**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/08500/2017

**THE IMMIGRATION ACTS**

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| **Heard at Manchester CJC** | **Decision & Reasons Promulgated** |
| **At a remote hearing via Skype for Business** | **On 30 July 2020** |
| **On 20 July 2020** | |

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**EJ**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Wilding, Counsel
For the Respondent: Mr Pettersen, Senior Home Office Presenting Officer

**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.

**DECISION AND REASONS**

1. The appellant has appealed against a decision of First-tier Tribunal ('FTT') Judge Shore sent on 16 March 2020, dismissing his appeal on international protection and human rights grounds. In a 43-page decision the FTT allowed the appeal brought by the second appellant, this appellant's wife ('A2') on international protection and human

rights grounds. This was predicated *inter alia*, upon the FTT's acceptance that their daughter ('D') faced a real risk of serious harm in Gambia by reason of female genital mutilation ('FGM').

2. The respondent did not appeal against A2's successful appeal before the FTT. This decision therefore solely focuses upon the first appellant before the FTT, who is now the only remaining appellant.

**Background**

3. The appellant is a citizen of Gambia, as are A2 and their three children (D, and her two brothers). He entered the United Kingdom ('UK') in December 2009 as a diplomat working for the Gambian government. His wife and sons followed him after this. The two sons arrived in the UK as very young children in 2011 and 2013. D was born in the UK in 2015. The appellant was convicted of dishonesty in December 2014 and sentenced to six years imprisonment. This related to financial dishonesty perpetrated against the Gambian government whilst working as a diplomat in the UK. He served three years in prison. The respondent issued him with a deportation order on 10 July 2017.

4. The procedural history is lengthy and only summarised here. Having each made asylum claims, the appellant and A2's appeals were linked before the FTT. Judge Shore considered the linked appeals at a hearing on 14 February 2020, when the appellant and A2 gave evidence. Having set out the background, the decisions under appeal, the evidence and submissions, Judge Shore dealt with A2's appeal first and reached the following key conclusions: she was a credible witness in relation to the FGM she was subjected to as a child and the risk of FGM to D, but she was not at risk of serious harm for reasons relating to her husband's criminal activities in the UK; she and D are at risk of persecution for a Convention Reason for reasons relating to the risk that D will be subjected to FGM; it would be a breach of Article 8 of the ECHR to remove A2 and the children as this would result in unjustifiably harsh consequences, in the light of, *inter alia*, the earlier finding regarding the risk of FGM and the finding that it would not be reasonable to expect the first child, a "qualifying child" (as he had resided in the UK for seven years) to leave the UK.

5. Judge Shore then turned to this appellant's appeal and began his assessment with Article 8 of the ECHR, before then turning to the certification of his asylum claim and Article 3 of the ECHR, and reached the following conclusions:

   (i) The effect of the appellant's deportation upon his three children would not be "unduly harsh" and he did not meet the requisite threshold in Exception 2 for the purposes of s. 117C(5) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act');

(ii) The test in s. 117C(6) of the 2002 Act "very compelling circumstances over and above Exceptions 1 and 2" was not met.
(iii) The appellant's case was correctly certified under s. 72 of the 2002 Act because he was convicted of a particularly serious crime and remained a danger to the community.
(iv) Even if the appellant was able to rebut the s. 72 presumption, his asylum appeal would have been dismissed both in relation to his claim that he is at risk at the hands of the Gambian government and in relation to the risk of FGM in relation to D.
(v) The appeal under Articles 2 and 3 of the ECHR must be dismissed as they were certified.
(vi) The appeal under Article 8 'outside the Rules' was dismissed because of an absence of exceptional circumstances or unjustifiably harsh consequences.

**Appeal to the Upper Tribunal ('UT')**

6. The appellant challenged the FTT's findings and conclusions in relation to his appeal only. No issue was taken in relation to A2's appeal, which was of course allowed. The grounds of appeal are fivefold and can be summarised as follows:

(1) The FTT misdirected itself when applying s. 117C(6) of the 2002 Act.

(2) The approach to undue harshness was flawed, which then infected the findings on Article 8.

(3) There was insufficient consideration of the best interests of the children.

(4) The FTT failed to take into account material evidence regarding the appellant's risk of re-offending, when assessing whether he presented a danger to the community for the purposes of s. 72 of the 2002 Act.

(5) The reasoning given for dismissing the appellant's Article 3 / asylum claims are inadequate.

7. Permission to appeal was granted on all grounds of appeal by FTT Judge Kelly in a decision dated 8 April 2020.

8. At the beginning of the hearing before me, Mr Wilding confirmed that there was no appeal against the failure on the part of the FTT to determine a wasted costs application that had been made before the FTT. I was told that this was yet to be determined. Mr Wilding clarified that this was included at [31] of the grounds of appeal as a means of drawing attention to this outstanding matter, and not with a view to alleging any error of law on the part of the FTT. I therefore need say no more about it.

9. Mr Wilding relied upon the grounds of appeal as drafted. I refer to his submissions in more detail below. Mrs Pettersen invited me to find that even if there were misdirections in the FTT's decision, these are not material because the appellant's human rights and asylum claim could not on any legitimate view succeed, even when the evidence is taken at its highest.

10. After hearing from both representatives, I reserved my decision, which I now provide with reasons.

11. At the conclusion of the remote hearing, both representatives confirmed that they felt able to make full submissions, and the hearing had been completed remotely in a fair and satisfactory manner.

## Error of law discussion

12. As set out above, there are five grounds of appeal – the first three deal with Article 8 and then the fourth and fifth grounds address the findings relevant to Article 3 and asylum. I begin by considering the latter. When considering an appeal based upon international protection as well as human rights grounds, it is more appropriate to begin with international protection. After all, if the appellant is successful on international protection grounds, there might be no need to go on to deal with Article 8. In addition, the findings of fact made for the purposes of determining an international protection appeal are likely to play an important role in an Article 8 appeal.

### *Asylum /Articles 2/3 ECHR: Grounds 4 and 5*

13. At [186] the judge found that the appellant had not rebutted the presumption that he is a danger to the community. Two of the reasons offered for this fail to take into account relevant evidence. First, the judge observed that "*the documents showed no more than a perfunctory engagement with taking academic courses*". The judge has failed to clearly engage with a letter dated 5 July 2019 from the appellant's offender manager (found at page 1 of the supplementary bundle) that he was assessed as being "*a low risk of serious harm to the public, due to zero significant indicators of risk*", albeit a reference to low risk is made at [173.6]. Second, the judge's comments that the appellant "*has never accepted his guilt*" at [173.6] and "*does not acknowledge his guilt*" at [186] is difficult to reconcile with the FTT's own summary of his evidence at [68]: "*he was remorseful about his Index Offence and its impact on his family and the community…*".

14. As Mrs Pettersen submitted, it is important to consider the substance of the Article 3 and asylum claims, that were rejected. Mr Wilding accepted that if ground 5 was not made out, any errors in relation to

certification would be immaterial. He therefore properly focussed his attention on ground 5 during his oral submissions.

15. Mrs Pettersen correctly conceded that the FTT erred in law in purporting to dismiss the appeal on Articles 2 and 3 grounds at [188] "*as they were certified under s. 72*". They were not and could not be certified in this way, and I agree that [188] contains a clear error of law. However, the Article 2/3 claim were based upon the same asserted prospective risk in Gambia that underpinned the asylum claim. The error in approach to the Article 2/3 claim would not be material if the FTT was entitled to make the findings it did regarding the appellant's asylum claim at [187]. Ground 5 vaguely asserts that [188] is "*perverse and inadequate. It wholly lacks reasons for dismissing the core of the asylum claim*". I have already addressed [188]. The grounds of appeal are entirely silent as to [187].

16. During the course of his submissions Mr Wilding agreed with me that the appellant relied upon two sources of risk to himself in Gambia, in support of his asylum claim, and this mirrored his Article 2/3 claim. First, the risk to him as a consequence of the financial dishonesty against the Gambian government and the embarrassment he caused. Second, the risks that flow as a result of D's risk of FGM in Gambia. Mr Wilding accepted that there was no clearly pleaded challenge to the FTT's findings as to the alleged risk emanating from the Gambian government and focussed his attention upon the second limb to the appellant's alleged risk in Gambia relating to D's risk of FGM.

17. Before turning to the second limb and for the sake of completeness, I note that the judge gave very brief reasons for rejecting the first limb within [187]. That must however be read together with [129], wherein the judge made comprehensive adverse findings. In particular, the judge considered the evidence provided by A2 to be inconsistent on this issue and the claim that there was a risk from the government was "*undermined to a huge extent by…[the evidence that one of the] co-defendants returned to Gambia in 2018 and suffered no ill consequences, other than an inability to find work*". Although these findings were made in respect of the claim from A2's perspective, they apply with equal force to the appellant's claim. The reasoning on this aspect of the appellant's appeal, specific to the appellant, is sparse. It is however important to note that the case was advanced before the FTT in a particular way, with a focus upon the consequences for the family members relating to the risk of FGM for D. As the judge noted at [38], the appellants' Counsel's skeleton argument dealt solely with the risk of FGM for D. The judge also made it clear at [42] that he dealt in more detail with those grounds that Counsel chose to emphasise. The judge recorded the closing submissions of the appellants' Counsel in considerable detail at [97] to [115]. These entirely focus upon the risk of FGM for D until [114], when the appellant's case under Article 8 (and not asylum/Article 2/3) is summarised. When the decision is read as a whole, and given the

manner in which the appellant's asylum claim vis a vis the government was not relied upon in substance, the FTT gave adequate reasons for rejecting it. In these circumstances it is unsurprising that the grounds of appeal are silent on this specific issue.

18. The judge's reasoning in relation to the risk posed to the appellant for reasons relating to D's risk of FGM in Gambia is also brief. The judge concluded that although D and her mother are at risk in Gambia, there is no reason why the appellant would be at risk there without D, as she would be able to safely reside in the UK with her mother. Mr Wilding criticised this as wrong in principle and relied upon the ground 5 which asserts that "*it is not clear on what basis the Judge determined that the daughter at risk ought to remain in the UK with mother as opposed to father*". Mr Wilding argued that it was erroneous for the FTT to 'choose' who should succeed in their asylum claim in order to remain in the UK with D, without giving any reasons for this. Mr Wilding alleged that the FTT only dealt with A2's appeal first in order to give him a foundation to reject the appellant's asylum appeal.

19. A decision that deals with two appellants with dependents, when each appellant relies at least in part upon materially different circumstances, needs to be carefully structured. This family is a good example of that. The appellant is a foreign criminal and any consideration of Article 8 in relation to him had to include the strict requirements contained in s. 117C of the 2002 Act. By contrast the focus of A2's Article 8 claim lay in the more benign application of s. 117B(6) of the 2002 Act. Although the international protection claims of the two appellants were very similar, the judge had to start with one appellant. In my judgment, the judge was entitled to start with A2. After all, she was clearly the primary carer for D and the children when the appellant was in prison. She was able to give first-hand evidence regarding her experience of FGM in Gambia in order to demonstrate the risk of FGM for D. It is this issue that took centre-stage during the course of the appeal and that is reflected in the closing submissions of the appellants' Counsel. These submissions foreshadowed this by dealing with what would happen if A2's appeal was allowed and the appellant's was not. In all the circumstances, it was entirely logical to start with A2's appeal.

20. Having made the findings he did in relation to A2 and D, the judge was obliged to consider the appellant's asylum claim vis a vis the risk to D, within that context. The judge had to consider whether this appellant had a well-founded fear of persecution for reasons relating to the risk of FGM to D in Gambia. This presented a straightforward answer: no, because D would not be in Gambia but would be in the UK with her mother and siblings. The surrogate protection of the Refugee Convention was therefore not required. Mr Wilding did not rely upon or take me to any discrete claim that the appellant feared serious harm to himself for reasons relating to the desire on the part

of family members to subject D to FGM, when D was living in the UK and would not be returning to Gambia.

21. That does not mean that D's risk of FGM in Gambia was completely irrelevant – it was clearly relevant to a proper determination of the appellant's Article 8 claim, which I now turn to.

## ***Article 8 ECHR: grounds 1-3***

*Legal framework*

22. Before turning to the grounds that rely upon Article 8, I summarise the relevant law regarding the correct approach to s. 117C of the 2002 Act in a case like this.

23. Section 117A(2)(b) of the 2002 Act provides that, in considering the public interest question, in cases concerning deportation of foreign criminals, the court or tribunal must in particular have regard to the considerations listed in section 117C. That provides as follows:

> "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."

24. The correct approach to the unduly harsh test is now well known, having been set out by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53. It is self-contained, that is to say it does not require a balancing of the relative levels of severity of the parent's offence.

Importantly, the unduly harsh test requires an elevated threshold to be met as set out by Lord Carnwath at [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".

25. Subsequent decisions of the Court of Appeal have emphasised that unduly harsh requires the court or tribunal to focus on whether the effects of deportation of a foreign criminal on a child would go beyond the degree of harshness which would necessarily be involved for any child of any foreign criminal faced with deportation: see for example per Holroyde LJ at [34] of SSHD v PG (Jamaica) [2019] EWCA Civ 1213. As Irwin LJ said in OH (Algeria) v SSHD [2019] EWCA Civ 1763 at [63]: "*As a matter of language and logic, this is a very high bar indeed*".

26. It is clear that, in the case of an offender sentenced to less than 4 years imprisonment, even if Exceptions 1 and 2 cannot be satisfied, the offender may still avoid deportation if there are "very compelling circumstances" within ss. (6) - see NA (Pakistan) v SSHD [2016] EWCA Civ 662; [2017] 1 WLR 207. Jackson LJ emphasised at [32] to [33] how stringent a test is in this way:

> "32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.
>
> 33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in

> poor health or the natural love between parents and children, will not be sufficient."

27. The very broad approach has been highlighted in subsequent Court of Appeal authorities - there is no closed list of what will constitute very compelling circumstances and a flexible approach is required to both the circumstances and the public interest – see Akinyemi v SSHD (No. 2) [2019] EWCA Civ 2098.

*Grounds 2 (undue harshness) and 3 (best interests)*

28. The findings in relation to the effect upon the children for the purposes of s. 117C(5), the focus of ground 2, feed into the broader approach necessitated when applying s. 117C(6), as submitted in ground 1. For this reason it is more convenient to address ground 2 first. Ground 2 overlaps with ground 3, and I therefore deal with them together.

29. Ground 2 is multi-faceted and widely drafted. I attempt to deal with all of its strands here. I begin by noting what has not been challenged. The grounds of appeal do not criticise the inclusion of [167.1] to [167.5] of the decision, and neither did Mr Wilding. Those paragraphs appear to be based upon a summary of the legal position prior to KO (Nigeria). Contrary to the what is said at [167.1] and [167.4], the unduly harsh test is entirely child-focussed and the public interest has no role to play. This was presumably not challenged because it was clearly included in the decision as a result of oversight. The judge correctly directed himself to the relevant authorities explaining the unduly harsh test at [168] to [171]. The grounds of appeal do not suggest that the FTT unlawfully imported any public interest considerations into the unduly harsh test, and neither did Mr Wilding.

30. The observation in the grounds of appeal that the FTT's focus on undue harshness "*is not understood given that the appellant was sentenced to more than four years*" is difficult to follow, and was not relied upon by Mr Wilding. It was important to logically address the nature and extent of the evidence said to support any of the Exceptions being met, before the FTT went on to holistically determine whether there were "very compelling circumstances over and above" the Exceptions.

31. The point is repeatedly made in ground 2 that the FTT failed to take into account a crucial consideration: this is a case in which D and her mother have been found to have a well-founded fear of serious harm in Gambia, and cannot return there. I accept that this is one of those cases in which deportation will involve the complete physical separation of the family members for a very lengthy period (at least 10 years before the appellant can apply to have his deportation revoked). This was undoubtedly a highly relevant aspect of the appellant's case on Article 8 grounds. I do not accept that the FTT's

decision "*entirely omits*" any reference to this, as submitted in ground 2. When the decision is read as a whole, it is clear that the FTT appreciated the gravity of the interference with family life that would follow as a result of the appellant's deportation. At [114], the judge recorded the submission on behalf of the appellant that to allow A2's appeal and dismiss the appellant's appeal would result in a "*total severance*" of family life. At [173.4] the judge said that he was "*very aware that there will be a physical barrier between the appellant and the family…*". Further at [194.5], the judge said that he did not make a decision "*that effectively splits the family lightly*" and there would "*obviously be a negative effect*" on the family: A2 would be unable to visit Gambia because of her asylum status and the appellant would be unable to visit the UK.

32. I am satisfied that the judge properly took into account the practical reality - both D and A2 could not be expected to return to Gambia even for a visit (based upon his own findings that they were at risk of serious harm as a result of the risk of FGM upon D), and this meant that the family would be separated from each other for a very lengthy period.

33. Ground 2 criticises each of the findings made at [173], said to support the judge's conclusion that the effect on the children would not be unduly harsh.

34. At [173.1] the judge found that "*no evidence was presented*" to show that the appellant's relationship with his children "*went beyond the normal parental relationship*". I accept that the judge has not employed careful language when applying the relevant authorities and should not have used the phrase "*normal parental relationship*". In my judgment, he was clumsily attempting to apply the authorities he referred to earlier to the effect that in order to meet the high threshold there needs to be a degree of harshness going beyond what would 'normally' be involved for any child face with the deportation of a parent. The focus is upon the effect on the child. The more the child is dependent upon the parent emotionally or physically, the more likely it is that the effect of separation will be unduly harsh. A child with significant health or other needs is likely to be more dependent but as the judge noted at [128.5], the children are all healthy. The judge was entitled to find that there was no evidence that the children enjoyed anything other than what one would normally expect in a genuine and subsisting parental relationship. The judge noted that there was no dispute that the appellant had a genuine and subsisting relationship with the children at [167].

35. Ground 2 criticises the finding at [173.2] that "*no evidence was presented as to the quality of the relationship with any child…*". As Mr Wilding acknowledged, the judge probably meant no 'cogent supporting' evidence because there was clearly some evidence that they enjoyed a close relationship. I asked Mr Wilding to take me to

evidence available to the FTT relied upon to demonstrate that the effect of the disruption of that close relationship upon the children would be severe or harsh, over and above the necessarily effects caused by deportation. He was unable to do so. He only took me to evidence from an organisation supporting family unity for prisoners which highlighted that the family remained close during the appellant's imprisonment.

36. Mr Wilding submitted that the judge engaged in speculation and acted unfairly in appearing to find at [173.3] that the family relationship "*could only be maintained by electronic means with occasional visits to third countries*". Ground 2 alleges that the FTT did not explore the particularities of how and in which third country all members of the family would be permitted to enter to enjoy a family visit. I do not accept there was any procedural unfairness here. It was for the appellant, who was represented by experienced Counsel, to make his case. In any event, the judge was merely observing precisely that which he has been criticised for ignoring. Family life would be physically impossible and could only be maintained by electronic means with visits to third countries. The judge did not observe that the relationship could or would be maintained in that manner. Rather, that was the only possible means of maintaining some form of family relationship. The judge was entitled to make such a self-evident observation.

37. I do not accept the submission that judge's finding at [173.4] that A's 2's ability to care for the children was irrelevant. S. 117C(5) is entirely child focussed - the judge was obliged to assess the effect of the separation of the appellant from the remainder of the family upon the children. It was clearly a relevant factor that the children would have the care, love and support of their mother in the UK. That would serve to lessen the adverse effects of separation from their father. This is all the more important in this case wherein the father was separated from the family for three years when he was imprisoned and there was no cogent evidence before the FTT of any serious disadvantages to the children.

38. I accept Mr Wilding's submission that it is necessary to consider the children's best interests when addressing whether their father's deportation would be unduly harsh on them. Mr Wilding submitted that the assessment of the children's best interests at [173.4] was inadequate. This was the focus of ground 3 and he therefore dealt with grounds 2 and 3 together in so far as best interests are concerned, as do I at this juncture.

39. The judge correctly directed himself to KO (Nigeria) and was fully aware of the relevant best interests principle, having directed himself to ZH (Tanzania) v SSHD [2011] UKSC 11. Although the judge did not expressly refer to the children's best interests at [173], when the decision is read as a whole I am satisfied that the judge had the

children's best interests in mind when considering the effect of the appellant's deportation on them. The judge was entitled to find that the children would be well cared for and loved by their mother in their father's absence. In addition, the judge had already considered best interests at [142], and referred to best interests again at [194.5]. I am satisfied that the judge addressed all relevant factors and applied the correct child-focussed test for the purposes of s. 117C(5). At [172] he found that "*the effect will be distressing and unpleasant, but not to the extent that it would go beyond 'due' harshness*". As made clear in SSHD v PG (Jamaica), the 'commonplace' distress caused by separation from a parent is insufficient to meet the unduly harsh test.

40. Mr Wilding did not take me to any cogent evidence said to be left out of the judge's assessment relevant to the manner in which the children would suffer without their father's presence in the UK. I note that D was born in April 2015, at a time when her father was imprisoned. He has been in prison for much of her short life. At [172] the judge expressly accepted that the effect of deportation would be distressing and unpleasant for the children, having earlier accepted at [142] that it was in their best interests to remain with both parents. It is implicit from this that the judge considered that the appellant's deportation would not be in the children's best interests i.e. it would be harsh, but he was entitled to find for the reasons provided, that the effect of deportation upon them would not be unduly harsh.

41. Finally, Mr Wilding submitted that [173.5] and [173.6] are entirely irrelevant to s. 117C(5), and the FTT erred in law in taking into account irrelevant matters. I accept that the judge has not clearly distinguished between matters that are relevant to Exception 2 (effect upon the children) and Exception 1 (private life) when setting out his findings at [173]. This does not give rise to any material error of law. When the decision is read as a whole, it is tolerably clear that the FTT found the appellant to be a long way off meeting the requirements of Exception 1. As the judge observed at [166], the appellant fell at the first hurdle. At [174] the judge concluded that the appellant did not meet Exceptions 1 and 2. At [173] the judge was attempting to draw the threads together: [173.1-173.4] in relation to Exception 2 and [173.5-173.6] in relation to Exception 1.

42. The FTT provided adequate reasons for concluding that the high threshold demanded by the test of undue harshness was not met. Although the FTT's findings and reasons could have been clearer and better structured, the FTT has adequately explained why that threshold could not be met in this case. In any event, there was a dearth of evidence available to support the proposition that the degree of harshness would go beyond what would necessarily be involved for children facing the deportation of a parent. When the evidence is viewed at its highest together with the judge's finding that the best interests of the children are to remain in the UK with

both parents, the conclusion that the high threshold required by the test of undue harshness was not met, was inevitable.

*Ground 1*

43. I now turn to the FTT's approach to s. 117C(6), which is the subject of challenge in ground 1. The judge correctly directed himself to the need to consider all relevant matters holistically for the purposes of s. 117C(6) at [162], [163] and [175]. However, the judge contradicted himself by stating that if the Exceptions cannot be met the appellant cannot "*logically*" show very compelling circumstances over and above the Exceptions at [165]. This approach is repeated at [174]. These are clear misdirections in law. S. 117C(6) should not be interpreted literally – it just requires circumstances that are more compelling than the existing Exceptions – see Akinyemi v SSHD [2017] EWCA Civ 236, NA (Pakistan) and Akinyemi No 2

44. As Mrs Pettersen submitted, the real issue is whether or not this legal misdirection is a material error of law. I invited Mr Wilding to take me to the factors and associated evidence before the FTT, that he relied upon to support the proposition that the appeal could possibly succeed under s. 117C(6), bearing in mind that it is an "*extremely demanding*" test - see MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 and RA (s.117C "unduly harsh": offence: seriousness) Iraq [2019] UKUT 00123 (IAC), per Mr Justice Lane, the President of UTIAC.

45. Mr Wilding accepted that in order for there to be a material error of law the appeal must be capable of success on a legitimate view of the facts taken at their highest. He relied upon three factors: (i) impact upon the three children, particularly D; (iii) the appellant's lengthy residence; (iii) appellant's low risk of offending. I have already addressed the impact upon the children when dealing with grounds 2 and 3 above. That assessment includes the impact upon D, who together with A2, will be unable to return to the DRC because of the risk of FGM she faces there. D and her mother would not be able to even visit the appellant. The separation between the appellant and his family is likely to be sharp, distressing and lengthy. That is what happens when parents are deported. Here there was no cogent evidence that the degree of harshness would go beyond that necessarily involved for any child faced with the deportation of a parent. This plight of this family in not being able to even visit the deported parent is not unique or uncommon, given the costs and practical hurdles involved in international travel. As Jackson LJ put it in NA (Pakistan), whilst the best interests of children certainly carry great weight, it is nevertheless, a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the

high public interest in deporting foreign criminals. For the reasons I have provided above on no legitimate view of the evidence could it be said that the appellant came anywhere near to meeting Exception 2.

46. The appellant's residence in the UK from 2009 has included serious criminal offending which resulted in a six year sentence of imprisonment. Similarly, on no legitimate view of the evidence could it be said that the appellant came anywhere near to meeting Exception 1. That leaves the appellant's low risk. That must be seen in the context of the undeniably strong public interest in favour of deportation as a result of the serious criminal offence. Mr Wilding was simply unable to identify any features of the appellant's case of a kind or similar in impact to those matters described in the Exceptions, far less matters that go over and beyond these.

47. Had the FTT properly directed itself to the need to conduct a holistic exercise and consider all the relevant factors relied upon by the appellant (even though they did not meet the Exceptions), it would have inevitably come to the conclusion that the very high threshold required for s. 117C(6), was not met. I am satisfied that on no legitimate view of the evidence, even when taken at its highest, could the appeal succeed under s. 117C(6).

48. It follows that the grounds of appeal may have identified misdirections in law but these were not material to the outcome and the decision of the FTT is not set aside.

**Notice of decision**

49. The FTT's decision does not contain a material error of law and I do not set it aside.

Signed: *UTJ Melanie Plimmer* Date: 22 July 2020
Upper Tribunal Judge Plimmer