Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00471/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 April 2018 and 13 June 2018	**On 23 November 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant (Secretary of State for the Home Department): Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent (AB): Mr D Chirico, Counsel instructed by Bindmans LLP

DECISION AND REASONS

1. As was the case when I gave my Note of Hearing and Directions following the commencement of this hearing on 4 April 2018, this is technically the Secretary of State's appeal against a decision previously made by the First-tier Tribunal and so for

ease of reference I shall where necessary throughout this decision refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to AB, who was the original appellant, as "the claimant".

2. This appeal has had a long history. The claimant, who is a national of Sierra Leone who was born on 10 December 1986, was a child soldier in that country. He had been forcibly recruited, along with his friend A, by the Revolutionary United Front the day after arriving in Maboka, after having run away from Freetown, where the claimant had been born. It was (and remains) the claimant's case that after his father had died in 1994, he had suffered abuse from his family which was why he had run away, after his friend A had persuaded him to.

3. In a decision made by Upper Tribunal Judge Eshun which was promulgated on 7 September 2015 (to which reference will be made below) Judge Eshun at paragraph 4 referred to findings of fact which had previously been made by the First-tier Tribunal, which had not been challenged by the respondent. At paragraph 6, Judge Eshun set out these findings insofar as it related to the claimant's activities as a child soldier:

> "6. The [claimant] was made to take drugs and to kill a man. There followed a significant period of time when the [claimant] was with the RUF and carried out significant acts of brutality, killing and raping civilians. In 1997 he spent time as an assistant to Ibrahim Koroma of the Armed Forces Revolutionary Council. He travelled to Guinea to try to find his mother and then back to Sierra Leone to rejoin the RUF. He was assaulted by his family again for his relationship with A and then fled to Guinea and Senegal and was eventually reunited with his mother in Gambia. His mother came to the UK to claim asylum in 2001 and the [claimant] went back to Sierra Leone to live with an aunt. He came to the UK in 2003".

4. On 29 October 2003 the claimant was granted indefinite leave to enter the UK and he entered on 16 December of that year under the refugee family reunion provisions.

5. It is the claimant's case that having been forcibly recruited as a child soldier, he was supplied by his abductors with heroin and cocaine, the intention being that he would become addicted/dependent upon these drugs. This claim is consistent with the expert evidence provided in the original expert report made by Mariama Conteh, dated 26 May 2014, in which, when commenting on child soldiers in Sierra Leone generally, she states as follows:

> "20. As well as the nature of its brutality, another major factor that brought attention of Sierra Leone's war to the international community was the use and forceful conscription of child soldiers, finally estimated at around 5,000. This figure excludes those that were attached to the fighting groups forcibly but with non-combative roles. Just over ten years after the end of the war, there are numerous testimonies, academic studies and articles available that describe these experiences. One of the more popular and

easily accessible accounts comes from Ishmael Beah, a child soldier from Sierra Leone who was able to find his way to the USA, get adopted and gain access to a university education.

21. Apart from actual soldiers, many young children were used as part of the forces to cook and clean or carry equipment and other loads. Young girls were often used as sex slaves. What is clear from many accounts is that apart from the initial few months of the rebellion where there appeared to be a sense of revolution against a corrupt government, the majority of child soldiers were forcibly recruited. Many accounts described the forcing of children to commit atrocities against their own family or village members so that they would never be able to return. Other accounts described rebels killing families to achieve the same result.

22. During their time as soldiers, children were not spared committing violent acts, fighting and killing. Their roles were the same as older combatants. There are also accounts of widespread drug use. Drugs were used by commanders to ensure that child soldiers fought fearlessly and ferociously, and also to the soldiers to deaden their emotions and distance themselves from the death and violence around them.

23. Not only were young fighters forced to kill, but also, aided by drugs they did so in a gruesome manner. Yet seeing and conducting this type of violence became a regular part of their lives. Ishmael Beah, a former ex-combatant who wrote about his experiences, explains this vividly by saying, 'somebody being shot in front of you, or yourself shooting somebody became just like drinking a glass of water'.

24. Child soldiers as the adult combatants were accused of heinous crimes. Not only did they murder civilians indiscriminately, but often this was done in a brutal way – 'apart from the infamous rituals 'amputation' of hands, and summary executions, child soldiers sometimes cut open the bellies of pregnant women just to see what sex the child was'".

6. Regrettably, but perhaps unsurprisingly given this claimant's background, after arriving in this country he soon fell foul of the authorities. In her decision referred to above, Judge Eshun noted as follows, at paragraph 4:

> "He was convicted of various public order, theft, criminal damage and common assault offences between 2006 and 2011, the sentences included two short custodial terms. [Then] on 10 August 2012 he was convicted at Exeter Crown Court of possessing a controlled drug with intent to supply and received a three year custodial sentence with a consecutive twelve month sentence for possession of an offensive weapon; making four years in all".

7. In his original witness statement, made for the First-tier Tribunal hearing (to which reference will be made below) on 2 June 2014, the claimant set out the circumstances in which the most serious offence was committed:

"3. My father was a successful businessman. I was very close to him before he died and I remember him telling me the importance of education and working hard in school. My life would have been very different if he had not died when I was so young and if I had not been convinced by A to leave my family. I was very young and didn't really know what I was doing, so when he suggested that we leave, I followed him.

4. As I mentioned in my asylum statement … I was about 10 years old when I was captured and recruited by the Revolutionary United Front (RUF) in Maboka. I was fed hard drugs including heroin and cocaine which was supposed to make me brave and willing to fight for them. Getting high like this was a daily occurrence and I became addicted. It stopped me from understanding what I was doing. I have been struggling with this addiction since coming to the UK in 2003. I have tried to stop before and have been successful at times but I ended up just swapping between different drugs. I could not afford the drugs that I was taking and, I started owing a drug dealer called Yousef money in 2006. This step was the reason I went to Glasgow; in order to get a job to pay it off.

5. On another occasion in about 2008 or 2009 while we were living in Peckham, I was beaten up by Yousef's guys in Burgess. I was also pulled into a van and beaten up a couple of times by about six guys in Lewisham in around 2011. This was all because I owed Yousef money but I kept telling him that I could not pay.

6. Yousef and the men who worked for him have attacked me on several occasions because of this debt. When I was living in Catford with A, they came to our home while we were out, broke in and took things like a laptop and a Nintendo Wii. A told the police about this.

7. I started sleeping at my cousin's (MLK) house at [~] Street, in around May 2012 until June 2012. This is because I felt that it was not safe for my children if I was … living in the same house. I knew that they were dangerous people and did not want my girls to be anywhere near that.

8. Two months before my arrest, I bumped into some of Yousef's people in Old Kent Road. They told me that I should transport some drugs for them to pay off the debt. They said that because I had owed them £4,000 for so long, I now owed them £10,000. They said that I could pay this off by making deliveries for them. I felt that I had no choice but to do this because they will keep threatening me and my family if I refuse.".

8. Following the claimant's conviction at Exeter Crown Court for possessing a controlled drug with intent to supply, for which he received a three year custodial sentence together with a consecutive twelve months' sentence for possession of an offensive weapon, the Secretary of State made a decision to deport him. The claimant appealed against this decision and his appeal was allowed by the First-tier

Tribunal. On 18 June 2015 the Upper Tribunal, consisting of Upper Tribunal Judges Eshun and Blum, had found that that decision had contained a material error of law such that it would have to be remade. As Judge Eshun notes in her decision already referred to, at paragraph 2:

> "The errors identified by the Upper Tribunal were that the First-tier Tribunal failed to refer to the Rules as then in place, erred in considering the case on the basis of Article 8 outside the Rules and failed to explain its conclusions".

9. This decision was then remade by Judge Eshun in the decision from which I have quoted above and, following a hearing at Field House on 18 August 2015, in a Decision and Reasons promulgated on 7 September 2015, Judge Eshun allowed the claimant's appeal.

10. At that time, the claimant was in a subsisting relationship with one AE, whom the claimant had met when she was 16, and the couple had two children, born in 2005 and 2009. As Judge Eshun records at paragraph 7 of her decision:

> "The [Secretary of State] has accepted that there is a genuine and subsisting parental relationship between the [claimant] and the children and that it is not reasonable for the children to leave the UK. The [Secretary of State] also accepted that the [claimant] is in a genuine and subsisting relationship with AE, a citizen of Jamaica, who was granted indefinite leave to remain in the UK".

11. In her decision, Judge Eshun had regard to the relevant Rules, being 398, 399 and 399A, and also to Section 117C of the Nationality, Immigration and Asylum Act 2002 (inserted by the 2014 Immigration Act).

12. At the time Judge Eshun made her decision, this Tribunal had just promulgated its decision in *MAB (para 399; "unduly harsh") USA* [2015] UKUT 435, where, as Judge Eshun notes at paragraph 21 of her decision, "The Tribunal rejected the submission of the SSHD that '*unduly harsh*' implied a need to factor in the public interest". She cited what the Tribunal in *MAB* had found at paragraph 72, of that decision, as follows:

> "'*Unduly*' requires that the impact upon the individual concerned be 'inordinately' harsh. By that we mean that the impact would be 'unusually large' or 'excessive'. We do not intend that to be a definition but rather a 'gloss' to assist decision makers applying para 399, indeed, s. 117C(5). [The assessment] is necessarily fact-sensitive but is focused upon the impact on the individual (whether child or partner) concerned".

13. Subsequently a differently constituted Tribunal (UTJ Southern) had declined to follow *MAB* but had found, in *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 that when considering whether or not it was "unduly harsh" to require a child in the UK to remain without the offending parent a Tribunal had to have regard to the criminality of the parent. In other words, the decision of this Tribunal in *MAB* was not to be followed.

14. Judge Southern's decision in *KMO* was upheld by the Court of Appeal in *MM (Uganda) v SSHD* [2016] EWCA Civ 617.

15. The Secretary of State appealed against Judge Eshun's decision on the basis that she had been wrong to rely on the decision of this Tribunal in *MAB*, and it was ordered by consent, in the Court of Appeal, that the appeal be:

> "remitted to the Upper Tribunal for reconsideration of whether the effect on the [claimant's] children of separating them from the [claimant] by way of the latter's deportation would be unduly harsh".

16. The Statement of Reasons agreed by the parties, included the following:

> "7. At [para] 28 and 31 of her decision in this case, UT Judge Eshun followed the decision in *MAB* [2015] UKUT 435 (IAC) in finding that 'unduly harsh' did not imply a need to factor in the public interest. At [para] 72 of the Tribunal in *MAB* said that:
>
> > 'Unduly' requires that the impact upon the individual concerned be 'inordinately' harsh. By that we mean that the impact would be 'unusually large' or 'excessive'. We do not intend that to be a definition but rather a 'gloss' to assist decision makers applying para 399, indeed, s. 117C(5). […] [The assessment] is necessarily fact-sensitive but is focused upon the impact on the individual (whether child or partner) concerned.'
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> 8. The UT in *MAB* went on to say that the earlier decisions of the UT – notably *MK Sierra Leone* [2015] UKUT 00223 (IAC) and *BM DRC CG* [2015] UKUT 00293 (IAC) – had not involved a balancing exercise and that, on the facts, '[i]t could not properly be established that the effect on [the claimant's children] of the [claimant's] deportation was excessive, inordinate or severe'.
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> 9. It is now clear from the judgment in *MM (Uganda)* that that decision is wrong. At [26] Laws LJ, with whom Voss and Hamblen LJJ agreed, expressly held that *MAB* was 'wrongly decided', and that, for reasons which he had set out at [23]-[24]:
>
> > 'The expression 'unduly harsh' in Section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history.'
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> 10. The parties accordingly agree that Judge Eshun therefore erred in her approach to the 'unduly harsh' test. They also agree that it is possible that the UT's decision would have been different if the judge had applied the correct test to the particular facts of the case. Therefore the decision on AB's substantive appeal against deportation should be reconsidered by the UT before a judge other than Judge Eshun …".

17. The appeal was then listed before the Upper Tribunal for directions on 23 January 2018. Following that hearing, the directions recorded that the parties had agreed that the issues to be determined would be as follows:

> "Whether the [claimant's] removal from the United Kingdom will breach his Article 8 rights:-
>
> (a) by reference to paragraph 399(a) of the Immigration Rules (having regard to the impact on the [claimant's] children of his removal from the UK);
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> (b) by reference to paragraph 399A of those Rules (having regard to the obstacles to the [claimant's] integration if returned); and/or
>
> (c) by reference to very compelling circumstances either under paragraph 398 of those Rules or in accordance with the guidance in *Ali v SSHD* [2016] UKSC 60".

18. It was also recorded that the parties accepted that there had been no challenge to the findings of the First-tier Tribunal which had been made and set out in paragraphs 15 to 18 of the decision of that Tribunal promulgated on 6 August 2014. Paragraphs 15 to 18 of that decision (which have been summarised earlier) were as follows:

> "**Our Findings of Fact and Law**
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> 15. We found the appellant to be a credible witness and his account is consistent with the expert report ('the expert report') from Mariama Conteh (appellant's bundle 2 pages 1-43). His family members know very little about his role as a child soldier. We find that his account is reasonably likely to be true and we make the following findings of fact. The appellant was born in Freetown in 1986. His mother left the family when he was very young. He went to live with his grandmother but when she died he returned to live with his father. His father died in 1994 and the appellant went to live with an aunt. He became friends with a neighbouring teenager, ABF ['A']. A was suspected to be gay. The appellant suffered abuse from his family and in 1996 A persuaded him to run away. He travelled to Maboka but the town was overrun by the Revolutionary United Front (RUF). The appellant and A were recruited as child soldiers.
>
> 16. The appellant was made to take drugs and to kill a man. There followed a significant period of time when the appellant was with the RUF and carried out significant acts of brutality, killing and raping civilians. In 1997 he spent some time as an assistant to Ibrahim Koroma of the Armed Forces Revolutionary Council. He travelled to Guinea to try to find his mother and then back to Sierra Leone to rejoin the RUF. He was assaulted by his family again for his relationship with A and then fled to Guinea and Senegal and was eventually reunited with his mother in Gambia. His

mother came to the UK to claim asylum in 2001 and the appellant went back to Sierra Leone to live with an aunt. He came to the UK in 2003.

17. The appellant met AE ('A') in 2005 and they started a relationship. She was 16 and from an unsettled background. She became pregnant and the couple had two children, in 2005 and 2009. He has a number of other family members in the UK, principally his mother, siblings and their children. We have seen an expert assessment report ('the expert assessment report') prepared by Peter Horrocks, an independent social worker, on 27 May 2014 (appellant's bundle 2, pages 43-69). The report concludes that the appellant has been traumatised and severely emotionally damaged by the horrors he witnessed and took part in as a child in Sierra Leone. He took a cocktail of drugs to cocoon himself from the realities of his life and this has continued into his early adulthood. His emotional needs were not met as a child. There has been domestic violence in the relationship with A but the couple appear to be maturing and are committed to each other and the children. They both grew up without fathers and do not want their daughters to experience the same thing.

18. The expert assessment report states that the appellant was a major figure in the lives of his daughters since birth and was their primary carer until he went to prison because A was at college and university. There was a significant impact upon the children when the appellant went to prison. M suffered from speech difficulties and L reverted to soiling and wetting herself. The children have continued to have contact with the appellant and are excited at the prospect of his return home. If the appellant were to be permanently separated from his children then this would in all likelihood have a major impact upon their well-being and development. A could suffer a deterioration of her mental health difficulties which could undermine the functioning of a family unit. We have carefully considered the expert assessment report as a whole and find the conclusions to be credible".

19. It was also recorded within the directions that the claimant had sought to "reserve his position" with regard to amending his grounds to include reliance on Article 3 of the ECHR. It was recorded that this was subject to the evidence of the country expert and/or further guidance given by the courts or Tribunal in relation to that issue. It was also to be open to the claimant at any stage "to apply to amend the grounds of his challenge if he has evidence in support of that and it will be for the Tribunal for decide whether to grant permission for such amendment".

20. The appeal was then listed before me for hearing on 4 April 2018. Regrettably, although the representatives of both parties had indicated at the directions hearing that in their view at least one full day should be allocated for the hearing, only half-a-day was allocated. In the event, the parties' time estimate proved to be more realistic than that of the Tribunal, the result being that it was necessary to adjourn the hearing

on 4 April 2018 part-heard, after the evidence which was available on that day had been heard but before submissions had been made. The hearing was resumed on 13 June 2018 when I heard further evidence from the claimant's mother, who had been unable (because of her ill-health) to attend on 4 April, and I also heard submissions on behalf of both parties.

21. In addition to hearing evidence, at the hearing on 4 April I also granted leave to the claimant to rely on Article 3 grounds, which application was not opposed by the Secretary of State. Having regard in particular to the evidence which was now before the Tribunal of Dr Deborah Brooke, to which reference will be made below, I considered that it was clearly in the interests of justice to allow the claimant to rely on Article 3 grounds also.

The Hearing

22. The claimant's solicitors prepared a consolidated bundle in advance of the hearing on 4 April consisting of two lever arch files. These contained new witness statements from the claimant, his sister, mother, and current partner (his relationship with AE now being at an end) as well as a very short statement from the claimant's solicitor, Mr Oldman, who confirmed that he had spoken with the claimant's former partner, AE, who had told him on the telephone that she would not agree to her children meeting with the independent social worker who had prepared the earlier report of 27 May 2014 (relied upon in the First-tier Tribunal) to enable him to prepare a new report.

23. The bundle contained new expert reports from Dr Brooke, a consultant psychiatrist, and Mariama Conteh, the country expert, an extract from whose original report of 26 May 2014 has been set out above. The bundle also contained the witness statements which had previously been served and also the expert evidence which had previously been before the Tribunal.

24. The Tribunal was also provided with documents relevant to the claimant's current family situation.

25. At the hearing on 4 April I heard live evidence from the claimant, his sister and current partner, who were all available to be cross-examined. I was assisted by a skeleton argument on behalf of the claimant and before the hearing was resumed on 13 June, I was provided also with a skeleton argument prepared on behalf of the Secretary of State by Mr Kotas, which addressed the evidence which had been given at the previous hearing on 4 April.

26. At the resumed hearing on 13 June I heard further evidence from the claimant's mother, who had been too unwell to give evidence on 4 April, and I also heard lengthy submissions on behalf of both parties.

27. I will not set out below everything which was said during the course of the hearings, but shall refer only to such of the evidence and submissions as is necessary for the purposes of this Decision. I have, however, taken account of all the evidence and

submissions, and all the material contained within the consolidated bundle, whether or not the same is referred to specifically below.

The Evidence

28. The first witness was the claimant himself, who described how his mother was currently in hospital with heart problems, and that he spent time with her. He affirmed his statements, and that he was still on occasion taking crack cocaine, although he had not had any for some six weeks. He said he had been able to pay for it by small sums his mother or sister had given him or people in the bookies. Regarding his most recent conviction for threatening and abusive words, he had pleaded guilty because he and his babies' mother were "in altercation"; they were arguing and the neighbours had called the police. Regarding his two convictions for failing to surrender to custody in court, on one occasion he had been five or ten minutes late for court because he had gone to the wrong court by mistake and on the second occasion no action was taken.

29. In cross-examination, the claimant confirmed that AE had now secured an injunction preventing him from seeing his children. She was making it very hard for him to see them. He had not understood the injunction properly, but he had only seen them three times since December. He had two other children, one was in Germany and he did not know where the other one was.

30. So far as his children with AE was concerned, she refused to let him in the house, so he would only be able to speak to them for a minute. Effectively he would turn up to see his children but AE would not let him.

31. When describing his feelings about being unable to see his children, the claimant said that although AE might not want him in her life, he "needed to be in his kids' lives". He then said that he was more depressed than ever before, and added that "all this is my own fault". His addiction had got him into prison and had got him to the state he was now together with his male pride. It was his fault that she had dumped him and that he did not see his children and he got depressed about that.

32. The claimant accepted when giving evidence that he had to have a drink every day, beer, cider or whatever he could afford.

33. In re-examination the claimant clarified what he meant by not having smoked crack cocaine for six weeks; he had occasionally bought £10 worth once or twice within the past six weeks, but in his eyes that was not smoking. Up to six weeks ago, he had been spending £20 to £30 a day. He would beg or borrow it. Since then, he had only smoked £5 to £10 worth occasionally, maybe £20 in total, because he was "fighting it mentally". The claimant then repeated that he was fed up with himself; "I am fit and healthy and living like this and my girlfriend says I am a useless man".

34. The claimant still maintained however that he was a good role model for his current girlfriend's children, because he made sure that those children did not see that side of him, although his current girlfriend did know about it.

35. The claimant hoped that he could work in construction in Elephant & Castle, but he did not have proper papers. He needed a passport or a biometric card, because he wanted to make something of his life. He wanted to fix his life up, get a job and somewhere to stay so he could look after his children. In answer to a question from a Tribunal, the claimant said he had not had a drink today, but the last time was last night.

36. The claimant's sister gave evidence. She relied on her statement and was cross-examined. She tried to do her best to assist her brother, even to the extent of telling the Tribunal that she had never seen him under the influence of either drink or drugs when he was with her children. She accepted however that it was certainly possible that he had used money she had given him for drink, and she accepted that he had a drink problem. She said that her brother was upset about his current situation so he tried to block it out through drink, if not every day, then every other day. She was not aware that he had taken drugs in the last few weeks.

37. Even though this witness was worried about the claimant's smoking drugs and heavy drinking, she still maintained that he was a good role model for her children when they were around, and that he took this very seriously.

38. When it was put to her in cross-examination that the psychiatric reports indicated that the claimant drank every day and might have his first drink at 8 or 9 in the morning, his sister said that she had not seen that.

39. This witness was asked questions about whether any of her family had returned to Sierra Leone since coming to the UK, to which her initial response was "not that I know of", but on further questioning she agreed that her mother might have, together with a younger sister; she explained this apparent inconsistency by saying that she had been thinking about herself. She was not aware of any family in Sierra Leone.

40. When it was put to her that she had tried to paint her brother in a better light than he really was in, she replied that "he is a good person and a good man" who "has been there for myself and my kids".

41. The claimant's current girlfriend, NK, adopted her statement. In that statement she described how she had met the claimant through his sister, whom she had known for a very long time and that the claimant had started living with her at the end of 2015, having just ended his relationship with AE. She says (which seems to be clear from all the evidence) that the claimant "is not very stable". She says (at paragraph 3) that "He feels hopeless and there is not much that is keeping him going other than his children and nieces". She states also how the claimant is currently unable to see his children because AE makes it very hard for him to do so. At paragraph 5, she says as follows:

> "When [the claimant] is feeling low, he tends to turn to drink and smoking crack. He tells me that everything is too much for him and sometimes disappears for days on end. I am there for him to talk to and I do what I can to

> help, and there are days when he is able to give up the drinking and smoking. But then things overwhelm him and he finds it hard to resist".

42. NK believes that she, his sister and his mother are "his only support". She believes he needs professional help with his mental health and his addiction problems.

43. NK believes that notwithstanding these problems the claimant is good with her children, who are aged 14 and 11, because he has patience and tolerance with them. She believes he is hands-on with her children and is "a very positive influence" on them. He also helps his mother a lot going to and from hospital with her.

44. At paragraph 9 NK says openly that "My relationship with [the claimant] is not easy and we have had our ups and downs". She continues as follows:

> "He sometimes says that he feels ashamed and like he is a burden on me because I am financially responsible for everything. … He often does not have money even to catch buses so that makes things very difficult. This, as well as the immigration case, has put a lot of pressure on our relationship. It has meant that we cannot make plans for our future or even know what could happen just months from now".

45. Having stated that it would have a very bad impact on her if the claimant were to be deported, she then sets out what she believes the effect would be on him (at paragraph 11):

> "[The claimant] will not cope if he is sent back because he won't have anything to live for in Sierra Leone. His biggest fear is his children growing up without knowing him and him not seeing them grow up. He will be lost in Sierra Leone and I think it would push him to become suicidal. Even here he gets to the point where he talks about suicide at times, so to be in Sierra Leone, where he knows no-one and is separated from his family and children – his whole life – I think that would push him over the edge".

46. NK then says how she believes that the claimant "is a really good person and wants to be a provider, especially for the children" and that he "is a hard worker" but that his immigration position has stopped him being able to work. She believes that were he able to work this would help with his alcohol and addiction problem.

47. NK was not cross-examined and in answer to a question from the Tribunal she said that the claimant spent five days a week with her.

48. When asking supplementary questions, Mr Chirico told her that two other people had given evidence that the claimant spent a lot of time at his sister's house as well, and so she was asked how many nights a week the claimant spent at her home, to which NK answered that he would stay at his sister's and come to her, sometimes two nights a week, sometimes three. Sometimes she would stay with him even when this was not at her house.

49. Because an issue had arisen within the claimant's sister's evidence as to whether or not the claimant's mother had visited Sierra Leone, and still had relatives there, before the hearing on 13 June, the claimant's mother had provided a further statement, and she was cross-examined on that statement. Although her evidence was in places confusing, it is not necessary for the purposes of this decision for me to set it out. It is sufficient to record that having considered her evidence very carefully, and also further documentation sent to the Tribunal after the hearing by the claimant's solicitors, I find that it is more likely than not that this claimant does not now have any remaining family in Sierra Leone to whom he could look for support were he to be returned there.

Submissions

50. As already noted above, Mr Kotas had very helpfully prepared a skeleton argument prior to the hearing on 13 June summarising his submissions. He also made oral submissions at the hearing. Likewise, Mr Chirico relied upon his skeleton argument which he also expanded orally during the course of the hearing on 13 June. I do not propose to set out the parties' respective arguments, but do take them into account within the discussion below.

Discussion

51. Matters have clearly moved on since the Court of Appeal hearing. As Voss LJ makes clear in his reasons for granting permission to appeal, Judge Eshun's decision had been made "before the Court of Appeal's decision in *MM (Uganda)* [2016] EWCA Civ 450 … where the principles to be applied in this kind of case were laid down".

52. Voss LJ stated further that:

> "It seems reasonably clear that UTJ Eshun applied the wrong principles to the meaning of the words 'unduly harsh' in Section 117C(5) in paragraph 399 of the Immigration Rules. She followed *MAB (USA)* [2015] UKUT 435 which is now no longer good law".

53. At the time of Judge Eshun's decision, the claimant was believed to have a subsisting parental relationship with his children. At paragraph 25 of her decision, UTJ Eshun had noted that:

> "the [Secretary of State] has accepted that the [claimant] was in a genuine and subsisting relationship with [M and L] who are under the age of 18. The [Secretary of State] also considered that it would be unreasonable to expect [M and L] to leave the United Kingdom".

54. Judge Eshun also noted that the Secretary of State had also accepted that the claimant was in a genuine and subsisting relationship with AE, and that accordingly (at paragraph 27) "the issue therefore that I have to decide under the Immigration Rules is whether it will be unduly harsh for the children and A … to remain in the UK without the [claimant]".

55. It was in the context of these relationships that Judge Eshun relied on the definition of the phrase "unduly harsh" in *MAB*.

56. The factual background has now changed. Although the claimant still wishes to see his children, it is clear that his contact with them is minimal, and he does not, in any meaningful sense, currently have a subsisting parental relationship with them. Nor does he have a subsisting relationship with AE.

57. Further, since the hearing, but before this decision has been promulgated (although I obviously was not addressed on this development), the Supreme Court in *KO & Ors* [2018] UKSC 53, has now decided that *MM (Uganda)* was wrongly decided. However, the Supreme Court in *KO* also made it very clear that the hurdle an applicant would have to overcome before establishing that the effect of deportation on his or her child would be "unduly harsh" was a very high one indeed (see in particular at paragraph 35 of the decision in *KO*).

58. It is common ground that this Tribunal has to consider this appeal on the basis of the facts as they are now, and in the context of the current position, vis-à-vis the claimant and his children, exception 2 set out within Section 117C of the 2002 Act clearly does not apply. Nor, having regard to the Supreme Court decision in *KO*, is it arguable that the effect on NK of the claimant's deportation could be said to be "unduly harsh" either.

59. So far as exception 1 is concerned (set out at Section 117C(4) of the 2002 Act) the claimant is not yet 32 and did not arrive in this country until after his 17th birthday. Accordingly, he has not been lawfully resident in this country for "most of" his life, as is required under Section 117C(4)(a). As to what obstacles there would be to his reintegration within Sierra Leone, this will be discussed below both in the context of whether a decision to deport him would on the facts of this case breach his Article 3 rights and also, when considering Article 8, whether there are sufficiently compelling reasons over and above those set out within the exceptions why, exceptionally, he should not be deported, despite the considerable public interest in deporting persons who commit serious criminal offences.

60. Although much of the evidence given on behalf of the claimant was confusing and some of it I found to be unreliable (in particular that of the claimant's sister where she attempted to downplay the extent of the claimant's current dependence on crack cocaine and alcohol) I have nonetheless found a number of aspects of the claimant's case entirely credible.

61. While the claimant currently still clearly has a serious problem with his drinking and also with regard to his drug taking, I accept that he is at least trying to control these addictions. I also accept, as I have already noted above, that even though the evidence was confusing, it is more likely than not that he does not have any family or other contacts within Sierra Leone to whom he could turn for support if he was deported to that country.

62. The situation with regard to the exploitation of child soldiers within Sierra Leone and the effect this has had on them is well-documented. Although one cannot necessarily exclude moral culpability on their part for the atrocities that they have inflicted on others, they (and this includes this claimant) are also victims. The moral culpability for the terrible crimes which the claimant and others like him committed is considerably mitigated by the circumstances in which their lives were ruined at a very young age. One cannot easily condemn as wholly wicked a person who at the age of 10 or 11 is given a choice between killing someone or being killed, and the atrocities committed by the claimant and others in his position were against a background of having been fed, at an extremely young age, with a cocktail of drugs which destroyed their moral compass.

63. It was clear to me from hearing the claimant give evidence, which is reinforced by the evidence in particular of NK and also the psychiatric evidence to which I will refer below, that this claimant struggles with a feeling of worthlessness and also of moral culpability, for which he is not alone responsible. He did not before this Tribunal attempt to justify his behaviour and I believed he was sincere when he told the Tribunal that he considered that the mess he was now in was all his fault.

64. It is within the context of these findings that I turn now to consider what realistically is likely to occur should the claimant be returned to Sierra Leone. With regard to whether there will be "very significant obstacles" preventing the claimant's integration within Sierra Leone, were the claimant in a less precarious psychiatric state, there would probably not be. Were he fit and able and not feeling desperate, he has sufficient knowledge of what life is like in Sierra Leone, and I note that English is spoken as a main language there, to be able to survive adequately.

65. However, the claimant is not in such a condition. I have regard in particular to the very clear findings contained within the relatively recent report of Dr Deborah Brooke, dated 18 December 2017, which is thorough and detailed. I note that at page 10 of her report (page 77 of the bundle) she states as follows:

> "In my opinion, [the claimant's] PTSD is complex because of his pre-existing developmental vulnerability, the young age at which he experienced severe and repeated traumatic experiences, the association with intoxication (which prevents integration and processing of experiences) and, most importantly his sense of guilt for his acts".

66. As I have indicated, this mirrors my own findings, and reinforces the view that I formed when hearing the claimant give evidence.

67. I also note what is said in the final paragraph at page 11 (page 78 of the bundle) with regard to the impact of removal of the claimant from the UK:

> "[The claimant] is a vulnerable man. His removal from the UK carries a clear risk of a recurrence of his depressive illness as he would lose the family integration – including that with his mother and siblings – which he has been able to build after his extremely damaging childhood experiences".

68. Dr Brooke also has regard to the report made by Mariama Conteh, to which I have also had regard in which she had stated that "At the time of writing, there were no psychotherapy services in Sierra Leone" and that "She did not think that interventions, such as counselling would be available to him, and there were no services to address suicide risk, to her knowledge" (this is at the top of page 12, page 79 of the bundle).

69. Dr Brooke went on to conclude as follows:

> "I conclude that his removal to Sierra Leone would both prevent his access to any therapy for his PTSD and take away his sense of purpose and belonging within his family. Recurrence of his depression would be highly likely".

70. The real force of Dr Brooke's report, in my judgement, is her conclusion as to the potential suicide risk of the claimant. In the middle of page 12 (page 79 of the bundle) Dr Brooke states first that "Suicide risk is difficult to predict and can change rapidly" before continuing as follows:

> "[The claimant] disclosed in prison that he had taken overdoses in the past. At interview, he appeared ambivalent. He described thoughts of killing himself, but he also thinks that he does not want to quit. He said that he injures himself by headbutting walls or punching walls 'just to feel the pain'. He does not see a future for himself. He expressed hopelessness about his lack of qualifications. Nonetheless, on the day of my interview, I thought his risk of suicide was low because he is in contact with his family, and he had seen his children two weeks before our interview".

71. However, having noted the claimant's vulnerability to depression, Dr Brooke goes on to consider the prognosis were this claimant now to be deported to Sierra Leone, at page 13 (page 80 of the bundle):

> "He would experience a process of removal, with a possible period in a detention centre, as a reminder of his last imprisonment. This is highly likely to precipitate another depressive illness. This will increase his risk of suicide, in my view, to high.
>
> On arrival in Sierra Leone, [the claimant] will be reminded of the traumatic memories associated with his life there. He has a number of fears relating to life in Sierra Leone, and very little in terms of happy memories to give him hope that a life there might be possible. In my view, the cumulative losses associated with his removal from the UK, plus exacerbation of his traumatic memories, will both act on his vulnerable mental state to escalate his risk of suicide to very high".

72. In other words, Dr Brooke's professional diagnosis, following a very detailed and thorough examination and consideration of the claimant's circumstances and history, is that although the risk of suicide is low should he remain in this country, it is "very high" were he to be returned to Sierra Leone.

73. I have to make a decision as to whether, having considered all the evidence, including the medical evidence, in the round, I agree with this diagnosis. In my judgement, this diagnosis is unsurprising in light of the evidence which I heard and all the papers contained within the file, and I accordingly accept it as soundly based and reliable.

74. Accordingly, in light of what I find to be the very high risk of suicide were the claimant now to be deported to Sierra Leone, I must consider whether his deportation to that country would be in breach of his Article 3 rights, having regard to the guidance given by the Court of Appeal in *J* [2005] EWCA Civ 629, as reinforced by the subsequent judgment of the Court of Appeal in *Y and Z (Sri Lanka)* [2009] EWCA Civ 362.

75. Referring to the *J* tests, clearly the "severity of the treatment which it is said that the applicant would suffer if removed" is severe, as the real risk of suicide always is. Secondly, there is, on the facts as I have found them to be, a clear causal link between the very real risk of suicide and the act of removal. Thirdly, acknowledging that the Article 3 threshold is high because it is a foreign case, and as the Court of Appeal in *J* indicated:

> "is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental"

notwithstanding that the threshold is high, on the facts as I have found them to be this threshold is passed. Fourthly, in light in particular of the professional and thoroughly reasoned prognosis of Dr Brooke, I consider the risk and fear of harm to be objectively well-founded. Fifthly, there is a real linkage between the claimant's mental state, which is felt likely to precipitate his suicide, and the very serious ill-treatment he received as a very young child. Sixthly, and finally, in light of Mariama Conteh's report, there do not appear to be effective mechanisms within Sierra Leone to reduce the risk of suicide. It is of particular importance in this case that this is a factor which had been considered by Dr Brooke before she gave her very depressing diagnosis.

76. Accordingly, although I have regard, as I must to the very large public interest in deporting foreign criminals, I consider that to deport this claimant now would be in breach of his Article 3 rights.

77. In light of this finding, I also find that the reasons why he should not be deported (because if he was it would be very likely that he would commit suicide, for a culmination of reasons which includes his ill-treatment within Sierra Leone) are sufficiently compelling that exceptionally he should also be allowed to remain on Article 8 grounds. Although the claimant as I have already found above, does not come within either of the exceptions set out within either the Immigration Rules or (which for practical purposes are the same) Section 117C of the 2002 Act, nonetheless

the very high risk of his committing suicide if returned is a sufficiently compelling reason as to outweigh the very great public interest in deporting him.

78. Accordingly therefore in summary I find as follows. Although the Secretary of State properly, on behalf of all those living lawfully in the UK, seeks to rid this country of those foreign nationals who have committed serious drugs offences, on the exceptional facts of this case, for article 8 purposes it would not be proportionate for him to do so, and it would also be in breach of this claimant's article 3 rights. It follows that this appeal must yet again (but for different reasons) be allowed. under both Article 3 and Article 8.

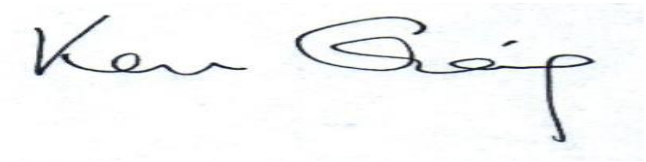
Decision

The claimant's appeal is allowed, under Articles 3 and 8 of the ECHR.

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

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

Signed:



Upper Tribunal Judge Craig Date: 19 November 2018