Upper Tribunal

(Immigration and Asylum Chamber)

CJ (international video-link hearing: data protection) Jamaica [2019] UKUT 00126(IAC)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

on 24 and 25 January 2019

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE WIKELEY

UPPER TRIBUNAL JUDGE O'CONNOR

Between

CJ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr R de Mello and Mr T Muman instructed by J M Wilson,

Solicitors

For the respondent: Mr S Kovats QC, instructed by the Government Legal Department

(1) The arrangements made to enable the appellant to give evidence in his human rights appeal by video link between the British High Commission in Kingston, Jamaica and the Tribunal's hearing centre in the United Kingdom did not involve the transfer of data to a third country, for the purposes of the General Data Protection Regulation ((EU) 2016/679).

(2) Even if that were not the case, the transfer was lawful under the derogation in Article 49(1)(e) of the Regulation (transfer necessary for establishment, exercise or defence of legal claims).

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)

Unless and until a Tribunal or Court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify the claimant or any member of the claimant's family. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1.
This is the decision of the panel. It concerns an appeal against the decision of the First-tier Tribunal ('the FTT') which sat in Birmingham on 17 July 2018 to hear the appellant's appeal against the respondent's deportation decision. The appellant, who by that date had already been deported, participated in the hearing (effectively under protest) by way of a video-link from the British High Commission ('the BHC') in Kingston, Jamaica. In summary, the appellant's case is that the FTT materially erred in law in dismissing his preliminary objection to the video-link arrangement. The appellant contended that this method of giving his live evidence necessarily involved a breach of both EU and domestic data protection law. He also argued that he was the victim of unlawful discrimination by reason of the processing of his personal data, including the transmission of the appeal bundles, through the link to the BHC in Kingston.

The factual background

2.
The bare facts of the case and the chronology are not in dispute. The appellant was born in Jamaica on 30 April 1993 and is a Jamaican citizen. He arrived in the UK at the age of 8 on a 6-month visitor's visa in December 2001. He became an overstayer in June 2002 and his immigration status was never regularised. He and his partner (a British citizen) had a daughter in October 2012 (who is also a British citizen). He has been convicted of several offences, starting at the age of 15 (three offences of robbery in September 2008, two counts of burglary in 2011, possession of cannabis in July 2013 and travelling on the railway without a ticket in September 2014), culminating in convictions at Winchester Crown Court on 14 April 2015 for conspiracy to supply crack cocaine and heroin. He was sentenced to 3 years' imprisonment, to be served concurrently, for each of those latter offences.

3.
The appellant was served with IS151A papers as an overstayer on 14 June 2013. Following his conviction for the last and by far the most serious offences, he was served on 29 July 2015 with notice of the respondent's decision to remove him to Jamaica. In August 2015 he submitted representations arguing he should not be removed because of his durable relationship with a British citizen and young child. In March 2016 the appellant applied for further leave to remain ('FLR') based on his family life. On 15 April 2016 the respondent served the appellant with a stage 1 deportation decision under section 32(5) of the UK Borders Act 2007. In August 2016, following his release from prison, the appellant was immediately detained under the Immigration Acts. On 22 September 2016 the respondent refused the appellant's FLR application, finalised the stage 2 deportation decision and issued a certificate under section 94B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). As a result, of course, the appellant could only challenge that decision by way of an out of country appeal once he had left the UK: see section 92(3)(a) of the 2002 Act.

4.
On 7 April 2017 the appellant was deported to Jamaica (there being no statutory bar on deportation before an appeal is lodged: see section 79(3) of the 2002 Act) and on 5 May 2017 he lodged his appeal

with the FTT against the respondent's decision of 22 September 2016 to refuse his human rights claim. This appeal was brought under section 82(1)(b) of the 2002 Act. Meanwhile, the appellant's challenge to the section 94B certificate by way of judicial review reached the end of the road when it was dismissed by the Court of Appeal on 24 October 2017. It followed that the sole substantive issue before the FTT was whether the respondent's decision of 22 September 2016 was unlawful under section 6 of the Human Rights Act 1998. As the appellant fell within the definition of a foreign criminal (section 117D(2) of the 2002 Act), the FTT was charged with assessing the public interest in his deportation, bearing in mind the possibility that he might fall within one of the exceptions in section 117C(3).

The decision of the First-tier Tribunal

5.
Following various case management directions, a three-judge panel of the FTT (Judge Clements P, Designated FTT Judge McCarthy and FTT Judge Carter) duly heard the appellant's appeal, as noted above, in Birmingham on 17 July 2018. In the morning session the FTT heard legal argument from counsel on the preliminary issue relating to the lawfulness of the proposed video-link facilities. In the afternoon, the FTT having decided to dismiss the preliminary objection, the panel proceeded to hear the substantive human rights appeal. On 14 August 2018 the FTT promulgated its detailed and lengthy decision on the appeal (running to some 58 pages and 314 paragraphs).

6.
In short, the FTT dismissed the appellant's human rights appeal. However, the bulk of the FTT's decision and reasoning related to the preliminary issue about the lawfulness of the video-link arrangement. The FTT recorded that the appellant had given notice that he did not consent to giving oral evidence by the video-link with the BHC in Jamaica (or for the appeal bundle to be electronically transmitted to the BHC). The appellant argued that the Home Office's proposed methods of transferring his personal data involved a breach of Regulation (EU) 2016/679, otherwise known as the General Data Protection Regulation ('the GDPR').

7.
On the day of the hearing, the FTT gave summary reasons for its determination on the preliminary issue in the following terms (FTT decision at paragraph [126]):

"Decision:

The essential question we have had to decide in this preliminary hearing is whether the transfers of data via video link and of the appeal bundle from the UK to Jamaica would entail any breach of data protection law.

We have decided that it would not.

We agree with the parties that the GDPR applies to all of the processing we have been considering.

We do not however consider it necessary, for the purposes of this preliminary matter, to consider the appropriateness of the safeguards in place, the effective rights or remedies available to [CJ] as,

a) either there is no transfer of personal data to a third country such that article 46 does not arise; or

b) assuming there has been a transfer to a third country, the derogation under article 49(1)(e) applies such that the transfers are necessary for the establishment, exercise or defence of legal claims.

We do not consider that any issue around the lack of a mandatory provision requiring retention within the EU is relevant to this case, noting in any event that there is not to be any retention of [CJ]'s personal data outside of the EU beyond 7 days unless [CJ] wishes himself to retain a copy of the bundle, which of course would be his choice and is highly unlikely to give rise to any breach of data protection.

In these circumstances, we have taken the view that the video-link may go ahead and the bundle be transferred.

Full written reasons will be given in the written determination of this appeal."

The application for permission to appeal

8.
On 11 September 2018 the appellant made an application to the FTT for permission to appeal to the Upper Tribunal. The grounds of appeal as set out in the application were divided into two parts – Part A concerned the preliminary issue and the EU data protection provisions, while Part B referred to various human rights grounds, both procedurally and substantively.

9.
On 19 September 2018 the FTT Chamber President, who had presided at the hearing, granted permission to appeal. As to the various grounds in Part A, the President observed that the EU data protection issues were novel matters, not previously considered in the context of immigration appeals, and so it was appropriate to give permission. In doing so, the President added one caveat. The final ground of appeal in Part A was a discrimination challenge, namely that there was no objective justification for treating the appellant's case differently from that of an appellant under the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), who may apply for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at their appeal hearing (see regulation 41). Counsel for the appellant conceded that this point had not been fully argued before the FTT. When giving permission, the President accordingly observed that it would be a matter for the Upper Tribunal to determine the extent to which that point could be argued.

10.
As to Part B, the grounds of appeal broadly fell into three categories. The first was that the respondent had been given too much leeway in providing video-link facilities from overseas. The second was that the FTT had failed to appreciate the difficulties the appellant had in preparing and presenting his case in the absence of legal aid. The third was that – in consequence of those first two failures – the FTT had reached several unsound factual findings. The President gave permission to appeal given these issues also related to the novel procedures adopted on the appeal.

11.
We had several written submissions in advance of the oral hearing. We also had the advantage of reading the multiple written submissions made in the FTT proceedings. We held an oral hearing at Field House in London on 24 and 25 January 2019. The appellant was represented by Mr R de Mello and Mr T Muman, acting pro bono . The respondent was represented by Mr S Kovats QC. At the outset of that hearing we indicated to counsel that in all the circumstances we were prepared to hear full argument on the discrimination issue despite the fact it had not been fully argued before the FTT.

12.

Both parties recognised that the present appeal was in effect a test case about such video-link arrangements. We also had before us an uncontested draft witness statement from Mr Andrew Bennett, a Home Office official, confirming that FTT substantive hearings with overseas video-links in section 94B appeals had been completed in respect of the following countries: Albania, Bangladesh, Ecuador, Gambia, India, Jamaica, Pakistan and Nigeria. In addition, the Home Office was in the process of putting in place similar arrangements for the following further countries: Democratic Republic of Congo, Dominica, Grenada, Kosovo, Nepal, South Africa, Sri Lanka, Turkey and Vietnam (and possibly also Cameroon and Trinidad & Tobago).

The framework of data protection law

13.
We now turn to consider the framework of data protection law as it applies for our purposes. The GDPR replaced Directive 95/46/EC and came into force on 25 May 2018. The GDPR was made in pursuance of Article 16 of the Treaty on the Functioning of the European Union (TFEU), which provides as follows:

“ Article 16

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.”

14.
It will be observed at the outset that the right enshrined in Article 16(1) applies irrespective of citizenship or nationality (“Everyone has the right to the protection of personal data concerning them”); see to similar effect recital (2) of the GDPR.

15.
The GDPR is divided into a total of 11 Chapters. However, we are principally concerned with certain provisions in Chapters I (general provisions), II (principles for processing personal data), III (rights of the data subject) and V (transfers of personal data to third countries or international organisations). As an EU Regulation, the GDPR is (at least both as at the material time and at present) directly applicable in domestic law (see Article 288 of the TFEU). However, the scope of the GDPR has been widened by the Data Protection Act 2018 (‘the DPA 2018’), meaning the two instruments must be read in tandem (and see especially section 22(1) of the DPA 2018).

16.
The DPA 2018 is arranged in 7 Parts, as explained by the overview in section 1 of the Act. We are primarily concerned with certain provisions in Part 2 (general processing), notably sections 8 (lawfulness of processing) and 15 (exemptions), along with Schedule 2 (exemptions etc. from the GDPR), as well as section 22 (application of the GDPR to processing to which this Chapter applies). Part 2 of the DPA 2018 accordingly supplements the GDPR (see also section 1(3)).

17.
As the DPA 2018 itself states, “most processing of personal data is subject to the GDPR” (section 1(2)). However, the DPA 2018 also refreshes parts of the world of data protection that the GDPR cannot reach. It achieves this by deploying the concept of the “applied GDPR”. This means “the GDPR as applied by Chapter 3 of Part 2” (see section 3(11) of the DPA 2018). Section 21(1) of the DPA 2018 provides that Chapter 3 of Part 2 “applies to the automated or structured processing of personal data in the course of (a) an activity which is outside the scope of European Union law”, subject to certain exceptions which do not arise for present purposes. Section 22(2) in turn stipulates that Chapter 2 of Part 2 (the provisions governing general processing) “applies for the purposes of the applied GDPR as it applies for the purposes of the GDPR”. As section 1(3) of the DPA 2018 sums up, Chapter 3 of Part 2 “applies a broadly equivalent regime to certain types of processing to which the GDPR does not apply”.

18.
For present purposes there is no material difference between the GDPR and the applied GDPR. It followed, Mr Kovats submitted, that there was no need to consider and determine whether the processing of data in this case fell within the material scope of EU law. Mr Kovats’s position was that the data processing in question was governed under domestic law by the DPA 2018 and thereby also by either the GDPR (by direct application) or by the applied GDPR regime (as supplemented by the DPA 2018). The FTT accepted that analysis (paragraph [134]), as do we. Insofar as there remains a live issue on this point, Mr de Mello submits that the GDPR applies in its pure form, as he says the appellant’s data was transferred to a non-EU third country, whereas Mr Kovats contends that the data processing took place at all times under the jurisdiction of the UK. We return to that issue further below in our consideration of the potential application and impact of Chapter V of the GDPR (Transfers of personal data to third countries or international organisations).

Key definitions in data protection law

19.
Before turning to consider the specific challenges made by the appellant to the arrangements for processing his personal data we need to outline some of the definitions of the key terminology used under the GDPR and the DPA 2018. As a general principle, we note the DPA 2018 provides in this context that “Terms used in Chapter 2 of this Part and in the GDPR have the same meaning in Chapter 2 as they have in the GDPR” (section 5(1)).

20.
Personal data means “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person” – see GDPR Article 4(1); see also DPA 2018 section 3(2). It is not in dispute that information relating to the appellant’s criminal convictions amounts to sensitive personal data that in principle qualifies for an extra layer of protection – see GDPR Article 10 and DPA 2018 section 10(4) and (5) (but note also paragraph 34 of Schedule 1 to the Act, providing in effect that processing such data is lawful “if the processing is necessary when a court or tribunal is acting in its judicial capacity”).

21.

Processing means “any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction” – see GDPR Article 4(2); see also DPA 2018 section 3(4).

22.
Controller means “ the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law” – see GDPR Article 4(7). This definition is modified by DPA 2018 section 6, which makes it subject to section 209 (and section 2010, which is not relevant for present purposes). However, section 209(1) provides for the Act to bind the Crown while section 209(2) stipulates that “For the purposes of the GDPR and this Act, each government department is to be treated as a person separate from the other government departments (to the extent that is not already the case).”

23.
Processor means “ a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller” – see GDPR Article 4(7); see also DPA 2018 section 3(6).

24.
Data subject means the identified or identifiable living individual to whom personal data relates – see DPA section 3(5).

25.
Consent (of the data subject) means “any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her” – see GDPR Article 4(11).

A reminder of the appellant’s grounds of appeal and a summary of our approach

26.
Mr de Mello’s written and oral submissions on behalf of the appellant ranged far and wide, mounting a concerted challenge to both the procedure adopted by the FTT and the substantive outcome of the human rights appeal. In the first instance we consider we need to focus on the FTT’s treatment of three specific challenges put to it by the appellant and based on the protection of his personal data. The first of these concerned the appellant’s right to object to the processing of his personal data. The second challenge was premised on his right to the erasure of his personal data that had been processed. The third aspect centred on what Mr de Mello submitted was the transfer of the appellant’s personal data to a third country. We then turn to consider the more general attack on the video-link arrangement based on discrimination arguments. Those heads of challenge deal with the primary grounds of appeal set out in Part A of the application for permission to appeal. We then turn to consider the Part B human rights arguments, which have both a procedural and a substantive focus.

Data protection and the right to object

27.

Following the overview in section 1, the first substantive provision in the DPA 2018 is section 2, which is concerned with the overarching goal of the protection of personal data. Section 2(1)(a) provides that “the GDPR, the applied GDPR and this Act protect individuals with regard to the processing of personal data, in particular by – (a) requiring personal data to be processed lawfully and fairly, on the basis of the data subject's consent or another specified basis ” (emphasis added). It follows that “another specified basis” may provide the basis for fair and lawful data processing, notwithstanding the absence of the data subject’s consent.

28.
Article 6(1) of the GDPR then sets out the circumstances in which data processing is lawful:

“1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.”

29.
As the appellant had not given his consent (i.e. for the purposes of Article 6(1)(a)), the issue here was whether processing was “ necessary for the performance of a task carried out in the public interest” within the meaning of Article 6(1)(e). In this context Article 6(3) further provides that “the basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by (a) Union law; or (b) Member State law to which the controller is subject.” To that end, section 8 of the DPA 2018 in turn provides that:

“In Article 6(1) of the GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority includes processing of personal data that is necessary for—

(a)
the administration of justice.”

30.

Article 9 of the GDPR provides special protection for sensitive personal data, in that processing such data is prohibited unless one of a number of defined exceptions applies, one of which is where the "processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity (Article 9(1)(f)). Likewise, the processing of personal data relating to criminal convictions must be carried out "only under the control of official authority" or when authorised with appropriate safeguards (Article 10).

31.
Chapter 3 of the GDPR then sets out a data subject's rights, of which the most significant for present purposes is in Article 21, otherwise known as the 'right to object'. So, in particular, Article 21(1) provides as follows:

"The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims."

32.
The right to object in Article 21(1) is not absolute. The terms of that provision itself provide some qualifications (i.e. where the data controller demonstrates compelling legitimate grounds, etc.) . In addition, Article 23 of the GDPR ('Restrictions') makes provision for a range of potential restrictions, of which we need only cite two:

" Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a

necessary and proportionate measure in a democratic society to safeguard:

…

(f) the protection of judicial independence and judicial proceedings

…

(j) the enforcement of civil law claims"

33.
This is amplified for domestic purposes by section 15(1) of the DPA 2018, introducing Schedule 2 to the Act, which makes "provision for exemptions from, and restrictions and adaptations of the application of, rules of the GDPR". Specifically, section 15(2)(a) notes that Part 1 of Schedule 2 "makes provision adapting or restricting the application of rules contained in Articles 13 to 21 and 34 of the GDPR in specified circumstances, as allowed for by Article 6(3) and Article 23(1) of the GDPR". There are two provisions under Part 1 which may be relevant in the present context. The first is that the relevant GDPR provisions "do not apply to personal data processed for any of the following purposes— (a) the maintenance of effective immigration control" (paragraph 4(1)(a)). However, before both the FTT and ourselves Mr Kovats expressly disavowed any reliance on that provision, which we

understand is being tested in other proceedings. That leaves in play the second possibility, namely the exemption provided for by paragraph 5(3) of Schedule 2:

“(3) The listed GDPR provisions do not apply to personal data where disclosure of the data—

(a) is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights,

to the extent that the application of those provisions would prevent the controller from making the disclosure.”

34.
It should not be overlooked that Part 2 of Schedule 2 also “ makes provision restricting the application of rules contained in Articles 13 to 21 and 34 of the GDPR in specified circumstances, as allowed for by Article 23(1) of the GDPR” (see section 15(2)(b)). This brings in paragraph 14(3) of Schedule 2, which provides that “the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings”.

35.
Bearing in mind those relevant statutory definitions, the FTT concluded that the Tribunal itself was the controller of the appellant’s personal data for the purposes of the appeal and that the Home Office was at times (depending on the factual context) a controller and at other times a processor (paragraph [149]). The FTT identified no other controllers or processors of the appellant’s data in relation to the appeal proceedings (paragraph [150]). There has been no challenge to those findings of fact. Having regard to the provisions of the GDPR and DPA 2018 as cited above, and the statutory constraints laid down by the section 94B certificate, the FTT concluded as follows:

“156. We conclude from all these considerations that it is necessary for the Appellant to participate in the appeal from overseas because no less restrictive measure is available, which will entail the processing of his personal data.

157. We find that it is necessary and proportionate in the circumstances of this appeal to override the Appellant’s right to object to the processing of his personal data because such processing is necessary in relation to judicial proceedings and/or is necessary for the purposes of or in connection with legal proceedings or establishing, exercising or defending legal rights. The former exemption applies to the processing by the Tribunal and the latter two exemptions to the processing by the respondent, in particular where that is otherwise than under the direction of the Tribunal.

158. In summary, we find the Appellant’s right to object to the processing of his personal data by the respondent and by the Tribunal, which he has exercised under article 21 of the GDPR, does not apply on account of the qualification in article 21(1) of the GDPR, and by the application of the exemptions in paragraphs 5(3)(a) and (c), and 14(3) of schedule 2 to the DPA 2018.”

36.
So how is the challenge to this finding by the FTT framed? The appellant’s most ambitious and far-reaching submission was the contention that the FTT had erred in law in concluding that it could only deal with the case as an out of country appeal. This primary ground of appeal further argued that the FTT was bound to apply the test of proportionality as understood in EU law. Had it properly done so,

Mr de Mello submitted, the FTT would have been duty-bound to disapply the section 94B certificate as there was a less restrictive measure available, namely to permit the appellant to return to give live evidence before the FTT in Birmingham. Suffice to say we remained unconvinced by this line of argument and agreed with Mr Kovats, who characterised the extant section 94B certificate as the inevitable starting point for any analysis of the lawfulness of the arrangements that had been put in place. Thus, the FTT was fixed with both a valid section 94B certificate and lawful deportation, which then acted as the springboard for the inquiry as to whether the video-link arrangement was necessary. On that question we cannot fault the FTT's analysis.

37.
The only other ground of appeal from Part A that is relevant in this context is the bare and unparticularised assertion that the FTT erred in law by holding that the appellant's right to object under Article 21 of the GDPR did not apply. However, the more we listened to Mr de Mello the more it seemed to us that he was revisiting submissions on the construction of the GDPR and the DPA 2018 which had already been ventilated before the FTT and roundly rejected. The FTT's central finding in this context (at paragraph [158]) was that the right to object did not apply because of the cumulative effect of:

(a)
the qualification in article 21(1) of the GDPR (i.e. where the data controller demonstrates compelling legitimate grounds, etc) ;

(b)
the application of the exemptions in paragraphs 5(3)(a) and (c) of Schedule 2 to the DPA 2018 (i.e. " necessary for the purpose of, or in connection with, legal proceedings" or "otherwise necessary for the purposes of establishing, exercising or defending legal rights") ; and

(c)
paragraph 14(3) of Schedule 2 to the DPA 2018 (where its application " would be likely to prejudice judicial independence or judicial proceedings").

38.
In our judgment the FTT directed itself entirely properly as to the interpretation and application of those provisions. Finally, however, we should note that in an additional written submission (22 January 2019) Mr de Mello sought to argue that paragraph 5(3)(a) and (c) of Schedule 2 to the DPA 2018 went "way beyond" what was permitted by Article 23 of the GDPR and should be disapplied. We do not accept this submission. Article 23 clearly envisages that there may be restrictions on a data subject's rights, including e.g. the right to object under Article 21(1). Any such restriction must be "a necessary and proportionate measure in a democratic society to safeguard" one of several specified interests. As already noted, these include both "the protection of judicial independence and judicial proceedings" (Article 23(1)(f)) and "the enforcement of civil law claims" (Article 23(1)(j)). In oral argument Mr de Mello submitted that "the enforcement of civil law claims" was an autonomous concept that did not include public law immigration appeals under the 2002 Act. However, we agree with Mr Kovats that "civil law" is used here in contradistinction to "criminal law", rather than in any narrower sense as that term is understood in English and Welsh law. This interpretation is supported by Article 2(2)(d), which excludes the processing of personal data for the purposes of the criminal justice system from the material scope of the GDPR (see also recital (19) and Regulation 2016/680/EU). Finally, section 15(2)(a) and (b) explains that the exemptions in Part 1 of Schedule 2 restrict the data subject's rights "as allowed for by Article 6(3) and Article 23(1) of the GDPR" (and see also

paragraph 1 of Schedule 2). Rather than being incompatible with Article 23(1), we consider that on an ordinary reading paragraphs 5(3)(a) and (c) of Schedule 2 are entirely consistent with the terms of Article 23(1)(f) and (j) – and indeed Article 6(3).

Data protection and the right to be forgotten

39.
The second principal challenge mounted by the appellant concerns the statutory right to erasure or the 'right to be forgotten'. The appellant's concern revolved around the retention of the appeal bundle by the BHC. Article 17(1)(a) of the GDPR provides as follows:

"The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a)
the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;".

40.
However, the FTT set out the assurances that were given by the respondent in the course of the proceedings, namely that the staff handling the appellant's data at the BHC were Home Office staff (rather than, e.g., FCO officials) and that the appeal bundle would be retained for no more than 7 days after the hearing. The FTT concluded that the assurances were reliable, not least as they were made in response to the FTT's directions, and that any data protection breach was unlikely, given that if the data was retained beyond the 7-day period "it would be at the behest of the appellant himself" (paragraph [161]). There was no serious challenge by Mr de Mello to those findings of fact. In those circumstances we conclude that the FTT properly directed itself as to the right to erasure.

Data protection and transfer of data to a third country

41.
The third principal area of dispute revolved around the question of the transfer of the appellant's personal data to a third country. We start with the relevant legal framework. Article 44 of the GDPR sets out the general principle for transfers, namely that:

"Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined."

42.
Article 45(1) of the GDPR provides that a transfer to a third country may take place without specific authorisation providing that the European Commission has made what is known as an 'adequacy decision', i.e. a decision that the third country in question ensures an adequate level of data protection. It is common ground that the Commission has not made an adequacy decision in relation to Jamaica. In the absence of any such adequacy decision, then a data controller or processor may only transfer personal data to a third country if appropriate safeguards are provided and "on

condition that enforceable data subject rights and effective legal remedies for data subjects are available” (Article 46(1)). There are, however, some derogations for specific situations, as provided for by Article 49:

“ Article 49

Derogations for specific situations

1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:

(a)
the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b)
the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c)
the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

(d)
the transfer is necessary for important reasons of public interest;

(e)
the transfer is necessary for the establishment, exercise or defence of legal claims;

(f)
the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;

(g)
the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to

providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

2. A transfer pursuant to point (g) of the first subparagraph of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register. Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

3. Points (a), (b) and (c) of the first subparagraph of paragraph 1 and the second subparagraph thereof shall not apply to activities carried out by public authorities in the exercise of their public powers.

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

5. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation. Member States shall notify such provisions to the Commission.

6. The controller or processor shall document the assessment as well as the suitable safeguards referred to in the second subparagraph of paragraph 1 of this Article in the records referred to in Article 30."

43.
In the event, the FTT decided not to determine whether the transfer of personal data between the Tribunal in Birmingham and the BHC in Kingston involved such data leaving the jurisdiction of the UK. The FTT, in summarising the parties' respective submissions on that issue, recognised that its resolution was by no means straightforward. The FTT found on the facts that there was no reason why the appellant's personal data would have to be transmitted to, or shared with, the Jamaican authorities and also no evidence that it was liable to being hacked. The FTT therefore concluded that either there was no transfer of personal data to a third country (and so GDPR Article 46 did not apply) or , alternatively, even if the appellant's personal data was being transferred to a third country, the derogation in Article 49(1)(e) would apply, namely that the transfer was "necessary for the establishment, exercise or defence of legal claims".

44.
We have had the benefit of more detailed argument on both points and consider that it is appropriate that we should deal with them both.

45.
Thus, the first question is whether the video-link arrangements between Birmingham and Kingston did indeed involve a "transfer of personal data … to a third country" within the meaning of Article 44 of the GDPR. We may summarise the parties' submissions on this point as follows.

46.
Mr Kovats submitted that the personal data being processed was at all times under the control of Home Office officials. He did not seek to argue that UK domestic law applied within the four walls of the BHC in Kingston. Rather, he pointed to the principles of public international law as guaranteeing the inviolability of diplomatic and consular premises. He contended that on a purposive interpretation of the GDPR, and on the facts of this case, there was in effect no transfer of data to a third country.

47.
Mr de Mello, to the contrary, submitted that the appeal necessarily involved the transfer and retention of the appellant's personal and sensitive data to a third country, notwithstanding the processing of that data in Jamaica took place within the BHC. The main thrust of his submissions was that because there was a transfer of data to Jamaica then that third country had to ensure an adequate level of protection for the appellant's data.

48.
We agree with the FTT (at paragraph [171]), that if the proper approach to be applied is a simple geographical test, then there is considerable force in Mr de Mello's argument that the data was being transferred to a third country outside the EU. But, in our view, such an analysis is not just simple but overly simplistic. The starting point is that the GDPR has a degree of extra-territorial effect. The GDPR defines its territorial reach in Article 3:

"1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. [omitted as not relevant]

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law."

49.
We should also observe that Article 3 of the GDPR reflects the terms of recital (25) which provides that:

"Where Member State law applies by virtue of public international law, this Regulation should also apply to a controller not established in the Union, such as in a Member State's diplomatic mission or consular post."

50.
The DPA 2018 is likewise extensive in its territorial scope. Section 207(2) expressly provides that the Act "applies to the processing of personal data in the context of the activities of an establishment of a controller or processor in the United Kingdom, whether or not the processing takes place in the United Kingdom " (emphasis added).

51.
So far as the relevant public international law is concerned, both Jamaica and the UK are signatories of, and have ratified, the Vienna Convention on Diplomatic Relations (1961). This treaty, of course, provides that "the premises of the mission shall be inviolable" (Article 22), along with its archives and documents (Article 24) and its official correspondence (Article 27.2). Similar safeguards apply under the Vienna Convention on Consular Relations (1963; see Articles 31, 33, 35 and 70), which again has been signed and ratified by both states concerned. Mr de Mello argued that the appeal bundle in the present case before the FTT did not count as a consular document. However, that is not to ask the right question. We observe that "consular functions" are defined very broadly by the Vienna Convention (1963), specifically so as to include "transmitting judicial and extrajudicial documents" (Article 5(j)). Mr de Mello also contended that the giving of live evidence by video-link was not a consular function. However, the Vienna Convention (1963) again provides more generally a catch-all definition of consular functions as including "performing any other functions entrusted to a

consular post by the sending State … to which no objection is taken by the receiving State" (Article 5(m)). From the principle of inviolability, it follows that the Jamaican authorities have no legal basis for gaining access to the appellant's personal data, and the integrity of that data is effectively secured to the same extent as if the data processing was taking place wholly in Birmingham.

52.
In support of his argument that Jamaica was required to ensure an adequate level of data protection, Mr de Mello placed great store by the decision of the Court of Justice of the European Union in Case C-362/14 Schrems v Data Protection Commissioner [2016] QB 527. However, Schrems concerned the transfer of data from Austria (Mr Schrems's home Member State) via Ireland to Facebook Inc's servers in the United States. The Grand Chamber's judgment does not address the special position of mission premises and so does not assist Mr de Mello's cause.

53.
We agree with Mr Kovats that it makes good sense for the GDPR itself to apply to an EU Member State's diplomatic and consular premises overseas, rather than to treat any data transfer to such premises as a transfer to a third country. This is because for all practical purposes the data remains under the sole control of the Member State.

54.
If we are wrong on that first question, and there is a transfer of data to a third country, we must also consider the second question, namely whether one of the derogations in Article 49 of the GDPR applies. The first of these is that the data subject has explicitly consented to the proposed transfer (Article 49(1)(a)). In the present case we recognise the appellant has expressly refused his consent. It follows that Article 49(1)(a) cannot apply. However, the fact that Article 49(1)(a) is a freestanding basis for derogation by definition means that any of the other heads of Article 49(1) may apply irrespective of the data subject's consent (as is also consistent with section 2(1)(a) of the DPA 2018).

55.
Mr Kovats did not seek to suggest that Article 49(1)(d) applied ("the transfer is necessary for important reasons of public interest"). Rather, he submitted that Article 49(1)(e) applied, namely that "the transfer is necessary for the establishment, exercise or defence of legal claims". Mr de Mello sought to persuade us that the formulation in Article 49(1)(e) applied only to preliminary steps taken before judicial proceedings were launched, rather than to steps taken in the course of those judicial proceedings themselves. However, as Mr Kovats argued, such a reading cuts across both the natural meaning of the words and the purpose of the derogation. We are accordingly satisfied that if the appellant's appeal did involve the transfer of his personal data to a third country, then such transfer was lawful under the derogation in Article 49(1)(e). That being so, it is unnecessary to consider Mr De Mello's further submissions on the applicability of the 'read-out' at the end of Article 49(1).

Data protection and the discrimination ground

56.
That takes us to the appellant's challenge based on alleged discrimination. In the proceedings before the FTT, this was put in terms of the data processing involved in the video-link arrangement as amounting to a breach of Article 14, taken together with Article 8 of the ECHR. The FTT dealt with this argument shortly as follows:

"163. We have considered if there is any merit in Mr de Mello and Mr Muman's argument that the proposed processing of the appellant's personal data would violate article 14 taken with article 8 of

the ECHR. In the context of the preliminary issue, we understand the appellant to be relying on the provision in article 8 of the ECHR that requires respect for his private life, which includes an element of a right to data protection in relation to a right to privacy. To this extent, we appreciate that article 14 of the ECHR might apply.

164. However, the argument suggesting discrimination is undeveloped and unclear. We find the argument has been included merely as a ‘catch all’ provision. There is no evidence that the appellant would be treated any differently from another person in a similar situation. The Tribunals, Courts and various government departments employ video link and other modern means of communication to take evidence from people who cannot attend a venue, whether through some physical or legal restriction. The only comparator cited is a British citizen but such a person is not an appropriate comparator because they are not subject to immigration control. We reject the argument based on article 14 as being without merit in relation to the issue of data protection.”

57.
Given the limited way in which the point had been argued before the FTT, we consider that its treatment in the decision in the passage at paragraphs [163]-[164] above was entirely proportionate. We had the advantage of further written and oral submissions on the discrimination point. Before us, Mr de Mello framed his arguments not in terms of ECHR Articles 8 and 14 but rather the broader principles of EU law and the Charter of Fundamental Rights of the EU. He argued that the video-link arrangements that were put in place amounted to both direct discrimination (on the basis of nationality) and indirect discrimination (on the ground of race and ethnicity) and (as regard the latter) was not capable of justification.

58.
Furthermore, and more specifically, Mr de Mello submitted there was no objective justification for treating the appellant’s case differently from that of an appellant under regulation 41 of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052). This provides that an EEA national who is a foreign criminal may apply for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at their appeal hearing. Details of the relevant arrangements are to be found in the relevant Home Office guidance to staff (Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016 , 3 August 2017). We understand that most of those who are allowed to return to the UK on this basis are housed in immigration detention centres for the duration of their stay.

59.
We agree with Mr Kovats that these submissions on behalf of the appellant conflate and confuse two distinct matters, being data protection rights and immigration rights.

60.
So far as data protection is concerned, we have already noted that the GDPR and the DPA 2018 do not discriminate on the grounds of nationality. Furthermore, and in any event, Mr Kovats disavowed any reliance on the specific restriction that applies to personal data processed for the maintenance of effective immigration controls (see paragraph 4 of Part 1 of Schedule 2 to the DPA 2018; and see paragraph 33 above). Nor does Mr de Mello’s invocation of Article 16 TFEU advance his argument, for the simple reason that it matters not whether the data processing in this case is or is not within the material scope of EU law (see paragraph 18 above). The reason for that was that the very same issues arose whether this case was dealt with under the GDPR or the parallel applied GDPR regime.

61.

As regard immigration, the appellant is undeniably a third country national. Of course, EU citizens have the right of free movement, subject to carefully defined restrictions. In contrast non-EU citizens are subject to the Immigration Acts and have no such rights. By virtue of that fundamental distinction, EU and non-EU citizens cannot be seen as being in an analogous position in respect of immigration. It follows that e.g. discrimination on the basis of nationality is entirely permissible in, and indeed fundamental to, immigration law. The simple fact of the matter is that the appellant is a non-EU national who thereby lacks EU free movement rights. For that reason, the purported comparison with the EEA foreign criminal who has the possibility of admittance under regulation 41 so as to attend his appeal hearing in person is based on a false analogy.

62.
In sum, we agree with Mr Kovats that the whole edifice of Mr de Mello's wide-ranging submissions on discrimination is founded on the premise that whenever any immigration decision involving the processing of personal data – in practical terms nearly every such decision – a non-EU citizen might be given the same rights as an EU citizen. Obviously, that is not what the law mandates.

63.
Furthermore, it seems to us that, at least in substance if not in form, the appellant's challenge is in reality an attack on the section 94B certificate. However, as the FTT correctly identified, case law has consistently stated that the FTT does not have the power to set aside a section 94B certificate. In the present case the section 94B certificate was challenged through the available route of judicial review but foundered at every stage and was ultimately dismissed. The inevitable consequence was that the certificate stood (paragraph [141]). Thereafter, given the Supreme Court's judgment in R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42; [2017] 1 WLR 2380, the issue was whether the procedure adopted for the appellant's out of country appeal satisfied the procedural requirements of guaranteed effectiveness and fairness. We therefore also turn to address those arguments.

The procedural challenge under human rights law

64.
The appellant's case before the FTT – putting to one side his data protection concerns – was that the arrangements for his participation in the hearing and giving his evidence by way of video-link did not amount to a fair procedure for the determination of the substantive human rights issues arising on his out of country deportation appeal. The FTT considered this challenge in depth. It began by setting the relevant legal framework, directing itself at length in accordance with the principles set out in R (Kiarie and Byndloss) and further explained in R (Nixon et al) v Secretary of State for the Home Department [2018] EWCA Civ 3 and AJ (s 94B: Kairie and Byndloss Questions) Nigeria [2018] UKUT 115 (IAC) (paragraphs [184]-[189]). The FTT then considered the difficulties faced by the appellant in instructing his legal representatives (paragraphs [190]-[201]), as well as those encountered in securing expert reports and other professional evidence (paragraphs [202]-[213]). The FTT also had regard to the absence of the appellant's partner in the context of other possible witnesses (paragraphs [216]-[221]), before reviewing whether the process for the evidence given by means of the video-link was satisfactory. The FTT reached the overall conclusion that the appellant had been able to participate effectively in the hearing and that being out of country and giving evidence by video-link did not impinge on the fairness of the proceedings (paragraphs [222]-[230]).

65.

The appellant's grounds of appeal to the Upper Tribunal under this segment of Part B of the application are a medley of disparate complaints. The first ground is that the video-link in the present case was established in a technically sophisticated manner (as the FTT itself acknowledged at paragraph [223]) that would not always be replicated in other out of country appeals. This takes the appellant nowhere; as Mr Kovats observed, it is effectively an admission that the video-link procedure adopted in this case was fair whilst speculating that this may not be so for other cases. However, this is the appellant's appeal, not some other appeal. The other grounds as pleaded and directed at the mechanics of the video-link arrangements are likewise concerned with the generality of such cases rather than the appellant's own case. The remaining grounds of appeal that attack the fairness of the procedure adopted (e.g. as regard the appellant's undoubted practical difficulties in instructing his solicitors and the absence of other witness evidence) all come down to an attempt to re-argue the fairness issue on the facts. However, we are satisfied that the FTT correctly identified itself as to the relevant law and then grappled with the realities of the situation, ultimately reaching sustainable findings on the evidence which demonstrate no error of law.

The substantive challenge under human rights law

66.
Most of the argument before both the FTT and this Tribunal centred on the preliminary issue. So far as the substantive appeal was concerned, the appellant submitted his deportation to Jamaica was unlawful under section 6 of the Human Rights Act 1998 as it breached his Article 8 ECHR right to respect for his family and private life. The legal framework for resolving such a claim is well-established. Given the appellant's 3-year sentence of imprisonment, the Secretary of State was required by section 32 of the 2007 Act to deport him as a "foreign criminal" unless one of the exceptions in section 33 applied. The appellant relied on Exception 1, namely that deportation involved a breach of his Convention rights (section 33(2)(a)). That being so, Part 5A of the 2002 Act applies (namely sections 117A-117D, inserted by section 19 of the Immigration Act 2014). In the present context two provisions from Part 5A are particularly relevant.

67.
The first is that the appellant had been an overstayer in the UK since 26 June 2002. Section 117B(4) is relevant as it provides that little weight should be given to a person's private life or a relationship formed with a qualifying partner (and it was not in dispute that the appellant's partner met that definition: see section 117D(1)) that is established at a time when the person concerned is in the UK unlawfully.

68.
The second is the statutory directive on the approach to foreign criminals as enshrined in section 117C, the material parts of which read as follows:

"Article 8: additional considerations in cases involving foreign criminals

117C – (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 [omitted as not relevant]

(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."

69.
In addition, paragraphs A398 to 399 of the Immigration Rules, which deal further with consideration of deportation and Article 8 ECHR, also fell for consideration. Realistically the only live issue here was whether it would be "unduly harsh" for the appellant's daughter to remain in the UK without him (see paragraph 399(a)). Furthermore, as the FTT recognised, section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to ensure that her immigration functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK, in which context the best interests of a British child are a primary consideration (see ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166).

70.
The FTT dealt with the substantive appeal in meticulous detail. It reviewed the appellant's evidence (paragraphs [231]-[254]), summarised the parties' submissions (paragraphs [255]-[270]), set out the legal framework with copious reference to statutory authority (paragraphs [271]-[274]) and then analysed the case under the Immigration Rules (paragraphs [275]-[287]) and by reference to the strength of the public interest (paragraphs [288]-[297]) before addressing whether the effect of the appellant's deportation was unduly harsh on his daughter (paragraphs [298]-[306]). The FTT concluded that none of the exceptions under the Immigration Rules applied, before also considering whether the appellant could benefit from any other Part 5A issues. In summary, the FTT found that the strength of the public interest was very strong and was sufficient to outweigh the private and family life rights which were adversely affected.

71.
The appellant's grounds of appeal to the Upper Tribunal on the substantive human rights issues, as set out in the application for permission to appeal, are six-fold. They are that the FTT was wrong to conclude that (i) the appellant's fear of harm from Jamaican criminal gangs was irrelevant; (ii) the appellant's residence as a minor in the UK was a "neutral" factor; (iii) it would be "unduly harsh" for the appellant's child to live in the UK without him; (iv) the public interest in the appellant's deportation remained strong; (v) the appellant's deportation had not had an "unduly harsh" impact on his daughter; and (vi) contact between the appellant and his daughter could be maintained by phone from Jamaica.

72.
The fundamental difficulty with all these grounds of appeal is that they amount to a thinly disguised attempt to re-argue the factual merits of the substantive human rights appeal that was properly determined by the FTT. It is axiomatic that the weight to be attached to individual items of evidence is a question of fact for the first instance tribunal to determine. The only one of these grounds which comes remotely close to a potential error of law argument is ground (iii), where it is said that the FTT erred in relying solely on the Court of Appeal's judgment in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617 in determining whether the appellant's deportation would be unduly harsh on his daughter. Instead, Mr de Mello submits that the FTT should have considered R

(MA (Pakistan) v Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705; [2016] 1 WLR 5093). This argument is unpersuasive, not least as MM (Uganda) concerned deportation of a foreign criminal while R (MA (Pakistan) did not. In addition, the central issue in R (MA (Pakistan) was whether it was reasonable to expect the child in question to leave the UK. In the present case, on the other hand, the FTT had expressly rejected the respondent's argument that it was reasonable to expect the appellant's partner and daughter to join him in Jamaica (see paragraph [298]).

73.
We have not overlooked the fact that the case law on the meaning of "unduly harsh" has moved on. In October 2018, and so after the FTT hearing, the Supreme Court delivered its judgment in KO (Nigeria) et al v Secretary of State for the Home Department [2018] UKSC 53; [2018] 1 WLR 5273. The Supreme Court, in effect clarifying the law with retrospective effect, held that the statutory test does not bring into consideration the seriousness of the appellant's offending when considering whether the effect of deportation was unduly harsh on his child (see Lord Carnwath's judgment at paragraphs [23] and [42]). However, notwithstanding the FTT decided this appeal before KO (Nigeria) , we are satisfied that the FTT's approach did not result in any material error of law. The FTT's finding that the effect of the appellant's deportation was not unduly harsh on his daughter was plainly based on a close and careful analysis of the facts of the case, quite independent of any consideration of the seriousness of the appellant's offending (see paragraphs [299]-[305]). Mr de Mello undoubtedly takes issue with both the details and the outcome of the FTT's analysis, but that is at root a disagreement over the factual findings. In short, we agree with Mr Kovats's submission that the FTT was entitled to make the findings of fact it did on the evidence before it as to the substantive human rights issues.

Decision

74.
We uphold the decision of the First-tier Tribunal on the basis set out above and dismiss the appellant's appeal. However, whilst doing so it would be remiss of us not to put on record our appreciation for the considerable assistance we received from Mr de Mello and Mr Muman, and their instructing solicitors, acting pro bono .

Signed

Upper Tribunal Judge Wikeley

8 March 2019