Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04125/2020**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On the 3 March 2022	**On the 30 March 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Harvey instructed by Turpin Miller Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

© CROWN COPYRIGHT 2022

Background

2. The appellant was born on 20 October 1994 in Burundi. It is in dispute, in this appeal, whether the appellant is a citizen of Burundi or is stateless.

3. On 22 April 2003, the appellant's mother entered the UK clandestinely. On 23 April 2003, she claimed asylum on the basis of a fear of persecution in Burundi due to her mixed Hutu and Tutsi ethnic heritage. On 24 March 2004, her asylum claim was refused but, following a successful appeal, on 13 August 2004 she was granted indefinite leave to remain as a refugee.

4. The appellant arrived in the UK on 29 July 2003 and was granted refugee status and ILR in line with his mother on 13 August 2004.

5. The appellant has a long history of criminal offending between May 2007 and, most recently for the purposes of this appeal, November 2018. They are helpfully set out in the First-tier Tribunal's decision at paras 10-32, 34, 39, 42 and 42-46. I only set out below as necessary, and to give an overview of the offending, some of the offences.

6. Between 2007 and January 2013, the appellant was convicted in a number of juvenile courts of offences of theft, ones relating to motor vehicles and drugs offences. Most recently, during that period, on 19 October 2012 the appellant was convicted on a number of counts concerning the supply of class B drugs and (as a result of subsequent variation) was sentenced to eight months' detention in a Young Offenders Institution. Likewise, on 9 January 2013, he was convicted of tendering counterfeit currency and sentenced to eight months' detention in a Young Offenders Institution.

7. The appellant's first conviction as an adult seems to have been on 1 September 2014 at the Cardiff Crown Court for producing a controlled drug, class A (crack cocaine) and possession of a controlled drug, class B (cannabis resin) for which he was sentenced to two years' detention in a Young Offenders Institution.

8. As a result of that conviction, the appellant was served with a notice of a decision to deport him on 13 November 2014 and invited to make submissions as to why he had not been convicted of a particular serious crime and constituted a danger to the community.

9. On 22 May 2015, the appellant was served with a notice of intention to cease his refugee status.

10. On 8 October 2015, the appellant's refugee status was revoked. On 23 November 2015. His human rights claim was refused and he was served with a deportation order. The appellant unsuccessfully appealed on 7 July 2016 and, following a refusal of permission to appeal, he became appeal rights exhausted on 12 August 2016.

11. On 29 December 2016, he made further representations claiming that he was stateless. These representations were rejected under para 353 of the

Immigration Rules (HC 395 as amended) on 17 January 2017. Removal directions were set for 17 February 2017, but these were cancelled as the appellant lodged a fresh claim for asylum on 11 February 2017.

12. The appellant was convicted of further motoring, public order and drugs offences between April 2016 and November 2018.

13. On 31 July 2017, the appellant was convicted at the Cardiff Crown Court of a number of offences involving a motor vehicle and was sentenced to eight months and fourteen days' imprisonment.

14. He was convicted of further offences on 17 May 2018 at the Cardiff Magistrates' Court and was sentenced to a community order which was subsequently varied by the Cardiff Crown Court to one month's imprisonment.

15. On 7 November 2018, at the Cardiff Crown Court the appellant was convicted on three counts of driving whilst disqualified, possession with intent to supply a class A controlled drug (cocaine) and a breach of a community order. He was sentenced to a total of three years and ten months' imprisonment.

16. Finally, on 30 November 2018 at the Haverfordwest Magistrates' Court the appellant was convicted of a number of motoring offences and was sentenced to sixteen weeks' imprisonment.

17. Following an asylum interview on 5 November 2019, the appellant's claim for asylum, and on human rights basis, was rejected by the Secretary of State on 24 July 2020. A supplementary refusal letter was issued by the Secretary of State on 2 March 2021 dealing with the appellant's claim to be stateless.

The Appeal to the First-tier Tribunal

18. The appellant appealed to the First-tier Tribunal. Following a hearing, his appeal was dismissed by Judge G C Solly in a decision sent on 23 June 2021. Before the judge, the appellant did not pursue any claim based upon asylum, humanitarian protection or under Art 3 of the ECHR. The appellant only relied upon Art 8.

19. First, the judge on the basis of the evidence, in particular an expert report by Dr Bronwen Manby, a Senior Policy Fellow at the London School of Economics and Political Science, found that the appellant was, indeed, stateless. At para 161, the judge said this:

> "For the above reasons looking at all the evidence in the round the appellant has established that it is unlikely on the balance of probabilities that at the time of the hearing he would be able to establish his entitlement to Burundi nationality".

20. Secondly, the judge found that the appellant's deportation would not breach Art 8 of the ECHR. She found, applying ss.117C(4) and (5) of the

Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") that the appellant did not fall within Exception 1 or Exception 2.

21. As regards Exception 2, the judge accepted that it would be "unduly harsh" for the appellant's partner ("LS") with her son ("D") and their daughter ("L") to return to Burundi with the appellant. However, the judge found that it would not be "unduly harsh" for them to remain in the UK if the appellant were deported.

22. As regards Exception 1, it was accepted before the judge that the appellant was not "socially and culturally integrated" in the UK and so could not meet the requirements of s.117C(4)(b) of the NIA Act 2002.

23. Thirdly, applying s.117C(6) of the NIA Act 2002, the judge found that there were not "very compelling circumstances" over and above Exceptions 1 and 2 to outweigh the public interest reflected in the appellant's offending.

The Appeal to the Upper Tribunal

24. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds.

25. First, the judge had failed to give any, or any adequate, reasons for concluding that the appellant's return to Burundi as a stateless person would not breach Art 8. In particular, the judge had failed to engage with the evidence concerning the discriminatory treatment a stateless person would face in Burundi. (Ground 1)

26. Secondly, the judge had erred in law in reaching her findings in relation to Exception 2 and under s.117C(6) in respect of "very compelling circumstances". (Ground 2)

27. As regards Exception 2, the judge had failed to make any finding whether or not the appellant had a "genuine and subsisting parental relationship" with his daughter, L. Further, the judge had made no findings in relation to whether or not the appellant's deportation was in the "best interests" of his daughter L and his step-son, D. Finally, in relation to the issue of "rehabilitation" the judge had misunderstood the evidence of the appellant's partner, LS when LS had said that she was "quite confident" that the appellant would not offend in the future. The judge had interpreted this as not meaning that she was "very confident" when one meaning of the word "quite" was "completely, fully, entirely, to the utmost extent or degree; in the fuller sense".

28. On 10 September 2021, the First-tier Tribunal (Judge Andrew) granted the appellant permission to appeal on all grounds.

29. The respondent did not file a rule 24 notice in reply.

30. The appeal was listed at the Cardiff Civil Justice Centre on 3 March 2022 when the appellant was represented by Ms Harvey and the respondent by Ms Rushforth. Both representatives made oral submissions.

Discussion

31. I will deal with each of the grounds in turn. But before doing so, there is an initial issue with which I must deal.

The Stateless Finding

32. Prior to the hearing, the Secretary of State did not challenge the judge's finding in the appellant's favour that on his return to Burundi he would be stateless. He would not be able to establish he is a Burundi citizen. The respondent did not raise a challenge to that finding in a rule 24 notice or in any other way prior to the hearing. However, at the hearing Ms Rushforth submitted that, if the appellant were successful in establishing an error of law in the judge's application of Art 8, she would wish to argue that the judge had erred in reaching her finding that the appellant was "stateless". She submitted, in effect, that the judge's reasoning was unsustainable based upon the expert report as there was no evidence that the appellant would, as he had done, be able to go to school if he was stateless. Also, the judge had only found that it would be "difficult" for the appellant to obtain sufficient evidence to persuade the Burundi authorities of his nationality rather than it being impossible.

33. I did not invite Ms Harvey to make any submissions on this issue as, having heard Ms Rushforth's submissions, I was satisfied that it is not appropriate for the Secretary of State to seek to overturn a factual finding by the judge at the late stage of the error of law hearing in the Upper Tribunal. The proper process for raising this issue would have been to raise the issue in a rule 24 notice. Rule 24(3)(e) states that any such notice should include:

> "The grounds of which the respondent relies, including in the case of an appeal against the decision of another Tribunal, any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal; ..."

34. I bear in mind the overriding objective in rule 2 of dealing with the proceedings "fairly and justly". By the time of the error of law hearing, the appellant could entirely reasonably have concluded that the respondent did not contest the judge's factual finding in his favour that he would be stateless on return to Burundi. The matter did not involve an issue of pure law, for example construction of legislation or the application of case law, but rather a challenge to a factual finding. The respondent has had ample opportunity, either through a rule 24 response to challenge this factual finding and to put the appellant (and indeed the Upper Tribunal) on notice that this was a live legal issue. Ms Rushforth did not offer any explanation why the matter had not been raised earlier.

35. In these circumstances, I have concluded that it is not just and fair to permit the Secretary of State at the late stage of the error of law hearing to raise a challenge to this factual finding and I proceed to determine the appeal on the basis of that factual finding made in the appellant's favour.

Ground 1

36. Turning now to the grounds, I first deal with the issue of whether the judge failed to give adequate, or any, reasons for concluding that the appellant's return to Burundi as a stateless person would not breach Art 8 of the ECHR based upon the treatment he would face as such a person.

37. Ms Harvey submitted that all the judge said about this issue was at para 200 when she said:

> "On my findings he will be stateless in the UK or Burundi. This would cause a degree of hardship. By his criminal behaviour he has operated outside societal norms for many years. I do not accept he shows genuine remorse or willingness to change and this mitigates the impact of this in his favour. Nevertheless, this is an issue weighing in his favour in the balance".

38. In fact, the judge did say a little more in para 201 where she said this:

> "I also take into account the Freedom House World Food Program article that Burundi is an unstable and corrupt society as weighing in the Article 8 balance. It is not said that the appellant would be so vulnerable in a violent place such as to claim persecution, humanitarian protection, breaches of Article 15(c) or Articles 2 and 3. I find the appellant to be a resourceful and not unintelligent with the wits to survive. I accept removal would present some hardship to him however he has brought this on himself by his continued offending. That there is likely to be some hardship weighs in his favour. However, he has been aware since 2014 that deportation to Burundi has, at its lowest, been considered yet he has not altered his offending behaviour save to escalate it".

39. Ms Harvey sought, at least initially, to place some reliance upon the expert report of Dr Bronwen Manby which is at pages 59–62 of the bundle. However, this report is an expert's report concerning the issue of the appellant's nationality and/or statelessness. Dr Manby's principal expertise is in citizenship law in Africa (see para 3 of her report). The report is not made on the basis of her being a country expert more generally and, true to that fact, she does not purport to express any view on the impact of the appellant's return to Burundi as a stateless person. The grounds assert that Dr Manby accepted in her oral evidence that the appellant would face "discriminatory treatment in Burundi". However, as indeed does the report itself, this relates to discrimination in relation to the nationality law and its application. Her report does not assist the appellant in establishing that the judge failed to have regard to the impact, once living in Burundi, as a stateless person. Further, the extract from Dr Manby's book "Citizenship Law in Africa: a Comparative Study" (at pages 63–65 of the bundle) also deals with "gender discrimination" but again that is in the context of the application of nationality laws. It is not

concerned with whether or not a person who is stateless would be discriminated against or otherwise adversely affected in Burundi.

40. The relevant documents drawn to the attention of the judge concerning the impact, if any, on the appellant in Burundi as a stateless person were the two documents referred to by the judge in para 201 of her decision.

41. The Freedom House document “Freedom in the World 2021: Burundi” (at pages 74–79) does deal with political rights and civil liberties in Burundi. However, Ms Harvey was unable to refer me to any specific passages in that document which were directed to the position of stateless persons in Burundi. Further, the document relates more generally to the position of those who live in Burundi. That, of course, was not the specific issue which the judge had to address given that the appellant was claiming that being a “stateless” person breached Art 8.

42. Likewise, the World Food Program document, “Burundi: Humanitarian Response Plan 2021” (at pages 90–91 of the bundle) deals with, in particular, “food security” in Burundi for those who live there. Again, it offers no specific evidence concerning the position of “stateless” persons.

43. The judge referred to both of these documents in para 201 and, without inaccuracy, stated that they demonstrated an “unstable and corrupt society” in Burundi and that there would be a “degree of hardship” to the appellant. In both para 200 and para 201, the judge noted that these features weighed in the appellant’s favour under Art 8 and the issue of proportionality.

44. I see no basis upon which it can be sustained that the judge failed to take into account relevant evidence concerning any impact upon the appellant as a “stateless” person returning to Burundi. As the judge noted in para 201, the appellant did not claim that his return to Burundi gave rise to a valid claim for asylum, humanitarian protection or under Arts 2 and 3 of the ECHR. In the absence of other evidence, I do not accept that the judge failed properly to consider, and give adequate reasons in relation to, the issue of the appellant’s circumstances on return to Burundi as a stateless person.

45. Ms Harvey sought to take issue with the judge’s statements in paras 200 and 201 that the appellant had “operated outside societal norms for many years” as being relevant to the impact upon him of living in Burundi as a stateless person. She submitted that this was tantamount to saying that the appellant could properly live outside the law. That, she submitted, would be wrong.

46. I do not accept that submission identifies any error in the judge’s reasoning. The judge’s comment, and it is no more than that in my view, simply reflects the fact that the appellant has been able to live and function in the UK despite leading a life in which he has committed numerous criminal offences between 2007 and 2018. The judge was not,

in my judgment, contemplating that the appellant should be required to live a life outside the law in Burundi. Simply that, and there was no evidence on this issue presented to the judge, he would be living in Burundi without citizenship. Of course, he has lived in the UK without British citizenship also.

47. In any event, it is clear in paras 200 and 201 that the judge took into account as weighing in the appellant's favour, that there would be a degree of hardship of him living in Burundi and that it was an unstable and corrupt society. There would be "some hardship to him". In truth, the evidence came nowhere near establishing any significant impact upon the appellant of returning to Burundi as a stateless person. If such evidence exists, it was not put before the judge and the judge's findings, in its absence, were entirely reasonably and rationally open to her.

48. For those reasons, I reject Ms Harvey's submissions on this issue.

Ground 2

49. Turning now to the judge's assessment under Art 8 and her application of Exception 2 in s.117C(5) of the NIA Act 2002, Ms Harvey's first submission was that the judge had failed to make a finding whether, as Exception 2 required, there was a "genuine and subsisting parental relationship" between the appellant and his daughter.

50. S.117C(5) provides as follows:

> "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".

51. It is recognised that, in the case of a medium offender (i.e. a person who has not been sentenced to four years' or more imprisonment), if Exception 2 applies then the individual's deportation is disproportionate (see e.g., NA(Pakistan) v SSHD [2016] EWCA Civ 662 at [36]).

52. In this appeal, the respondent had not accepted that the appellant was in a genuine and subsisting relationship with his partner LS or had a genuine and subsisting parental relationship with his daughter L or his step-son, D.

53. As regards LS, the judge accepted that the appellant had a genuine relationship with LS in para 179. She said this:

> "I accept he has a genuine relationship with his partner ...".

54. At para 177, the judge said this about the appellant's relationship with D:

> "A relationship akin to parenthood has also developed with [D] who has a British father".

55. It is plain, therefore, that the judge did, in fact, find that there were genuine relationships between the appellant and his partner and with D, his step-son.

56. By contrast, it is difficult to see any explicit finding that the appellant has a “genuine and subsisting parental relationship” with his daughter, L.

57. At para 179, the judge found that the appellant had not established that he had a relationship with L before going into prison as “she was not born” at that time. However, the judge accepted, although not in its entirety, the evidence of LS that the appellant had, since his release from prison in August 2020, not lived with her (and therefore also D and L) until February or March 2021. That was, I was told and it is not controverted by the respondent, due to the gradual reintroduction of the appellant to the family following his release having been convicted of drugs offences.

58. Whilst, therefore, the judge does not appear to have made a specific finding in the appellant’s favour as regards his relationship with L, the judge undoubtedly proceeded to apply Exception 2 on the basis that such a relationship did exist. The issue of whether it would be “unduly harsh” for D and L (as well as LS of course) to remain in the UK if the appellant were deported, only arises if genuine relationships falling within the terms of s.117C(5) existed. And, of course, it would be remarkable that the judge would conclude that there was a genuine and subsisting parental relationship with D (his step-son) whilst there was not one with his daughter, L given that his post-release contact with them would, broadly speaking, fall into the same category of visits prior to moving in together with them and LS in February or March 2021 which was some two or three months before the First-tier Tribunal hearing.

59. In my judgment, the fact that the judge made no explicit finding as regards whether there was a “genuine and subsisting parental relationship” with L, was not a material error as he proceeded on the basis that such a relationship did exist.

60. In my judgment, whether the judge materially erred in law in applying Exception 2 must turn upon the remainder of Ms Harvey’s submissions concerning the judge’s assessment of LS’s evidence and whether she properly took into account the best interests of D and L.

61. Turning now to those issues, Ms Harvey first submitted that the judge had misunderstood LS’s evidence at para 189 of her decision. There, in relation to the issue of “remorse and reform”, the judge quoted LS’s evidence, in cross-examination, when she was asked about the likelihood of the appellant’s future offending, that she was “quite confident that he will not do so – not I note very confident”.

62. Ms Harvey’s own notes were that LS had said in her evidence that she was “confident” but, on consulting the judge’s Record of Proceedings the judge

had recorded that LS had said she was "quite confident" and Ms Harvey did not seek to submit that was in error.

63. Ms Harvey submitted, based upon the grounds that the Shorter Oxford Dictionary defined the word "quite" effectively as having diametrically opposed meanings: either "completely, fully, entirely" etc. or "somewhat, moderately, fairly". She submitted, LS's evidence could be understood to mean that she was "fully" or "entirely" confident that he would not reoffend.

64. Ms Rushforth submitted that what the judge had said in para 189 was immaterial and was just a passing comment. In any event it was only the opinion of LS. She submitted that the judge was entitled to find on the evidence, as she did, that there was a risk of the appellant reoffending given his history of offending, including that he had continued to offend after 2014, when he had initially been informed that he was at risk of deportation.

65. Even accepting the ambiguity in the word "quite" based on the dictionary definitions, this was not a matter which was explored further in LS's evidence. Either way, whether LS meant, (and we do not know in which sense of the word "quite" she meant to use that word), this was only her opinion as Ms Rushforth submitted.

66. There was, in this appeal, no OASys Report or probation report to assist the judge in assessing the risk of the appellant offending in the future. There was, however, the appellant's offending history and its escalation. The judge had evidence of the considerable offending history of the appellant including offending after 2014 when he had first been notified that he was being considered for deportation and, indeed, that his offending escalated. The judge specifically referred to this in para 201 when she said:

> "However, he has been aware since 2014 that deportation to Burundi has, at its lowest, been considered yet he has not altered his offending behaviour save to escalate it".

67. The appellant had been out of prison from August 2020 until June 2021 and, of course, had not offended during that relatively short period of time.

68. The judge's comment in relation to LS's evidence must be seen in the context of what she said in para 189 prior to that:

> "It is accepted by the appellant he is not culturally and socially integrated in the UK. The similarity of evidence given to the 2016 Tribunal and myself concerning the appellant's regrets at his past offending and his intention not to future offend, I find to not be maintained by the appellant after the 2016 Tribunal, the lack of risk assessment means he has not established as credible his assertions of remorse and reform".

69. That, of course, is reference to the appellant's appeal in 2016 when, as before Judge Solly in 2021, he had expressed remorse and an intention not

to future offend which, as his offending history demonstrates, he simply failed to live up to.

70. In my judgment, it was rationally and reasonably open to the judge to conclude, despite LS's evidence, whatever she meant by "quite confident", that the appellant had not shown "genuine remorse or willing to change" (para 200) and that "there will be a significant future risk to the UK public given the quality of his offences over the years, their escalation and that the offences cause harm to the public" (para 190).

71. Consequently, I reject Ms Harvey's submissions on this issue.

72. That then leaves the issue of whether the judge properly took into account the "best interests" of D and L.

73. In her decision, the judge specifically referred to s.55 of the Borders, Citizenship and Immigration Act 2009 and ZH (Tanzania) v SSHD [2011] UKSC 4 at para 194 of her decision. She did so in the context of "considering the interests of the children [D] and [L]". Ms Harvey, correctly in my view, did not pursue the point made in para 22 of the grounds that the judge had erred by stating that "I bear in mind" s.55 of the 2009 Act. That, of course, is no more than a recognition that she would take into account the "best interests" of the children in determining whether a breach of Art 8 was established.

74. The issue of D and L's best interests arose in the context of determining whether or not, when applying Exception 2, the impact upon them of the appellant's deportation and their remaining in the UK was "unduly harsh" (see HA (Iraq) v SSHD [2020] EWCA Civ 1176 at [55]). In HA(Iraq), referring to Lord Carnwath's judgment in KO (Nigeria) v SSHD [2018] UKSC 53, Underhill LJ said this at [55]:

> "The first [point] is that what Lord Carnwath [in *KO(Nigeria) v SSHD* [2018] UKSC 53] says in the relevant parts of his judgment in *KO* makes no reference to the requirements of section 55 of the 2009 Act and is likely to lead tribunals to fail to treat the best interests of any affected child as a primary consideration. As to that, it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55: see para. 15 of his judgment, quoted at para. 41 above. The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test. It was not necessary for Lord Carnwath to spell out that in the application of Exception 2 in any particular case there will need to be "a careful analysis of all relevant factors specific to the child"; but I am happy to confirm that that is so, as Lord Hodge makes clear in his sixth proposition in *Zoumbas*."

In his words, the "best interests of the child is built into the statutory test".

75. In this appeal, the judge specifically considered whether the impact upon D and L would be "unduly harsh" if they remained in the UK and the appellant was deported. At para 179, having considered the evidence, the judge said this:

> "Looking at the individual circumstances in the round I consider it would not be unduly harsh for the appellant's partner, [D] and [L] to remain in the UK without the appellant because of my factual findings. His partner has been able to manage in his absence in prison and I find he has played a limited role in the lives of the children since going to prison in 2018. The appellant has not established that he had a relationship with his daughter before going into prison as she was not born. I accept he had a genuine relationship with his partner although the evidence is missing as to when they moved in together and he has thus not established the period they were doing so prior to his imprisonment in 2018. I notice that this does not appear on the chronology at page A5. I find that they have lived together since 2 February 2021 which is the date identified by the probation officer. [D] remains in contact with his father and that relationship can continue. For these reasons the appellant does not satisfy ... [E]xception 2 to Section 117C".

76. Ms Harvey placed reliance upon evidence before the judge in the probation report at pages 25–26 of the bundle, LS's witness statement at pages 18–19, the appellant's mother's witness statement at page 14 of the bundle, the evidence of the appellant himself and the social worker's email at page 99 supporting the continued contact and best interests of the appellant remaining in the UK. The probation report refers to the appellant as being a "very devoted father" and a strong bond was witnessed between L and the appellant. The report also talks of the appellant's aspiration to move to a quiet part of Cardiff where his children can be actively involved in education and sport.

77. The judge specifically refers to this evidence at para 191 including noting that the appellant is a "very devoted father".

78. Although the judge did not set out extracts from LS's witness statement, she set out LS's oral evidence at paras 108–113. Likewise, the evidence of the appellant's mother given at the hearing, is summarised at paras 94–107 of the judge's decision. Both witnesses adopted their witness statements. I have no doubt that the judge had well in mind their evidence when reaching her adverse finding in relation to the issue of "unduly harsh".

79. Despite the evidence of the close relationship between the appellant and L and D, I am satisfied that the judge applied the correct approach, citing HA (Iraq) at para 178 of her decision, and reached a rational and reasonable conclusion. In HA (Iraq) at [51]–[53], Underhill LJ said this:

> "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."

80. Given the very significant extent and seriousness of the appellant's offending, which the judge specifically recognised in paras 190 and 192 and having regard to the "best interests" of D and L, it was undoubtedly reasonably open to the judge to find that the "harshness which the deportation will cause" for D and L was not "of a sufficiently elevated degree to outweigh [the] public interest".

81. It is, of course, not suggested that the judge's finding, that the impact upon LS would not be unduly harsh, is unsustainable.

82. Reading across the judge's sustainable findings in relation to Exception 2, the grounds do not otherwise challenge the judge's finding in relation to s.117C(6) that there were not "very compelling circumstances, over and above those described in Exceptions 1 and 2" sufficient to outweigh the public interest.

Conclusion

83. For all these reasons, therefore, the judge did not materially err in law in dismissing the appellant's appeal under Art 8 of the ECHR.

Decision

84. The decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

85. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
14 March 2022

TO THE RESPONDENT
FEE AWARD

The judge made no fee award and that decision also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
14 March 2022