Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09594/2018

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Monday 8 November 2021	**On Tuesday 30 November 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR TAITEI MAZANHI

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, Counsel instructed by Waterfords solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

PROCEDURAL BACKGROUND

1. By a decision promulgated on 23 October 2018, First-tier Tribunal Judge Gurung-Thapa allowed the Appellant's appeal against the Respondent's decision refusing his human rights claim. That refusal was in the context of a deportation decision made against the Appellant dated 13 April 2018 to remove him to Zimbabwe. Judge Gurung-Thapa allowed the appeal on the basis that deportation of the Appellant would have unduly harsh consequences for his children. She did so however taking into account the circumstances of the Appellant's offending in accordance with the

Court of Appeal's guidance in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617, current at that time. That judgment has since been disapproved by the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)").

2. The Respondent appealed Judge Gurung-Thapa's decision on the basis that the Judge had misapplied the relevant test in relation to undue harshness and the public interest, relying also on the guidance given in KO (Nigeria).

3. Permission to appeal was granted by First-tier Tribunal Judge O'Garro on 9 November 2018 in the following terms so far as relevant:

> "... 3. In **MM (Uganda) and [sic] [2016] EWCA Civ 450** it was held that the phrase 'unduly harsh' plainly meant the same in section 117C(5) of the 2002 Act as it did in paragraph 399 of the Immigration Rules. It was an ordinary English expression coloured by its context. The context invited emphasis on two factors: first, the public interest in the removal of foreign criminals and, secondly, the need for a proportionate assessment of any interference with Article 8 rights. The public interest factor was expressly vouched by Parliament in section 117C (1). Section 117C(2) provided that the more serious the offence committed, the greater the public interest in deportation. That steered the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it would be to show that the effect on his child or partner would be unduly harsh. Any other approach would dislocate the 'unduly harsh' provision from their context such that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation.
> 4. In light of this guidance, I find arguable merit in the grounds in the terms in which they are set forth and permission to appeal is granted."

I observe that this decision makes the self-same error as Judge Gurung-Thapa's decision but, given that the judgment in KO (Nigeria) had only recently been handed down at that date that is perhaps unsurprising.

4. The appeal came before the Upper Tribunal (Judges Coker and Rintoul) on 16 July 2019. By a decision promulgated on 19 July 2019, they found an error of law in Judge Gurung-Thapa's decision. In spite of the procedural course taken by this appeal thereafter to which I refer below, both parties accepted before me that the Upper Tribunal's error of law decision should still stand. For that reason, I set out the Upper Tribunal's reasoning for finding an error of law in Judge Gurung-Thapa's decision as encapsulated in the following paragraphs:

> "... 2. In brief, the judge, in reaching her decision that it was unduly harsh for the children and his wife to remain in the UK without him, improperly took into account the more general issues of Mr Mazanhi's immigration status and history, his remorse and the conviction in addition to the circumstances of the children and his partner.
> 3. Although submitted by Mr Vokes that the findings made by the judge were sufficient to meet the 'threshold' of 'very compelling circumstances over and above those required to meet Exceptions 1/2 'despite the First-tier Tribunal judge not having

> considered that issue, we are satisfied that the findings and the evidence before the First-tier Tribunal judge was insufficient to reach such a finding. The judge had not considered whether there were very compelling circumstances. Ms Aboni submitted that the findings of the judge did not meet the threshold required and the decision should be set aside.
>
> 4. We are satisfied that the errors of law are such that the decision is set aside to be remade; findings reached by the First-tier Tribunal to be retained."

5. By a decision promulgated on 18 December 2019 the same composition of the Upper Tribunal re-made the decision and dismissed the appeal. I will need to come back to that decision in relation to the preserved factual findings. Based on those facts, though, the Tribunal did not accept that the Appellant's deportation would result in unduly harsh consequences for the Appellant's wife and children "whether individually or collectively". The appeal was therefore dismissed.

6. The Appellant appealed the Upper Tribunal's decision to the Court of Appeal. Permission to appeal was refused by Upper Tribunal Judge Coker on 27 February 2020 but granted by Lord Justice Popplewell on 14 December 2020 in the following terms:

> "The law governing the unduly harsh test has been the subject of further clarification since KO (Nigeria), in the decisions of this court in HA (Iraq) and AA (Nigeria), both of which postdate the Upper Tribunal's decision. It is not clear what principles of law were applied by the UT in this case, and it is arguable that the UT could not have reached the conclusion that the effect on the children and partner would not be unduly harsh had it applied the correct principles of law, given the findings of the FTT, especially those at paragraphs 51 to 53, and the evidence from the social worker recorded in the UT decision.
>
> Although this is a second appeal, it is the applicant's first appeal because he succeeded before the FTT."

7. By a consent order sealed on 10 February 2021, the parties agreed that the Upper Tribunal's decision of 18 December 2019 should be set aside and that the appeal should be remitted to this Tribunal for a fresh determination of the appeal. As I have already noted, the parties are agreed that this did not have the effect of setting aside the error of law decision and accordingly, it is accepted that the First-tier Tribunal's decision contained an error of law. As I come to below that this also has the effect of preserving certain factual findings made by the First-tier Tribunal. Although this was not canvassed with the parties at the hearing before me, I did not understand the Respondent to suggest that the Appellant and his wife were not credible witnesses and nor was there any dispute as to the facts. As I will come to below, therefore it is appropriate to retain the findings of fact made by the First-tier Tribunal as set out in the Upper Tribunal's decision of 18 December 2019.

8. For completeness, the statement of reasons accompanying the consent order made clear that the Respondent maintained that her deportation decision remained lawful but accepted, as had Lord Justice Popplewell, that it was not clear what principles of law had been applied by the Tribunal and that, since the Tribunal's decision in

December 2019, there had been two leading cases which were decided by the Court of Appeal bearing on the issues in this case. I understand that to refer to the Court of Appeal's judgment in HA (Iraq) and RA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 ("HA (Iraq)").

9. The appeal therefore comes before me to re-make the decision. I had before me the Appellant's bundle before the First-tier Tribunal (referred to as [AB/xx]) and a supplementary bundle produced for the hearing before me (referred to as [ABS/xx]). The supplementary bundle contains updating statements from the Appellant and his wife as well as an initial and supplementary report from a social worker. I have read the documents relevant to the issues I have to determine but refer only to that evidence which is relevant to my reasoning and conclusions.

FACTUAL BACKGROUND

10. The Upper Tribunal's error of law decision preserved the findings of the First-tier Tribunal as to the facts. Since the parties are agreed that the error of law decision stands (see [7] above), this has the effect of preserving the factual findings of the First-tier Tribunal. For ease of reference, I refer to the summary of those facts as contained in the December 2019 decision notwithstanding the setting aside of that decision. None of the facts as set out below are controversial in any event:

> "6. The background and retained factual findings are as follows:
>
> (i) The appellant was arrested on 16th January 2004 and gave a false name. He was convicted on 23rd January 2004 of obtaining property by deception, resisting/obstructing a police constable and driving whilst uninsured. He received a financial penalty and points on his licence. He was served with administrative removal paperwork as a result of deception. He absconded.
>
> (ii) He was due to appear in the Sheriff Court on 19th September 2006 having been charged with being concerned in the supply of Class A controlled drugs. He absconded.
>
> (iii) On 16th January 2009 he was arrested for domestic assault, gave his real name and was linked to the above. A PNC check showed he had pending prosecutions. No criminal proceedings ensued from the domestic violence arrest.
>
> (iv) An application made to the SSHD on 30th April 2015 resulted in him being given leave to remain on 4th September 2015 until 4th March 2018 (30 months).
>
> (v) On 18th July 2016 he was convicted at Aberdeen Sheriff Court for supply, perverting the course of justice and failing to attend proceedings in the Sheriff Court. He received a sentence of 42 months imprisonment.
>
> (vi) An application made on 1st March 2018 for further leave to remain was refused; on 13th April 2018 a deportation order was signed in accordance with s32(5) UK Borders Act 2007. It is Mr Mazanhi's appeal against the concurrent refusal of his human rights appeal that is the subject of these proceedings.
>
> (vii) He has a wife with whom he cohabits, Ms Mapunde, with whom he has one child born 10th October 2016 (C6). His partner has two children from an earlier relationship, one born 23rd May 2002 (C1) and one born 21st

September 2009 (C5). All three children and his wife are British Citizens. Their relationship started in 2009, started living together in 2010 and were married in November 2015.

(viii) Mr Mazanhi also has a child born 30th June 2006 (C4) who is a British citizen from an earlier relationship.

(ix) He has two other children born 15th August 2003 (C2) and 30th January 2006 (C3) from an earlier relationship. Those children are Zimbabwean citizens, having indefinite leave to remain and live with their maternal grandparents. Their mother is in a relationship with other children.

(x) There is no evidence Mr Mazanhi has committed any further offences since the drugs offence in 2006, save for perverting the course of justice.

(xi) Mr Mazanhi informed his criminal solicitors of his previous criminal activity and this was what led to his subsequent arrest and conviction in 2016. He also informed his immigration solicitors who had applied for him to be given limited leave to remain in 2015.

(xii) Mr Mazanhi plays an active role in all of his children's upbringing; C4 visits every three weeks and spends part of the summer holidays with him and his wife; C2 and C3 live close by and spend holidays and weekends with him and his wife. The relationship with C4 was broken whilst he was in prison and her behaviour deteriorated but it has now settled down since he came out of prison.

(xiii) Ms Mapunde, who is a qualified social worker and works full time, struggled to cope emotionally and financially when Mr Mazanhi was in prison; her mother visited from Zimbabwe for three months during that time to assist her. She would not be able to continue working full-time if Mr Mazanhi were deported.

(xiv) The older children became withdrawn and spent more time in their rooms when Mr Mazanhi was in prison.

(xv) The SSHD accepts that it would be unduly harsh for any of the children to go to Zimbabwe in order not to be separated from their father.

(xvi) The SSHD accepts that it would be unduly harsh for his wife to go to Zimbabwe in order not to be separated from her husband."

11. I have to consider the facts as exist at the date of the hearing before me and it is necessary to update the facts as found above in light of current circumstances and further evidence which I have seen and heard. I do that below in the section headed "Evidence and Further Findings". I there refer to the children using the notations adopted by the previous Tribunal in order to preserve their anonymity and notwithstanding that two of the children (C1) and (C2) are now adults.

LEGAL FRAMEWORK AND ISSUES

12. In order to succeed in his appeal, the Appellant must either fulfil the exceptions to deportation set out in the Immigration Rules ("the Rules") or demonstrate that there are very compelling circumstances over and above those exceptions. That test and the exceptions in the Rules are essentially the same in content as the exceptions set out in section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") and I therefore set out those exceptions by reference to that section.

13. Section 117C provides as follows so far as material:

> "**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.
> …"

14. There can be no dispute that Section 117C applies to the Appellant. He has been sentenced to a term of imprisonment of over twelve months. Although Section 117C (6) on its face does not apply to the Appellant as he was not sentenced to at least four years, the Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 at [24] to 27] of its judgment held that this applied equally to "medium offenders who fall outside Exceptions 1 and 2". This means that, even if the Appellant does not meet Exceptions 1 and 2, I am still required to consider whether "there are very compelling circumstances over and above" those exceptions in the event that I find that the exceptions are not met. In order to conduct that exercise I would need also to consider the extent to which the Appellant meets or does not meet the exceptions.

15. The only ground of appeal before me is that the refusal of the Appellant's human rights claim breaches section 6 Human Rights Act 1998 on the basis that it is a disproportionate interference with the private and family life of the Appellant and others impacted by the decision, in particular his wife and children.

16. As confirmed by the Court of Appeal in HA (Iraq), whereas, when considering the position within Exceptions 1 and 2, there is no room for balancing the interference with the Article 8 rights of the Appellant and others affected by the decision against the circumstances of the offending, the position is different under Section 117C (6). If I reach that stage I would be required to balance the impact of deportation against the public interest in the Appellant's deportation.

17. The central focus of the Appellant's case is the impact of his deportation for his children and to a lesser extent his wife. It is therefore his case that he meets Exception 2. As I have already recorded, it is accepted by the Respondent that the Appellant's children with whom he lives permanently (that is to say now C5 and C6) and in consequence also the Appellant's wife cannot be expected to return to Zimbabwe with him. The Appellant's wife continues to have family in Zimbabwe and has visited that country with the Appellant in December 2015/January 2016 but since she would be the sole carer of C5 and C6 were the Appellant to be deported and since it is accepted that they cannot permanently locate to Zimbabwe, she could not be expected to accompany him either.

EVIDENCE AND FURTHER FINDINGS

18. The Appellant has provided two statements dated 30 August 2018 and 8 November 2020. His wife, Ms Mapunde, has likewise provided two statements dated 30 August 2018 and 8 November 2020. They adopted their statements and were examined both in chief and by the Respondent. I also asked some clarificatory questions.

19. The main focus of the Appellant's case is his children including his stepchildren and I therefore begin with the evidence about them.

20. C1 is Ms Mapunde's eldest daughter and the Appellant's stepchild. She is now an adult (aged nineteen years). I was told that she is studying at Birmingham City University. In spite of the proximity of that university to her home address, I was told that she lives in halls of residence. She pays for her accommodation herself via a student loan. She only started at university this academic year and therefore her intentions about returning home are unclear, but I was told that the expectation is that she would return home during the university holidays. Whilst there is no dispute that the Appellant has a parental relationship with C1 (although she also has contact with her biological father), her position is not relevant to Exception 2 as she is now an adult.

21. Likewise, C2 is also an adult. He is now aged eighteen years. I heard some limited evidence about him and his sister, C3 who is now aged fifteen years. Both live with their maternal grandparents rather than their mother. I was told that the Appellant, Ms Mapunde and C1, C5 and C6 see C2 and C3 as often as they can. They come to stay with the family during some school holidays. The Appellant said that these two children have musical interests, and he attends concerts when they perform. Ms Mapunde said that she has some communication with the grandparents with whom C2 and C3 live but that is only via the Appellant. The mother of C2 and C3 was apparently recognised as a refugee. I asked the Appellant whether it was suggested that C2 and C3 could not go to Zimbabwe for that reason. He confirmed that they could not go at one time due to status. Now they were British, they could presumably visit were they inclined to do so. Their mother never goes to Zimbabwe.

22. C4 is now aged fifteen years. She lives with her mother, Ms Phiri, in Luton. The Appellant said that as a result he sees less of her than he would like. Ms Mapunde confirmed in her evidence that she has no contact with C4's mother nor with the mother of C2 and C3.

23. C5 is the younger of the Appellant's two stepchildren (the child of Ms Mapunde). She is aged thirteen years. She has no contact with her biological father. I heard evidence that C5 wanted to find out about her biological father as part of exploring her identity, but he did not wish to see her. I heard evidence that Ms Mapunde and the Appellant had to sit down with C5 to explain the situation, and to reassure her that the Appellant would always be her father and would not leave her. The impact on C5 of the Appellant's deportation is one of the core issues.

24. The central focus of the Appellant's case however is C6. C6 is his biological child. He is aged just five years. He has various medical conditions. Mr Bellara rightly did not seek to rely on C6's allergies which are in the form of hay fever and are controlled by medication. However, C6 has other more serious allergies. These were described by the Appellant and Ms Mapunde in their evidence. The allergies are to peanuts and almonds, beans and berries. C6 has not had tests for particular allergies but the allergies have been discovered over time. They demonstrate themselves as swelling. Ms Mapunde said that C6 goes purple and struggles to breathe. He carries an epi-pen, but it is still necessary for one parent to be available on call at all times in case of an episode. Ms Mapunde described in her evidence one occasion when C6 was at nursery, developed an allergy to something and his epi-pen misfired. An ambulance had to be called and the nursery contacted the Appellant to come to his aid.

25. Both the Appellant and Ms Mapunde emphasised the need not only for schools to be able to contact one of them in an emergency but also the need for care to be taken over C6's diet. The school has been provided with letters from doctors about what C6 can and cannot eat. At home, it is the Appellant who ensures that C6 has the right foods. The Appellant was clearly aware of the care which needs to be taken with the food C6 is given and of what C6 can and cannot tolerate.

26. In addition to dealing with C6's dietary requirements, it is the Appellant who looks after both C5 and C6. He is in effect their main carer. He drops off and picks up C6. He helps him with homework. He described how he goes through the reading books which C6 is given. I do not place weight on the Appellant's inability to recall the name of the books. The hearing before me was not a memory test and I had no reason to doubt that the Appellant does assist C6 in this way. The Appellant gave as an example of how he helps C6 with his school activities, how he had rehearsed lines with C6 as C6 is to be one of the three wise men in the school nativity play. The Appellant described how C6 lacked confidence about this and was clearly worried but felt better after the Appellant helped him. In addition to feeding and helping C6 with schoolwork, the Appellant bathes C6 at night and puts on skin cream as C6 has a skin condition. He also reads C6 bedtime stories.

27. Ms Mapunde is a social worker. She gave evidence that she works long hours. She is the breadwinner of the family. As such, although contractually, her hours are nine to five, she often works overtime and can on occasion be called out at unsocial hours due to the nature of her work.

28. There is limited evidence about Ms Mapunde's mental health condition. However, her account of her condition was not seriously challenged by Ms Cunha. Ms Mapunde was diagnosed with anxiety and borderline depression in November 2019. She says in her statement that she had to take six months off work. She said in oral evidence that her condition has been managed since March 2020 by medication (paroxetine and amitriptyline). Although that date coincides with the start of the pandemic, Ms Mapunde confirmed in evidence that her problems had started in late 2019 and were linked to the Appellant's appeal. The onset of symptoms was around the time of the negative appeal decision.

29. The main relevance of Ms Mapunde's mental health condition is to her ability to look after C5 and C6 without the Appellant's assistance. She said that she relies on the Appellant for support – she described him in her evidence as her "pillar". However, if it were not for her need for support with the children, I would not have found on the evidence that the Appellant's deportation would have very serious consequences given her ability to continue to work albeit helped by medication.

30. The Appellant served twenty-two months in prison and, therefore, much of Ms Cunha's cross-examination focussed on how Ms Mapunde had coped during that period. When the Appellant was sentenced, she was a few months pregnant with two children to look after. She and the Appellant explained that, when Ms Mapunde had given birth, the Appellant's mother came from Zimbabwe to help. Understandably, however, given her status, she could not remain for more than a few months. Ms Mapunde also took longer than usual maternity leave, some of it unpaid. She confirmed that, whilst she was on unpaid leave, she had claimed benefits, but she did not want to do this as it was against her ethos. She did "not wish to be a burden on the social system any longer than needed".

31. The Appellant and Ms Mapunde went to Zimbabwe for about one month in December 2015/January 2016 to visit their respective families. The Appellant has his father, mother, brothers and sisters in Zimbabwe. Only one of his sisters is in the UK. Ms Mapunde has a grandmother in Zimbabwe. The visit was soon after the Appellant was given limited leave to remain. They did not take with them C1 or C5 (C6 was not born at this stage). The children had to attend school for some of the time and the purpose of the visit was to see families rather than to take a holiday, so it was not appropriate for the children to go. During this time, the children were cared for by Justina, the Appellant's aunt who lives in Slough. She came to stay with the children. She could not be expected to do this on a regular basis if the Appellant were deported as she has her own life. Similarly, both the Appellant and Ms Mapunde said that the Appellant's mother who lives in Stowmarket could not be expected to come to help out. She is a live-in carer with her own responsibilities. Ms

Mapunde also has two brothers in the UK, one living in Hull and the other in Burton-on-Trent. Neither would be able to assist due to geographical distance and that they have their own responsibilities.

32. The Appellant and Ms Mapunde were asked about barriers to C6 going to visit his father in Zimbabwe. C6 suffers with Glucose-6-phosphatase deficiency. According to Ms Mapunde's statement, this is "a genetic condition which means if he comes into contact with certain foods and medications his blood cells begin to breakdown and his immune system would start to shut down". The impact of the condition is set out more fully in a letter from the GP, Dr Martin CE Ashton dated 22 July 2021 ([ABS/55]) as follows:

> "[C6] has a condition called Glucose-6 phosphatase deficiency. This means that certain medications cannot be given to him as they may cause haemolytic anaemic and other complications. Amongst those medications are treatments for malaria and most drug prophylaxis for malaria. The only safe preventative would be Doxycycline which is usually contraindicated in young children because of its effects on tooth enamel. Active treatments for actual malaria infection would also be problematic as almost all the treatments that are available would also be contraindicated in his condition. It would therefore be extremely difficult for [C6] to visit his father in Zimbabwe and so contact between father and son would be in danger of being broken."

33. Ms Cunha sought to explore with the Appellant and Ms Mapunde what the Appellant would do if permitted to remain in relation to employment no doubt in order to suggest that full-time parental care was not actually required for C6. Both were though adamant that the Appellant would not work if permitted to remain unless he had a job which was sufficiently flexible for him to be able to leave at a moment's notice in case of need. I accept that evidence and that the Appellant would, as he does now, carry out the role of running the household and childcare with Ms Mapunde earning for the family. Although the Appellant did apparently work prior to the deportation decision, the Appellant said that he could do so only because he was able to work when Ms Mapunde was not working. They were not both working at the same time.

34. Ms Mapunde said that she would not be able to work if the Appellant were deported due to the long, sometimes unsocial, hours she has to work in her profession. I am not entirely convinced by that evidence. She, in common with many single parent families, has an option to find alternative childcare so that she could at least work part-time. However, I do understand given C6's medical condition that it might be harder to find someone willing to assume responsibility for his care. I also understand and accept that Ms Mapunde would find it difficult to leave C6 in the care of another person, even if a qualified child-minder due to concerns about his medical condition.

35. Both the Appellant and Ms Mapunde described what they see as the devastating consequences for, in particular, C6 were the Appellant to be deported. The Appellant described C6 as "his heartbeat" and it was very evident from both his

evidence and my own observation of C6 with his parents at the hearing that C6 and his father have a very strong bond which is a mutual one. Ms Mapunde described the damage which she considered would be caused to C6 as "irreparable". Given her qualification as a social worker, I give some weight to that assessment.

36. In addition to the evidence of the Appellant and Ms Mapunde, I also have before me at [ABS/34-54] a report dated 16 October 2019 from Msekiwa Makwanya, an independent social worker and an addendum report dated 14 October 2021 (at [ABS/20-33]).

37. Dealing first with C2 and C3, Ms Makwanya explains that they enjoy "the consistent and stable care of their grandparents". They have "a strong bond and positive attachment" to them. Their relationship with the Appellant and their biological mother is described as "warm and close" offering them "a consistent source of emotional and material support". The main role played by the Appellant in relation to these two children (one now adult and the other a teenager) is his ability to keep his children in contact with each other. However, both children are now in a position to retain that contact themselves if they so wish. The Appellant said in his evidence that they were now "a bit grown up" (C2 is in fact an adult) and there is no reason why they could not travel independently to visit their half-sibling and stepsisters.

38. There is nothing specifically said in either of the social worker's reports about C4. On the Appellant's own admission, he has less regular contact with her. She is now aged fifteen and there is little if any evidence that she has or needs continued contact with him or her half-siblings or stepsisters.

39. In her first report, Ms Makwanya says that the Appellant's relationship with his children would be "significantly disrupted" and that C6 in particular would be "at risk of suffering significant emotional harm as a result of separation anxiety" because of the Appellant's role as C6's full-time carer. That is consistent with my own observation of the closeness of that relationship. Although C5 is older, the Appellant plays a similar role in relation to her because her mother works full-time and often longer hours.

40. Turning then to her second report, at [6.3] ([ABS/27]), Ms Makwanya sets out her views of how the Appellant's deportation would impact C6 as follows:

> "[C6] has spent most of his young life with his father, as his main carer, since he was just over a year old, he is turning 5 years old in October 2021. This is a significant time for [C6] to develop a strong bond and attachment to his father in a time that is important in terms of his physical and emotional development. [C6] relies on his father and during or [sic] conversation mentioned that he enjoys fixing things with his father like wheelbarrows, gardening and playing football. Taking this into consideration, my professional view is that [C6] is very close to his father and so removal of Mr Mazanhi from the UK will cause a significant disruption to [C6's] already developed attachment to his father, and potentially cause him emotional harm."

41. Ms Makwanya deals with the impact of the Appellant's deportation on C5 at [6.4] of the report ([ABS/29-30]). As C5 is a teenager and able to express her views more readily than C6, it is important to take into account what she herself says about the impact of the Appellant's deportation which is recorded in this section of the report which I therefore cite in full:

> "6.4. [C5] informed that her 'dad' (step-dad Mr Mazanhi) is the only father figure she has known in her life and he has been the one taking her to the various extra-curricular activities such as netball, music and help her with homework. [C5] said she looks up to her 'dad' (Mr Mazanhi) for guidance, protection, advice and counts on his presence when her mother is at work, which is the case most of the time. Mr Mazanhi has been there for [C5] since she was 6 months old, now turning 13 in September 2021. Like [C6], [C5] has developed a very close bond and attachment to Mr Mazanhi, which is at risk of being disrupted and potentially immensely affect her emotional wellbeing, should Mr Mazanhi be deported to Zimbabwe, at a time [C5] is embarking in her teenage years and the trials and tribulations this may bring for her. Ms Mapunde stated to me that one example has already occurred and is one they envisage to come and go as [C5] gets older and tries to make sense of her situation. Ms Mapunde explained that together, they have had to discuss with [C5] about her biological father, as she was starting to explore her identity. Ms Mapunde said, [C5] needed them together, to reassure her that Mr Mazanhi remains her dad and will always be there no matter what happens in her explorations. Ms Mapunde and Mr Mazanhi said informed [sic] that they supported [C5] in informing her about her biological father and tried to make contact with him on her behalf, however, her the [sic] biological father did not wish to have contact with [C5], and they had to be the ones to break this to her and again reassure her that her life will not change and all her needs will be met as they have always done. Ms Mapunde explained how heart breaking this was to see [C5] feeling rejected even though she was reassured and comforted. Ms Mapunde stated that her fear is that should Mr Mazanhi be deported this will be another blow for [C5] and stated she did not wish to imagine the emotional impact this will have on [C5].

42. At [6.5] of the report, Ms Makwanya deals with the impact on C2 and C3. C2 is now an adult and C3 is now aged fifteen years. Ms Makwanya says that these children "do face some challenging times which require the father's guidance and support" and reports that Ms Mapunde says that the Appellant "does help keeping his teenage children on the right path, given the many challenges that teenagers face in terms of the various social ills". Neither Ms Makwanya nor Ms Mapunde provide specific examples and Ms Makwanya expresses no view there about the impact of the Appellant's deportation on these two children.

43. Ms Makwanya goes on to consider what alternative support Ms Mapunde would have with child-care faced with the Appellant's deportation. I accept her conclusion that the grandparents of C2 and C3 would be unlikely to assist. They are unrelated to C5 and C6. There is no reason they would help even if they were able.

44. Ms Makwanya also deals at [8.1] to [8.2] with the sufficiency of social media contact between the Appellant and his children were he to be deported. She identifies as a particular issue contact with [C6] who is "used to having his father physically present". Although not mentioned by Ms Makwanya, the same of course goes for [C5] albeit she is older and will therefore have a larger network of friends. As Ms Makwanya points out, [C6] will not understand why his father is being taken away from him and could not be given hope that he would return in the short-term. As Ms Makwanya says, "the honest answer that his father would not be coming back any time soon] will be heart breaking for [C6]". I do not place weight on Ms Makwanya's comments about the potential technical difficulties with social media in Zimbabwe as her sources appear to be limited to one newspaper article in June 2021.

45. Ms Makwanya turns finally to her assessment of the impact on the children and family as a whole. I accept her obvious conclusion that the Appellant's deportation would be disruptive to the family's life. I also accept her conclusion that it is in the best interests of the Appellant's children, particularly [C5] and [C6], that the Appellant remain physically in the UK. The answer to that question is less obvious for the other children (insofar as they are children) but the Appellant does retain a relationship with all his children, and I am prepared to accept that it is in their best interests that he remains in the UK.

46. Ms Makwanya provides this final assessment at [9.2] to [9.3] ([ABS/32-33]):

> "9.2 This [immigration appeal] process has resulted in the children living in constant fear of losing their father at any moment. My view is that, it is in the children's best interest that the matter is resolved at the earliest opportunity in ways that will assure the children that their father will physically remain in the family unit and continue to play his central role in their lives. It is also important to note that if the father was to be deported the change will be immense for the children given the close attachment that the children have with their father and it will take enormous time and significant emotional resources to support the children to somewhat recover from the emotional trauma and disruption of their attachments caused by removing their father from them, if at all the damage will be repairable. From my assessment of the relationship, Mr Mazanhi's family unit will never be complete without him, and it will be like losing a significantly useful part of their body, so to speak.
> 9.3 I can conclude by indicating that, Mr Mazanhi's multiple roles in the family as a caring father and husband, and a stabilising force in his children's lives ought to be observed as being in the children's best interest, particularly for [C6] and [C5]."

47. Finally, in the Appellant's initial bundle, there are letters of support for his case. Those come from his brother, Reverend Brian Chiyesu ([AB/35-36]), Ms Mapunde's brother, Tapiwa, at [AB/39-40] and the grandparents of C2 and C3 at [AB/42-43] and [AB/45-46]. Those are now somewhat dated (having been produced in 2018). Reverend Chiyesu supports the Appellant's account of his rehabilitation and lack of offending since 2006 as well as the significant role which he plays in relation to his family. Reverend Chiyesu at that time lived in Leeds and says that he would be unable to assist on a constant basis were the Appellant to be deported. Tapiwa Mapunde supports Ms Mapunde's account of the struggles she faced when the

Appellant was in prison and the Appellant's account of the role he plays in the family. C2's and C3's grandparents support the Appellant's account of the relationship which he maintains with those two children.

48. In relation to the Appellant's offending, I take into account what is said at [11] and [12] of the Upper Tribunal's earlier decision albeit that has been set aside and for ease of reference:

> "11. The applicant was served on 17th December 2009, with the indictment for possession and supply of Class A drugs on 19th September 2006, giving a false name and failing to appear on 17th May 2007 without reasonable excuse, with a first appearance on 5th January 2010 and trial date of 18th January 2010 notified. It is not clear what happened on that date save that the actual conviction did not take place until 2016. On 21st June 2016 he was remanded in custody and on 18th July 2016 was convicted of the drugs offences, attempting to pervert the course of justice and failing to attend the Sheriff court.
> 12. Mr Mazanhi pleaded guilty (in his false name) on 18th July 2016 and was sentenced that day. The judge's sentencing remarks include the following:
>
> '… I appreciate ... that you are essentially a different person from the person who was due to appear in court on the 19th September 2006.
> The fact that this has taken so long to resolve is not, it appears to me, the fault of the crown on this occasion, but entirely attributable to your failure to face up to your responsibilities. There was a significant quantity of Class A drug diamorphine involved in this case. The matter would have been disposed of in 2006 or 2007 and, probably at that time, the sentences that would have been imposed would be longer than they are now, so to that extent you have probably escaped some justice and simply by note appearing. …in the circumstances in this case, I can see no alternative but to imposing a lengthy custodial sentence. Again, I appreciate that you see yourself as a pawn in this, but I'm sentencing you as a courier not as a main player in relation to this drug dealing and for those reasons I feel I can impose a relatively restricted sentence…I take Charge 3 [concealing identity] as simply a rather amateurship attempt to evade justice at the initial stage when you were detained. I don't intend to impose any additional penalty in relation to that…In relation to charge 5 (failure to attend without reasonable excuse) I propose to impose an additional penalty because of your failure to appear for …indictment. I do not consider that there was any significant utilitarian value in the plea being tendered and therefore that will be an non-discounted penalty."

49. As already noted, the Appellant was sentenced to forty-two months in prison. The factual findings as retained by the previous Upper Tribunal include an arrest in January 2009 for domestic assault for which the Appellant was not prosecuted. There was one conviction prior to the index offence. There have been no further offences save for the further offence of perverting the course of justice. It was accepted by the previous Tribunal that it was the Appellant's disclosure of his previous offences to his criminal solicitors which led to the arrest and conviction in 2016 and that he also disclosed the offences to his immigration solicitors when applying for leave to remain in 2015. It is the Appellant's evidence that he did not intend to evade justice at any point and that he took steps to face up to his crimes.

50. The Appellant's bundle contains character references from two persons involved with a Media Access Project whilst he was in prison and who worked with him ([AB/360] and [AB/364]). They describe his "mature attitude and ability to work with all groups of people" and his "work ethic and desire to help others".

DISCUSSION AND CONCLUSIONS

51. I do not need to dwell on the first of the exceptions set out in Section 117C. The Appellant entered the UK in September 2000 as a visitor and thereafter overstayed. He was given leave to remain for thirty months in 2015. That leave was not extended and the deportation order was made in April 2018. The Appellant has therefore been in the UK lawfully for a total of only three years. He has not lived here lawfully for half his life. Whilst I would accept on the evidence that he has socially and culturally integrated in the time he has spent here, there is no evidence of very significant obstacles to integration in Zimbabwe. The Appellant took the opportunity almost immediately he was granted leave to remain in 2015 to visit that country where he continues to have family.
52. I turn then to the core issue of Exception 2. As I have already said, absent the need to care for her children, I would not have accepted that it would be unduly harsh for Ms Mapunde to go to Zimbabwe with the Appellant. She too has some family members there and was willing to accompany the Appellant in his visit in 2015. It is though understandable that the Respondent has conceded that Ms Mapunde cannot return to Zimbabwe with the Appellant whilst she has caring responsibility for her children in the UK.

53. Dealing then with the Appellant's minor children, the Respondent accepts that it would be unduly harsh for them to go to Zimbabwe with him. In relation to the question whether it would be unduly harsh for them to remain in the UK without him, I accept, following KO (Nigeria) and HA (Iraq) that this issue must be resolved without reference to the Appellant's offending. The issue is whether the impact on the children reaches the high threshold which is implicit in the words "unduly harsh".

54. At [23] of the judgment in KO (Nigeria), the Supreme Court had this to say about the threshold:

> "23. On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next

section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

55. It is however important to read what is there said now with the Court of Appeal's commentary in HA (Iraq). Lord Justice Underhill (with whom the other Lords Justice agreed) said this about that paragraph:

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

Having referred to other passages in KO (Nigeria) and the cases considered by the Supreme Court, Lord Justice Underhill went on as follows:

> "50. What light do those passages shed on the meaning of 'unduly harsh' (beyond the conclusion on the relative seriousness issue)?
> 51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.
> 52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be

> no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.
> 53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

56. As is clear from those extracts, what I have to consider is the impact of the Appellant's deportation on these particular children, recognising the high threshold which applies but without a comparison with any norms. With those principles firmly in mind, I move on to consider whether the test is met in relation to the Appellant's children in this case.
57. As I have already said, two of the children (C1 and C2) are now adults and I leave them out of account. In relation to C4, there is limited evidence of much contact between the Appellant and that child. She lives for and is cared for by her mother and there is limited evidence of a relationship between her and the Appellant's other children. She is in any event now aged fifteen years and if she wished to make and maintain contact with her half-siblings and step-siblings, she is old enough to take the initiative to do so. Whilst it may be marginally in her best interests for the Appellant to remain in the UK so that he can continue the physical contact he has now, there is no evidence to show that the impact of the Appellant's deportation on this child would be unduly harsh.

58. Similarly, I am not prepared to accept that the impact on C3 is unduly harsh. She is cared for by her grandparents. That is her main support. There is no suggestion that the Appellant's assistance is needed in this regard. He maintains a relationship with this child which is I accept a supportive one. There is though no evidence that the absence of that as a physical relationship would have even harsh impacts on her. She also has a relationship with her half-siblings or step-siblings (C1, C5 and C6). Ms Mapunde said that she has contact with the grandparents who care for C2 and C3 but only via the Appellant. I am unable to accept though that she would not continue that contact directly were the Appellant not in the UK in order to ensure that her own children maintained contact with their own half-siblings or step-siblings. Whilst I accept that it is marginally in C3's best interests for the Appellant to remain in the UK, the consequences of his deportation for her do not reach the threshold of undue harshness.

59. The position is however very different for C5 and C6. Although the focus of most of the evidence was on C6 as the Appellant's biological child, I begin with the position

of C5. I have in mind what is said by the social worker about this relationship. C5 has no contact with her biological father. The Appellant is the only father she has known. She calls him "dad". She is an older child (now thirteen) but that does not mean that the loss of the only father she has ever known would be any less. In some senses, it may even be worse as she has had the relationship for longer and will have a better understanding than her brother about what deportation is likely to mean.

60. I was particularly impressed by the evidence provided by the social worker and developed by Ms Mapunde about the impact on C5 of her biological father not wanting to have contact with her. Understandably, she suffered feelings of rejection. They were assuaged to some degree by the Appellant reassuring her that he would always be her father and would always be there. Whilst that might not have been a sensible promise to make in the circumstances, I accept that if the Appellant were to be deported, C5 is likely to see his absence as yet another instance of rejection. For a thirteen-year-old child, that is likely to have devastating consequences.

61. Moreover, the Appellant is the parent looking after her on a regular basis whilst her mother works. There is no suggestion that C5 does not have a close relationship also with her mother. As she is an older child, she will have less reliance on the Appellant for help with things like schoolwork and socialising. She is likely to have developed her own circle of friends. However, she is likely to miss the absence of the parent who has been the mainstay of the domestic arrangements since his release from prison.

62. Taking all of the evidence about C5 together, I accept that her best interests are strongly in favour of the Appellant remaining in the UK. Whilst Ms Mapunde could and would no doubt provide emotional, parental support if the Appellant were to be removed and would cope as best she could in the circumstances, I am satisfied that the consequences for C5 are unduly harsh for the reasons I have given.

63. I would in any event have reached the same conclusion in relation to C6. Although he is younger and by implication has had the Appellant in his life for less time than C5, he is more dependent upon his father for support. I doubt that C6 understands completely his own medical condition. However, I accept the evidence that there is a need for one of his parents to provide constant support to ensure that he does not have a life-threatening allergic reaction. In this case, that support is provided by the Appellant. Although I am not entirely persuaded that Ms Mapunde would have to give up work altogether to ensure that C6's condition is managed since he is now at school, I am prepared to accept that the Appellant's absence would restrict the extent to which she is able to work. She would probably be forced to work only part-time in order that she could be at home when C6 returned from school. I accept her and the Appellant's evidence that there is no other family support available. As with C5, it is clearly strongly in C6's best interests that the Appellant remain in the UK.

64. The Appellant described his son as his "heartbeat". I accept that there is a mutually very strong relationship between the two as I was able to observe for myself at the

hearing. I accept the evidence of the Appellant and Ms Mapunde as supported also by the social worker that the consequences of the Appellant's deportation would have a significant and damaging emotional impact on C6. Although Ms Mapunde did not give her evidence as an independent expert, as a qualified social worker, I give weight to her evidence that the damage to C6 is likely to be "irreparable". The independent social worker may not state the case quite that highly but does opine that it would take significant time and resource to repair the damage done if the damage could be repaired at all. I do not accept that the consequences could be attenuated by remote contact. The impact is sufficient to meet the threshold of undue harshness.

65. For those reasons, I accept that the Appellant is able to rely on Exception 2. For those reasons, I do not need to go on to consider whether there are very compelling reasons over and above the exceptions which would prevent the Appellant's deportation.

66. It would be unduly harsh for the Appellant's children, C5 and C6, to remain in the UK without the Appellant. He therefore meets Exception 2 of Section 117C. It follows that the Respondent's decision breaches section 6 of the Human Rights Act 1998 and the Appellant's appeal is therefore allowed.

DECISION

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

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 16 November 2021