal Judge's conclusion at paragraph 47. Even if the First-tier Tribunal Judge was correct to view the seriousness of the appellant's offence through the prism of an undiscounted eighteen month sentence, that sentence was still at the lower end of the scale of seriousness. Second, Mr McGregor contends that the First-tier Tribunal Judge was, in fact, wrong in law in refusing to accept that the seriousness of the index offence was determined

by reference to the twelve months' sentence of imprisonment, thereby placing it at the lowest end of the scale of seriousness of offences for the purposes of section 117C and the Immigration Rules.

30. We shall begin with the second submission. The reason why it is necessary to determine at what point of the scale or range the index offence lies is articulated by Underhill LJ earlier in his judgment in HA (Iraq):-

> "92. … The question then arises whether … in principle a potential deportee can rely, as part of the overall proportionality assessment, on the fact that his offence was at or near the bottom of the scale of seriousness. It seems to me that that must indeed be the case. There can be no principled reason for treating the two arguments differently. That conclusion is also in accordance with the Strasbourg jurisprudence, to which, as is confirmed both by *NA (Pakistan)* and by *Hesham Ali*, we are obliged to have regard. In *Boultif* the ECtHR held in terms that it was necessary in the assessment of the proportionality of deportation to take into account "the nature and seriousness of the offence committed by the applicant" (para. 48); and it is clear from para. 51 of its judgment that in coming to the conclusion that the applicant's deportation was disproportionate it took into account the fact that his sentence was comparatively low. Since it was established in *KO* that the relative seriousness of the offence cannot be taken into account in considering Exception 2 (see para. 43 above), it must be capable of being deployed by the potential deportee at the second stage.
>
> 93. In making this point I do not wish to be misunderstood. It cannot be the case that an appellant can rely on the fact that his offence attracted a sentence of, say, "only" twelve months as sufficient by itself to constitute very compelling circumstances for the purpose of section 117C (6): that would wholly subvert the statutory scheme. But if there were other compelling circumstances in his case the fact that his offence was comparatively less serious could form an element in his overall case that the strong public interest in deportation was outweighed."

31. We have already seen that at paragraph 147, Underhill LJ held that the Upper Tribunal should have based its view of seriousness on the sentence actually imposed, rather than the sentence that would have been imposed but for the discount afforded by reason of the plea of guilty. At paragraph 94, in discussing the appellant HA, Underhill LJ said:-

> "94. … The Tribunal is of course right that the offences are serious, for the reasons which it gives. But their seriousness is reflected in the sentence which the Court imposed. Generally, for the purpose of the proportionality balance that falls to be struck in a deportation case the seriousness of the relevant offending is established by the level of sentence: see *Secretary of State for the Home Department v Suckoo* [2016] EWCA Civ 39, per Simon LJ at para. 43. It is true that this Court has since made it clear that that is not an absolute rule, to the extent that a tribunal may be entitled to take into account aggravating or mitigating factors: see *Secretary of State for the Home Department v Barry* [2018] EWCA Civ 790, per Singh LJ at paras. 56-57); but I do not think that that qualification has any relevance to the present case. HA should have been treated when striking the

proportionality balance as having committed an offence of sufficient seriousness to attract a sentence of sixteen months, no more and no less."

32. We are in no doubt that the First-tier Tribunal Judge fell into error on this issue. Having noted, at paragraph 40, the reasons for using the sentence as a "heuristic", which correctly led the First-tier Tribunal Judge to ignore the fact that the appellant's sentence of twelve months' imprisonment had been arrived at "to some extent because of the state of her health" (paragraph 41), the First-tier Tribunal Judge, beginning at paragraph 42, adopted a completely contrary approach with regard to discount for the plea of guilty.

33. Although the First-tier Tribunal Judge is correct to observe that the statutory scheme refers to the seriousness of "the offence" in section 117C, whereby the more serious the offence committed by the foreign criminal, the greater the public interest in his or her deportation, Parliament's decision in section 117D to define "foreign criminal" by reference to (*inter alia*) the length of sentence and its decision in section 117C that a sentence of imprisonment of at least four years gives rise to an enhanced public interest in deportation, are demonstrative of length of sentence being used as a determinator of the seriousness of the offence. Since these statutory "bright lines" equate seriousness with length of sentence, the "judge-made" mechanism for determining the strength of the public interest for the purposes of section 117C(6) is, therefore, wholly compatible with Parliament's own approach.

34. Furthermore, the length of sentence is the length actually imposed, rather than what it might have been before the application of any sentencing discount. If it had been Parliament's intention to use the latter, it could and would have said so. The approach of the First-tier Tribunal Judge raises the spectre of cases crossing the "bright line" of four years' imprisonment where, for instance, a sentence of 3 years and nine months would have been one of over four years, but for the discount.

35. There are problems with the First-tier Tribunal Judge's reliance upon Gemmell v HM Advocate. As paragraph 29 of Gemmell makes clear, the whole concept of discounting in criminal sentencing is, at its heart, a matter of discretion. Although the primary benefit of guilty-plea discounts may be administrative, it also spares complainers and victims the need to give evidence (paragraphs 25 and 34). It is, therefore, not as simple as the First-tier Tribunal Judge suggests when he says that early pleas are merely made by the self-interested and have no bearing on the suitability of the punishment actually imposed. The First-tier Tribunal Judge's observation at paragraph 43 that the offender who is "impenitent" has the same entitlement to discount as one who is remorseful ignores the fact that a person who pleads guilty is, nevertheless, publicly acknowledging their guilt; whereas a person who pleads not guilty is plainly not.

36. For these reasons, the First-tier Tribunal Judge's attempt to draw a distinction between sentencing practices in Scotland and England and Wales breaks down. That is so, even before one comes to the question of whether, in every case, a First-tier

Tribunal Judge hearing a human rights appeal involving deportation will be able readily to ascertain the exact nature of the guilty-plea discount.

37. The First-tier Tribunal Judge's approach also inextricably leads to the undesirable consequence, whereby identical cases may lead to different outcomes, depending upon the law of the part of the United Kingdom that falls to be applied. The profoundly problematic nature of such a result is a further powerful reason why we find the judgment of Underhill LJ in HA (Iraq) needs to be adopted without qualification, insofar as it concerns the relationship between seriousness and sentence.

38. As we have seen, at paragraph 94, Underhill LJ held that, for the purpose of the proportionality balance, the seriousness of the offending is established by the level of sentence only in the generality of cases and that this is not an absolute rule. The Tribunal may be entitled, in certain circumstances, to take into account aggravating or mitigating factors. Although that qualification is not relevant to the issue with which we are here concerned, it is, perhaps, useful to say something about Secretary of State of Statement for the Home Department v Barry, which was cited by Underhill LJ in this context.

39. At paragraph 57 of Barry, having noted that the categories in the Immigration Rules are broad ones; and notwithstanding that "questions of mitigation will already have played their part in arriving at the appropriate sentence for the underlying offence, Singh LJ nevertheless held that:-

> "… in an appropriate case, I can see no reason in principle why either aggravating factors or mitigating factors might not be taken into account by the FTT in assessing the seriousness of the offence in question and, accordingly, the strength of the public interest in deportation."

40. Two points need to be made. First, in the light of HA (Iraq), the circumstances in which the First-tier Tribunal should look beyond the sentence imposed in order to identify relevant aggravating or mitigating factors will rarely arise. Second, when they do, it is crucial that the Tribunal ensures that there is no element of "double counting", whereby the factor in question is weighed twice; first by reference to the length of sentence and secondly as part of some discrete analysis of the Tribunal itself (see in another context: Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC); [2021] Imm AR 355).

41. For the reasons we have given, we find that the First-tier Tribunal Judge made an error of law in treating the index offence as one in which the relevant term of imprisonment was eighteen, rather than twelve, months. Given that, at paragraph 48, the First-tier Tribunal Judge considered that, even so, the factors weighing on the appellant's side of the balance "go a considerable way to establishing very compelling circumstances", it is evident that the judge's error was material. Accordingly, the error is sufficient to make it necessary for us to set aside the judge's decision.

42. For completeness, however, we also agree with Mr McGregor that even if the offence were to be viewed as carrying a sentence of eighteen months' imprisonment, it is still at the lower end of the scale of one to four years. The fact that the appellant had committed other criminal offences is not relevant to the determination of the seriousness of the index offence for the purposes of section 117C(2): see section 117C(7). Those other offences are, however, of relevance when it comes to the overall Article 8 balancing exercise to be undertaken within the ambit of section 117C(6). We do not consider that section 117C(7) precludes the taking of such a holistic view.

43. We therefore re-make the decision in the case of the appellant. In doing so we have regard to the totality of the evidence, including that that was before the First-tier Tribunal Judge. In her statement of 4 October 2021, upon which she was not cross-examined, the appellant states that her health has deteriorated further since the hearing before the First-tier Tribunal. She fractured her knee following a fall and was in hospital for six weeks from March to mid-April 2021. She now requires the use of a Zimmer frame to move about. She requires help from friends with shopping.

44. So far as Exception 1 in section 117C(4) is concerned (and its counterpart in the Immigration Rules), we agree with Mr McGregor that the First-tier Tribunal Judge fell into error at paragraph 30 in effectively disregarding, for this purpose, the fact that it is more likely than not that the appellant would be unable to claim pension credit or any US social security benefits; and that she would not be likely to have access to free healthcare. All those matters do, in our view, directly and materially impact upon the appellant's ability to reintegrate. As held in Kamara, there is more to reintegration than whether the appellant would be returning to a place with which she has some ongoing familiarity and where there are no linguistic barriers. Returning at an advanced age with significant (albeit not grave) health issues, where the appellant would be likely to be in a far worse financial position than she is in the United Kingdom, is bound to impact upon her ability to forge new social relationships. There is, however, the fact that the appellant has children in the USA, with whom she is on better terms than she sought to suggest in her appeal to the First-tier Tribunal. We bear that in mind.

45. Overall, albeit by a narrow margin, we find that the appellant has not demonstrated that there would be very significant obstacles to her integration, were she to be returned.

46. We therefore move to the holistic Article 8 assessment under section 117C(6). On the respondent's side of the balance is the fact that the appellant is a foreign criminal and that Parliament has decreed that the deportation is in the public interest. She has also committed other criminal offences, as outlined above. Nevertheless, the seriousness of the index offence is shown, by the sentence of twelve months' imprisonment, to be at the very bottom of the range or scale described in HA (Iraq). We find that this fact tempers the strength of the public interest in this particular case.

47. What that means is that the matters weighing on the appellant's side of the balance may well be such as to make it a disproportionate interference with her Article 8 rights for her to be deported. Those factors include the very great length of time that the appellant has been living lawfully in the United Kingdom, most of it with indefinite leave to remain; the fact that she has, over that time, established a private life of some quality; that she has significant health issues which, having regard to her age, can only be expected to worsen and which are likely to impede her forging a meaningful private life in the United States; and that, notwithstanding she has relatives in the United States, her financial position in that country is likely to be extremely precarious (again, with consequent impact upon her private life).

48. The present case is analogous to that described by Underhill LJ at paragraph 95 of HA (Iraq):-

> "If the UT were to regard HA as only having failed by a small margin to bring himself within Exception 2 and/or if there were other circumstances weighing against deportation, the fact that his offence, as measured by his sentence, had been near the bottom of the scale of the seriousness might make a material difference to how the balance was struck."

49. Overall, we find that the balance in this case falls to be struck in favour of the appellant. We accordingly allow her appeal against the refusal of her human rights claim.

D. ANONYMITY

49. We lift the anonymity direction made by the First-tier Tribunal judge. Given the importance of the principle of open justice, there is no justification for anonymity in the case of a foreign criminal, whose conviction and sentence were not subject to reporting restrictions and whose health problems are not of an embarrassing or otherwise sensitive nature.

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

20 October 2021