Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10396/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Tuesday 18 May 2021	**On 15 June 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR ROBERT CHOOMOLA

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Reid, Counsel instructed by Signature Law LLP
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 22 January 2021, I found an error of law in the decision of First-tier Tribunal Judge L Nolan, itself promulgated on 8 April 2020, allowing the Appellant's appeal against the Respondent's decision dated 30 May 2019 refusing his human rights claims in the context of a decision to deport the Appellant to Zimbabwe. I therefore set aside Judge Nolan's decision and gave directions for the re-making of the decision by way of a resumed hearing. I gave directions permitting

the filing of further evidence and for oral evidence to be given at the hearing. My error of law decision is appended hereto for ease of reference.

2. On 13 May 2021, the Appellant filed a small, supplementary bundle of evidence. Although that was filed outside the time limits in my directions, I admitted that evidence with no objection from Ms Everett. However, since Ms Everett had not received that bundle prior to the hearing, it was sent to her electronically and I permitted her a short adjournment to read what was a short bundle. In addition to the supplementary bundle to which I refer below as [ABS/xx], I also had before me the original Appellant's bundle (to which I refer below as [AB/xx]), a core bundle of documents relating to the appeal and the Respondent's bundle. I have read the documents but refer to them only so far as necessary to support my reasoning and conclusions.

3. The hearing was conducted via Skype for Business. There were no major technical issues affecting the conduct of the hearing.

4. I heard oral evidence from the Appellant, his mother, Shaluza Malunga, and his ex-partner, Chelsea Cooley. The Appellant's stepfather, Alistair Taylor, was also available to give evidence but Ms Everett indicated that she had no questions for him. There was one point of clarification /amendment made to his statement but that did not entail him giving oral evidence. The Appellant's sister, Sharon, was also present at the hearing but had not provided a statement and she attended only to provide support to her brother. I have taken into account all the evidence I heard but refer only to that which is relevant to my reasoning and conclusions.

LEGAL FRAMEWORK

5. The legal framework which applies in this appeal and passages of case-law which are relevant to that framework are set out at [11] to [13] of my error of law decision.

6. In summary, I am required first to consider whether the Appellant falls into either or both of the two exceptions to deportation under paragraph 399A of the Immigration Rules ("Paragraph 399A")/section 117C(4) Nationality, Immigration and Asylum Act 2002 ("Section 117C(4)") and/or paragraph 399 of the Immigration Rules ("Paragraph 399")/ section 117C(5) Nationality, Immigration and Asylum Act 2002 ("Section 117C(5)"). Paragraph 399A and Section 117C(4) are concerned with the impact of deportation on the Appellant's private life. Paragraph 399 and Section 117C(5) are concerned with the Appellant's family life. In the context of this appeal, that is concerned with the relationship between the Appellant and his daughter ([R]). His other family relationships with his mother, stepfather, other family members and his ex-partner are not relevant to the family life exception but may be relevant to his private life (in terms of integration and obstacles to deportation) and are relevant if I reach the stage of an assessment outside the Immigration Rules ("the Rules").

7. If I find that neither exception is met, I am required to go on to consider whether there are "very compelling circumstances over and above" those exceptions. That obligation arises in practice under paragraph 398 of the Rules ("Paragraph 398")/

section 117C(6) Nationality, Immigration and Asylum Act 2002 ("Section 117C(6)"). If I carry out that exercise, I may still take into account factors which fall within the two exceptions which I have identified. At this stage, though, I am required to balance the impact on the Appellant's private and family life against the public interest which includes, most importantly, in this case the Appellant's criminal offending. The public interest involves a consideration not only of that past offending and the risk which the Appellant now poses but also such factors as deterrence of others by the enforcement of deportation against foreign national offenders.

8. I have to have regard to the impact of deportation on [R], the Appellant's young daughter through the lens of what is in her best interests. Those best interests are a primary although not a paramount consideration. Although they are a primary consideration, they are capable of being outweighed by the public interest where that is appropriate.

9. When dealing with the test under Paragraph 399 and Section 117C(5) and the issue whether the deportation of the Appellant would have an unduly harsh impact on [R] (which incorporates what is in her best interests), I have regard to what is said by the Court of Appeal in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 ("HA (Iraq)"). A summary of the test which applies in that regard is to be found at [39] to [57] of the judgment informed also by the comments of the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)"). The salient points made by the Court are encapsulated in the below passages:

> "'THE MEANING OF UNDULY HARSH'
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> 39. Both Appellants contend that the effect of their deportation on their children would be 'unduly harsh', within the meaning of section 117C (5) – i.e. Exception 2 – and paragraph 399 (a) of the Rules. There is an issue before us about the height of the threshold which that phrase sets. The meaning of 'unduly harsh' was considered in *KO (Nigeria)* …
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> 40. … It is important to bear in mind, and is perhaps rather unfortunate for our purposes, that the actual issue in *KO (Nigeria)* was a very specific one, namely whether the word "unduly" referred back to sub-section (2) of section 117C and thus required what Lord Carnwath described at para. 20 of his judgment as "balancing of the relative seriousness of the offence" – "the relative seriousness issue" … Although in the course of his discussion of that issue he does also express a view as to the height of the threshold which the phrase "unduly harsh" connotes, that is not his primary focus.
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> …
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> 42. … Lord Carnwath considers the language of section 117C, and more particularly sub-section (5), as regards the relative seriousness issue … He continues, at para. 23:
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> > 'On the other hand, the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B (6), taking account of the public interest in the deportation of foreign

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

That is an important passage, and it is necessary to identify exactly what Lord Carnwath is and is not saying.

43. The starting point is that the question to which the reasoning is directed is whether the word 'unduly' imports a requirement to consider 'the severity of the parent's offence: that, as I have said, was the actual issue in the appeal. Lord Carnwath's conclusion is that it does not…. it follows that it is irrelevant whether the sentence was at the top or the bottom of the range between one year and four: as Lord Carnwath says, the only relevance of the length of the sentence is to establish whether the foreign criminal is a medium offender or not.

44. In order to establish that the word 'unduly' was not directed to the relative seriousness issue it was necessary for Lord Carnwath to say to what it was in fact directed. That is what he does in the first part of the paragraph. The effect of what he says is that 'unduly' is directed to the *degree* of harshness required: some level of harshness is to be regarded as 'acceptable or justifiable' in the context of the public interest in the deportation of foreign criminals, and what 'unduly' does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not primarily on how to define the 'acceptable' level of harshness. It is true that he refers to a degree of harshness 'going beyond what would necessarily be involved for any child faced with the deportation of a parent', but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would 'necessarily' be suffered by 'any' child (indeed one can imagine unusual cases where the deportation of a parent would not be 'harsh' for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category.

45. Lord Carnwath then turns more particularly to the case of KO … The only part that is relevant for our purposes is para. 27, where he says:

> '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 … 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.'

…

50. What light do those passages shed on the meaning of 'unduly harsh' (beyond the conclusion on the relative seriousness issue)?

51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

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

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value.

54. The Appellants of course accept that Lord Carnwath said what he said in the passages to which I have referred. But they contend that it is not a complete statement of the relevant law and/or that it is capable of being misunderstood. In

their joint skeleton argument they refer to the statement in para. 23 of Lord Carnwath's judgment that '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' and continue:

> 'This statement, taken in isolation, creates the opportunity for a court or tribunal to reach a conclusion on undue harshness without due regard to the section 55 duty or the best interests of the child and without careful analysis of all relevant factors specific to the child in any particular case. Instead, such considerations risk being 'swept up' under the general conclusion that the emotional and psychological impact on the child would not be anything other than that which is ordinarily expected by the deportation of a parent ... that cannot have been the intention of the Supreme Court in *KO (Nigeria)*, which would otherwise create an unreasonably high threshold.'

…

55. … it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55 … The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test …

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

> of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.
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> 57. … Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50-53 above."

10. The main points which I take from that passage are that the threshold to be applied is a high one. It is higher than that which applies in a removals case but is not as high as that which applies when considering whether there are "very compelling circumstances over and above" the exceptions for the purposes of Section 117C(6) (although that latter test also incorporates a balance between the impact of deportation against the seriousness of the offending which is relevant to the public interest). Although the test is an "elevated" one, the consideration is of the impact on the individual child in the context of that child's relationship with the parent to be deported. That child's circumstances in the UK are also a relevant part of that consideration. There is no base standard of harshness which is to be expected due to the context of deportation. Ultimately, though, what I have to consider is whether, in the context of deportation of a foreign national offender (which is in the public interest), the impact of the deportation of the Appellant on the child has an impact which can legitimately be described on the evidence as meeting the elevated threshold of undue harshness.

11. The burden of proving the strength and extent of his private and family life and the effect of interference with that private and family life lies with the Appellant. Thereafter, it is for the Respondent to justify the necessity and proportionality of that interference in the public interest. I have to consider the position as at the date of the hearing before me.

ASSESSMENT OF THE EVIDENCE

The Appellant's Family Life with [R]

12. [R] is aged six years old. She lives with her mother, Ms Cooley. However, she has regular contact with the Appellant (including staying contact) as I will come to below.

13. I begin with the Appellant's witness statement dated 10 December 2019 at [AB/1-7] where he says the following about the separation from his daughter when he was in prison:

> "12. The separation from my daughter when I was in prison was the absolute hardest thing for me. Because I was placed in Belmarsh which was a high security prison, I did not want my daughter to be anywhere near that place and I didn't allow Chelsea to bring her to visit. I saw more violence and crime happen during my stay in prison than I probably will for the duration of my whole life. It is not an environment for a child to be in and I would have been horrified to see my daughter in a prison visiting room with me and the other criminals. It's not healthy and I hope to God she will

never have to see anything like that in her life. If she ever does it will not be because of me.

13. We never told [R] that I was in prison or arrested but I told her that I was away working. I spoke to her on the phone but that was so difficult for both of us as she was desperate to know when I was coming home, why wasn't I coming home, couldn't I come home. She was very young and just very persistent because she couldn't understand. I was desperate to see her and talk to her but it was very painful having to talk to her and try to come up with excuses as to why I couldn't come home and see her.

14. It is scary for me to think about being permanently separated from my child and I don't know what I would do without my family.

15. While I was in jail, I was very close to depression and I have never entertained those kinds of thoughts until then and I feel that being removed from the UK would be similar. I would lose everything. My music and my child are what keeps me going. I can do my music wherever I am but my daughter is based here in the UK."

14. The Appellant goes on to speak about the struggles faced by Ms Cooley coping as a single parent when he was in prison. Ms Cooley's statement dated 10 December 2019 at [AB/8-14] deals with the period of [R]'s separation from the Appellant as follows:

"17. After Robert was arrested, it had a terrible effect on [R]. She was really young but she was really close to her dad and she didn't understand why her dad had just disappeared. Her entire routine was changed overnight and at that age even a small change in routine can have massive effect. Her dad disappeared and she was just distraught. She would cry every day. Even if she calmed down in the morning when I took her to school she would come home and start crying that her dad wasn't home.

18. I never told [R] that her daddy had been arrested or gone to prison. I told her that he had been naughty and had to go away for a while. [R] is a very clever little girl and she knew something was wrong and there were enough people around her talking about 'arrest' and 'prison' that I think she knew. She asked for her daddy every single day that he was away from her.

19. When Robert came out of prison and was on bail, he didn't want to leave the house. I think he was too embarrassed about what had happened to him and he didn't want to face anyone. He was really down and just wanted to spend time with [R]. He took her to school and just spent time with her. [R] was over the moon when Rob came back and we tried to minimise the stress for her so we did tell her that her daddy would need to go away again. We told her that he would be going away again but we told her he was going on holiday.

20. She kept asking him where he had been and it took her a while for her to settle. It was really sad for me to see her getting herself upset and worried about whether her daddy would be home if I took her out anywhere. If I took her out to the shops and we left Rob at home, she [would] get really upset and constantly ask if he was going to be home when we got home. The first thing she would do as soon as she got through the door was go and find him.

21. I think that when Rob went back to prison the second time, [R] was a bit better prepared so she didn't get hysterical like she did before but she still constantly asked where he was. She became very clingy with me and she would get in with me in bed a

> lot more than she ever did before. I don't know if she was having nightmares but she built it up in her head and at one point she told me that her daddy had been hurt and that is why he had gone away. She built the situation up in her head and it was really hard to see the effect it had on her.
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> 22. While he was in prison, Robert would call home at least every 2 or 3 days and he would speak to [R] at least 3 or 4 times week. It was difficult and we started to worry whether it was the right thing for her to speak [to] her daddy on the phone but she desperately wanted to speak to her daddy. The conversations were usually really upsetting for both Rob and [R]. She would continuously [ask] when he was coming home and why he couldn't come home. She was only 3 years old but she was so persistent about where her daddy was and why he wouldn't come home. It was really upsetting for Robert as well and he would run out of excuses and ways to tell her he couldn't come home because she just couldn't understand."

15. The evidence of the Appellant and Ms Cooley is consistent as to the impact which separation of the Appellant from [R] had on her while he was in prison. It is also consistent with what they said in their oral evidence about not having told [R] about the deportation proceedings and prospect of a further separation. I was particularly struck by Ms Cooley's evidence that it might be worse for [R] to try to continue a remote relationship with her father (even though both said that they would try to do this). That is consistent with what Ms Cooley says in her statement about [R] becoming upset by telephone contact with the Appellant when he was in prison.

16. Ms Cooley also says, consistently with the Appellant's evidence, that she found it "really hard to cope" whilst the Appellant was in prison particularly because of the impact which the separation was having on their daughter. She was prescribed anti-depressants. As she accepts in her evidence, however, she did have support from her own family and from the Appellant's family. That is consistent with Mrs Malunga's evidence that she had "always helped" and "whatever happens" would continue to do so because she loves her granddaughter. The Appellant's stepfather says in his statement at [ABS/7-8] that their and the Appellant's priority is "what's best for [R]".

17. I turn then to the current contact which the Appellant has with [R]. This is dealt with in his statement dated 30 April 2021 (at [ABS/1-2]). Immediately following his separation from Ms Cooley they agreed that he would have [R] every weekend from Friday evening to Monday morning. That arrangement was disrupted by the pandemic. The Appellant's stepfather is clinically vulnerable and therefore they sought to reduce risk to him. During the first lockdown therefore, it was agreed that [R] would stay with the Appellant only every other weekend. Since July 2020, the weekly contact has resumed. Both the Appellant and Ms Cooley confirmed this arrangement and also confirmed that the Appellant takes [R] if Ms Cooley needs him to do so either because she has other commitments or "when it becomes too much for her". It was clear from Ms Cooley's oral evidence that she is keen to support the continuing relationship between the Appellant and their daughter and equally clear from the Appellant's evidence that he wishes to continue with the current arrangements.

18. As to the current relationship between the Appellant and [R], the Appellant says this in his April 2021 statement:

> "9. Since the last hearing my relationship with my daughter has only grown stronger and I cannot imagine what I would do if I was forced to leave her. I don't want my daughter to lose her father because of my mistakes and I want to be there to support my daughter and her mother as she grows up. My daughter is older now, she is talking more and understanding everything. She was always very bright but as a child gets older they have more comprehension. It would be devastating for my daughter to lose her father and for us as a family. Even though I am no longer in a relationship with her mother, we work together to raise our daughter and I need to be here to support my daughter and her mother."

19. As the Appellant lives with his mother and stepfather at the moment, it is Mrs Malunga who is probably the best placed to provide corroboratory evidence about the current relationship between the Appellant and [R]. The Appellant has recently been ill and was hospitalised (as I will come to below). Mrs Malunga says this about the relationship and [R]'s behaviour when the Appellant was in hospital and when he came out (statement dated 12 May 2021 at [ABS/3-6]):

> "13. Rob's relationship with [R] is so close and at the moment the arrangements are for him to see her every weekend. He will collect her from school on the Friday afternoon and she will stay with him until he drops her to school on the Monday morning. Even when he was sick, I collected her from school and she spent the weekend with us but she wanted to go and see Rob in the hospital. When Rob got out of hospital, he couldn't get out, he was bed bound but [R] just wanted to stay with him. I asked her 'Do you want to go out with me and aunty Helen? But she said no she wanted to stay with her father. I tried to tempt her with TV time and she came to sit with us in the lounge but after about 3 minutes she told me she 'missed daddy' and I let her go back in with him.
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> 14. I look at them together and it's so clear that it's not like she is one of those children who don't know her dad. I see how excited she is when she comes in for the weekend with him and she just wants to spend as much time with him as she can. Sometimes when he goes to drop her back at home with Chelsea, we usually check to see if he needs a lift home but he always tells me that she asked him to stay until she goes to sleep and he always does."

20. The Appellant and Ms Cooley were asked by Ms Everett how they would prepare [R] if he were deported. The Appellant said that he would have to prepare [R] for this as they had not told her about the prospect to avoid frightening her. He would sit down with [R] and explain the situation. He said he would write to her when he got back to Zimbabwe. He did not know what internet technology would be available to him in Zimbabwe. He accepted that he could get a phone, but he did not know if he would be able to get internet access. He also accepted that in principle, [R] could visit him in Zimbabwe. His mother, Mrs Malunga, visits Zimbabwe generally about once per year to see her mother there (see below). However, the Appellant said that he and Ms Cooley would not be able to afford the airfares for [R] to go. Mrs Malunga and his stepfather would not be able to help out in this regard as they had to scrape together the money for Mrs Malunga's own flights.

21. Ms Cooley did not provide a supplementary statement for the hearing before me. However, in her oral evidence, when asked how she would prepare [R] if the Appellant were deported, she said it would be very difficult for [R] to adjust because of the closeness of the relationship between [R] and the Appellant. She said that [R] constantly asks for her father. She even said that [R] sometimes "calls [her] dad by accident". She could not imagine how [R] would be if she were again separated from her father. She also said that she couldn't envisage being able to prepare [R] for a further separation. She would probably have to turn to other family members to do so. When asked if she would facilitate contact via the phone or internet, she confirmed that she would of course do so but that it would be very difficult. I have already referred to her comment that it might almost be worse if [R] had that remote contact as it would accentuate the impact of physical separation.

22. I also have two reports of an independent social worker, Mr Laurence Chester, which deal with the relationship between the Appellant and [R] and the potential impact of separation on [R]. Those reports are dated 15 December 2019 ([AB/58-73]) and 9 May 2021 ([ABS/13-18]).

23. I do not set out the detail of the conversations which Mr Chester had with the Appellant, Ms Cooley and [R]. I have read what is there said. Nor do I make reference to what Mr Chester says about the Appellant's mood or the situation [R] might face in Zimbabwe. Mr Chester does not purport to have any medical qualifications or to know anything about Zimbabwe. As I will come to below, in any event, Ms Everett, although not conceding the point (rightly) did not submit that [R] could be expected to go to Zimbabwe with her father on a permanent basis.

24. Mr Chester's opinion in his first report was that, notwithstanding the estranged relationship between the Appellant and Ms Cooley, they remained a "close knit family, unified by their strong attachment to each other and shared love for [R]". He says that he "would be deeply concerned for the significant emotional distress [R] would suffer if her father were deported. Especially given the current high level of involvement [the Appellant] has in her life." Such distress "may impact on [R's] overall wellbeing". He goes on to say that deportation of the Appellant "would have a profound impact on [R]'s emotional wellbeing". That concern is seemingly based on [R] having "experienced stress and anxiety when her father was incarcerated". There is a suggestion that [R]'s school attendance in reception class was affected at the time and a referral made to Children's Services. I do not give that aspect of Mr Chester's report weight as I can find no reference to this in the witness statements of either the Appellant or Ms Cooley. There is no evidence from Children's Services.

25. Overall, the points made by Mr Chester about the impact of the Appellant's deportation on [R]'s well-being are based on generic factors rather than specific evidence about past or present impacts of separation.

26. I place some weight on Mr Chester's more recent report, in particular what he says about the closeness of the relationship he was able to observe between the Appellant and [R] during the Zoom interview which he conducted on 2 May 2021. Mr Chester

describes [R] as a confident, happy child with "a loving, strong personality". I have regard to what [R] said to Mr Chester about her relationship with her mother and father. I accept that, notwithstanding that [R] lives with her mother during the week and sees the Appellant at weekends, the relationship she has with her father is close. I was struck by the fact that [R] apparently re-entered the chat after a few moments of being out of the room "as she was missing her dad".

27. I also have regard to what the Appellant said to Mr Chester about the potential impact on [R] if he were deported. He did not overstate the position. He fears that [R]'s "emotional stability would suffer" and that she would be "extremely sad". I have regard to Mr Chester's opinion that "[R] has a close, loving relationship with her father" and that her "close family attachments form an intrinsic part of [R]'s own development" (as is indeed evident from the answers which [R] gave to Mr Chester's questions during interview).

The Appellant's Private Life

28. The Appellant came to the UK in January 2008, then aged just seventeen years. He came to join his mother who had moved to the UK to join his stepfather when he was aged about thirteen years. The Appellant was left at boarding school in Zimbabwe. During the school holidays, he was left in the care of his grandmother. She is still alive and living in the family home in Zimbabwe. She is elderly and is cared for by Mrs Malunga's cousin. The Appellant was given indefinite leave to enter on arrival. The Appellant's sister also lives in the UK.

29. Although the Appellant was nearly an adult when he came to the UK, his education in Zimbabwe was conducted in English. He says in his first statement that he does not speak much Shona. It appears that his mother does speak that language. I accept however that the Appellant has not had to speak the language every day since he left Zimbabwe. He has not returned to Zimbabwe since he left in 2008.

30. Since leaving school and college, the Appellant has tried to forge a career in music production. He set up his own company but did not do well financially. It was as a result of the premises he was using that he became involved with those dealing drugs which led to his conviction. I will come on to the detail of the Appellant's conviction and rehabilitation below. There is no direct evidence in relation to the Appellant's educational achievements but there is mention in the OASys report at [AB/29] that the Appellant completed 6 GCSEs (A-C grades) at school in Zimbabwe and A levels in computer science, maths and English at college in the UK (with a distinction in computer science).

31. Since he is subject to a deportation order, the Appellant is not presently entitled to work. As to his past integration in the UK and his ties with Zimbabwe, the Appellant says this in his first statement:

> "32. Given the length of my residence in the UK and my circumstances in Zimbabwe before I came to the UK, I believe that the UK is my home. It is where my family,

> friends and life are based. I have no family or friends in Zimbabwe other than my elderly grandmother as everything I have is now in the UK.
>
> 33. I have no links or ties with Zimbabwe. When I left, I didn't keep in touch with friends because people move on. It's always hard when life goes in a different direction to try to maintain that sort of connection, particularly when you are young. I came to the UK and I built a life here with my family."

32. That position is corroborated by the evidence of Mrs Malunga in her statement as follows:

> "5. In Zimbabwe, I don't know if he could cope or what would happen if he gets sick again as he would be alone. In Zimbabwe, the only family that he really has is my mother, his granny, but she is over the age of 80 and cannot even look after herself. There is one aunty, my cousin that Rob met when he was going to boarding school, after I came to the UK. She would help with buying things for the children when they were home for the holidays but Rob never got along with her. I would get complaints about them from her and complaints about [her] from them. I don't know what happened in Zimbabwe after I came to the UK but Rob has never had a positive thing to say about boarding school or when he was staying with my mother in the holidays.
>
> 6. In terms of Rob returning to Zimbabwe, he has lived here so long and has always found the UK more of a home to him than Zimbabwe. When he left, he wasn't at an age or in a situation where he had developed a connection with any family members or friends really. He has no real connection with anyone in Zimbabwe and he has no relationship with his extended family members there. As I said, I don't know what happened but Rob hasn't even agreed to speak to any of my family members on the phone since coming to the UK. My cousin who Rob met before coming to the UK is currently living in my house in Zimbabwe, looking after her mother. She is living there with her family but when my mother passes they will return to their own home. They are only staying there to look after my mother who is her aunty so I'm not sure of what they would say if I had to ask them to look after Rob in the future. They have never got on."

33. Whilst I accept the consistency of that evidence as to the extent of the ties which remain in Zimbabwe, I do not accept what appears there to be suggested of acrimony between the Appellant and his extended family in Zimbabwe. There is no mention of any such acrimony in the Appellant's own statement. The Appellant in his oral evidence said that if he was sent back to Zimbabwe, he would be able to stay in the house where his grandmother lived. He did not say that he would feel uncomfortable doing so. He said only that he had not been there for some time and he had not spoken to his grandmother because he considered his life to be with his parents in the UK, his grandmother was too old and he "did not expect this to happen". The only mention of the relationship between the Appellant and Mrs Malunga's cousin in her oral evidence was that her cousin had not been able to look after the Appellant when he was young and healthy and would be unable to do so now that he was sick.

34. That brings me on to the Appellant's medical conditions. The Appellant was diagnosed with HIV when Ms Cooley was pregnant. At the time of his first statement, the Appellant said that he was "not managing [his] HIV" at that time "as

it was very difficult for [him] to juggle things". He was on medication whilst in prison but came off the medication and since "[t]aking the drugs intermittently is not medically recommended [he was] taking a break with medical supervision". There is no documentary evidence in the original bundle concerning the Appellant's medical condition or treatment in the UK. There is no evidence in either bundle concerning the treatment available for HIV in Zimbabwe. There is reference in the Respondent's decision letter to evidence from a MedCOI database to the following effect:

> "HIV specialists are all available in Zimbabwe. Viral loading and CD4 counts can be carried out in Zimbabwe. As regards ARV drugs for HIV – cobicistat and rezolta are not available, but darunavir, emtricitabine, tenofir, alafenamide and descoy are available in Zimbabwe."

35. The Appellant has recently (in January 2021) become ill and was hospitalised. This was for an inflammation of the brain. He says in his statement that his lungs were weakened by the illness and he has to be treated with a breathing machine every four weeks. He does not however overstate his general health based on his HIV. He says in his latest statement that "[his] health has generally been stable" although, understandably, he has had to be very careful during the pandemic because, as he there says, "[he is] more susceptible to infections".

36. Dealing then with the Appellant's current medical condition and recent illness, there is at [ABS/9] a letter from Dr P Saigal, Consultant Physician in GUM/HIV, Queen Elizabeth Hospital dated 7 May 2021 which reads as follows:

> "Robert has longstanding HIV-1 infection and has recently been diagnosed with an opportunistic infection (PML).
>
> His most recent CD4 count is 199 and viral load 412. He reports very good adherence to his treatment.
>
> He does remain immunosuppressed. He needs access to daily antiretroviral treatments, without which he risks becoming unwell from a potential life threatening illness.
>
> In addition, he is also under the Surgical Team and waiting debulking of a lower GI mass, which may potentially be a tumour.
>
> Given his ongoing current medical issues, I would strongly support his application to stay in the UK. Without access to both medical and surgical intervention, he is at risk of becoming incredibly unwell."

37. Unfortunately, that letter does not deal with the extent to which it is the Appellant's current illness which has given cause for concern or his longstanding medical condition. The letter does not explain what "medical and surgical intervention" is required in the longer term in order to assess what would or might be available in Zimbabwe. As I have already pointed out, the Respondent has put forward evidence that antiretroviral drugs are available in Zimbabwe. There is also a letter dated 6 April 2021 at [ABS/11] confirming the Appellant's discharge from hospital on that day. The diagnosis at discharge is "acute encephalitis; HIV". The only actions set out are to see the Appellant in the HIV clinic on 8 April 2021.

38. Mrs Malunga provides more evidence about the Appellant's recent illness in her statement as follows:

> "3. Recently my son has not been very well and required hospitalisation. I thought we would lose him around Easter this year but thankfully he is getting better. It was such a bad situation that I had to [take] unpaid leave in order to be able to look after him. We didn't know exactly what was wrong with Rob as he just tried to keep going so it wasn't until he was in so much pain and couldn't walk properly that he went to hospital. He had an infection which caused swelling in his brain and he was on a lot of steroids so is really swollen from that. He has to go for check-ups and we still don't have the full picture of what exactly was wrong.
>
> 4. Rob is obviously as a grown up man but the condition he was in when he wasn't well was so bad he couldn't take a bath or get to the bathroom himself. For me I am a carer and I understand these things so I could help him but it made me start to worry about what will happen to him if he is sent to Zimbabwe. We can care for him."

39. Mrs Malunga goes on to talk about her concern that the Appellant would not receive medical care on return to Zimbabwe as follows:

> "7. Another concern I have is for the medical care that Rob would be able to access in Zimbabwe. Zimbabwe has a lot of problems and the hospitals are not functioning as they used to. The country is suffering financially and even before Covid there just wasn't not sufficient treatment for everyone. It is not a matter [of] financials, we would support continue to support [sic] Rob if he is returned to Zimbabwe. Just having money doesn't guarantee you treatment.
>
> 8. I return to Zimbabwe maybe every other year and the last time I travelled there I had a problem with my eye. It was so painful but even a simple thing like getting my eye checked wasn't possible and I had money to pay. I paid a private optician for a hospital referral but they said the hospital weren't able to accept referrals. I know the struggle I faced to try to even get to see a doctor about my eye so I can't image [sic] how hard it would be for Rob to get treatment for something a lot more complicated if he needed to."

40. Mrs Malunga's concern for her son's health and future medical treatment is entirely understandable. I also accept that it is genuine. She became visibly distressed when talking about the prospect of his return to Zimbabwe in the course of her evidence. As I have already explained, however, there is very limited medical evidence before me. That which is included and indeed the Appellant's own evidence is that he is generally in good health and that his HIV is controlled by check-ups and antiretroviral drugs, both of which are, according to the Respondent's evidence available in Zimbabwe. I cannot place weight on what Mrs Malunga says about medical treatment in Zimbabwe generally. When trying to get treatment for herself, she was a visitor to that country. It appears from what she says that it was not an emergency – she was seeking a referral. In those circumstances, it is perhaps unsurprising that an optician was unwilling to refer her to a hospital for treatment which could wait until she returned to the UK. That is a very different situation to that of an individual requiring long-term treatment as a resident of Zimbabwe.

41. In relation to the Appellant's recent illness, whilst I accept the seriousness of that episode (from which it appears the Appellant is continuing to suffer to some extent), I have no evidence that the Appellant has suffered any other serious illness in the six years since he was diagnosed with HIV. There is no medical evidence dealing with the longer-term prognosis or treatment for this recent illness. There is no evidence that Zimbabwe does not have functioning emergency medical services should the Appellant require such treatment.

42. The Appellant lives with his mother and stepfather in the UK. It is clear from their statements that they have a close relationship with the Appellant. Although Ms Cooley very candidly says in her statement that the Appellant "was not a good partner" (although "an amazing father"), it is evident from her statement and oral evidence that the relationship between her and the Appellant remains a friendly one. She has been willing to support him in this appeal. They appear to successfully cooperate to co-parent [R]. There are no signs that the breakdown of the relationship was an acrimonious one. Although I did not have any evidence from the Appellant's sister, I am aware that she attended the hearing remotely in order to support her brother.

43. Ms Cooley also notes in her statement that the Appellant was "really well liked and respected" in the local area. She says that, when the Appellant was in prison, she went round the shop owners and his former college to obtain character references. She says that all those she asked gave her "statements in support just confirming that he was a polite and well-mannered young man". Unfortunately, those are not in evidence before me but I take note of what is there said.

The Appellant's Offending and Rehabilitation

44. The Appellant was convicted on 12 October 2018 of conspiracy to possess a Class A drug (cocaine) with intent to supply. He was sentenced to twelve months' imprisonment and ordered to pay a victim surcharge. The particulars of the offence are set out in the Judge's sentencing remarks as follows:

> "Robert Chomoola, as you have already heard me say, I take the view that you were involved in this conspiracy during the course of one day and one day only. What you did was go to Zoe Orton's flat and there assist in the cutting and wrapping of Class A drugs that were going to be sold on the street later that day and you did so because you were a user in the hope of getting some free drugs so that you could feed your own habit.
>
> You have never been in trouble before and so this fall from grace can be treated, in your case, as being entirely out of character and I do.
>
> So transient was your involvement in this conspiracy, and on such a limited basis, that it seems to me that to follow sentencing guidelines would end up with a sentence that was not a just one in terms of it reflecting what you actually did and so I do not follow the guidelines for that reason.
>
> However, you pleaded guilty and so you cannot have any credit for a guilty plea and I am afraid, even those who get involved as you did only in passing, in the trade in Class A drugs must expect prison sentences because, if the courts do not

> react in any other way, people are encouraged to become involved in this trade which causes a good deal of misery and unhappiness.
>
> In all the circumstances, the sentence in your case is one of 12 months' imprisonment. Any time that you have spent in custody and 46 days as a result of the period you were on bail subject to a tagged curfew, will count towards that sentence. As you know, you will serve half of it, then you will be released. Again, as long as you behave yourself during the licence period and a period of post-sentence release that will also apply to this sentence, you will hear no more of the matter. Get into trouble again and you may be recalled to serve some or all of the balance or be sentenced for any breach of any conditions that are attached to your post-sentence supervision. The statutory surcharge applies in your case in the sum of £140 and again, I have no discretion to waive it."

45. There is an OASys report at [AB/17-57]. That is dated 2 December 2019. The Appellant's licence expired on 10 December 2019. The Appellant is reported to accept responsibility for the offence. The risk factors associated with the Appellant's offending are said to be his lifestyle and associates, substance misuse and lack of finances. The Appellant's family is said to be a positive factor. At the time of the OASys report, the Appellant was said to be using ecstasy and Spice on an occasional basis and cannabis daily. However, the narrative records that the Appellant had only tried MDMA and Spice once and had not used them again as they made him sick. He said that he had not used cannabis since leaving prison. That is consistent with what Mr Chester records in his report that the Appellant told him that he had not used drugs since he came out of prison. I deal below with the Appellant's attitude to his offending and rehabilitation on the basis of his evidence in this appeal. The report concludes that the Appellant is at low risk of serious harm and low risk of reoffending (4% in first year and 7% in second year). The low risk is confirmed by the letter from the National Probation Service at [AB/16] which also reports the Appellant's full compliance with his supervision requirements.

46. The Appellant's evidence demonstrates his contrition. By way of example, in his first statement, he says this:

> "10. I was just kidding myself that I wasn't doing anything wrong because I convinced myself that just because I wasn't actively doing anything, just opening the door and things like that, that I wasn't really involved. Drugs, dealing, being involved in anything criminal like that is just not who I am. It's not who I was raised to be and it is not something I have ever wanted to be associated with. I see what that sort of life does to a person and I want nothing to do with it. The women whose house that I was in was murdered and one of the other people I was initially arrested with was actually re-arrested while I was out on bail. It is a situation that I will never let myself get into again. I deeply regret that I am now facing being defined for the rest of my life by my mistake."

47. The reference there to the offence being his mistake, thereby taking responsibility for it, is a thread which runs through all of his evidence. For example, he says at [23] of his statement that "[he] can see what [his] actions have done to [himself] and [his] family".

48. The Appellant also appears to be genuinely ashamed of what he has done. At [26] and [30] of his first statement he says the following:

> "26. I have always tried to hold myself to a higher standard and I know that I have lost that now. I have lost a lot of trust with my family. I have let down my little siblings and my elder sister is devastated by what I have done. I know I let everybody down and what I did was just something my family will never be able to comprehend. I have a lot of work to do to come back from just being seen as a criminal.
>
> …
>
> 30. The situation that I have put on my family is hard for me to accept and I deeply regret putting them through this. Even now, I am out of prison and have completed my sentence and probation but due to the ongoing threat of deportation my family are still having to go through it. Because of me they have to go to court to give evidence. My sister and Chelsea had to go to a bail hearing and stand to offer sureties for me. These are things that they would never have had to go through if it weren't for me. For Chelsea in particular, having to give evidence at the Court is difficult as she gets quite anxious and having to go to court is an intimidating experience for anyone to go through. For all of these reasons, I know I will never commit another crime. It was a one-off situation and something that I will never let myself get into again I will never do that to my family."

49. The statements of the Appellant's ex-partner, mother and stepfather reflect their disappointment in the Appellant's actions. They are however consistent in their opinion that the experience has changed him for the better. They say that, whereas he would not previously talk about problems, he now does. Prior to the offence, the Appellant had not even told his parents about his HIV status.

General

50. As Ms Everett very fairly submitted (and I agree) the evidence I heard was "cogent, reasonable and sensible" in relation to the impact of the Appellant's deportation. I have indicated in the foregoing a few aspects of the evidence generally which I found to be overstated. However, for the most part the evidence, both documentary and oral is consistent. As Ms Everett also very fairly conceded, this is not a case where credibility is at issue. The issue is how the facts as presented are to be assessed within the legal tests which apply. I therefore move on to that assessment.

DISCUSSION AND CONCLUSIONS

Exception one: Paragraph 399A/ Section 117C(4)

51. It is accepted by the Appellant that he cannot meet this exception based on his private life. He has been in the UK for less than half his life. Although he had leave until the making of the deportation order, he no longer has leave. He has not therefore been in the UK lawfully for half his life. He has however been here now for over thirteen years and for most of that period was with lawful leave.

52. I accept that the Appellant is integrated in the UK. His direct family members are all here. I accept his evidence that he has not maintained contact with his family

members in Zimbabwe. His ex-partner is in the UK. Although I do not have much evidence about the Appellant's educational background either here or in Zimbabwe, it appears from the OASys report that he attended college in the UK and successfully obtained qualifications.

53. Based on the period he has spent in the UK moving from teenager into adulthood, the family and relationships he has built here and his upbringing in the UK, I accept the Appellant's evidence that he views the UK as his home.

54. I will need to deal with the Appellant's criminal offending later but for the moment I note that this was a single conviction for offences committed over a period of three months. The Appellant was apparently a drug user before he went into prison, but I do not consider that his cannabis use impacts on his integration in the UK. I note that a number of local people and his former college were willing to provide character references for the Appellant during the criminal proceedings.

55. In terms of the situation in Zimbabwe, I do not consider that the reasons advanced as being very significant obstacles to his integration meet the high threshold.

56. As was said in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 "[t]he idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

57. Although I accept that the Appellant has not been back to Zimbabwe since he left in 2008, he grew up in that country. I accept he may struggle to speak Shona presently, but he appears to be an intelligent man who could re-learn the language if he needed to do so. He could probably get by in daily life speaking English. Although I accept that his grandmother is elderly, the Appellant does have family members in Zimbabwe. They may not be able to support him either financially or emotionally. However, with the exception of his HIV and recent illness, the Appellant appears generally well and there is no reason why he could not work in Zimbabwe to support himself. Although it was said that the Appellant's mother and stepfather could not provide financial assistance, for example, in order for [R] to visit the Appellant, his mother made clear in her evidence that they would provide financial assistance after return for matters such as health care if the need arose. The Appellant says that he has lost contact with his friends but there is no evidence that he could not re-form those relationships on return. The Appellant might find it difficult to re-acclimatise to his home country and there are likely to be obstacles to him settling there particularly given the age he was when he left, but the obstacles put forward are not such as to amount to very significant ones.

Exception two: Paragraph 399/ Section 117C(5)

58. Although Ms Everett did not expressly concede that [R] could not return to Zimbabwe with the Appellant, were he to be deported, she sensibly did not press that suggestion. As she pointed out, the decision maker at the time of the deportation decision did not have much information about [R]. The Appellant and [R]'s mother are now separated. For that reason, I accept that there is no question of Ms Cooley leaving her family in the UK to go back to Zimbabwe with the Appellant. It would be unduly harsh to remove [R] from her mother and indeed the rest of her family in the UK. As Ms Everett also pointed out, that is the more so given [R]'s age and her British citizenship.

59. I turn then to the issue whether it would be unduly harsh to expect [R] to remain in the UK with her mother while the Appellant is deported to Zimbabwe.

60. I begin with what is in [R]'s best interests. Notwithstanding the separation of her parents, [R] has a close relationship with both her parents. I note that she told the independent social worker that her wish would be for "[her] mum and dad to be together so that [she] could live with them together all the time". The closeness of the relationship which [R] has with her father is reflected in Mr Chester's report, and the evidence of both the Appellant and Ms Cooley. The Appellant has very regular contact with [R] and she is very evidently upset by any separation from her father. I have no hesitation in finding that it is in [R]'s best interests for her father to remain in the UK and to continue the contact as at present.

61. That is however not the end of the matter. The issue for me is whether the impact on [R] of separation from her father would be unduly harsh. I have set out at [9] and [10] above what I understand to be meant by that test.

62. Based on the impact which the Appellant's imprisonment had on [R] I am quite prepared to accept that [R] will be very distressed by separation from the Appellant. [R] was only aged about three years at the time but the passage of time is likely to have strengthened rather than weakened her relationship with her father. As an older child, she is also likely to be more aware of what is happening around her. I appreciate that [R] does not live with the Appellant permanently. In spite of [R]'s wish that her parents could live together, there is no suggestion of any reconciliation.

63. However, Ms Cooley's evidence is that [R] constantly asks for her father. [R] is clearly very close to him. They have regular contact for at least two full days each week. I accept that [R] would be very upset if she were again separated from him on a permanent basis.

64. The Appellant has explained that, if he were deported, he would sit down with [R] to tell her that he had to leave and would do his best to maintain contact as closely as possible via letters, phone and internet calls. I accept Ms Cooley's evidence that this would be no substitute for physical contact and that the disruption caused by such remote contact might almost be worse for [R] emotionally as it was when the

Appellant was in prison (although she says that she would not prevent such contact for that reason).

65. I also accept that visits, at least frequent visits, are unlikely to be possible for financial reasons. [R] is only aged six years at present in any event and would need to be accompanied probably by the Appellant's mother.

66. I accept therefore that there would be substantial disruption to [R]'s relationship with her father caused by his deportation.

67. I take into account the impact on [R] when the Appellant was in prison. I accept that [R] was told that her father was only away from her on a temporary basis. I also accept the evidence that she was very upset, although Ms Cooley said that on the second occasion (ie after the conviction), [R] dealt with the separation rather better. I am prepared to accept that this was because [R] had encountered one separation when her father had returned and therefore expected him to do so the second time. The position may well be different if she is told that the separation is permanent.

68. There is however no evidence that [R]'s well-being was impacted in the longer term by either of those separations. In spite of what is recorded in Mr Chester's report, there is no evidence that [R]'s attendance at school was affected by her father's absence or that she developed any mental health problems. There is no suggestion that her emotional development was impacted. She is described as a happy, confident child who is popular at school and has a number of friends. There is in short no evidence that the earlier separations had any longer-term impacts on [R]'s emotional stability and well-being. She has a close and loving family unit around her who could help her to adjust. That unit includes Ms Cooley's family as well as the Appellant's family members. The Appellant has made clear that he will do whatever it takes to maintain the relationship with [R] as closely as possible.

69. I have already made a finding that [R]'s best interests are for her father to remain with her in the UK. That is, I accept, a primary consideration. In context of what is said in MK (Sierra Leone) (as set out in KO (Nigeria) above), if the issue were whether separation of [R] from her father is difficult or even harsh, I would answer that question in the affirmative. However, as the Tribunal there explained (and as endorsed by the Supreme Court and the Court of Appeal in HA (Iraq)) the use of the word "unduly" "raises an elevated standard still higher". Since, at this stage, I am not required (or permitted) to take into account the seriousness of the Appellant's offending, the issue is simply whether the evidence shows that the necessarily high threshold is met. I have reached the conclusion that it is not.

Section 117C(6) – very compelling circumstances over and above the exceptions

70. Although Section 117C(6) refers to the need to show that there are very compelling circumstances over and above the exceptions, that does not exclude the consideration of the factors which are relevant to the case within those exceptions.

71. In this case, I therefore take into account all that I have said about the Appellant's family life with [R] and the likely impact on her. Whilst not reaching the threshold of undue harshness, I have recognised that the impact is likely to be very difficult and even harsh. I accept that separation will be very distressing. Unlike the previous separation where [R] expected the Appellant to return, on this occasion, her parents would not be able to give her that reassurance. [R] is now older and is likely to understand and therefore experience the impact of separation more acutely. The evidence shows clearly that [R] is extremely attached to her father. Her relationship with him will only have strengthened since his release from prison. For those reasons, although I am unable to conclude that the impact on [R] is such as to reach the high threshold of undue harshness, I accept that the impact on her will be significant.

72. The impact of separation will be felt by not only [R] but also her mother and the Appellant himself. They will not be able to maintain the close relationship they have now as a family unit (notwithstanding the separation of the parents).

73. I take into account the practical effect which the Appellant's deportation will have on Ms Cooley who relies on the Appellant to co-parent [R] and to take responsibility for [R] on a regular basis and also when Ms Cooley needs help. I have regard to the evidence that Ms Cooley struggled when the Appellant was in prison. She was put on anti-depressants which she no longer takes therefore showing the causative effect of the Appellant's absence. I accept that she has family members who can assist her and will also be able to rely on help from the Appellant's family. It could not be said that deportation of the Appellant would have an unduly harsh impact on her (and that could not meet the exception under Section 117C(5) in any event as the Appellant's relationship with her is no longer subsisting). However, I do not underestimate the impact which the Appellant's deportation would have.

74. The Appellant's closest family members are in the UK. Those are his mother, stepfather and sister. I did not have evidence from his sister. It is clear from the statements of Mrs Malunga and the Appellant's stepfather that they are a close family. I accept that Mrs Malunga would be very worried for her son's welfare were he to be deported, particularly in light of his recent medical history. I accept that whilst the Appellant has extended family in Zimbabwe, they are unlikely to be able to give the Appellant the same level of care that his mother does.

75. On the other hand, the evidence is that Mrs Malunga visits Zimbabwe on a regular basis. As I understood her evidence, she is employed in the UK. However, I did not have evidence to show that she could not return with the Appellant in the short term to help him settle in Zimbabwe, were she minded to do so. She readily admitted that she would be able to visit the Appellant there. I accept though that this could only be a temporary arrangement as she is a carer (from which I understood that she works as such).

76. I do not accept that the relationship which the Appellant has with his family amounts to family life as that is understood in Article 8(1). There is not the evidence of

dependency of the Appellant on his family members (other than when he was recently ill as to which see below). Prior to his incarceration and the breakdown of his relationship, the Appellant had moved away from the family home and formed his own family unit. Although I accept that the Appellant has now moved back to his parents' home, the evidence suggests that he still has his own independent life.

77. Those relationships do however form part of the Appellant's private life which I now go on to consider. I accept that the relationships which the Appellant has with his family members and Ms Cooley are close ones and that the separation caused by deportation would have a significant impact not only on the Appellant but also on his family members.

78. I have not accepted that there would be very significant obstacles to the Appellant's integration in Zimbabwe. He grew up there and lived there until he was sixteen years old. Nonetheless, he has never worked there. He previously had a supportive environment in the form of boarding school and his grandmother who looked after him during the school holidays. I accept that she is not in a position to do that now.

79. There is no evidence before me that the Appellant would not be able to work in Zimbabwe. He has some qualifications which are likely to assist him to find work. Nevertheless, I am aware that Zimbabwe is a country which has in recent years experienced economic turmoil and I do not underestimate the difficulties which the Appellant will have in finding work. However, Mrs Malunga said that she and the Appellant's stepfather would find money to pay if the Appellant needed healthcare and could presumably do so if he needed short-term support with financial maintenance. The Appellant's grandmother lives in the family home in Zimbabwe and the Appellant would therefore have accommodation.

80. I take into account in the consideration of the Appellant's private life his medical condition. I accept that he is HIV positive. That condition is controlled by medication. I have no evidence that such medication would not be available in Zimbabwe – indeed, to the contrary the Respondent has provided evidence that it is.

81. Fortunately, although the Appellant's immune system is doubtless affected by his condition, he does not appear to have experienced acute ill health until recently. Although the Appellant has been discharged from hospital, the recent episode of ill health appears to have been very serious. I accept Mrs Malunga's evidence that she had to do everything for the Appellant when he came out of hospital. Although, fortunately, the Appellant appears to have recovered well, that episode is an indicator of what might occur if he is taken ill again. That may be somewhat speculative, but his condition does leave him open to serious infections of this nature. I have regard to what is said by the Appellant's consultant physician who "strongly supports" the Appellant's application to remain in the UK on the basis that "without access to both medical and surgical intervention, [the Appellant] is at risk of becoming incredibly unwell".

82. Although I have not accepted Mrs Malunga's evidence about her experience of the health system in Zimbabwe as reflecting the position generally, I doubt that the system there is on a par with the UK. It is not (nor could it realistically be) submitted that the impact of deportation on the Appellant's health would reach the Article 3 threshold. However, if he were to fall ill again, I accept that he would not have the personal care available to him as provided recently by his mother (unless she were able to travel to Zimbabwe to assist). The possibility that he may once again fall seriously ill is not a remote one. It is a factor which I weigh in the balance.

83. Whilst not reaching the threshold of very significant obstacles, therefore, the difficulties which the Appellant will face in Zimbabwe are real and I do not underestimate the problems which the Appellant would face given that he has not lived or even visited that country since he left as a child.

84. I accept the Appellant's evidence that he sees the UK as his home. Notwithstanding the crime of which the Appellant was committed, I have accepted that the Appellant is socially and culturally integrated in the UK. He has lived here for over thirteen years and, as I say, has never returned to Zimbabwe in that time. His immediate family are all here as is his ex-partner and child. I accept that he has no friends in Zimbabwe due to the age at which he left. I accept however that there is no evidence of strong friendships in the UK, possibly because the Appellant has taken steps to disassociate himself from those with whom he socialised prior to his imprisonment as his lifestyle and associates were part of the reason behind his offending.

85. Having set out the factors which are relevant to the Appellant's private and family life and which fall on his side of the balance, therefore, I now move on to the public interest which falls on the other.

86. I accept that there is strong public interest in the deportation of those foreign nationals who commit crime. Whilst I accept that the Appellant has been convicted on one occasion only as part of a conspiracy which took place only over a few months, his crime was a serious one involving the supply of Class A drugs. The supply of drugs is I accept a scourge on our society, and I do not seek to minimise the level of the public interest which applies in this case.

87. The level of the public interest is not diminished in any way by the length of the sentence which was passed in the Appellant's case. I accept that this was at the bottom end of the threshold which applies in deportation cases. However, it is still the case that, due to the length of the sentence, there is a Parliamentary presumption in favour of deportation of those in the Appellant's position who are classified as medium offenders (see section 32 UK Borders Act 2007). The level of the sentence also takes into account any mitigating factors in the Appellant's case and to reduce the public interest in recognition of those factors would be to double count in the Appellant's favour.

88. It is however appropriate to consider the nature of the offending, the reasons for it and the risk which the Appellant is likely to pose in the future when considering the

strength of the public interest in this individual case. Those are factors relevant to the public interest. The public interest requires the deportation of foreign criminals precisely to protect the public, although I accept that other factors are relevant (as I come to below).

89. I take into account in this regard the remarks of the sentencing Judge. Although the conspiracy in which the Appellant was involved took place over the course of a few months, the evidence against the Appellant as accepted was that he was involved in that conspiracy for only one day. It was not evidently accepted as the Appellant says in his first statement that he was not really involved and was just opening the door. It appears that he was convicted for having assisted in the cutting and wrapping of Class A drugs for supply. As I say, though, the conviction was based on him doing this on one day only. The sentencing Judge described the Appellant's involvement as "transient".

90. Further, his reasons for so doing were said to be linked to his own drug use. Although there is some inconsistency within the OASys report about continuing drug use, I accept that the narrative within that report is to the effect that the Appellant has not used drugs of any form since he left prison in December 2019. That is consistent with what the Appellant told Mr Chester, the social worker.

91. As I have already mentioned, another factor behind the Appellant's offending was his lifestyle and associates. There is evidence that the Appellant has taken concrete steps to distance himself from those with whom he previously associated. Ms Cooley says in her statement that the Appellant did not even have a mobile phone when he came out of prison so that he can "stay as distanced as he can from any of the old bad influences he had".

92. Both Ms Cooley and the Appellant's parents have commented in some detail in their statement about the change in the Appellant since his imprisonment. He is willing to discuss his problems with his family which he did not do previously. His family are clearly shocked and disappointed in the Appellant's behaviour. It is clear from the Appellant's statements that he is acutely aware of this and ashamed. His remorse and desire to change is I accept entirely genuine. The very low level of risk which the Appellant poses as a result is consistent with what is said in the OASys report.

93. I accept that rehabilitation is unlikely to be a significant factor in the balance. Society is entitled to expect that members respect and uphold the law. That the Appellant is now likely to do so is only what society expects and therefore the change in his behaviour cannot be a significant factor in the reduction of the public interest. It does however reduce the risk of reoffending and to that extent is relevant.

94. I also accept that there are factors which weigh in favour of the public interest, aside the protection of the public from offenders. Deterrence of others from committing crimes and maintaining integrity in the criminal justice and immigration systems are also of importance.

95. Nonetheless, I do regard the nature of the Appellant's offending as a significant factor to be weighed in the balance. In the Appellant's case this was a one-off offence. The conviction relates to an offence committed on one day. The Appellant has shown genuine remorse for his crime and, I accept, has changed his behaviour so that he now poses a very low – almost minimal risk – to the public. Although as I have already pointed out, it would be wrong to weigh in the equation the mitigating factors already taken into account in the sentence, I note that the sentencing Judge went so far as not to follow the sentencing guidelines as he considered that to do so would not justly reflect on the extent of the Appellant's conduct and part (in other words, that to follow the guidelines would have resulted in too severe a sentence).

96. I recognise that in order to succeed in a case where I have accepted that neither exception applies, there must be very compelling circumstances over and above those exceptions before an appeal can be allowed.

97. Based on the individual factors, I have explained why the exceptions are not met in this case. The position is, however, I conclude, different when the cumulative effect of deportation on the Appellant's private and family life is considered. I do not repeat what I have said above. In summary, I accept that the Appellant's deportation will be very distressing for [R] and is likely to have a significant impact on her. I accept that the impact on the Appellant and his family members is also likely to be significant. The Appellant will no doubt encounter serious difficulties on return to Zimbabwe, a country he has lived in only as a child and does not now know. Those difficulties may well be exacerbated if the Appellant were to fall seriously ill again.

98. I recognise the weight which I am bound to afford to the public interest. I have set out the various facets of the public interest. However, proportionality involves a balance between impact and public interest. Having carried out that balancing assessment, I do not consider that the public interest in this case is sufficient to outweigh the impact on the Appellant's private and family life when all the factors are taken together. I so conclude having regard to the significance of the public interest in deportation cases and the high threshold which applies.

99. For those reasons, the appeal is allowed. The decision to deport the Appellant is a disproportionate interference with his Article 8 ECHR rights. It is therefore a breach of section 6 Human Rights Act 1998.

DECISION AND DIRECTIONS

The appeal is allowed on human rights (Article 8 ECHR) grounds.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 27 May 2021

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10396/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Wednesday 6 January 2021	22 January 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR ROBERT CHOOMOLA

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms K Reid, Counsel instructed by Signature Law LLP

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. I refer to the parties hereafter as they were before the First-tier Tribunal for ease of reference. The Respondent appeals against the decision of First-tier Tribunal Judge L Nolan promulgated on 8 April 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the

Respondent's decision dated 30 May 2019 refusing his human rights claims in the context of a decision to deport the Appellant to Zimbabwe.

2. The Appellant came to the UK, in January 2008, then aged seventeen years, with indefinite leave to enter to join his mother who is settled in the UK. He was convicted in October 2018 of an offence of conspiring to possess a Class A drug with intent to supply and was sentenced to a term of twelve months in prison. A deportation order was made on 29 May 2019 and was followed by the refusal of the human rights claim under appeal.

3. The Appellant's human rights claims are founded on Article 3 in relation to his medical condition (he is HIV positive) and Article 8 in relation to his family and private life, in particular his relationship with his daughter, [R]. The Appellant is estranged from the child's mother. The Appellant also has family members in the UK, notably his mother, stepfather and siblings.

4. The Judge found that the Appellant could not meet paragraph 399A of the Immigration Rules ("the Rules") in relation to his private life as he had not been in the UK lawfully for more than half of his life. She also accepted that he could not meet paragraph 399 based on his relationship with his former partner as that relationship had ended and that the separation of the Appellant from his daughter would not be "unduly harsh" as the impact "would be the distress suffered by any child whose parent is to be deported" ([37] of the Decision). However, the Judge went on to consider whether there were "any other compelling circumstances" not considered within those paragraphs. She accepted that the Appellant "prior to this offence was a person of good character" and that he was "a low risk to the public and at a low risk of reoffending" ([39] and [40] of the Decision). Having found that the public interest was reduced by those matters and by the sentence being the "minimum possible custodial sentence", she concluded that the interference based in particular on the Appellant's relationship with his daughter outweighed that public interest. She therefore allowed the appeal.

5. The Respondent appeals on four grounds which are broadly summarised as follows:

   Ground One: The Judge, having found that the Appellant could not meet the Rules in relation to the exceptions to automatic deportation, used Article 8 as a "general dispensing power in that he [sic] fails to identify anything exceptional that would warrant such a conclusion". It is said that this amounts to a material misdirection in law.

   Ground Two: The Judge failed to apply Section 117 Nationality, Immigration and Asylum Act 2002 ("Section 117"); in particular the Respondent points out that the Judge, having found that neither of the two exceptions in Section 117C was met, was required to consider whether there were "very compelling circumstances" going beyond those exceptions (under Section 117C(6)). It is said that this amounts to a material misdirection in law.

   Ground Three: The Judge appears to have thought that the conferring of the lowest possible sentence for the offence was reason to lower the public interest even though

twelve months is the threshold trigger for automatic deportation. The Judge's conclusion fails to take into account that the sentencing Judge had already taken account of the Appellant's level of participation in reaching that sentence and also fails to consider such factors as deterrence which are also relevant to the public interest. As a result it is said that the Judge's conclusion is perverse.

Ground Four: The Judge fails to give adequate reasons for finding that, prior to the offence, the Appellant was of good character given her finding that it was as a result of his drug use that he had been driven to commit the offence.

6. Permission to appeal was granted by First-tier Tribunal Judge SPJ Buchanan in the following terms so far as relevant:

> "… 4. As contended in GOA(1) and (2): it is arguable that in assessing proportionality of the decision to deport, the FTTJ has failed to identify very strong features of the appellant's article 8 claim which might constitute very compelling circumstances so as to defeat the public interest.
>
> 5. It is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application. I grant permission to appeal."

7. On 29 July 2020, Upper Tribunal Judge Norton-Taylor reached the provisional view that there should be a remote hearing to determine the error of law issue. The parties were directed to file a skeleton argument and rule 24 response respectively. Neither party complied with those directions. However, since there was no objection raised to the forum of the hearing, on 5 October 2020, Upper Tribunal Judge Finch ordered a remote hearing and gave permission to the parties to file skeleton arguments. Again, no skeleton arguments were filed.

8. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties and by the Appellant himself. There were no technical issues affecting the conduct of the hearing and all those present indicated that they were able to follow the hearing at all times. I had before me the Appellant's documents as they were before the First-tier Tribunal hearing including the skeleton argument provided for that hearing. Mr Clarke also provided me with a bundle of authorities on which he relied.

9. At the conclusion of the hearing, I indicated that I found there to be an error of law in the Decision and I gave directions orally for a resumed hearing before me. I indicated that I would provide my reasons for finding an error of law in writing and confirm those directions. I therefore turn to do so.

DISCUSSION AND CONCLUSIONS

10. Since the focus of the oral submissions and my reasons for finding an error of law are based largely on the Respondent's grounds one and two which, as Ms Reid submitted, overlap to a large extent, I begin with those grounds.

11. Before turning to the Decision itself, it is appropriate to set out the legal background against which the appeal had to be determined. Both the Rules and Section 117C contain two exceptions which would render disproportionate a decision to deport an individual. Those are to be found at paragraph 399A and Section 117C(4) in relation to an individual's private life and paragraph 399 and Section 117C(5) in relation to an individual's family life. Although there are some minor differences in wording, the overall position is the same. In relation to private life, an individual must be lawfully resident for more than half of his life, be socially and culturally integrated in the UK and face very significant obstacles to his integration in his home country. In relation to family life, an individual must be in a genuine and subsisting relationship with either or both of a partner and child and the impact of the individual's deportation on that partner and/or child must be unduly harsh.

12. Both under paragraph 398 of the Rules and Section 117C(6), if an individual is unable to satisfy the exceptions, then deportation will be disproportionate only if there are "very compelling circumstances over and above" those exceptions. Although Section 117C(6) expressly applies that provision only to cases of sentences of four years or more, as the Court of Appeal concluded in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 ("NA (Pakistan)") at [25] of its judgment, that provision applies equally to "medium offenders" (ie those sentenced to between twelve months and four years) if they do not satisfy the two exceptions.

13. As Mr Clarke pointed out by reference to NA (Pakistan) and to the recent judgment of the Court of Appeal in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 ("HA (Iraq)"), the threshold to succeed under that latter provision is a high one. Given the importance of this issue to my reasons for finding an error of law in the Decision, it is appropriate to set out the paragraphs of HA (Iraq) on which Mr Clarke placed reliance which paragraphs also incorporate extracts from the judgment in NA (Pakistan):

> "30. Logically it follows that the correct decision-making structure in the case of a medium offender is, as the Court said in *NA (Pakistan)*, at para. 36:
>
> > 'In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are 'sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2'. If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails.
>
> It will be convenient to refer to the second stage as the exercise 'required by section 117C (6)' or similar phrases, but that is arguably slightly misleading. The second stage is necessary not because of section 117C (6) but because the effect of article 8 is that a proportionality assessment is required in every case (at least where the issue is raised): what section 117C (6) does is to prescribe the weight that has to be given to the public interest in deportation when carrying out that assessment (in a case where neither Exception applies).
>
> 31. The effect of the phrase 'very compelling circumstances over and above those described in Exceptions 1 and 2', and the nature of the exercise required by

section 117C (6) as it applies both to medium offenders and to serious offenders, are carefully discussed at paras. 28-34 of *NA (Pakistan)*. It is unnecessary that I quote that discussion in full here, but I should note four points applicable to the case of a medium offender.

32. First, the discussion is underpinned by the fundamental point of principle which the Court identifies at para. 22 of its judgment, as follows:

> 'Section 117C (1) of the 2002 Act, as inserted by the 2014 Act, re-states that the deportation of foreign criminals is in the public interest. The observations of Laws LJ in *SS (Nigeria)* [[2013] EWCA Civ 550, [2014] 1 WLR 998], concerning the significance of the 2007 Act, as a particularly strong statement of public policy, are equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. Both the courts and the tribunals are obliged to respect the high level of importance which the legislature attaches to the deportation of foreign criminals."

It is because of the high level of importance attached by Parliament to the deportation of foreign criminals that, where neither Exception 1 nor Exception 2 applies, the public interest in deportation can only be outweighed by very compelling circumstances.

33. Secondly, the Court's explanation of the effect of the phrase "over and above those described in Exceptions 1 and 2", at para. 29, reads as follows:

'The phrase used in section 117C (6), in para. 398 of [the Immigration Rules] and which we have held is to be read into section 117C (3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. … [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of [the Rules]), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.'

That passage is expressed to cover the case of both serious and medium offenders. At para. 32 the Court specifically addresses the case of medium offenders, as follows:

> '… [I]n the case of a medium offender, if all [the potential deportee] could advance in support of his Article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the

> Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.'

Those two passages make clear that, in carrying out the full proportionality assessment which is necessary where the Exceptions do not apply, facts and matters that were relevant to the assessment of whether either Exception applied are not 'exhausted' if the conclusion is that they do not. They remain relevant to the overall assessment, and could be sufficient to outweigh the public interest in deportation either, if specially strong, by themselves or in combination with other factors.

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

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

This passage makes a point which appears often in the case-law. But it is important to bear in mind that it is directed at the exercise under section 117C (6). The Court was not saying that it would be rare for cases to fall within section 117C (5).

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

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

Again, this is a point frequently made in the case-law; but, again, it should be borne in mind that, as the reference to a "sufficiently compelling circumstance" shows, the final sentence relates only to the exercise under section 117C (6)."

30. Bearing in mind the Court of Appeal's observations, I turn to the exercise conducted by the Judge in this case. As I have already noted, the Judge found that the Appellant could not meet either of the exceptions in relation to his private and family life. I deal at this point with an issue which I raised concerning the Judge's finding about the family life exception at [37] of the Decision. That is based in large part on the Judge's finding that the impact of the Appellant's deportation on [R] would be much the same as for any child. That is based on what was said by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)"). Although the Decision pre-dates the Court of Appeal's judgment in HA (Iraq), as I pointed out to the parties, it might be said that there was an error adverse to the Appellant based on the Judge's reasoning in this regard. As the Court of Appeal held at [34] of its judgment in HA (Iraq) the reference to "commonplace

incidents of family life" which are not sufficient relates to the assessment under Section 117C(6) and not Section 117C(5) which is what the Judge was considering at [37] of the Decision. However, as Ms Reid recognised, since this was not a point taken by the Appellant in either a Rule 24 Reply or cross appeal, she could not rely on it. It might be relevant to materiality, however, depending on my view of the remainder of the Judge's reasoning.

31. Having found that the Appellant could not meet either exception, the Judge continued her analysis as follows:

> "38. I go on to consider if there are any other compelling circumstances which have not already been considered above. Ms Reid submitted that the appellant had always been lawfully present in the UK from a young age, and that prior to the conviction leading to the deport order, the appellant had no prior convictions. Ms Reid sought particularly to rely upon the sentencing remarks of the trial Judge, which in her submission showed limited involvement in the offence, and upon the subsequent assessments which were said to show a low risk of reoffending.
>
> 39. The appellant was unable to meet the requirements of exception 1 (private life), and I have found above that exception 2 (family life with [R]) is not satisfied. The appellant no longer claims to have a family life with Ms [C] as their relationship has now ended. I fully accept that the appellant has always been in the UK lawfully with ILE having entered as a child to join his mother, and that he has not since returned to Zimbabwe. I also accept that prior to this offence he was a person of good character, and I accept that he has a genuine and subsisting parental relationship with [R]; that he provides at least some parental care for [R] and that he is involved in her life, and I accept that virtually all of the appellant's immediate family are now present and settled in the UK. The sentencing remarks say that the appellant took part in the offence of cutting and wrapping Class A drugs because he was a drug user in the hope of getting some free drugs; that the appellant had never been in trouble before and this offence was 'entirely out of character' going on to say that 'so transient was your involvement in this conspiracy, and on such a limited basis, that it seems to me that to follow sentencing guidelines would end up with a sentence that was not a just one in terms of it reflecting what you actually did and so I do not follow the guidelines for that reason', and that a prison sentence was imposed only because 'if the courts do not react in any other way people are encouraged to become involved with this trade which causes a good deal of misery and unhappiness.' The OASys report and the letter from the appellant's Probation Officer state that in every respect the appellant is a low risk to the public and at a low risk of reoffending, and since his release in May 2019 he has been 100% compliant with probation visits.
>
> 40. The sentencing remarks strongly indicate that although the offence for which the appellant was convicted is prima facie serious, the appellant's involvement in that offence was minimal, and he was previously of otherwise good character. He has been assessed by the Probation Service as being a low risk to the public and at a low risk of reoffending. His custodial sentence of twelve months was at the very lowest limit required to engage an automatic deportation decision, and it appears from the sentencing remarks that the trial Judge imposed the minimum possible custodial sentence bearing in mind all the

> circumstances in the appellant's case. These factors reduce the public interest in the appellant's deportation. It is accepted that the appellant has a genuine and subsisting relationship with his British citizen daughter, and that although I have found above that the effects on [R] of her father's deportation cannot be said to be 'unduly harsh' so as to satisfy exception 2, the expert ISW report concludes that the appellant's deportation would cause his daughter 'significant emotional distress', and I find that it would be in [R]'s interests for her father to remain a present and active part of her life in person and to continue to provide care and support for her as he presently does, and as discussed above it would not be reasonable for [R] to leave her mother and go to Zimbabwe to live with her father. The appellant has been in the UK since entering as a child in 2008 and he has fully integrated here. The appellant has established both a private and a family life in the UK during a time when he had a legitimate expectation that he would be entitled to remain in the UK indefinitely, and his deportation would necessarily interfere with his current private and family life I accept that the appellant deeply regrets the offence for which he was convicted, and I accept that he has been successfully rehabilitated and is at low risk of reoffending, and that he presents a low risk of harm to the public. When considering all the factors as set out above, I conclude that the public interest in deporting the appellant is outweighed by his Article 8 private and family life rights. For all those reasons as given above, I conclude that the decision to deport the appellant is, in all the circumstances, disproportionate."

32. It cannot sensibly be argued that [38] of the Decision contains an appropriate self-direction as to the law which applies to an assessment outside of the two exceptions to deportation. There is no reference to the high threshold which applies; the Judge refers only to "compelling" and not "very compelling" and does not refer to those other factors being "over and above" the two exceptions. I accept that the requirement is not necessarily one of factors which are of a different nature to the exceptions and the reference by the Judge to "other" circumstances not considered under those exceptions might be said to rescue the self-direction in that regard. However, as a result of the inaccurate self-direction, the Judge has failed to remind herself that, although factors falling within the exceptions may still be part of the cumulative assessment, the factors which apply must be sufficient to outweigh the high public interest in deportation or, put another way, to overcome the high threshold which applies where the exceptions are not satisfied.

33. Ms Reid valiantly sought to persuade me that, notwithstanding the wrong self-direction, the Judge had in fact recognised the test which she had to apply. Ms Reid was constrained to accept that there is no mention in the Decision of Section 117C (6) or paragraph 398 of the Rules in this regard. Ms Reid drew my attention to [36] of the Decision where the Judge states that "the deportation of foreign criminals is stated to be in the public interest, and the more serious the offence, the greater the public interest in deportation". That reflects, as Ms Reid submitted, Sections 117C (1) and (2). The Judge was obviously also aware of the exceptions in Sections 117C (4) and (5) which mirror the paragraphs of the Rules relied upon and to which she refers at [34] and [35] of the Decision.

34. I accept that the Judge was aware of Section 117C generally. However, I am unable to read her self-direction at [38] of the Decision as one which reflects Section 117C (6). It might be argued that, in her assessment at [39] and [40] of the Decision, the Judge recognised that elements of the exceptions, even if they were not satisfied, were relevant to the assessment outside the exceptions. It might be said that this shows that the Judge was undertaking the correct exercise. However, having concluded that neither of the exceptions in Section 117C(4) or (5) are met, she fails to remind herself that it is only in a case where the relevant factors (whether within the compass of exception 1 and 2 or otherwise) are (in the words of the Court of Appeal) "specially strong" that an appellant should succeed.

35. The second reason why I am persuaded that the Judge's assessment at paragraphs [38] to [40] of the Decision contains errors of law, relates to the Judge's analysis of the public interest. That aspect of the Decision is the subject of the Respondent's ground three.

36. The Respondent argues that, by discounting the public interest based on the sentencing Judge's remarks, the Judge has impermissibly ignored the fact that this was an automatic deportation case and is therefore in the public interest and has, furthermore, ignored other aspects of the public interest in deportation, namely deterrence.

37. Although I am satisfied that the Judge has erred in relation to her analysis and by reducing the public interest as she has done, I would formulate the error slightly differently. Although I accept that, at [40] of the Decision, the Judge mentions that this is an automatic deportation case, she does so only to note that the sentence was at the bottom end of the scale. The length of sentence and nature of offence is something which can be factored into the balancing assessment, but a Judge cannot ignore that automatic deportation is deemed by statute to be in the public interest. In her assessment, Judge Nolan appears to balance the fact of the twelve months' sentence in the Appellant's favour rather than as reinforcing the public interest; indeed, she goes on to say that "[t]hese factors reduce the public interest in the appellant's deportation". That is notwithstanding her self-direction at [36] of the Decision that deportation is in the public interest.

38. Moreover, I can find no consideration of the deterrence aspect of deportation. The mere fact that this is part of the reasoning of the sentencing Judge does not save the Decision in that regard. Indeed, to rely upon those remarks is to double count the leniency of the sentence in the Appellant's favour. The remarks of the sentencing Judge were also made in the context of criminal offending and not in the different context of the public interest in deportation.

39. Whilst I accept therefore that the length of sentence and indeed the risk which an appellant now poses are factors to which a Judge is undoubtedly entitled to have regard when balancing interference with an appellant's rights against the public interest, I am satisfied that the Judge has erred in this case by ignoring aspects of the

public interest, and weighing factors in the reduction of the public interest in an impermissible way.

40. I am unpersuaded by the Respondent's ground four. As Ms Reid submitted and I accept, whether an individual is of good character in this context is concerned with a person's criminal record and not with his other behaviour (here as a drug user). That is the way in which the Judge used the term at [39] of the Decision and I am satisfied that she was entitled to make that observation and to factor it into the assessment.

41. For the above reasons, I am satisfied that the Respondent has demonstrated that the Judge fell into error in the ways set out in grounds one to three but not ground four.

42. As I have noted above, I am not satisfied that it can be said that the Judge applied the right test notwithstanding the lack of proper self-direction. Whilst it is quite possible that another Judge could come to the same conclusion, I cannot say that this will be or is even highly likely to be the case. I therefore consider it necessary to set aside the Decision for re-making.

43. I do not preserve any of Judge Nolan's findings. As I explored in the course of submissions, it is likely that the Judge's conclusion in relation to exception 2 (in relation to the impact of deportation on the Appellant's child) will need to be revisited following HA (Iraq) and in any event, the Appellant wishes to put forward updating evidence in that regard so that finding will need to be reconsidered.

44. Although the Appellant cannot succeed under exception 1 in relation to his private life as he has not lived in the UK lawfully for a sufficient period, it is necessary to consider the extent to which he meets either of the other two criteria within that exception in order properly to conduct the balancing exercise in the event that the finding remains that the Appellant does not meet exception 2.

45. It was agreed that the appeal could be retained in the Upper Tribunal for re-making. I have given directions below for that to happen.

DECISION AND DIRECTIONS

The Decision of First-tier Tribunal Judge L Nolan promulgated on 8 April 2020 involves the making of an error on a point of law. I therefore set aside the Decision.

I make the following directions for the resumed hearing:

1. **By 4pm on Friday 30 April 2021, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he relies.**

2. **The resumed hearing is to be listed with a time estimate of ½ day on the first available date after Monday 17 May 2021. That hearing is to be listed via Skype for Business (or other appropriate platform). The parties have liberty to apply for a different form of hearing no later than 28 days after this**

decision is sent but it is noted that the Appellant's mother who is likely to give evidence is shielding and could not be expected attend a hearing at this time. The parties are required to provide joining details for that hearing within 28 days from the date when this decision is sent for those who are to attend the hearing which may include the Appellant, his witnesses and legal representatives for both parties.

3. **If an interpreter is required for the hearing, the Appellant shall notify the Tribunal accordingly within 28 days from the date when this decision is sent.**

4. **Documents or submissions filed in response to these directions may be sent by, or attached to, an email to FieldHouseCorrespondence@Justice.gov.uk using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents which should continue to be sent by post.**

5. **Service on the Secretary of State may be to UTdirections@homeoffice.gov.uk and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.**

6. **The parties have liberty to apply to the Tribunal for further directions or variation of the above directions, giving reasons if they face significant difficulties in complying.**

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 19 January 2021