Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **RP/00159/2017**

THE IMMIGRATION ACTS

At **Field House**
on **07.01 & 11.04.2019**

Decision & Reasons Promulgated:
On 03.06.2019

Before:

Upper Tribunal Judge **John FREEMAN** and

Deputy Upper Tribunal Judge **Toby DAVEY** (on 11 April)

Between:

Gezim [M]

appellant

and

Secretary of State for the Home Department

respondent

Representation:
On 7 January:
for the appellant: *Joanne Rothwell* (counsel instructed by Oaks)
for the respondent: Mr Toby Lindsay
On 11 April:
for the appellant: *Alison Harvey* (counsel instructed by Oaks)
for the respondent: Mr Tony Melvin

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Fiona Beach), sitting at Taylor House on 28 September 2018, to allow a revocation of protection appeal by a citizen of Kosovo, born 1972.

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

HISTORY

2. The appellant came as a visitor in 1991, overstayed and in 1992 claimed asylum, which was granted in 1997, followed by indefinite leave to remain in 1999. He has a long-standing partner, [VD], also from Kosovo, but now a British citizen, and they have twin daughters, V1 and V2, born here on 27 May 2006. In 2002 the appellant himself applied for British citizenship, but failed to reply to Home Office inquiries, so was refused the following year.

3. Between May and August 2014, the appellant and another man took part in a conspiracy to steal with persons unknown who were ordering electronic items over the Internet, for delivery on rounds where they were able to get the Royal Mail and Parcelforce delivery drivers to sign for the goods as if they had been delivered. Over £40,000 worth of them were stolen, and, as the sentencing judge pointed out, a substantial breach of trust was involved. This was particularly the case with the appellant, who had begun as a courier driver himself, but by this time ran a business, employing a number of others. In the judge's view, no real distinction could be made between the defendants' position and that of Royal Mail drivers, in terms of the absolute integrity required by their work.

4. After a three-week trial in June 2016 the appellant and his co-defendant were found guilty, and on 6 July the appellant was sentenced to 27 months' imprisonment, with slightly less for the other man. The judge noted the favourable things said about the appellant, including by a prosecution witness: he was very well-liked and hard-working, and had built up his business from virtually nothing. However, he was doing well at it, and not in want of money, except to support his growing business. His had been a leading rôle in a conspiracy involving breach of a high degree of trust, and sophisticated planning.

5. This sentence was followed on 22 July 2016 by a notice of intention to deport, to which the appellant replied on 28 August. Next, on 5 October, came notice of the Home Office's intention to apply the presumption set out in s. 72 (2) of the Nationality, Immigration and Asylum Act 2002, allowing for his expulsion despite the grant of asylum. On 16 August 2017 the UNHCR indicated that they had no objection to this course being taken, subject to a full examination of the appellant's individual case, and on 28 October 2017 a deportation order was signed, and sent with full reasons on the 30th.

APPEAL TO DATE

6. The appellant did not pursue any protection claim, so there is no need to discuss his conviction or its consequences any further, except to say that, despite his good conduct while in prison, and since, there is clearly a strong public interest in his removal, as Judge Beach recognized. She referred to s. 117C of the 2002 Act, and in particular to Exception 2, set out at (4). The appellant clearly had a 'genuine and subsisting relationship' with a 'qualifying partner' and both 'qualifying children': the question was whether the effects of his deportation would be unduly harsh on them. It is now clear that, in both her case and theirs (see *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), referred to in more detail below), at paragraph 8:

> "As a result of KO (Nigeria), the position is that, in determining whether Exception 2 (in section 117C(5)) applies, a court or tribunal is not to have regard to the seriousness of the offence committed by the person who is liable to deportation."

7. The judge found as follows:

> "76. it would be unduly harsh for the appellant's partner to stay here without him; but it would not be unduly harsh for her to return to Kosovo with him;
>
> 84. it would be unduly harsh for the children to stay here without him; and
>
> 87. so would it be for them to go to Kosovo with him."

8. Those findings were challenged by the Home Office, in rather prolix grounds (not drafted by Mr Lindsay), and permission to appeal granted by a first-tier judge, on the basis that there had been a lack of explanation as to why it would be unduly harsh for the appellant's family to go to Kosovo with him: as just noted, this was not a finding the judge had made in respect of his partner. This did not seem to me to be what the case was really about: the children are both British citizens, who have always lived here, and already at secondary school. They are both of course entirely innocent parties, and, irrespective of what conditions might await them in Kosovo, it must now be unduly harsh to send them there.

9. I made it clear to the parties at the first hearing on 7 January that the real question in my view had been whether the judge was entitled on the evidence to find that it would be unduly harsh either for the children or their mother to stay here without the appellant. Her decision had also been challenged on that point, as not supported by the evidence. I considered this required reconsideration, for reasons which will shortly become clear; but, in fairness to the appellant and the family as a whole, I also agreed to receive a psychological report on the mother, when re-making the decision. The further hearing for that was adjourned on 26 February, when it became clear that this report would not be ready for 4 March, as promised, till 11 April. I also made it clear that I should receive further oral evidence, limited to events since the first-tier hearing.

ERROR OF LAW

10. The appellant was sent to prison on 6 July 2016, and, with the usual 50% remission, served 13½ months before his release in late August 2017. From then till the final hearing before me, he has been at home with his family for just over 18 months. At paragraph 84, the judge concluded her reasons on the children's position, if he were sent back to Kosovo, in this way, after accepting, on the basis of the partner's own evidence and the report of an independent social worker, that she was 'emotionally fragile':

> "The appellant's partner could seek support from professionals but an intervention by Social Services cannot be considered to be in the children's best interests particularly at a time when they will be bewildered and upset by their father's deportation from the UK."

11. No doubt children who had a 'genuine and subsisting relationship' with their father would inevitably be upset by his deportation; but it has to be said that one significant reason for these children to be especially bewildered by it must have been that their parents chose

not to tell them anything about its being a possibility till just before the independent social worker made her report. Of course this mistaken, if to some extent understandable decision cannot be held against the children; but the independent social worker's report has to be read in the light of the situation the parents had created.

12. The grounds of appeal referred to *BL (Jamaica)* [2016] EWCA Civ 357. There were a number of significant factual differences, including BL having been sent to prison for four years; but I was concerned with extracting the relevant principles, rather than trying to match up the facts. The common features with this case, which led to the passage relied on by Mr Lindsay before me were these:

(a) the appellant's partner and children were all British citizens;

(b) she was said to have difficulty in looking after them without him (in *BL*, because she drank more than was good for her), and the Upper Tribunal inferred that they would descend into poverty and require the support of the social services.

13. What the Court of Appeal said about that, at paragraph 53, was this:

> "As against this, however, [the partner] had looked after the family while BL was in prison or immigration detention and the UT had not made any findings that the family had then descended into poverty or required the support of social services, or that if that were to happen, there would not be adequate support services for these children. The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of [counsel for the appellant], the UT was not bound in these circumstances to regard the role of the social services as irrelevant."

14. While the judge reached a number of other findings on the evidence, in my judgment her conclusion on this point had to depend on her finding at paragraph 84, set out at **10** above, which showed a very different approach from that prescribed by the Court of Appeal in *BL*. For this reason, I took the view that her conclusion on the children's position at 84 could not stand, and still less what she said about the effect on their mother of staying here without him at 76. This is why the judge's decision, detailed and comprehensive as it was, had to be re-made.

MORE LAW

15. Following the fresh hearing on 11 April, our attention was drawn to *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), and we invited submissions on it by e-mail. Following the passage already cited at **6**, the Tribunal went on to reject the appellant's argument that *MK* (section 55 – Tribunal options) [2015] UKUT 223 (IAC) prescribed any general approach to the facts, in cases such as this. At 17, once again summarizing the effect of *KO*, they said this:

> "… 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)."

16. That is as far as we need go with *RA*, since the rest of the decision on the law is concerned with the interpretation of s. 117C (6), which was not argued in this case, where the appellant must succeed under Exception 2, or not at all (until much later: see **54 – 55)**. It follows from the previous citation that, having noted the facts of the appellant's offence, and the factors in his favour as part of the background, we are no longer concerned with them, though we should be if this were a s. 117C (6) case. The effect of his deportation on his partner and children has to be considered solely in terms of whether it would be unduly harsh on them. This is a question for our judgment, to be exercised in the light of the citation just made, and no further reference to the authorities is required.

FRESH HEARING: EVIDENCE

17. We heard evidence from both the appellant and his partner [VD]: from now on we shall refer to her by her personal name only. Both also made witness statements, as did the appellant's mother [N] and his sister [I], who live together in this country. There is a report about the children by Sally-Anne Deacon CQSM, an 'independent social worker' (20 September 2018, with an addendum on 27 February), and one about [V] by Dr Tracy King, a clinical psychologist (2 April). There is also a report from [V]'s GP practice, containing one entry, for 16 July 2018. Apart from school reports on the children, those are the main sources of evidence before us.

18. The appellant Most of his first statement is concerned with his own situation: we do not say that as a criticism, but to explain why we are not going into more detail on it. He describes how [V], the children and his mother and sister all came to see him in prison three times a month, the most allowed; he also spoke to [V] and the children 'every single day without a miss'.

19. The appellant and [V] hadn't discussed his real situation with the children, as they felt they were too young, but simply told them he was going away to work in an institution and would be away for a long time. He accepted with hindsight that this might have been a mistake, and in his oral evidence he also made clear that the children would have seen posters and other signs on their visits, making it obvious to them what sort of a place he was in; but that had never been mentioned.

20. As for [V], the appellant thought she would be 'devastated' if he were to be deported; he had heard she had been taken to hospital with a panic attack when he went to prison, and was given intravenous medication. She had found it very hard to cope without him, 'especially since they did not understand why I was not there for them'. She had improved since his release, but was 'rather fragile', and he was worried how she would cope without him, or what he was earning.

21. In oral evidence, the appellant explained that he had had to guide [V] with a number of things on visits and calls, such as how to tax their car. She had coped; but on the basis that this was only a temporary situation. She had hated being home alone, ever since she was young (we shall return to her early life in dealing with her evidence), and, if he wasn't there at night, would wedge chairs under their flat door for security, which the children found rather funny.

22. The appellant said he had done his best to help the children with homework and school projects, and both he and [V] had encouraged them to value themselves as girls. Neither of them had ever smacked them, as parents tended to in Kosovo. Without his earnings, [V] wouldn't be able to afford extras, such as *tai chi* (though the appellant's sister had paid for this while he was in prison) or after-school activities or trips, and wouldn't have the confidence to drive far (if she could still afford to run their car at all). For the present, his previous employers, who had given him a reference for his court case, and were clearly aware of his record and status, had been happy to have him back, and even promoted him.

23. As for the family's situation if the appellant had to go back to Kosovo, job prospects there weren't good: 65% were presently out of work. The appellant's work experience here had been in 'social care and transport logistics', neither of which existed there. If he did get a job, he gathered the average wage was €350 a month. (We may as well say right now that, while we have no doubt that an enterprising hard-working man like him could fend for himself in a country he knew, if that were our concern, we do not regard it as at all likely that he would be able to send any significant amount of money back to help his family).

24. While the appellant's only close relations (his mother and sister) were here, [V] had a sister, who lived in Kosovo, though she was also a Canadian citizen. That had meant they could visit each other, and they had done so probably about ten times over the 15 years the appellant and [V] had been together. On four or five of those occasions, [V] had taken the children to Kosovo. Usually they spent five or six weeks away, as [V] got the same long summer holidays as them: the appellant would join them for two or three, as and when he could get away from work. Often they would go on trips (more cheaply arranged from Kosovo) to the coast in Albania, or even to Turkey. They had last all been to Kosovo in 2014, and since he had been unable to travel, [V]'s sister had been to see them here.

25. **[V]** [V]'s first statement gives considerable detail about her family history. She was born in Kosovo in 1973, and when she was only nine months old, her father murdered her mother: she was lying on the bed next to her at the time, and was told what happened later by her maternal grandmother. Her father suffered from schizophrenia, and spent the rest of his life in hospitals, till he died in about 2009. All the children were first taken in by their paternal grandparents; but later the grandparents found that too much for them, and [V]'s siblings were sent to live with other relations.

26. [V]'s brother went to Spain when he was 18, and she has been in touch with him only once or twice a year, in brief phone calls, since she last saw him in about 2012. One sister (Sofie) qualified in medicine before the war, and went to live with her husband in Canada, where they are citizens; but, as Sofie's qualifications were not recognized there, they went back to Kosovo later: he runs a successful business, while she practises medicine. [V]'s other sister ([B]) came with her to this country in 1998, and married a Spaniard. Unfortunately, after [V] met the appellant in 2005, relations between her and [B] broke down, and they haven't been in touch at all for the last three years, even though they live quite nearby. This has also affected [V]'s relationship with Sofie, though she does not explain to what extent.

27. [V] says the appellant was always a hands-on father, and would feed, bathe and put their daughters to bed when they were small. Since then he has taken them for all kinds of activities, and shared fully in the house-work. She says his love has made her very secure and confident, and would be devastated if she lost his company, though she would never lose his love.

28. The appellant's arrest had come as a complete surprise to [V], while she was on holiday in Kosovo: he had been with her and the children, but had returned the week before they were due to come back. She found the investigation and trial process so intensely stressful that she couldn't even write down the contact details for him when he was sentenced, and his solicitor had to do it for her. The following morning she was having panic attacks, with breathing problems: she got a friend to take the children to school, and went to a hospital A&E department, where tablets failed to calm her down, so she was given an intravenous injection, which enabled her to come home that night, with the help of the appellant's sister [I] (Lili).

29. Afterwards [V] managed to cope, by reminding herself that the appellant would only be in prison for just over a year. They went to see him regularly, and found him very emotional; the girls were not told he was in prison, but clearly suspected it. After they were told, in advance of their visit to Ms Deacon (the 'independent social worker'), they broke down, and were crying all through their interview with her. Since then they have been less anxious, as for the moment their father is with them. [V] speaks highly of the appellant's attitude to others, polite to everyone, and generous, particularly to drivers who worked for him. She was shocked and surprised by what he had done, but regarded it as very much out of character.

30. [V] says the appellant's mother [N] is old (now 74) and has too many health problems of her own to help anyone else. His sister Lili works long hours, and has decided to remain single: she is very fond of the children, but hasn't got very much time to help with them; nor does she drive. The appellant's English is much better than [V]'s, so he has always been the one to help with homework, and go to parents' evenings. [We found the appellant's English extremely good, and [V]'s more than good enough to give evidence in; as should be the case for both of them, given the length of time they have been in this country].

31. [V] says she is happy to take the children to Kosovo for holidays, but not for them to grow up there, for reasons she gives, and which we have already accepted. She says she is finding it increasingly hard to cope as the hearing date (for his first-tier appeal) draws near, and is taking prescribed medication. The appellant was dishonest, but didn't think about the consequences to his family, or anyone else, at the time; but seeing them suffer has been so distressing for him that he would never offend again.

32. [V]'s second statement (6 February 2019) covers a good deal of the same ground again. She is finding it hard to sleep, or to listen to her daughters when they want to tell her about their day at school. She doesn't feel she is doing her best at work, though no-one at her school has complained. She does have the children skills which might be expected from a

teaching assistant; but coping with her own daughters' needs, in her present mental state, is another matter.

33. In her oral evidence, [V] said she hadn't been taking medication again after her visit to the A&E till last summer, when the first-tier hearing was coming up. She knew the appellant had received a notice of intention to deport in July 2016; but she had been coping from month to month while he was in prison.

34. As for visits to Kosovo, the appellant had last come with them before his arrest in 2014: he used to come for part of their visit every year. In 2018 [V] and the children had been there for four or five weeks and stayed with her sister Sofie: her sister-in-law Lili had paid their fares, and the appellant, though he couldn't travel, had encouraged them to go, as had her GP. Lili and her mother lived not far away, in Gospel Oak, but, as previously mentioned, were unable to give much help. The children were still going to their *tai chi*, and had started piano lessons just before the last New Year. They all saw Lili and her mother on a Sunday; but she didn't feel up to having the children's friends to stay over.

35. [V] provided evidence of recent appointments with Komal Oza, a 'psychological wellbeing practitioner', with iCope, an NHS service to which she had been referred by her GP in February. Mr Oza says they had met once, and have five further sessions planned: [V] was suffering from low mood and anxiety, and he hoped to be able to give her some help and support; but he thought it likely that, owing to the lack of certainty around her and her family's future, she would continue to experience these symptoms.

36. **[N] (the appellant's mother)** [N] sets out the family history in Kosovo, and how they came to make their way to this country in 1994. She is still suffering from her husband's death in 2010, after 44 years of marriage. Now she is nearly 75, with 'very high blood pressure', dizziness and shoulder and knee pain. [I] lives with her, and looks after her, subject to work pressure. She was so upset during the appellant's trial that her family had to send her to Kosovo for the duration, where she suffered from continuous chest pain. She says how dependent she is on the appellant's help; but we cannot consider whether the effect of his deportation on her would be unduly harsh, so this is more relevant to the question of what help she, or [I] could give [V] with the children and things in general, if he had to leave. Of course she speaks highly of him, and of the children, and expresses the fear that "… the whole family will descend into some darkness", if he had to go.

37. **[I] (the appellant's sister)** [I] has been a British citizen since 2002: she gives more of the family history, and her own, including her work record, and the breakdown of her marriage in this country. She received her psychotherapy diploma in 2008, and has since done voluntary counselling work for six years for one day a week. She works for a beauty products company. [I] does not give her age, but was clearly a young grown-up when she first came here as an *au pair* in 1987 – 89. She had been very shocked when she found out about the appellant's crimes; but she says he is still visibly sorry for them. Besides other visits, he always comes round to see her and their mother on a Sunday, which is their special family day, when they took care to book prison visits.

38. On the question of what happened while the appellant was in prison, [I] says this (paragraph 23 of her statement)

> I managed to somehow support my brother's family while [he] was in prison, but it was with the understanding that it was going to be only for the duration of his sentence. I also experienced my fair share of emotional turmoil trying to put on a brave face while at work and with my family. It was extremely difficult because I was constantly delaying my duties … sometimes calling in sick just so I can stay at home to recover my energy or even just simply by crying to myself on my own.

39. [I] goes on to say that, much as she loves the children, she would never be able fully to support them, emotionally or financially, as she doesn't earn enough, and sometimes has to travel for her work. She is afraid the responsibility in itself of taking her brother's place would be too much for her. [I] explains the effect of what happened on her and her mother:

> As a result of [V]'s condition my mother and I rallied round and helped every day the best way we could. It was not easy, because all of us carried our own share of distress. We were in a constant state of just surviving every day the best way we could.

They hadn't known how to explain to the girls, then only ten, that their father faced deportation.

40. <u>Dr King (the clinical psychologist)</u> Dr King's very recent, long, discursive and somewhat repetitive report on [V] was of course not before the judge. She gives her assessment of her as suffering from the following personality disorders:

> <u>Dependent Personality Disorder</u> (over-reliance on others to meet emotional and physical needs, hard to make decisions without excessive advice from others, passivity, fear of being left alone to care for self, devastated by separation and loss and may go to great lengths to stay in the relationship).
>
> <u>Avoidant Personality Style</u> (extreme inhibition, inadequacy and sensitivity to negative criticism and loss and may go to great lengths to stay in the relationship), and
>
> <u>Schizoid Personality Style</u> (solitary habits, emotional distance difficulties expressing emotion)

41. Dr King's answers to the questions about [V] she was asked by the appellant's solicitors were as follows (mostly summarized by us):

1. Is she suffering from any known psychological conditions that have affected her mental health due to past experiences?

   See above, also Major Depression (recurrent, severe) and Generalized Anxiety disorder.

   Unusually dependent, self-effacing and non-competitive; lack of initiative and general avoidance of autonomy; vulnerable without support and sensitive to criticism; intensely needy of affection and nurturing; destabilized by finding out at the crucial age of 10 how she had come to lose both parents, with unconscious memories of the event itself 'stored physiologically in the body', reducing her

mental resilience; exposed to the war in Kosovo, 'females being particularly at risk'; high anxiety level apparently 'suppressed to some degree with a functional level of depressive symptomatology to reduce the connection with the emotion of fear; any loss likely to trigger her unprocessed trauma and her early isolated life as a child; may withdraw from relationships if she fears rejection; lost older relations earlier than usual.

Will try to appear calm, despite underlying fear; submits to the needs and fears of others to avoid rejection; "simple responsibilities may then demand more energy than she can muster; may feel life as empty, but draining, with weariness and apathy; may withdraw, depriving herself of support; fearful of humiliation and exclusion; shy, apprehensive and awkward; sees herself as "weak, fragile and inadequate and believes she is unable to meet everyday tasks without help", minimal self-confidence, and puts herself down in the hope of reassurance.

Disorientation and despondency indicate major depressive disorder; sensitive to ridicule and 'worries that she worries', giving the appearance of generalized personality disorder; daily apprehensive and short of sleep, tired, with aches and pains; restless, unable to concentrate, easily distracted and apt to fear the worst.

2. If so, are these long-term and do they require sustained long-term treatment?

   Long-term treatment for at least two years required; at risk of frequent mental health instability till stabilized; even then at risk of relapses, owing to her age and the state to which her mental health has got. Medication likely to help, but anti-depressants will only manage some symptoms; needs personal therapy to build up her self-confidence and reduce her anxiety and low mood.

   Needs different approaches, such as Schema Focused Therapy and Eye Movement Desensitisation Reprocessing, less likely to be available on the NHS, and likely to cost about £100 a session for two years; current counselling will support her during that time, but will not deal with her underlying problems.

3. Are these conditions likely to affect her day-to-day functioning and activities, such as ability to continue employment, study and running of the household and most importantly care of her daughters who are about to enter their teenage years and puberty?

   She will have difficulties in empathizing with and in setting in context her daughters' concerns at their crucial age; at the moment her employer can cope with her having 'bad days'; but this may not last, especially as she is working with special needs children, so she might lose her job; in view of her father's reported schizophrenia, she might be at risk of genetic mental health trouble over time.

   She has a good relationship with the appellant's mother and sister; but [N] needs support herself, and [I] can't help with long-term support. This might mean her mental health got worse fast, and expose the children to neglect and isolation, for which she would be unlikely to seek help.

4. In your opinion, how would the deportation of her husband exacerbate the psychological difficulties that she is experiencing today?

   Her dependent nature, there since her childhood experiences, is focused on the appellant, and would last for at least two years, at a crucial age for the children, when they would effectively lose both parents, one to deportation, and the other to mental health troubles. Deportation would be worse than when he went to prison, as it would be indefinite. She couldn't see or speak to him so often, owing to the cost and safety concerns for women (and particularly the girls) in Kosovo. "Prison was also a loss of his presence for her and a deterioration in her presentation was evident" [*It is not clear how Dr King is able to give a professional opinion about this, on the basis of her very recent knowledge of [V]*].

5. Explain or comment on her current difficulties that she is experiencing since her partner's appeal was won, and then when the Home Office appealed, and the whole situation regarding the deportation has returned to square one.

   The situation for [V] is very difficult, as she was confident it had been put right, but then returned to the original very frightening situation. "This feeds into her sense of instability and lack of control and reinforces her sense of helplessness. These will create physiological responses in the body that are likely to directly trigger her early infant trauma of being present at her mother's murder and her teenage trauma of being exposed to war in Kosovo. The deterioration evident is explained in prior questions with regard to her overall psychological formulation"

42. <u>Ms Deacon (the 'independent social worker'</u> naturally covers a great deal within Dr King's expertise, and also covered by her; so we shall try to summarize her reports only so far as they add anything significant. They do not contain any summary of her conclusions, and reference to them is not helped by the lack of numbered paragraphs. We have already dismissed the possibility of the girls' having to move to Kosovo, so that part of Ms Deacon's evidence need not be considered. Clearly if they are to stay here without the appellant, then they must have their mother to look after them; so the question for us is whether it would be unduly harsh for them or her to have to stay here without him.

43. While it is clear from Ms Deacon's report that the appellant is a very good father, very close to the girls, and a provider, it is equally clear that [V] has "highly skilled levels of parenting", as Ms Deacon puts it. Both girls are doing very well at school (as their reports show; and both were described as 'exceptionally gifted' to Ms Deacon by the head of their year) and equally well in their personal lives, as Ms Deacon's report makes clear at p 17.

44. So far as the direct effect on the girls of being without their father is concerned, Ms Deacon says this in her first report, at p 16

> It is also argued that the girls could maintain contact with their father through regular visits to Kosovo and modern means of communication. However I feel that these methods are significantly inadequate and impracticable given [their] familiarity with their father's physical presence, the positive nature of their attachment and the family's anticipated lack of financial resources

Ms Deacon had already given the basis for this conclusion, so far as the girls' attachment to the appellant was concerned, and on that basis it can easily be accepted that keeping in touch at a distance, and on visits, would be very much less satisfactory for both them and him.

45. At p 7, Ms Deacon quotes [I], who (she says) is a qualified child and adolescent psychotherapist, as saying that the appellant's time in prison was

> … devastating for the children, but manageable with everyone's support because it was short term and the girls were able to see their dad regularly. If this happens again it will be forever and the levels of abandonment that the girls would feel would have a significant effect on the future for them in terms of their identity, their mental health and their ability to fulfil their potential.

We do not of course take this by way of professional expertise on the part of [I], talking about close members of her own family.

46. Given the effect of *KO*, as set out in *RA* (see our 15), we take the view that the main question for us is not whether [V] could keep up the present standards of care for the girls on her own, without the appellant's emotional, practical and financial support; but whether her ability to do so, without him, would collapse to the point of its being unduly harsh to her, or, even more importantly, them, for him to be removed. The answer mainly depends on Dr King's evidence; but we shall look at Ms Deacon's to see what help she can give on it.

47. Ms Deacon gives her opinion (at p 16), disclaiming any specific professional expertise in this area, that the appellant's deportation would appear likely to result in "a protracted, if not permanent decline in [V]'s mental health, which is likely to compromise her current highly skilled levels of parenting".

48. The evidence Ms Deacon relates in her first report, which is capable of supporting that conclusion, is already available to us from other witnesses: for example, at p 9, the appellant's about her jamming their flat door with chairs if he is not there, and [I]'s about her lacking resilience and having 'fallen apart' while the appellant was in prison, and needing to be hospitalized. As we know from her own evidence (see **28**), this did not last long.

49. In Ms Deacon's second report, she deals with the case under three headings, which do not entirely reflect the contents of what follows. Her first point (1) consists in a return to what happened when the appellant went to prison; then she goes on to consider the effect on the girls themselves of having to do without their father. In considering the 'extreme and understandable distress' they had shown, we shall need to consider, as she does not, the effect of the way the news of its possibility had been broken to them: see **29**. That is the context for our consideration of what she goes on to say about them experiencing their father's permanent absence "as tantamount to a parental death".

50. At 2, Ms Deacon again draws the distinction between the effect on [V] of the appellant's permanent absence, as compared to his temporary absence in prison, and returns to the quality of contact that could be kept up between him, her and the children, for example

by Skype, from Kosovo. She expresses the view that [V]'s 'anticipated heightened levels of anxiety' would force her to terminate her employment, in which case regular visits there would be beyond her means.

51. At 3, Ms Deacon makes the point that teenagers do better with the support of their parents, and may take to drink, drugs or other vices if allowed to go astray. She notes these girls' high performance at school, and ambitions for their future lives, and repeats the view that the appellant's absence in itself would have "… potential to have catastrophic implications for the girls' futures", especially if [V] became 'unwell' without him.

52. At 4, Ms Deacon notes the availability of social care; but she takes the view that this would be unlikely to be offered on a long-term basis as a protection need for the children, as they have an extended family who could take responsibility. This is slightly at odds with [V]'s own evidence about [I]'s commitments and [N]'s lack of capacity. Ms Deacon goes on to note the availability of voluntary support; but she concludes that this would be unlikely to be offered more than once a week, which would not be adequate. She has not informed herself on [V]'s take-up of mental health support; but again she speaks of "a significant delay in assessing this resource", owing to nationwide demands.

53. GP report This relates to what is described as a first depressive episode, which [V] came in with on 16 July 2018. By this time the appellant would have been out of prison for nearly a year, and was awaiting his first-tier appeal hearing on 28 September. Her history is given as ''depression with low mood, lack concentration, difficulty focusing, poor sleep'': the context is given, and the only further potentially significant point is ''prev[ious] depression around time girls born, again, never self harm thoughts then either. Case due to be heard in September''.

54. [V] was prescribed the well-known anti-depressant Citalopram, and was to be reviewed in two or three weeks. It was noted "can self ref[er] psychology at any stage": no doubt this was advice which had been given her at the time. There is then a final entry 'crisis plans': presumably this also referred to advice, but no further details are given.

55. There is no evidence from the GP about any further appointments, or prescriptions; and no evidence of any reference by [V] or anyone else to a psychologist, until this was finally done in response to the application made by the appellant's then counsel, on the basis of which I adjourned the hearing to 4 March, and then 11 April. (I was a little put out to see that Dr King dates her instructions only from 9 March; but Miss Harvey succeeded in reassuring me that something at least had been done before that). That concludes our treatment of the main sources of evidence, as listed at **17**, so we shall now turn to the argument.

DISCUSSION

56. Both advocates made oral submissions at the hearing, and others in writing, in Miss Harvey's case by e-mail, in response to the late submission of *RA* by Mr Melvin. Since these dealt with her general argument, it is convenient to take that first. Besides the 'unduly harsh' point, extensively discussed at the hearing, Miss Harvey relies on the 'very compelling circumstances' exception under s. 117C (6), on the basis that the appellant

> … has lived lawfully in the UK for some 28 years, since 1 September 1992 and was recognised as a refugee from the war in Kosovo. The very long length of his residence and that, as a refugee, for many years the UK was the only country that he could call home are factors, taken cumulatively with those that bring the case within Exception 2, constitute very compelling circumstances.

57. That is not an argument we can accept: if we had regarded it as arguable, then we should either have had to re-open the case for a third hearing, or else invite Mr Melvin to reply by e-mail. However, while the 'very compelling circumstances' exception is open in a medium-sentence case, as made clear in *NA (Pakistan)* [2016] EWCA Civ 662, this case was argued throughout before us, with good reason, on the basis that this appellant must succeed, if at all, under Exception 2.

58. The version of the 'very compelling circumstances' argument put forward in Miss Harvey's e-mail here is 'over and above' Exception 1, if anything. Exception 1 was not argued before us, or at the first-tier hearing, for the good reason that this appellant, born on 28 December 1972, was already 28 years 8 months old when he arrived in this country, on 31 August 1991, and, following that, had spent only another 26 years and (nearly) 2 months here by the date of the decision under appeal on 30 October 2017, so had not been here for 'most of his life'.

59. The 'very compelling circumstances' argument is one which will only become relevant if the appellant fails on the 'unduly harsh' point: see *NA (Pakistan)* at paragraph 36. Besides that, it is quite clear from the appellant's own evidence that he has quite happily taken his family on holiday to Kosovo and nearby countries a number of times over more recent years, and is by no means a person whose only possible home is here now. Dealing with the present situation as we must, the 'very compelling circumstances' argument is one which could not in any case succeed on its merits.

60. The other additional point of law taken in Miss Harvey's e-mail is her reliance, in rather general terms, on the continuing validity of Strasburg jurisprudence on article 8. While no doubt she is right in principle on that, we were not in any case proposing to take any notice of the Home Office circular relied on by Mr Melvin, but to base our decision squarely on the 'unduly harsh' point, as laid down by Parliament, definitively defined in *KO*, explained in *RA* and argued before us.

61. As already explained at **16**, there is no need to go further into the authorities in this case: there is one question, for us to answer in what is described in *MK* as an exercise of 'evaluative judgment'. Would the consequences of the appellant's removal be unduly harsh, either for his children (directly or because of the effect on their mother), on on [V]?

62. Dealing first with the direct consequences, we entirely accept that

(a) both the girls and [V] are particularly close to the appellant; in [V]'s case, perhaps all the more because of the continuing effects of her grisly early history (see **25**);

(b) remote contact with him (by Skype or the like) could not replace face-to-face, especially for girls of that age; and

(c) they would all have a considerably lower standard of living without his income; the only direct relevance of this to the 'unduly harsh' criterion is that it would make it harder for them to go and see him in Kosovo.

63. We do not accept that such visits would be completely impossible: [I] could no doubt give some help in finding the money for occasional tickets for the cheap flights which are on offer to Kosovo, as with many eastern European destinations, even if she is unable to take on any regular or continuing responsibility. Once there, [V]'s sister Sofie certainly could, and there is reason to suppose, given her past hospitality, would help with arrangements.

64. The result is that, though the direct effects of the appellant's removal on the girls remain something to be borne in mind on the 'unduly harsh' question as a whole, they cannot answer it in his favour on their own. The same would apply to the direct effects on [V], if they went no further than missing his practical, financial or emotional support. Sadly, as made clear in *KO* and a number of previous decisions, missing a father or a partner, even very much indeed, may be harsh, but is a normal, rather than an unduly harsh consequence of his deportation.

65. In our view the key to this case is whether the consequences of the appellant's deportation would go so far as to include what in ordinary language we should call a complete breakdown on [V]'s part. If they did, we should be prepared to accept that they would indeed be unduly harsh for her, and, because of their effect on her, for the girls; but not otherwise. Simply not being able to look after them as well as she does now would not be enough to make it unduly harsh for them. While that state of affairs would no doubt be extremely worrying for [V], we do not think that could be described as unduly harsh for her, unless, once again, it led to a complete breakdown.

CONCLUSIONS

66. As we have already made clear, the crucial evidence on this point is Dr King's: from her 4.1, she had exactly the same sources of information as we do, with a three-hour interview with [V] taking the place of the oral evidence we heard from her. While we do not doubt the general validity of Dr King's conclusions at 1 and 2 (see our **41**), the most relevant questions for our purposes are 3 and 4.

67. Bearing in mind that Dr King's first-hand knowledge of [V] is so very recent (from their interview less than a month before the hearing), some detailed consideration of her recent history was clearly important. Dr King lists the GP report among her sources, and we should have expected some discussion at 3 of whether or not there had been any further visits to the surgery, or attempts to seek their help, or that of the NHS psychology service; and, if not, why not.

68. We do not doubt that [V] was genuinely anxious about the appellant's future when she saw the GP last July. It was clearly significant that she did so, and on the evidence before us only did so, when the first-tier hearing was approaching. The question is whether [V] went to see her GP because the uncertainty involved in that prospect had made her notably more anxious than she had been before; or because she wanted, or had been told, to get further evidence for the hearing?

69. Similarly there was no attempt to get any further psychological help for [V] till after the Home Office appeal first came before me on 7 January, and Dr King's involvement was forensic, rather than therapeutic. Only in February (see **35**) did [V] get referred by her GP to Mr Oza, and any help he had been able to give her was at a very early stage, though he was not optimistic about the results. We have no evidence as to how the referral to Mr Oza came about, though the involvement of Dr King was clearly on legal advice, following the adjournment in January.

70. We do bear in mind what both Dr King and Ms Deacon say about [V]'s reluctance to seek help, and we certainly do not regard the fact that she only did so on the occasions just mentioned as fatal to the contention that she would break down without the appellant, failing the two years or more of weekly treatment recommended by Dr King under 2. We regard her as an entirely genuine witness, and we have no doubt that her visit to her GP when the first-tier hearing was approaching was brought about by genuinely increased anxiety on her part.

71. What the lack of any other previous attempts to seek help does mean, however, is that [V]'s likely response to being without the appellant has to be tested, so far as practical, rather than theoretical facts are concerned, to a very large extent on what happened while he was in prison between 1 July 2016 and late August 2017.

72. Under 4, Dr King says this about [V] being without the appellant then

> Prison was also a loss of his presence for her and a deterioration in her presentation was evident. However she could see him weekly and have daily telephone contact with him for support. There was also an end in sight for them to reunite. She therefore will not have felt so helpless or out of control as she does now.

73. The last three sentences of that passage make perfectly good sense, and indeed correspond with findings we should have been prepared to make for ourselves on the evidence before us, including [V]'s live evidence, and rather anxious appearance as she gave it. However the language of the first ('presentation') tends to suggest a professional observation by the user, which of course was something Dr King had had no opportunity of while the appellant was in prison.

74. There is a similar lack of investigation of [V]'s recent history (see 52) on the part of Ms Deacon, so far as she is qualified to give an opinion on the point we are considering; and she refers to her 'hospitalisation' at **48** without making it clear that it had only been temporary. Of course we bear in mind that the intravenous medication [V] was given when she took herself in to the A&E department had been a rather drastic intervention, and, in view of her failure to respond to the tablets she was given, no doubt a necessary one.

75. However, [V] had been able to cope after that, though again we bear in mind that she was able to speak to the appellant every day, and see him every week. In the process she had to be talked through such ordinary details of organizing one's own life as how to set about taxing the family car, to which she has now been introduced. Although the appellant refers to the anxiety (irrational in this country) which [V] had shown by jamming the

front door with chairs every night when he was away, this now dates back nearly two years. More recently, she had felt able to leave the appellant at home here last summer and take the children to Kosovo for four or five weeks, though with the help of [I], who had paid for their trip, and they stayed with [V]'s sister Sofie.

76. It is quite true that the girls, both 13, are now at a crucial stage in their lives, and that remains a relevant factor, though it does not in itself require their father's appeal to be allowed (as made clear by the Tribunal in *RA*, in their treatment of *MK*). The other self-evident truth about them is that they will be growing up fast: as time goes on, they will need less support from their mother, and be able to give her more themselves.

77. On that basis, the crucial period for the girls will last for a relatively short time after the appellant has to leave, if eventually that does happen. While [N] is unlikely, in view of her health, to be able to give any practical support, a grandmother's wisdom and experience can itself be valuable. Though [I] disclaims any ability to commit herself to long-term support, she has, to her credit, shown herself ready and willing to make a valuable contribution by paying for [V]'s trip to Kosovo with the girls last summer.

78. Neither Dr King nor Ms Deacon deals with this point: 13-year olds, and particularly girls are growing up fast, and the need for support for them and their mother cannot be assessed as if the situation were static. We bear in mind what Dr King says under 2 (see our **41**) about [V]'s need for long-term help, and the limited value of what can be done in the short term; and also Ms Deacon's views at **52** about the limited scope of help available from public sources.

79. However, on the basis that the crucial period for the girls is likely to last for a limited time, [V] and the girls can all get useful help from [I], and [V] should be able to cope with such short-term help as she can get from her GP, social services, or the NHS psychology service (as she did without any of that, though with much greater opportunity for contact with the appellant, while he was in prison).

80. That does not entirely deal with [V]'s own position, as she would no doubt still miss the appellant very badly, even after the girls had adapted to his departure. However, once she had got through the crucial period for them, we think she should be able to stay here with them for as long as they need her to look after them: while that may be for more than five years, it is likely to be less than the ten for which the appellant himself would be excluded, following deportation.

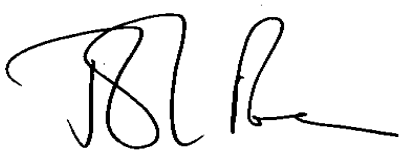
81. We think the judge was right not to regard joining the appellant in Kosovo as unduly harsh for [V], for her own sake rather than the girls'. Once they no longer needed her living with them and looking after them, [V] would have the choice whether to wait till the appellant could eventually rejoin her here (which we see no reason why he should not, once ten years have passed); or to rejoin him in Kosovo. That would give [V] at least something other than permanent separation from the appellant to look forward to, and so we cannot regard the consequences of his removal as unduly harsh for her, for her own sake, either.

82. On that basis, though the consequences of the appellant's having to go will certainly be harsh for the whole family, we cannot, on the law as declared in *KO*, regard them as unduly harsh, either for [V] or for the girls. That is the starting-point for our consideration of article 8, and we have not been referred to any specific Strasburg or other jurisprudence or legislation which might make it inapplicable, or modify it in this case.

83. The result is that the Home Office appeal must be allowed. We reach this conclusion with complete lack of enthusiasm: [V] and the girls are all British citizens, leading hard-working lives and, in the girls' cases, potentially valuable ones to society outside their own family. They are all innocent parties, and the consequences for all of them will be harsh. *RA* makes it clear that the appellant is not entitled to rely on the result of the individual case in *MK*, as opposed to the principles set out in it, endorsed in *KO*; but we do note that the children in *MK* were only seven, so would go on requiring support for very much longer than in this case.

84. Even the appellant, not that his interests are for us to consider, has always been a hard-working man, and, apart from becoming involved in crime, an excellent father and partner. He was an engaging witness, and we have no doubt he genuinely regrets his past dishonesty, if only for the harsh effects it has had, and may now go on having for his family. If we had had to consider only the proportionality of his removal to the public interest in the prevention of crime, without looking at it through the 'unduly harsh' test, then we might have reached a different result; but that is not the case.

First-tier decision set aside: decision re-made
Appellant's appeal dismissed



(a judge of the Upper Tribunal)
28.05.2019