Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07465/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 August 2019	**On 8 October 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ES
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr R Layne, Counsel instructed by Ineyab Solicitors
For the Respondent:	Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me following a hearing before Knowles J and me on 7 February 2019 at which we found that the decision of the First-tier Tribunal ("FtT") promulgated on 14 November 2018 was vitiated by error of law requiring its decision to be set aside, with a re-making of the decision to take place in the Upper Tribunal.

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2. In order to put this decision on the re-making into context, and to explain the background to the appeal, I quote from certain passages of the earlier (error of law) decision as follows:

> "1. This is an appeal with the permission of First-tier Tribunal Judge Lambert against a decision of the First-tier Tribunal (FtT) promulgated on 14 November 2018 dismissing the Appellant's appeal against the Secretary of State's decision to deport him pursuant to s 32(5) of the UK Borders Act 2007. On 21 July 2017 a decision was taken to refuse the Appellant's protection and human rights claims. The Appellant is a national of Jamaica born in 1973.
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> 4. The Appellant entered the UK as a visitor on 29 December 1999. He made further applications for leave to remain all of which were refused until he was served with a notice of removal on 28 October 2008. An appeal was lodged against a decision to refuse an unmarried partner application. This was allowed and the Appellant was granted leave to remain until 29 April 2012. Further leave was granted because of the birth of a British child to the Appellant. That expired on 14 August 2016. He was subsequently detained pending a criminal prosecution which led to deportation action being taken. On 23 November 2015 a deportation order was signed against the appellant under another name but also including his real name. An emergency travel document was issued on 1 April 2016. In the meanwhile on 21 March 2016 further representations were received requesting reconsideration. These were treated as an application to revoke the deportation order and was refused. Removal directions were made but subsequently deferred because a judicial review application was lodged, and further submissions were made. Judicial Review was refused. Further directions were set. Further removal directions were again deferred because of a judicial review application which was refused in due course. Further removal directions were set, whereupon the Appellant claimed asylum, leading once again to cancellation of the removal directions. The asylum claim was refused and certified. Finally, on 21 July 2017 the decision under appeal was made. It can be summarised as follows.
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> 5. A notice of decision set out the Appellant's immigration history and gave as a reason for making the deportation order, the Appellant's conviction at the Crown Court sitting at Wood Green on 5 May 2015 for assault occasioning actual bodily harm, for which he was sentenced to two years and nine months' imprisonment. The assault was a sustained attack on his former partner and included kicks to the face whilst she was on the ground. The decision refers to earlier convictions. A certificate was issued under s72 of the 2002 Act (the 'serious criminal' provisions which apply for the purpose of the construction and application of Article 33(2) of the Refugee Convention).
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> 6. The Appellant's asylum claim was based on his alleged fear of return to Jamaica because of threats from gang members. The claim was refused. Even if the Appellant's claim was taken at face value, the Secretary of

State was of the opinion that there would be sufficiency of protection for the Appellant in Jamaica and also the option of internal relocation.

7. As regards the Article 8 claim based on family life in the UK, the Appellant's three children (including one step-child) were taken into account. The best interests of the three children were considered by the Respondent to be outweighed by the public interest in removing the Appellant from the UK in order to protect the public. It was not accepted that the Appellant had a genuine parental relationship with one of the children, [T2], and in respect of the Appellant's youngest child, it was not considered unreasonable for the child and the child's mother to relocate to Jamaica.

8. The Secretary of State also did not accept that the Appellant had a genuine, subsisting parental relationship with the child [T1]. It was not accepted that it would be unduly harsh for [T1] to remain in the UK if the Appellant were to be deported because she would remain in her mother's care, who is her primary carer.

9. It was also not accepted that the Appellant had a genuine parental relationship with his step-child Taija. It was not considered unduly harsh for Taija to remain in the UK with her mother if the Appellant were to be deported.

10. The Appellant also claimed to have a family life in the UK with his partner, AC. The Respondent accepted that she is a British citizen, naturalised on 4 September 2009, but it was not accepted that the Appellant has a genuine and subsisting relationship with her. It was further not accepted however that it would be unduly harsh for AC to live in Jamaica with the Appellant should she choose to do so, nor would it be unduly harsh for her to remain in the UK if the Appellant were to be deported. As to private life, it was not accepted that the Appellant was socially and culturally integrated in the UK and, moreover, the Appellant presented a serious risk of harm to the public because of his previous offending. The Appellant also has a poor immigration history. It was not accepted there would be very significant obstacles to the Appellant's reintegration in Jamaica. Overall, there were no very compelling circumstances outweighing the public interest in having the Appellant deported."

3. Certain aspects of the FtT's decision are also set out in the error of law decision. Again, I quote as follows:

"13. At [32] the judge said that there was no dispute about the Appellant's liability to deportation on the basis of his criminal record. His convictions include: possession of a bladed article; supplying Class A drugs for which he received a sentence of three years imprisonment; and assault occasioning actual bodily harm for which he received 33 months and was made subject to a restraining order. The victim was a partner of the Appellant, a Ms L. Among other things, she was kicked in the face whilst on the floor and suffered cuts and bruises.

14. At [33] the judge referred to evidence of violence towards AC. He had been assessed as showing a high risk of violence towards intimate

partners. At [34] the judge found that the Appellant was not remorseful, despite his proclamations to the contrary. He found these were a means to attempt to stay in the UK and avoid deportation. He found that there is a very strong public interest in removing the Appellant in order to protect others with whom the Appellant forms relationships.

15. At [36] the judge said that a certificate had been issued under s 72 of the 2002 Act and the Appellant was presumed to have been convicted of a particularly serious crime and to constitute a danger to the community because he had been sentenced to imprisonment for more than two years. He said that the Appellant had failed to adduce sufficient evidence to rebut the presumption. He found that the Appellant constituted a danger to the public or that section of it with whom he forms a relationship. The judge therefore upheld the certificate. At [44] the judge reiterated his finding that the Appellant is capable of using violence to get his way.

16. At [37] the judge found that the Appellant had failed to establish any real risk of persecution.

17. At [38] and [39] the judge said that the thrust of the Appellant's case was Article 8 and the effect on his children and that [399] of the Rules applied because of the length of the Appellant's sentence.

18. At [40] the judge found that none of the Appellant's children would accompany him to Jamaica and so the issue was whether he had a genuine and subsisting parental relationship with a child under the age of 18 in the UK who is either a British citizen or who has lived continuously in the UK for at least seven years, and whether it would be unduly harsh for the child to remain the UK without the Appellant.

19. At [42] the judge referred to s 117C(4) of the 2014 Act. Section 117 provides that the deportation of foreign criminals is in the public interest, and that public interest requires deportation unless an exception applies. One of those exceptions is where there is a genuine and subsisting relationship with a qualifying child and the effect of deportation on the child would be unduly harsh.

20. At [43] the judge said that the Appellant came to the UK in 1999 aged 26. He said that he had not been lawfully resident in the UK for most of his life and so s 117C(4) did not apply.

21. Between [45] and [56] the judge considered the evidence concerning the Appellant's children. At [49] he referred to the evidence concerning [T^1], his daughter (born in 2008) and [T^2], his son (born in 2015). The Appellant's evidence was that he had a close, genuine and subsisting relationship with his children. His daughter suffers from sickle cell disease. She is also currently seeing an NHS psychologist. He said he took her to school and to medical appointments. He also said that he took his son to nursery and he sees his children every other weekend.

22. At [50] the judge referred to medical evidence from the North Middlesex University Hospital and [T^1]'s consultant haematologist. She wrote on 2 October 2018 to support the Appellant's application to stay in the UK on the basis that he provides care and support for his daughter, whose health worsened when he was previously removed.

23. At [51] he referred to evidence from a child and adolescent psychologist, who reported her understanding that it was the medical team's opinion that it would be 'highly detrimental' to [T1] if the Appellant were to be deported, though it was too early to make any assessment. The psychologist said [T1]'s additional symptoms could be caused by anxiety related to her worry that her father would be removed from the family. As to that, the judge noted that although the Appellant had contact and played a part in his children's lives, he was not part of the same nuclear family and was not living under the same roof.

24. At [54]-[56] and [58] the judge said this:

> '54. The children remain in the full-time care of their mother, they are in education and have access to health care. All of that will continue.
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> 55. The extent to which the appellant's deportation will have a detrimental effect on [T1] is hard to gauge. It is obvious that it is contrary to her wishes that her father be deported, and there may be some deterioration in her health as regards anxiety and other symptoms, though the sickle cell disease will continue whether or not the appellant is in the country.
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> 56. Given the circumstances of the assault in 2015, one cannot help but wonder whether the appellant has much genuine concern for his children or whether he is merely using them as a means of enhancing his case. I remain cautious about that. I take account of the submission made by Ms Ferguson that the best interests of the children are not merely to be protected but also to be promoted. They are entitled to a relationship going forward which will not happen if the appellant is deported.
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> 58. The welfare of the children is a primary but not a paramount consideration. I conclude that notwithstanding the distress caused to the appellant's daughter in particular, the public interest in this case requires deportation. The public interest outweighs the impact on the children.'"

4. The following are the reasons for our having found an error of law requiring the FtT's decision to be set aside:

> "31. We agree that the FtT's decision is vitiated by an error of law. The judge failed to grapple with, or make any findings in relation to, the relevant factual questions under ss 117C(5) and [399(a)], namely, whether the Appellant had a genuine and subsisting relationship with [T1] in particular, and whether the impact of the Appellant's deportation on his children and [T1] especially would be unduly harsh. There was undisputed medical evidence about her physical and mental health and there was evidence that the Appellant's deportation would cause a deterioration in her health. Assuming the judge was satisfied as to the first question, there was then a need for the judge to carefully evaluate that evidence; make appropriate findings of fact; and then assess by

reference to the relevant case law whether the test of 'undue harshness' was met. As to the test, in *KO (Nigeria) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2018] 1 WLR 5273, [23], Lord Carnwath (with whom the other justices agreed) said:

> "23. On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."

32. Because the FtT did not carry out this exercise, its decision is vitiated by error of law and cannot stand.

33. Accordingly, we set aside the decision of the FtT. We do not consider that the appeal should be remitted to the First-tier Tribunal for re-hearing, having regard to paragraph 7.2 of the Senior President's Practice Statement. The decision will be re-made in the Upper Tribunal after a further hearing. To that end, the parties are to note the directions below.

34. As regards preserved findings, our provisional view, subject to the submissions of the parties, is that those findings of fact that are not vitiated by error of law are to be preserved."

5. The scope of the re-making is therefore clear from [31] of the error of law decision as set out above.

Submissions

6. The parties agreed that all findings of fact made by the FtT were preserved.

7. Ms Isherwood submitted that the appeal should be dismissed. The appellant did not live with his children, as was clear from [14]-[16] of the FtT's decision. It is a preserved finding that he has no income, but contrary to that the evidence from the school was that the appellant pays for lunches and trips for [T1]. Therefore, it must be someone else who is paying for those things. The children do not need him financially.

8. There was no additional evidence with reference to the other children. All the evidence in relation to the appeal therefore focuses on [T1].

9. It was accepted that [T1] has a disability. However, even should she have a health 'crisis', the fact is that he is not with her all the time. They obviously manage

without him. The evidence from the hospital shows that her mother is her primary carer.

10. The hospital letter dated 2 October 2018 states that she has been kept away from school (because of headaches due to her illness), yet the evidence from the school (in the letter dated 28 November 2017) is that she has 100 per cent attendance. What is said in the medical report would have come from the appellant. Likewise, in terms of the evidence that her headaches started when the appellant was remanded in custody. The letter from the hospital dated 12 October 2018 to the effect that the appellant is "seemingly involved in her care" is unsupported by other evidence. In addition, the letter dated 14 February 2019 from the hospital is not a full assessment. It does not show what the up-to-date position is. Her mother did not attend the assessment process and the evidence does not establish that they are not able to cope if he is deported. [T1] would continue to have the support of the hospital.

11. Ms Isherwood accepted however, that the appellant does have a genuine parental relationship with [T1], but such was not accepted in relation to the other children. There were, nevertheless, only four photographs of the appellant and [T1], and those were all taken at the hospital. There was no evidence from [T1]'s mother about her particular circumstances.

12. Ms Isherwood relied on *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 123 (IAC), in particular at [17] in terms of the meaning of unduly harsh. It was submitted that the evidence fell short of establishing undue harshness in relation to the appellant's daughter [T1].

13. Mr Layne relied on the skeleton argument. It was submitted on behalf of the appellant that the test of undue harshness was met in relation to [T1]. It was specifically said that she was the focus for the argument on behalf of the appellant and that the appeal was not advanced in terms of his relationship with the other children.

14. As to the meaning of 'unduly harsh', Mr Layne relied on *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273, accepting that the phrase means more than 'severe'.

15. [T1] has a serious medical condition and needs long term hospital care. I was referred to reports from North Middlesex University hospital dated 1 and 12 October 2018. Those letters refer to the appellant's involvement in her life. The most recent evidence is in the letter from the hospital dated 14 February 2019. It shows his attendance at her hospital appointments.

16. The evidence is that stress has an effect on her condition. It is likely that there would be another crisis if he is removed. That would mean that the burden would all fall on her mother, AC, who has two jobs as revealed in the evidence recorded in the FtT's decision at [15].

Assessment and Conclusions

17. The legislative framework is set out in the error of law decision but I repeat it here.

18. Paragraph 398 of the Immigration Rules ("the Rules") provides:

"Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

…

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; …"

19. Paragraph 399 provides:

"399. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

20. Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides:

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

21. The only basis upon which the appeal is advanced is in terms of the appellant's relationship with one of his children, [T[1]]. It is not argued that he is able to succeed in his appeal in terms of paragraph 399A of the Rules/Exception 1 of s. 117C of the 2002 Act (lawfully resident in the UK for most of his life; socially and culturally integrated; very significant obstacles to integration on return). No submissions were advanced in terms of the cumulative effect of the appellant meeting, in part, any provisions of the Rules or the 2002 Act, either in relation to him personally or with reference to any other relationships with a child or partner.

22. That the appellant has a genuine and subsisting relationship with [T[1]] is accepted on behalf of the respondent. She is a British citizen, as is acknowledged in the respondent's decision dated 21 July 2017. She was born on 26 March 2008 and is now, therefore, 11 years of age.

23. On behalf of the appellant it was specifically said that the appeal was advanced only in terms of the appellant's relationship with [T[1]], as distinct from any other of his children (or step-child). That was the position as stated at the hearing before me, which I take to be the up-to-date basis of the appeal notwithstanding that the skeleton argument (not drafted by Mr Layne) suggests that the appellant relies on his relationship with his *children*. The skeleton argument makes it clear that he does not rely on his relationship with [T[1]]'s mother, AC, who did not provide any evidence to the FtT and no evidence from her was adduced before me.

24. It is not said on behalf of the respondent that [T1] could be expected to leave the UK and return to Jamaica with the appellant. For many obvious reasons that would not be appropriate in this case.

25. Although the decision of the FtT has been set aside, the evidence that was before it is nevertheless part of the background and I therefore refer to certain aspects of it.

26. Before the FtT the appellant gave evidence that he lived with an aunt. He was not allowed to be bailed to AC's address, because of a letter from social services saying that the appellant had thrown a stone at AC's house, which he denied.

27. The appellant gave evidence before the FtT of his taking the children to school and of how often he sees them. He said that AC had two jobs, the details of which he provided. The appellant gave evidence of his remorse for his offending.

28. His evidence was that AC cannot look after the children alone and has no one she can rely on, although she has brothers, sisters and her mother living in the UK. However, she gets depressed and drinks. The appellant's aunt also has a young child but she would not assist the appellant. His aunts and uncles would be willing to assist him but he has not asked whether or not they would help AC if he returns to Jamaica.

29. [T1] was said by the appellant to be seeing a psychiatrist because she was afraid that she would not see him again and was becoming stressed about it. He said that she would be sick again if he is deported.

30. The parties agreed that the findings of fact made by the FtT were to stand. The most significant of those findings can be summarised as follows:

    - Although the appellant had expressed remorse for his offending, the FtJ did not accept that he feels any remorse.
    - The appellant had failed to rebut the presumptions under section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (conviction for particularly serious crime, and danger to the community).
    - The appellant came to the UK in 1999 at the age of 26. He has not been lawfully resident in the UK for most of his life.
    - [T1] suffers from sickle cell disease.
    - The children remain in the full-time care of their mother, are in education and have access to health care. All of that would continue.

31. There is no dispute but that [T1] suffers from a serious medical condition. The most recent medical evidence put before me comes from letters from North Middlesex University Hospital dated 10 January, 18 March, 8 July and 14 February 2019. The first three deal with appointment dates and are from the Child & Adolescent Psychiatry Paediatric Liaison Team at the hospital.

32. The authors of the letter/report dated 14 February 2019 are Rachel Bull (Child and Adolescent Psychotherapist) and Dr Lucy Parkin (Clinical Psychologist). The letter refers to her diagnosis of Sickle Cell Disease and states that she also suffers from pica (an eating disorder), enuresis and headaches. It also states that Dr Yardumian (Consultant Haematologist) felt that her symptoms could be exacerbated due to worry that the appellant may soon be deported.

33. The letter goes on to state that Rachel Bull initially met with [T1] and the appellant for an assessment. There were nine appointments, four with [T1] alone, three with the appellant alone, and two for both of them. AC was also invited to attend but did not do so. It then states that due to the complex nature of the family situation and presenting difficulties, the team decision was to have two clinicians; one to support [T1] and one to support the appellant.

34. After setting out the proposed care plan the letter says that [T1] "seems to be very close to her father who is very involved in her day to day care, as her mother is currently working long hours." It says that the team have not met AC as she is unable to attend and wishes to leave responsibility for [T1]'s hospital appointments to the appellant. The letter states that since the beginning of their work with [T1] the appellant has accompanied her to all her appointments, that he is committed to the work and that they are excellent attenders. It goes on to state that he is keen for any support that is available for [T1] and is willing to engage in the parent work.

35. In relation to the appellant's proposed deportation, it says that understandably there is anxiety in the family in relation to that issue. The appellant seems to have told the team that he fears for his life if returned to Jamaica (although the FtT rejected that claim). He also told the team that he does his best to protect [T1] from his concerns but "it is well known that children are attuned to such worries within a family and are inevitably affected by them." It states that [T1] has also been affected by the times when the appellant has been away from the family (such as when detained) and that she has real anxiety about him being away again. Given that he is currently spending a lot of time with her and providing a lot of her daily care, the prospect of his leaving again is understandably distressing to her.

36. The letter further states that, as is common in children with Sickle Cell Disease, [T1] has complex feelings about having the condition to manage, including fears about her health and life expectancy, and that stress can have an impact on physical health. She required hospital admission for a Sickle Cell Disease related crisis (severe pain caused by Sickle Cell Disease) immediately following a recent negative decision by the court, suggesting that her levels of stress and worry are interacting with her physical health condition.

37. Finally, it states that her worries about the appellant's situation are extremely hard for her to manage on top of her physical health condition with its own psychological impact. She needs on-going psychological support to help her to manage all of those issues. It concludes by stating that it is in [T1]'s best interests to

have as much consistency of care as possible and for the appellant to remain in her life.

38. A letter from [T[1]]'s Head of School dated 13 March 2019, apart from speaking very highly of [T[1]], states that before she started in year 6 the appellant brought her to school and collected her, and has been paying for dinners and school trips. It goes on to state that the whole family attends school events (plays, concerts and fayres) and make a good contribution to the school community. Finally, it states that the author of the letter, and [T[1]]'s teachers, feel that it would be "unduly harsh" on her if the appellant had to leave the UK, and that [T[1]] had expressed concern about that and has been more distracted "recently". It is something that worries her and is beginning to impact on her education.

39. The error of law decision quotes from *KO (Nigeria)* as to the meaning of "unduly harsh". It is also worth emphasising that at [23] in terms of an assessment of undue harshness it states that:

> "What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence."

40. Further, the Supreme Court approved the guidance given by the Upper Tribunal on the meaning of unduly harsh. Thus at [27] there is the following:

> "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
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> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.""

41. As is clear from the Supreme Court's reasoning overall, undue harshness in relation to separation of parent and child in a deportation case, does not involve an assessment of the seriousness of the offending (except to the limited extent explained). It relates only to the effect on the child in question.

42. Although on behalf of the respondent it was pointed out that the appellant does not live with [T[1]], it was nevertheless accepted that he has a genuine parental relationship with her. So much is in any event clear from the evidence from the hospital, and to a lesser extent from the school.

43. It was said on behalf of the respondent in submissions that the school letter(s) states that the appellant pays for school dinners and trips. However, he has no income and therefore someone else must be making those payments, it is said. That

submission is probably correct but the fact of the subsisting relationship is nevertheless evident.

44. The letter from [T1], which was before the FtT, is undated. It states that she was sickly every time he was taken away and was not doing well at school. It states that she is happier now that he is back, not so sickly, and that he takes her to school and to the doctor. She says that she does not want him to be taken away again.

45. That it is a close relationship is also evident from the medical evidence. The appellant is clearly closely involved with [T1]'s treatment. Her worries about his being deported are also clearly evidenced. The medical evidence is to the effect that those worries, quite apart from [T1]'s very understandable concerns about her own health, affect her health adversely.

46. I am satisfied that [T1]'s best interests lie in her maintaining the relationship that she presently has with the appellant in terms of their contact and the support he provides in relation to her hospital treatment. In other words, her best interests lie in his remaining in the UK, because of the close contact she presently has with him and because of the emotional and practical support that he presently provides.

47. However, it is clear from authority, that the finding of where a child's best interests lie is not determinative of an appeal, although it is a primary consideration.

48. In terms of the effect on [T1] of the appellant's removal, on the one hand he does not live with her. The evidence does not demonstrate that he even sees her on a daily basis. In that context I note that the most recent letter from the school dated 13 March 2019, states that before she started in year 6 "this September" he brought her to school and collected her. That is also what is said in the letter dated 26 September 2018 that was before the FtT, so there appears to be an element of 'cut and paste' in the recent letter. The letter dated 1 December 2017 states that the appellant brings his daughter to and from school every day, but it does not say which daughter, and the letter dated 28 November 2017 refers to his bringing his daughter Kelise to and from school (although also speaks about his interest in [T1]'s progress).

49. On the other hand, that he has a close involvement with [T1]'s treatment so far as hospital appointments are concerned is, as already indicated, apparent. Although the school evidence is not clear as to how closely he is involved with her in terms of her education, it does suggest that he has some involvement in that context.

50. Thus, it is reasonable to conclude that the effect that his removal would have on [T1] would be less than in the case of a parent who lives with a child and sees them every day, but more than in the case of a child who does not have the health conditions to contend with that [T1] does. In addition, the evidence suggests that it is the appellant, rather than [T1]'s mother, who takes responsibility for her treatment, *vis-à-vis* the hospital.

51. I accept that the appellant's removal is likely to have a detrimental effect on [T1], not only emotionally, which one would expect, but more significantly in terms of

her health. The evidence does tend to show that previously when separated because of the appellant's offending, that has resulted in deterioration in her health, related to her Sickle Cell Disease.

52. However, the evidence does not establish that without the appellant [T1] would not be able to receive the treatment that she needs, or is likely to need if they are separated, or with regard to attendance at hospital appointments. There is no evidence from AC to that effect, albeit that relatively recently historically she has relied on the appellant in relation to hospital appointments. There is evidence from the appellant about AC having to look after her other children and her own personal difficulties, but no evidence from her about her situation.

53. I note that the evidence before the FtT was that AC has two jobs but that does not mean, in the absence of evidence, that she would not be able to take [T1] to her hospital appointments or that she would not be able to enlist the support of someone else to help her in this respect. It has not been suggested on behalf of the appellant that [T1] would not be able to receive appropriate treatment if the appellant was removed. I also bear in mind the evidence from the school to the effect that the whole family are involved in school events. That suggests very clearly that AC would make appropriate arrangements for [T1] to be able to attend her appointments.

54. In addition, it is important to take into account that the s.72 certificate (that the appellant constitutes a danger to the community of the UK) was upheld by the FtT. That is a preserved finding. He has a record of serious criminal offending and the upholding of the s.72 certificate necessarily means that there is a risk of reoffending.

55. Quite apart from the s.72 certificate, as the FtT pointed out, there are emails from social workers at Children and Young People's Services dated July 2016, at AQ1 and AQ2 of the respondent's bundle, in relation to the risk of domestic violence that the appellant was said at that time to pose. The risks were said to involve not only women but children (with the OASys report at 6.10 relating the latter risk in terms of children to their witnessing physical or emotional abuse of their mothers by the appellant).

56. At [13]-[15] of the error of law decision (quoted above at [3]) there is reference to aspects of the FtT's decision which summarise the appellant's offending and the risk that he poses. The OASys report is dated 22 September 2016 but it relates to an assessment completed on 8 May 2015. It states that the appellant represented a medium risk of serious harm to children in the community and a high risk of serious harm to known adults.

57. The risk of reoffending is said in the OASys report to be low (19% with regard to violent offending in year 2 after release), and I bear in mind that there is no evidence that the appellant has committed any offences since his release from detention which, according to the appellant's witness statement dated 12 October 2018, was on 5 October 2017.

58. Therefore, it is not as if the evidence points unequivocally to the appellant remaining a 'constant' in [T[1]]'s life during her childhood without any reason to think that she might again be separated from him because of his offending. He has been found to represent a risk of serious harm, and the potential for him to reoffend is evident. Those are matters that are relevant to a consideration of whether it would be unduly harsh for [T[1]] to be separated from him, even accepting that a period of separation if he were to be imprisoned would be very different in nature and extent to separation resulting from deportation.

59. It is inevitable, in the light of the evidence, that [T[1]] would be emotionally affected by the appellant's deportation. There is also the risk, to which I have already referred, that her health would also be adversely affected. However, considering all the circumstances, applying the guidance in *MK (Sierra Leone)* as approved in *KO (Nigeria)*, I am not satisfied that the effect of the appellant's deportation would be unduly harsh. [T[1]] would be able to receive the treatment that she needs without the appellant being in the UK. She would continue to live with her mother who would be able to provide her with emotional support, and who would ensure that she receives appropriate treatment, including in the event of a Sickle Cell Crisis should that occur because of separation from the appellant. Her education would continue.

60. The conclusion that it would not be unduly harsh for her to be separated from the appellant by reason of his deportation is the same in terms of paragraph 399 of the Rules and s.117C(5).

61. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at [25]-[27] it was decided that what was described as the "fall back protection" of "very compelling circumstances" should apply equally to those sentenced to periods of imprisonment of less than four years as it does to those sentenced to a period of imprisonment of at least four years. Thus, s.117C must be read in that way.

62. Accordingly, I have considered whether there are very compelling circumstances, over and above those described in Exception 2 (the 'unduly harsh' provision). None have been put before me. No submissions in that respect were advanced, and I cannot see that within a consideration of very compelling circumstances there is any matter that is not already taken into account in my consideration of the issue of undue harshness in this case.

63. In all these circumstances, the appeal is dismissed.

Decision

64. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision by dismissing the appeal.

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

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

Upper Tribunal Judge Kopieczek 4/10/19