Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09073/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 July 2019	**On 29 August 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QL
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr B Malik, Counsel, instructed by Binas Solicitors

DECISION AND REASONS

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

Unless and until a Tribunal or court directs otherwise, the Appellant 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 Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The Appellant is a citizen of Vietnam. His date of birth is 28 December 1977.

I have anonymised the Appellant to protect the identity of his daughter.

The Appellant successfully appealed to the First-tier Tribunal against a deportation order made by the Secretary of State on human rights grounds. The Secretary of State was granted permission to appeal against this decision. I found that the First-tier Tribunal materially erred at a hearing at Field House on 25 April 2019. I set aside the decision to allow the Appellant's appeal. I found an error of law for the following reasons:

> "13. The structure of the Rules and the statutory framework is such that the public interest question has been decided within the sentencing thresholds. KO decided that Exception 2, like Exception 1, is self-contained. No account should be taken of the Appellant's criminality when considering whether deportation is unduly harsh. I do not accept Mr Malik's submission that the judge's reference to criminality went no further than to acknowledge the thresholds within the statutory regime. It is self-evident from the decision that the judge considered the Appellant's criminality when assessing unduly harsh (see paras 104, 105, 106 and 111) going well beyond the thresholds set out in s117C. The judge failed to apply KO and the judge's self-direction at paragraph 78 refers to MM (Uganda), which had been overruled and does not set out the correct legal test to be applied. As I understand Mr Malik's submission was that the error is not material because the judge considered extraneous factors for deportation as well as against. I do not accept that the error is somehow cancelled out by this. No account should be taken of the Appellant's criminality.
>
> 14. In any event, the assessment so far as it related to the Appellant's step-daughter is wholly lacking in detail. The judge goes on to consider briefly her circumstances at [114]. In respect of separation and its impact on the child, the judge found that the Appellant has been the child's stepfather from the time she was aged 2 and that she will be aged 10 in 2019. He concluded that it is a considerable length of time in the life of a child and that she has known no other father. It is found that the Appellant played a crucial role in the family unit and he is the child's main carer. He concluded that it would be unduly harsh for the child to remain in the UK without the Appellant. The judge did not apply the correct test namely that identified in KO as the test applied in MK (Sierra Leone) v Secretary of State [2015] UKUT 223 further explained in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123. The circumstances he identified in the decision were not capable of amounting to unduly harsh.
>
> 15. I set aside the decision of the FTT. Mr Malik persuaded me to allow the Appellant to submit any further evidence relating to the issue and the opportunity to make submissions relating to that further evidence. In these circumstances, I reluctantly agreed to adjourn the matter for a further hearing before the UT. I am mindful of the standard directions issued to the parties and the failure of the Appellant to submit further evidence; however, the case concerns

> a child and therefore on balance, with regard to the overriding objective (Rule 2 of the Procedure Rules 2008), I conceded to the application.

The background

The Appellant unlawfully entered the UK on 7 June 2007. He was granted temporary admission subject to reporting conditions. He failed to report. He next surfaced on 8 July 2012. He was granted temporary release and required to report. He again failed to report. On 26 February 2013 he was stopped during a routine traffic stop. He was required to attend Bedfordshire Magistrates' Court on 30 April 2013, facing the following charges: driving with no licence, driving with no insurance, driving with minors without appropriate harnesses and possession of identity documents with intent to deceive.

He failed to attend the Magistrates Court as required. A warrant for his arrest was issued. He was recorded as an absconder by the Home Office. He was arrested on 7 October 2014 and appeared at Luton Crown Court where he was convicted of offences including an offence concerning the possession and control of identity documents. He was sentenced to nine months' imprisonment. For the offence of failing to surrender to court he was sentenced to three months' imprisonment. He was on the same occasion convicted of driving otherwise than in accordance with a licence and using a vehicle without insurance, for which he was given no separate penalty.

The Secretary of State's case is that the Appellant's deportation is conducive to the public good because the Appellant's offending has caused serious harm (with reference to paragraph 398(c) of the Immigration Rules). The Secretary of State considered the sentencing comments of the judge on 7 November 2014, which are as follows: -

> "… Your offence is still serious because you had a false instrument which you were prepared to use to deceive the authorities … The choice you took was to use a false document to deceive the officer who had stopped you … You were driving not in accordance with a licence …"

The Secretary of State's view is that the danger to the public from unqualified drivers driving in the UK is self-evident and further to this, the possession of a false document causes serious harm to the integrity of UK immigration and other public services by undermining public confidence in those services and exposes the UK public to risk due to persons being present in the UK who have not been through the appropriate screening. There has never been a challenge to the Secretary of State's decision with reference to para 398 (c) of the Rules. I raised this at the error of law hearing. Mr Malik confirmed to me that "that ship has very much sailed" and he accepted it was not a finding that the Appellant sought to interfere with.

Resumed hearing

On 3 July 2019 at the resumed hearing Mr Malik indicated that he relied on the evidence that was before the First-tier Tribunal, specifically the witness statement of the Appellant of 25 October 2018 (page 39 of the Appellant's bundle) and the witness statement of his partner, TT, of the same date (page 44 of the Appellant's bundle). In addition, he relied on a letter from a consultant hepatologist of 27 June 2018 concerning TT.

The Appellant submitted a supplementary bundle. This contained a report dated 26 June 2019 from an independent social worker, Charlotte Opie-Greer, and a further witness statement of TT of 26 June 2019. In addition, in the supplementary bundle there is further evidence relating to TT's health condition. Mr Malik also relied on the supplementary witness statement of TT, which was unsigned and undated and served on the Tribunal and Mr Tufan at the hearing.

At the start of the hearing it became clear that an interpreter had not been booked and that the Appellant was unable to give evidence without an interpreter. I was informed by Mr Malik that his partner would also need one. The Appellant's solicitor who was in attendance at the hearing produced a letter dated 26 June 2019 to the Tribunal from the solicitors requesting an interpreter. This letter had not been received by the Tribunal. There was no record of it and as a consequence an interpreter had not been booked. Mr Malik stated that he intended to ask the Appellant's partner three or four questions at most in evidence-in-chief. He proposed taking a very short witness statement from her and serving that on Mr Tufan, who would then be in a position to decide whether or not he wished to cross-examine the witness. He confirmed that the Appellant's solicitor, in attendance, spoke Vietnamese and would summarise the case to the Appellant at the conclusion of the hearing. Mr Malik confirmed that the Appellant was content for the matter to proceed on this basis without an interpreter. Mr Tufan confirmed once he had sight of the supplementary witness statement of TT that he would not be seeking to cross-examine her. The parties agreed that the matter should proceed without an interpreter by way of submissions only.

It was agreed at the start of the hearing that the issue in this appeal was whether the effect of the Appellant's deportation on the child, L, would be unduly harsh in the context of her remaining in the UK with her mother and without the Appellant. L is not the Appellant's biological child. She is his step-daughter. It was not a matter of dispute that the Appellant has a genuine and parental relationship with L. It was agreed by the Secretary of State that it would be unduly harsh to expect L, a British citizen, to return with the Appellant to Vietnam.

The evidence of the Appellant

Much of the Appellant's evidence concerns his reasons for fleeing Vietnam. His appeal was dismissed on protection grounds and this has not been challenged by the Appellant. He arrived in the UK in 2007 in a lorry. His parents are now deceased. He is not sure whether his stepmother is alive

having lost contact with her when he left Vietnam in 1999. Since he came here he has been in a genuine and subsisting relationship with TT. They have lived together for seven years. She has leave to remain as a parent of a British child, L. L was born on 3 July 2009 in Newham. She attends school. The Appellant has raised L as his own child. TT is suffering from health conditions. She has non-alcoholic fatty liver disease and F3 fibrosis. She is receiving treatment in the UK for this. She runs her own business and provides for the family.

The Appellant is a househusband. He is not permitted to take employment. In relation to his criminality he gives an account of this at paragraphs 18 and 19. He does not have family in Vietnam. He wants to be able to remain here to support his wife and stepdaughter.

The evidence of TT

TT's first witness statement of 25 October 2018 is brief. She confirmed her health conditions as outlined by the Appellant. She says that the "[the Appellant] caters to the housework and ensures my daughter's nurturing into adolescence". Her evidence is as follows: "I noticed a genuine father daughter relationship develop between them as she began to refer to him as father and this was truly settling". She says that the Appellant acts as a father figure for L and that she cannot stress how much he means to her and L and that his deportation "would be detrimental to the family lifestyle that has developed". L is performing well at school. The Appellant "undoubtedly has impacted my daughter to provide he with the father figure that she does not biologically have".

In her second witness statement of 26 June 2019 (page 43 of the supplementary bundle) TT's evidence is that the First-tier Tribunal's decision allowing the Appellant's appeal was "significantly conducive to my mentality as well as my health". Her evidence is that the decision to set aside that decision has negatively affected her health. Her evidence in the undated supplementary statement is that she suffers from liver cirrhosis. The last treatment she had was on 13 June 2019. Her next appointment is on 23 September 2019. In this statement she describes the impact of the condition on her day-to-day living as follows:

> "I am frequently in pain. I am unable to carry out strenuous activities because I get tired very easily. I am able to work because I run a nail bar and my work is sedentary. My social life has been significantly affected as a result of this; I am simply unable to combine work with other pastimes because I am too tired.
>
> The help that my partner [QL] provides in looking after my daughter [L] is all the more important to me because of my low energy levels. I believe I would really struggle to combine work and parenting if he had to leave the UK."

Expert evidence

The evidence of the independent social worker

Ms Opie-Greer is a qualified social worker with over ten years' experience. She has appended her curriculum vitae to her report. She is registered to practise as a social worker and has a history of working in Children's Statutory Social Care Services. She confirms at paragraph 1.6 of her report that she has had no prior involvement with the Appellant and his family. She was instructed by the Appellant's solicitors to complete an assessment on the family's social circumstances and to ascertain the child's wishes and feelings. She was asked specifically to report on the relationship between the Appellant and his stepdaughter, what impact an enforced move would have on the child and what in her opinion would be in the best interests of L.

The assessment was carried out on 17 June 2009 and lasted two and a half hours. It took place at the Appellant's home with all members of the family. The Appellant told the social worker that he is not L's biological father, but that he views himself as her father and loves her as she was his biological child. The social worker was told by TT that L's biological father lives in London, but his location is unknown. She is unable to contact him. He has no involvement in L's life. The Appellant is the only family that they have in the UK.

Helpfully, at the start of her report (section 2) the social worker summarises her conclusions as follows:

> "**2. Summary of Conclusions**
>
> 2.1. The assessment highlighted that it is against the family's wishes and feelings for [QL] to be forced to move to Vietnam. It is my view that an enforced move would cause a disruption to the life that [L] has in the UK, and their current life and circumstances would not be able to be replicated in Vietnam.
>
> 2.2. In my opinion an unwanted change would cause disruption to [L's] routine, stability and would remove one of her main care givers, which would have a detrimental effect on her emotional wellbeing.
>
> 2.3. It is my opinion that if [QL] is removed from the UK, [L's] family composition would change to a lone parent family, placing significant limitation to the family's resources. This would have an impact on her identity formation, which in my view, is likely to negatively affect her sense of self and reduce her self-esteem and self-confidence in the longer term.
>
> 2.4. I would recommend that it is in the best interest of [L] for her circumstances to remain unchanged and for the family to remain together in the UK. Any disruption to [L's] current life would cause harm to her emotional and physical wellbeing and reduce her ability to meet the Five Outcomes for Children and Young People outlined in Every Child Matters."

At 7.9 of the report the social worker indicated that she completed an Ecomap (Appendix 2) with QL and TT to identify people who provide support to the family and the couple identified two friends who have provided character references. TT owns and works in a nail salon in Bedford. She has worked there since 2007. It is her sole responsibility to provide financial support for the family because the Appellant is unable to work.

The Appellant does not have any physical health concerns.TT is not in good physical or mental health and the social worker refers to a letter (Appendix 4) from a consultant hepatologist to TT's GP confirming that she has liver cirrhosis. TT told the social worker that her condition leaves her in great pain. At times she is unable to complete normal day-to-day activities. She takes medication. She is depressed as a result of stress placed on her by the prospect of deportation of the Appellant. She is overcome with worry. She worries that if she dies L will have no-one to care for her. The family lives on TT's earnings. They do not receive benefits. They live in privately rented accommodation which they share with another family.

TT was emotional throughout the assessment. She said that all she could think about is the Appellant's immigration status and that she is concerned that her emotional state is having a detrimental effect on L's emotional wellbeing. TT reported that she is "overcome with worry about how her daughter would cope if her stepfather was forced to leave the UK."

The Appellant is worried about who would provide the day-to-day care for L if he were forced to leave. TT would no longer be able to work, which would put the family under financial pressure and could result in them losing their home. There would be no-one there to care for TT and take her to medical appointments. The Appellant is concerned that L would grow up without a father and is concerned about how this would impact on her. He feels that he has a good, close bond and relationship with L and feels that it would disadvantage her and negatively impact on her mental health if this was to end.

The social worker at 7.27 states as follows:

> "7.27. [QL] advised that he spent a period of time in custody, and at this point left [TT] to be the sole carer for [L]. This was clearly a very distressing period of separation for the family and provided an insight into how they would cope without [QL]. [TT] spoke in detail about how she struggled to manage practically and financially without her partner. [TT] feels that she was able to build up some resilience as she knew that he was going to return home but feels completely hopeless thinking about him being forced to leave the UK permanently. [TT] advised that when [QL] was in custody, she took her daughter to visit him weekly so that they still had a close bond."

L is currently at school and has a good support network of friends. It was clear to the social worker that she was achieving well and extracurricular

activities were important to her. She is a healthy child with no additional health needs. The social worker under the heading Wishes and Feelings at 7.40 stated as follows:

> "7.41. I observed [L] at her family home, in the company of her parents. I observed a close and loving relationship between the family, this was observed in the way they interacted, laughed and joked at times. I observed [QL] and [TT] speak positively and praise [L].
>
> 7.42. I completed 'my wishes and feelings' (appendix 5) which is a self-assessment for children and young people. [L] filled this in herself and we spoke about her answers. Throughout wishes and feelings work, she presented as a confident child who was able to speak clearly about her feelings, her family and people who are important to her. It was clear that she feels very well supported and loved by her parents and friends in the UK. [L] stated in her 'my hopes for the future' page that one of her hopes, is that she 'always; lives close to Mum and Dad'.
>
> 7.44. [L] spoke in detail about her worries; she is very worried that her Father [QL] will be forced to move to Vietnam and that this will mean that she is not able to see him. She added that she is worried about her Mother's health and about what would happen if he were not around to support her. [L] advised that her parents tell her 'not to worry' but she added that she does worry because she often sees both her parents crying and feeling stressed."

The social worker was satisfied that the Appellant and TT were in a stable relationship. Under the heading Family Composition and Overview the social worker stated as follows:

> "8.4. [QL] is not [L's] biological father, but they have clearly built a close, loving and supportive relationship, which they view as a father/daughter relationship. [L] is aware that [QL's] immigration status is unclear and this is causing her great emotional harm and distress. Recent research continues to highlight the importance of a father figure, with emphasis placed on the father's relationship with their daughters. Research completed in 2013 by Culpin, Heron and Araya finds that girls with absent fathers had a 53% greater chance of experiencing troubles with their mental health in later life. Further research informs us that children who are no longer able to interact with their fathers have problems relating to their sexual identity, difficulty recognising limits and learning the rule of social interaction (Allen et al, 2007). Given this research, and since her biological father has always; been absent from her life, I would have concern that she would be at risk of emotional harm if [QL] was forced to leave the UK.

8.5. It is against the family's wishes for [QL] to be forced to leave the UK. If he is forced to leave then they would lose the physical contact, closeness, emotional and practical support that he offers to the family. If [QL] is forced to leave then [TT] would become a solo parent, which would have a direct impact on the family's resources. An enforced separation is likely to make [L] feel that her wishes and feelings are not valid, which would impact on her sense of self-worth and self-importance. An enforced separation also raises questions about how [TT] would manage her health needs, her work commitments and raising her daughter alone.

8.6. [QL] forms a part of her life since 2012. In my opinion losing this relationship would cause feelings and symptoms of grief and loss (Ross 1969 and Bowlby 1980) which would be likely to cause emotional distress and impact on her social and emotional wellbeing. [QL] was incarcerated from November 2014 to August 2015. Despite this separation, the family report that [L] saw [QL] weekly and, therefore, was able to maintain a level of physical contact. Research completed by Munford M and Sanders J (2014) evidences that there is a need for children to be able to seek and maintain secure connections with key people in their lives. The research goes onto highlight that any long-term disruption to this can profoundly disadvantage children and young people, with the detrimental effects of this continuing into later life. I would be concerned that, if [QL] were forced to leave the UK, [L] would not be able to maintain these relationships and that, therefore, she would be at risk of emotional harm if her current circumstances change.

8.7. The information provided indicates that [QL] and [TT] are providing the necessary routine, stability, encouragement and support for their daughter to develop, thrive and achieve. If [QL] were forced to leave the UK, then it is unclear whether [TT] would be able to continue to offer this level of care along.

8.8. Statements from the family and character references from [TRR], [TR] and [HVN] indicate that the family have a strong support network in the UK. Due to the length of time that [QL] and [TT] have been away from Vietnam, this could not be replicated there.

8.9. [L] is settled in her educational setting and is achieving well. It is likely that any distress and sudden change in her personal circumstances would have an impact on her educational achievement. It was clear from speaking with the family that [QL] is crucial in ensuring that she is supported to attend school and supported with completing her schoolwork. There would be a risk that without the appropriate support she would be unable to meet the five key outcomes for children and young people identified in the Children Act 2004, Every Child Maters they are, 'to Be Healthy, Stay Safe, Enjoy and Achieve, Make a Positive Contribution and Achieve Economic Wellbeing'. [L] and her parents report that [L] enjoys partaking in extra-curricular

> activities and they feel that this has increased her self-confidence. This belief is echoed by research completed by Public Health England (2014) which found that, 'academic and extra-curriculum success has a strong and positive impact on children's subjective sense of how good they feel and how their lives are (life satisfaction) and is linked to higher levels of wellbeing I adulthood'. This highlights how important it is for [L's] long-term development to be supported to complete their education and extra-curricular activities. I would be concerned that, if [QL] is forced to leave the UK, her education would be disrupted and, therefore, she would fail to achieve these outcomes."

The social worker prepared a balance sheet to evaluate the information illustrating the benefits to and burdens on L remaining in the current circumstances and those if the Appellant was forced to return to Vietnam. The balance sheet raises concerns about how L's mother would cope as her main caregiver and identifies concerns around the emotional implications to L if her father is forced to return. L would feel that her feelings were not listened to or valued. She would lose a father figure from her day-to-day life and would be unable to maintain a high enough level of contact with him. There are concerns about who would meet her physical needs as her mother has health needs and work commitments. L would lose a primary attachment figure in her life, which would cause issues of separation, loss and grief which would negatively impact on her into later life and would potentially cause disruption to her education.

L would lose her connection with her stepfather. He would not be physically present to parent nor teach her about his historical heritage. It would be likely to have a detrimental impact on her development of self and there is a risk of lowered self-esteem and self-confidence. There are concerns that TT would have difficulty managing as a single parent and there would be a reduction in family resources. The Appellant provides all childcare and without him being present it is unclear how TT would manage to continue to work as a sole parent which would cause financial hardship.

The social worker observed a close and loving relationship between the Appellant and L. He and TT are providing the necessary care, routine and stability required for L to meet the five outcomes for children and young people outlined in Every Child Matters. Should he be forced to leave it would have a negative impact on L. At 9.5 of the report the social worker states:

> "It would cause the loss of a primary attachment figure which would cause her feelings of grief and loss (Bowlby 1980), which would have a negative impact on [L] emotionally. In addition, [L] 'stability, order and routine' would be affected, which Maslow (1970) identified in his hierarchy of needs as necessary to increase self-esteem, personal strength and independence. In my opinion a disruption to [L] would

> cause her emotional harm and have an impact on her developmental and educational progress.
>
> If [QL] is forced to leave the UK, it would place the family under pressure financially, as it is unclear is (sic) [TT] would be able to continue to work and provide the level of practical care that [QL] does. A change in financial circumstances would also impact on their ability to visit [QL] if he was forcibly removed."

The social worker at 9.7 opines that:

> "… If the family were missing the support that [QL] provides then [L] ability to be able to participate with her educational and social activities may be reduced. In the long term, if [L] developmental and education progress is detrimentally affected then her life choices and chances will be reduced. It is therefore my opinion that it is in [L] best interests for her circumstances to continue unchanged."

Submissions

Mr Malik confirmed that TT has limited leave to remain here as a parent and that she is not entitled to public funds. His first submissions focused on the personal circumstances of L. She is aged 10 and will soon be transitioning from primary to secondary school. Whilst it was accepted that single parenthood is a way of life for many, the circumstance in this case are unusual because of TT's illness, corroborated by the letter from the consultant hepatologist of 13 June 2019. Whilst there is no medical report, the evidence is sufficient to establish she has cirrhosis of the liver and that this is not a transient condition. She does not have a lot of energy. Her work is sedentary. She does not have an entitlement to public funds. Her health condition would impact on her ability to juggle childcare and work commitments.

Mr Malik turned to the report of the independent social worker on which he stated he relied quite heavily. In his view, the report showed that there would be a particularly severe impact on L should the Appellant be deported. He drew my attention to the credentials of the social worker. Her conclusions could not sensibly be challenged. Her report is consistent and complies with the requirements relating to expert evidence. He urged me to accept the conclusions in the way that they are clinically and professionally articulated. He specifically drew my attention to paras 7.27 and 7.42. He submitted that the report reflected that L has specific anxiety about the prospect of separation. He drew my attention to paras 7.44 and 8.4. He asked me to take into account the conclusions in the report in the context of L not knowing her biological father and not having any contact with him. He drew my attention to paras 8.5, 8.6 and 8.9.

Mr Malik accepted that linking emotional impact and outcome was probably a matter of common sense. However, the report shows that there has been

a rigorous assessment. It is a specific report based upon the forensic analysis of the family. Considering the evidence in the round, departure of the Appellant would impact strongly on L's emotional wellbeing to the point of impeding her development. It is against this background that TT would become a sole parent. She herself as health conditions and no access to public funds. Mr Malik accepted that the threshold is elevated even if not by a significant margin. However, the evidence establishes that deportation of the Appellant would be meet the high threshold required.

Mr Tufan referred me to the case of KO and the test as approved in MK. There is no medical report relating to TT. She is suffering from cirrhosis and has been for some years. Should she be unable to take care of L the Social Services would by law be obliged to help and provide for L. He relied on the case of BL (Jamaica) v The Secretary of State for the Home Department [2016] EWCA Civ 357. He submitted that the role of the Social Services is not irrelevant. He drew me to the social worker's conclusions at paragraph 2 of the report. TT runs her own business. It was not clear how many people she employs but it is not beyond her resources to pay someone to look after L if she has to. There is no evidence that she was not able to run her business when the Appellant was incarcerated. It is not challenged that it is in L's best interests for the Appellant to remain in the UK.

Mr Tufan submitted that the social worker's conclusions at paragraph 8.6 that L would be at risk of emotional harm is speculative.

In response Mr Malik stated that the social worker was entitled to give an opinion on the future impact of deportation and he asked me to take into account the social worker's credentials and the quality of the report.

The legal framework

Sections 117A – D NIAA 2002 have set out public interest considerations which a court or Tribunal must take into account in an appeal based upon Article 8:

> "117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard -

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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

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

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

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

(4) Exception 1 applies where -

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

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

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

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

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

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

117D Interpretation of this Part

(1) In this Part-

'Article 8' means Article 8 of the European Convention on Human Rights;

'qualifying child' means a person who is under the age of 18 and who -

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

'qualifying partner' means a partner who -

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(2) In this Part, 'foreign criminal' means a person -

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who -

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under -

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time -

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital

or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

Immigration Rules

The considerations set out in Section 117C NIAA 2002 are reflected in IR, which is the Immigration Rules, which provide, so far as is material:

"A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

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

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

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

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

(i) the child is a British Citizen; or

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

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

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

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

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

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

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

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

Application of legislation and the Immigration Rules

In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath (giving the judgment of the Supreme Court) analysed the exception, based on the deportee's relationship with a qualifying child, in Section 117C(5) NIAA 2002 and paragraph 399(a) IR. At [15], he explained that he started from the presumption that the provisions were intended to be consistent with the general principles relating to the "best interests" of

children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74per Lord Hodge at [10]). He concluded that the exception was self-contained and so, in deciding whether or not it applied, the decision maker should only consider the factors specified, and disregard the degree of seriousness of the parental offending and other public interest considerations (at [20] – [23]).

Lord Carnwath gave guidance on the meaning of "unduly harsh" at [23]:

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

Lord Carnwath cited with approval the guidance given by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC):

> "… '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."

The Upper Tribunal more recently in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 considered KO and the unduly harsh test. The headnote insofar as it relates to the issues in this case reads as follows:

> *"(1) In KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53, the approval by the Supreme Court of the test of 'unduly harsh' in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, formulated*

by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT223 (IAC), does not mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it.

(2) The way in which a court or tribunal should approach section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State[2016] EWCA Civ 662.

(3) Section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of KO (Nigeria); namely, those who have not been sentenced to imprisonment of 4 years or more, and those who have. Determining the seriousness of the particular offence will normally be by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation; but the ultimate decision is for the court or tribunal deciding the deportation case.

(4) Rehabilitation will not ordinarily bear material weight in favour of a foreign criminal."

The Tribunal stated at paragraph 17 the following:

> "17. As can be seen from paragraph 27 of KO (Nigeria), the test of 'unduly harsh' has a dual aspect. It is not enough for the outcome to be 'severe' or 'bleak'. Proper effect must be given to the adverb 'unduly'. The position is, therefore, significantly far removed from the test of 'reasonableness', as found in section 117B(6)(b)."

Conclusions

There was no challenge to the credibility of the Appellant and TT. I accept their evidence. Whilst their statements lack detail, the social worker's report is very detailed. I accept the conclusions of the social worker which support the Appellant and TT's evidence.

I have taken into account that the Appellant is currently a house husband. However, I find that this is likely to be as a result of his status here an inability to seek employment. I accept that TT has health problems as evidenced by the correspondence from a consultant. I find that this has an impact on her ability to live life to the full. Her condition makes her lethargic. I am not prepared to speculate about a future prognosis in the absence of a medical report. The evidence is that she is able to run a business. Whilst raising a child singlehandedly would no doubt cause difficulties for her, she has managed to do so previously whilst running a business at a time when L was younger (when arguably her demands were greater) whilst the Appellant was in custody between November 2014 and August 2015. Whilst I accept that life as a single parent would not be easy for her, she has done it previously and it is reasonable to infer that she has

friends (friends of the family were identified by both the Appellant and TT to the social worker) that are able and willing to assist her. It is reasonable to infer from the evidence that she could employ someone to arrange cover in the workplace to enable her to take over childcare responsibilities. There was no evidence before me about her business structure or hours worked. I have drawn reasonable inferences from the evidence before me.

There is in this case no doubt whatsoever that L and the Appellant are in a genuine and subsisting parental relationship. The social worker has prepared a thorough and properly resourced report. She has impressive credentials. There is no reason not to attach weight to her professional opinions. There is no challenge to her best interest's assessment. However, her conclusions do not simply address what is in L's best interests, it is a far more nuanced than that. I attach weight to the social worker's conclusions when considering whether separation of the family would be unduly harsh.

The social worker has concluded that deportation would leave L at risk of emotional harm. The challenge to her evidence was that her findings about harm caused to L were speculative. I engage with this submission. Much of the assessment of the social worker concerns the situation of a child losing a primary attachment, in this case a daughter losing a father. Some of the conclusions are generic and is not evidence that meets the elevated threshold. However, I accept Mr Malik's submission that one of the factors that make this case unusual is that L does not have a relationship with her biological father. L has already lost a father and it is this factor that makes this case unusual. Her biological father is absent from her life. This is a matter to which the social worker attached weight. L has effectively already lost a parent. A proper reading of the report and its conclusions makes it clear that the social worker's more far reaching conclusions concerning L suffering emotional harm were made against this background. I have attached weight to the social worker's experience, that the report is properly resourced and that there is no challenge of significance to the social worker's professional ability. Whilst TT's health, economic factors and the reality of being a single parent do not nearly, alone or together, amount to unduly harsh, cumulatively considered together with the compelling evidence of the social worker these factors reach the high threshold required to meet the elevated test. I conclude that the impact of the Appellant's deportation would be unduly harsh on L.

Therefore, the appeal is allowed on Article 8 grounds.

Notice of Decision

The appeal is allowed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant 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 Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam* Date11 July 2019

Upper Tribunal Judge McWilliam