



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/25163/2018**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**Promulgated**

**On 10 March 2022**

**On the 19 April 2022**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**W K  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

**Representation:**

For the Appellant: Ms E Saunders, Counsel, instructed by MQ Hassan Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

## **DECISION AND REASONS**

### **Introduction**

- 1.** This is the re-making of the decision in the Appellant's appeal against the Respondent's decision, dated 3 December 2018, refusing his human rights claim made in the context of deportation proceedings. Those proceedings were triggered by the Appellant's 2014 conviction and sentence of 15 months for an offence of sexual assault, which occurred in 2013.
- 2.** The Appellant's appeal to the First-tier Tribunal was dismissed by a decision promulgated on 7 November 2019. However, this decision was set aside by a panel of the Upper Tribunal (Mr Justice Saini and Upper Tribunal Judge Norton-Taylor) in a decision promulgated on 4 November 2021. That decision is appended to this re-making decision. In summary, the panel concluded that the First-tier Tribunal had erred in its approach to the unduly harsh test under section 117C(5) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). In particular, it had in effect required the Appellant to show too much when seeking to assert that a separation from his younger son, T, would be unduly harsh on the latter, with reference to the guidance set out in HA (Iraq) [2020] EWCA Civ 1176; [2021] Imm AR 59.
- 3.** The following findings of the First-tier Tribunal were preserved: (a) that it would be unduly harsh for the Appellant's wife, V, and T to relocate to Zimbabwe; and (b) that it would not be unduly harsh for V to remain in the United Kingdom if he was deported to Zimbabwe.
- 4.** Thus, the two issues in this case are: (a) whether it would be unduly harsh on T to be separated from the Appellant; and/or (b) whether there are very compelling circumstances.

### **The documentary evidence**

- 5.** When re-making the decision in this case, I have had regard to the evidence contained in what is now the Appellant's single bundle, indexed and paginated 1-376 and the Respondent's original appeal bundle. The former contains a variety of materials relating to the Appellant, his family unit, and the current situation in Zimbabwe. The latter contains materials relating to the Appellant's previous asylum claim, Sentencing Remarks, various documents relating to the deportation proceedings, and the Respondent's decision to refuse the human rights claim.

### **The oral evidence**

- 6.** The Appellant, V, and a family friend, Mr D, attended the hearing and gave oral evidence. T also attended, but he remained outside. Mr Walker confirmed that there would be no questions for him.
- 7.** The evidence is a matter of record, but I will summarise it here. The Appellant relied on his recent witness statement. In chief, he was asked

about the mental health of his son, X (T's older brother). He confirmed that X had been assessed by a specialist mental health nurse who suspected the presence of psychosis. Following this, a referral was made to the local mental health team. It concluded that he did not have psychosis, although they believed he might have been taking illicit substances. X was then discharged from the team and pointed towards a self-referral programme. The Appellant described X being hesitant to follow this course of action and that there was a need for X be accompanied when he goes out.

- 8.** In cross-examination, the Appellant described the family having to move from the previous address in order to get away from X's problems. They were currently living in the Appellant's brother-in-law's house. The Appellant asserted that he was innocent of the sexual assault offence, stating that it had been "unfortunate" that the jury had found him guilty. Finally, the Appellant explained that his eldest son, B, remained in Zimbabwe as a result of the Covid pandemic and a lack of funds to return to this country.
- 9.** In response to a couple of clarificatory questions from me, the Appellant confirmed that he had no relatives in the United Kingdom, but V had two brothers and a sister here. They currently resided with one of those brothers. V's sister was a care worker and lived in a one bedroom flat in East London and that she had a close relationship with his sons but could not spend much time with them. V's other brother did not have a close relationship with the sons. The family unit had moved from their original address due to a combination of rent arrears and X's problems.
- 10.** V relied on her witness statement. In cross-examination, she provided clear and detailed evidence on X's circumstances, describing her suspicion that he had been taking drugs before they moved address, changes in his personality, and her concerns for his mental health. She compared some of his behaviours to OCD, but also that he would neglect personal hygiene. He would at times laugh to himself. In V's opinion, things had not improved since the move to her brother's house. She described the relationship between T and X as being "unstable" at the moment, stating that the younger son wanted to socialise with his older brother, but this was proving very difficult. She also confirmed that she suffered from lower back problems and had received a facet block injection in 2021, which had not produced significant improvement. She was on daily medication and her condition was affecting her ability to work.
- 11.** In response to questions from me, V stated that her sister and other brother had not helped them out in any way so far. She believed that the Appellant's deportation would have a "huge impact" on T. She reiterated the difficult relationship between T and X, and T's wish to get on better with his brother. She has seen an adverse effect on T because of X's struggles.

- 12.** Mr D adopted his witness statement and confirmed that he got on well with the Appellant and that he believed the Appellant's absence would have a big impact on V.

### **Submissions**

- 13.** Mr Walker submitted that there was no "compelling" medical evidence to show that X had mental health problems. There were no credibility issues in this case, save for the Appellant's protestation of innocence in relation to his offence. It would not be unduly harsh on T if the Appellant was deported. The Appellant had relatives in Zimbabwe and had skills which could be used to assist re-integration. In all the circumstances, there were no very compelling features in this case. Mr Walker accepted that V suffered from the claimed medical condition (cervical spondylosis).
- 14.** Ms Saunders relied on her skeleton argument. She emphasised what she described as the "enormous significance" of the Appellant in T's life. He was "irreplaceable". Reliance was also placed on X's circumstances and the additional importance of the Appellant's role in the life of both children. X was clearly going through a very difficult time and if the Appellant were to be deported, T would lose a source of support, as would X and V. The cumulative effect of this demonstrated undue harshness.
- 15.** Alternatively, Ms Saunders submitted that all the factors went to show the presence of very compelling circumstances. Although the Appellant had claimed he was innocent of the index offence, the police nonetheless regarded him as being "low risk". This should be taken into account together with the length of time the Appellant has spent in this country and the ties established here.

### **Findings of fact**

- 16.** In reaching my findings of fact, I have had careful regard to all the evidence presented to me and the submissions made thereon.
- 17.** I have taken into account Mr Walker's stated position that there were no issues taken against the reliability of the evidence, save for the Appellant's protestations of innocence in respect of the index offence. That particular aspect of the evidence certainly does the Appellant no favours whatsoever. I have carefully considered whether it also has a knock-on effect on other aspects of his evidence. In my judgment, it does not, at least not to any material extent. The Appellant's assertion that he did not commit the offence, misconceived as it may be in light of the conviction and absence of any successful appeal, does not intrude into his evidence relating to his sons and the other relevant issues in this case and Mr Walker did not seek to suggest the contrary.
- 18.** Taking the evidence as a whole, I find that the Appellant and V have provided a truthful account of their current circumstances. Their written

and oral evidence is essentially internally consistent and sits well when placed against each other's. There is nothing inherently implausible about it. In particular, I found V's oral evidence, when taken together with her witness statement, to be compelling.

- 19.** I have not of course left out of account T's witness statement, which is unchallenged by the Respondent. I find what he says to be entirely truthful.
- 20.** In light of these general comments, I make the following findings of fact.
- 21.** I accept that the Appellant plays a pivotal role in the life of T, both on an emotional and practical level. I find that they engage in a number of activities together including bike rides and football (with the Appellant as a supporter and facilitator in terms of transportation and suchlike). T currently studies for three days a week at college, undertaking a carpentry and joinery course. I accept that the Appellant helps him with relevant homework, to the best of his ability. All-told, I accept V's description of the relationship as being "remarkable" and constituting a "very strong bond".
- 22.** I find that V suffers from cervical spondylosis, which causes her significant pain and has a debilitating impact on her day to day life. I find that she received a facet block injection 2021, but this did not have a lasting positive effect. It is unlikely that further injections would be given, given the potential risks involved. In any event, I accept that this condition has limited her ability to work (she now only works approximately 20 hours a week as a nurse) and that the Appellant provides assistance with certain practical tasks and emotional support. It is, I find, unrealistic to expect V's brother and/or his wife to step in with approximate assistance if the Appellant were not around.
- 23.** I find that V's health condition does have an impact on T. First, it would in my view be wholly unrealistic to assume that T would not be adversely affected by seeing the core source of support for his mother being removed from their lives, with the consequence of her being not simply emotionally distressed, but also having to deal with a medical condition and other matters alone (I will return to the issue of familial support, below). Second, T acknowledges in his witness statement the assistance provided by the Appellant to his mother and the importance of this. The corollary of this is what I have said in the first point.
- 24.** The circumstances surrounding X are not entirely clear cut. It is the case, I find, that he was initially assessed by a specialist mental health nurse who had sufficiently serious concerns to make a referral to the local mental health team. It is apparent from the documentary evidence that following an assessment by that team, X was discharged and recommended for a self-referral programme. This would indicate an absence of sufficient concern so as to warrant ongoing assessments/care by the team. I accept the Appellant's candid evidence that the team did not believe that X was suffering from psychosis. It is unclear from the evidence as a whole

whether the team assessed X for any other potential mental health conditions.

- 25.** I find that X has not in fact been diagnosed with any mental health condition. That is not, however, the end of the evidential story, as it were. The Appellant and V have provided clear and consistent evidence of behaviours which are causing them significant concerns. I find that that evidence has not been made up out of thin air, nor has it been exaggerated. Whilst I cannot reach a clear finding as to whether X has in fact been using illicit substances, I accept that his parents hold a genuine belief that this is the case. Beyond that, I accept the description provided as to X's conduct. Specifically, I accept that he is at times neglectful of his personal hygiene, whilst in other respects appears to demonstrate signs of obsessive behaviour. I accept that his personality has changed over time, and matters have not improved since the move to V's brother's house in late 2021. V gave a truthful account of a particular incident in which X went back to his old area, did not return for a significant period of time, and eventually had to ring his parents to help him get back home. Notwithstanding the absence of confirmatory medical evidence, I find that V's description of X as being "mentally unstable" is, at least from a layperson's perspective, accurate. I find that X has not yet referred himself to the relevant programme: it may well be that his current difficulties is proving to be a hindrance to this step.
- 26.** I accept the evidence of T and his mother that the relationship between the brothers is currently problematic by virtue of X's behaviours. I also accept that T wishes to be closer to his older brother and is having to cope with what must undoubtedly be a difficult situation. T believes that he does still have a "strong" relationship with X, and there is no reason to doubt the genuineness of this assertion. I note that this is immediately followed in the witness statement by an acknowledgement of the difficulties with communication at the present time. I find that T is being adversely affected by his brother's current situation, albeit that this is ameliorated by the presence of his parents and their support.
- 27.** I find that the Appellant has no relatives in United Kingdom. It is, I find, unlikely that V's family members would be in a position to provide anything approaching equivalent support and assistance to her and/or T and X were the Appellant to be deported. The brother with whom the family unit currently resides is clearly providing support in the form of accommodation and some funding, but there has been no suggestion that they would be in a position to do more and Mr Walker did not seek to argue otherwise. I accept V's evidence that her other brother and sister are not in a position to provide any meaningful assistance. Again, Mr Walker did not put this forward in questioning or submissions.
- 28.** In terms of the Appellant's individual circumstances, I find that he has a number of skills which could potentially be employed to assist in re-integration into Zimbabwean society. I find that he has a number of

relatives in that country, as does V. It is highly unlikely that he would face destitution were he to return alone.

- 29.** Finally, I accept that B currently resides in Zimbabwe, but holds an intention to return to the United Kingdom. It is plausible that he is subject to an enforced stay in that country by virtue of the Covid pandemic and a lack of funds to bring him back. It would be unduly speculative on my part to attempt to make a finding as to when he might return. Even if he were in this country, it is very unlikely that he would in some way be able to assume the role of a father-figure to T and X.

### **Analysis and conclusions**

- 30.** The Appellant is clearly a foreign criminal, as defined in section 117D of the 2002 Act. It is equally clear that the Appellant has a genuine and subsisting relationship with V and a genuine and subsisting parental relationship with T.
- 31.** There is a preserved finding that it would be unduly harsh for T and V to relocate to Zimbabwe. The question posed by the second limb of the family life exception under section 117C(5) of the 2002 Act is whether a separation of the Appellant from T would be unduly harsh on the latter (it also being a preserved finding that separation of the Appellant from V - were her personal circumstances to be taken in isolation - would not have that impact on her).
- 32.** The current legal framework for the assessment of undue harshness is set out in the two leading authorities of KO (Nigeria) [2018] UKSC 53; [2019] Imm AR 400 and HA (Iraq), *supra*. The relevant guidance to be gleaned from these judgments was helpfully summarised in KB (Jamaica) [2020] EWCA Civ 1385, at paragraph 15:

“(1) The unduly harsh test is to be determined without reference to the criminality of the parent or the severity of the relevant offences: KO (Nigeria) para 23, reversing in this respect the Court of Appeal's decision in that case, reported under the name MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617, in which at paragraph 26 Laws LJ expressed this court's conclusion that the unduly harsh test required regard to be had to all the circumstances including the criminal's immigration and criminal history.

(2) "Unduly" harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent: KO (Nigeria) para 23.

(3) That is an elevated test, which carries a much stronger emphasis that mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but the threshold is not as high as the very compelling circumstances test in s. 117C(6): KO (Nigeria) para 27; HA (Iraq) paras 51-52.

(4) The formulation in para 23 of KO (Nigeria) does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of "ordinariness": HA (Iraq) paras 44, 50-53, 56 and 157, AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 at para 12.

(5) Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance: HA (Iraq) at paras 53 and 57. There is no substitute for the statutory wording (ibid at para 157)."

- 33.** It is with this in mind that I turn to the core issue in this appeal.
- 34.** I have found that T has a very strong bond with the Appellant, combining features of emotional and practical interaction on a daily basis. A separation would in my judgment clearly result in significant distress to T. On one level, this relationship and the effects of separation might appear to disclose simply a "normal" loving bond between an involved father and his son. It is the case that T does not suffer from any medical or behavioural conditions and to that extent there are no additional elements of dependency.
- 35.** The preceding paragraph does not represent a complete picture of this case. First, there is no requirement that a relevant child must be afflicted in some way by conditions in order for a separation to be unduly harsh. That would run the risk of introducing an unjustified requirement of exceptionality into the equation and result in a "potentially misleading and dangerous" path being followed.
- 36.** Second, my findings on X's current circumstances are an important factor in the assessment. As matters stand, three members of the nuclear family are trying to cope with the concerning behaviours exhibited by the fourth. The responsibility for this in reality falls on the shoulders of the Appellant and V. T is still a child and what he wants is a good two-way relationship with his older brother. That this is not currently possible is, as I have found, having an adverse impact on T. In my judgment, were the Appellant to be removed from the equation, it is highly likely that: (a) the significant distress caused to T by the simple (but important) fact of separation would be exacerbated by the loss of a parent who is playing an important role in trying to help X in his (X's) current difficulties; and/or (b) T's relationship with X would deteriorate further, or at best would not stand a reasonable chance of improvement from where it currently is, again resulting in an exacerbation of the "direct" distress consequent on separation from the Appellant.



- 37.** Third, I take into account the likely impact of the Appellant's deportation on V, not insofar as it would affect her individually, but as it would be experienced by T. He is obviously aware of her health condition and how this affects her day-to-day life. Equally, it would be clear to him that if the Appellant was removed from the family unit, his mother would be very distressed on an emotional level and would lose a source of practical support, both in terms of managing her condition and trying to deal with X's difficulties.
- 38.** Fourth, on my findings, it is unlikely that any alternative sources of meaningful emotional and/or practical help would be forthcoming from other relatives in the United Kingdom.
- 39.** Fifth, whilst not a significant factor, it is in my judgment very unlikely that T would be able to make any, or at least any regular, trips to Zimbabwe to see the Appellant if the latter were deported. The family unit's financial circumstances are strained as it is. In the Appellant's absence, V's current part-time work might have to be reduced yet further, or at best remain at its current level. There is no suggestion that other relatives would be able to make meaningful financial contributions. Whilst I find in due course that the Appellant could obtain some form of employment in Zimbabwe, it is highly unlikely that that would be sufficient to pay for flights.
- 40.** Sixth, it follows from all of the above that it is manifestly in T's best interests for the current nuclear family unit to remain intact.
- 41.** I bring all of the above factors together and, on that cumulative basis and focusing on T's particular circumstances, I conclude that it would be not simply harsh, but unduly harsh for him to be separated from the Appellant. In so concluding, I have full regard to the elevated threshold applicable to the test, which "carries a much stronger emphasis than mere undesirability or what is merely uncomfortable, inconvenient or difficult".
- 42.** My conclusion has the consequence that the family life exception under section 117C(5) of the 2002 Act is made out. It follows from this that the Appellant's appeal succeeds.
- 43.** For the sake of completeness, I will address the question of whether there are also very compelling circumstances, pursuant to section 117C(6) of the 2002 Act.
- 44.** In the Appellant's favour I take the following factors into account. First, the fact that he has no other convictions to his name. Second, that he constitutes a "low risk" of serious harm to the public and of re-offending. Third, that he has spent a significant period of time in United Kingdom, most of it lawfully. Fourth, that the economic situation in Zimbabwe is difficult. Fifth, all of the factors relating to the unduly harsh test go into to the balance.

- 45.** Against the Appellant, I take the following factors into account. First, the very significant public interest in deportation. Second, the particular circumstances of the index offence (as described in the Sentencing Remarks) and the fact of the Appellant's outright denial of guilt notwithstanding his conviction. Third, the ties that he retains in Zimbabwe. Fourth, his ability to re-integrate into that society without facing very significant obstacles. Fifth, the absence of features falling outside those described in either of the exceptions contained in section 117C of the 2002 Act. Sixth, the features relating to the family life exception in section 117C(5), whilst sufficient on a cumulative basis to satisfy the unduly harsh test, do not of themselves disclose a very compelling case over and above the circumstances on which I have relied when undertaking the assessment of that test.
- 46.** In my judgment, the Appellant has failed to demonstrate that there are very compelling circumstances in his case. This is immaterial to the outcome of the appeal, given my conclusions on the unduly harsh test.

### **Anonymity**

- 47.** The First-tier Tribunal had made an anonymity direction in respect of the proceedings before it. At the error of law stage, the panel considered it appropriate to make a direction under the Upper Tribunal's Rules.
- 48.** At the re-making stage, I have considered whether it remains appropriate to maintain that direction, having regard to the importance of open justice. I have concluded that it is. This case involves a minor child and, although he has not been referred to by name, there is a real prospect of him being identified were no direction made. In and of itself, this would not have been sufficient to justify a direction. However, I also take into account my findings on T's older brother's situation, particularly relating to his mental health problems, and the likely impact that identification could have on both T and his brother.

### **Notice of Decision**

- 49. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**
- 50. I re-make the decision by allowing the appeal on the ground that the Respondent's refusal of the human rights claim breaches the Appellant's protected Article 8 rights and is therefore unlawful under section 6 of the Human Rights Act 1998.**

Signed: H Norton-Taylor

Date: 11 April 2022

Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00. This is because, whilst the Appellant has succeeded in his appeal, much of the evidence was not put to the Respondent in the first instance.

Signed: H Norton-Taylor

Date: 11 April 2022

Upper Tribunal Judge Norton-Taylor

**APPENDIX: ERROR OF LAW DECISION**

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/25163/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19 October 2021**

**Decision & Reasons  
Promulgated**

.....

**Before**

**THE HONOURABLE MR JUSTICE SAINI  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR W K  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

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

**Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.**

**Representation:**

For the Appellant: Ms E Sanders, Counsel, instructed by MQ Hassan Solicitors  
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

**DECISION AND REASONS**

## **Introduction**

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge White (“the judge”), promulgated on 7 November 2019, by which he dismissed the Appellant’s appeal against the Respondent’s refusal of his human rights claim made in the context of deportation proceedings.
2. The Appellant is a citizen of Zimbabwe, born in 1970. He arrived in the United Kingdom in 2001, following after his wife, elder son and stepson, who had come to this country a year previously. Following an unsuccessful asylum claim which resulted in an appeal being dismissed, the Appellant was eventually granted indefinite leave to remain in 2009. Meanwhile his wife gave birth to their youngest son, T, in 2005. In July 2014, the Appellant was convicted of sexual assault and sentenced to fifteen months’ imprisonment. It was an unpleasant offence in which the Appellant assaulted a younger employee at the care home at which they both worked. A deportation order was subsequently signed on 26 February 2015.
3. The Appellant’s human rights claim was predicated on the Appellant’s long residence in this country and his family life with his wife and their children. The claim was refused by the Respondent in December 2018 and the appeal came before the First-tier Tribunal in November the following year.

## **The decision of the First-tier Tribunal**

4. Having set out background information, the judge made robust adverse credibility findings in relation to the Appellant’s original and subsequent protection-related claims, and in response to the continued denial of responsibility for the offence.
5. Turning to Article 8, the judge found that the Appellant had genuine and subsisting relationships with his wife and the three children (the older two being adults at the time).
6. For the reasons set out in paragraph 14 of his decision, the judge concluded that it would be unduly harsh for the Appellant’s wife and T to relocate to Zimbabwe. Thus, the first limb of the undue harshness assessment under the family life exception set out in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, as amended (“the 2002 Act”) was satisfied.
7. In addressing the second limb under section 117C(5), the judge concluded that it would not be unduly harsh for the Appellant’s wife and T to remain in the United Kingdom. This conclusion was then factored into the assessment of whether very compelling circumstances existed for the purposes of section 117C(6). For the purposes of this appeal, the important aspects of the judge’s assessment are contained within paragraph 18 and 21 of his decision:

“18. So far as [T] is concerned I have no evidence of any medical complications or possible mental or physical health effects of his father’s deportation. I have limited evidence from his school...[T] is now 14 years old, an age when undoubtedly he still needs parental care and support, but will be increasingly independent and able to help his parents and do many things for himself. I have no doubt that the absence of his father would be distressing to him and would generate a degree of detriment but, as already noted, deportation of a partner or parent is inevitably harsh for the remaining partner or any child. The requirement that the effects be unduly harsh indicates a higher threshold, something more than the harshness which necessarily follows. Life will certainly be harder for all the family, but considering the evidence as a whole I am entirely unpersuaded that it would be unduly harsh for [the Appellant’s wife] or [T] to remain in the United Kingdom if the appellant is deported. Accordingly I find that the appellant cannot bring himself within the family life exceptions...”

21. I have no doubt that it is in [T’s] best interests to remain with his mother and siblings in the United Kingdom. I also accept that it is in his best interests for his father to remain with him, but it is plain that that is not alone enough to prevent deportation. I have no evidence to show that the separation from his father will produce some specific and severe detriment, beyond the natural consequences of such separation, as discussed in considering the question of undue harshness.”

### **The Appellant’s grounds of appeal**

8. The Appellant put forward three grounds of appeal. The first of these can be summarised as follows: firstly, that the judge failed to refer to relevant authorities on the issues before him and it could not be assumed that he had directed himself correctly as to the law; secondly, the adverse credibility findings had impermissibly “impacted” the assessment of undue harshness for T; thirdly, the judge had applied to high a threshold to the question of undue harshness; fourthly the judge should have had regard to the factual matrix in other similar cases; fifthly the judge made erroneous generalisations about the independence of teenage children; and sixthly, the conclusion that it would be unduly harsh for T to go to Zimbabwe should have been factored into the question of whether it would be unduly harsh on T to be separated from the Appellant.
9. The second ground of appeal asserts that the judge erred in his assessment of whether it would be unduly harsh for the Appellant’s wife to be separated from him. The third ground of appeal contends that the judge failed to take country information on Zimbabwe into account when conducting the proportionality exercise.

### **The hearing**

10. Having considered the grounds of appeal, submissions made by Ms Sanders and our indication that there appeared to be merit in the first ground, Mr Lindsay accepted that the judge’s assessment of T’s circumstances through the prism of undue harshness was not consistent

with the guidance provided by the Court of Appeal in HA (Iraq) [2020] EWCA Civ 1176; [2021] WLR 1327.

11. In our judgment, Mr Lindsay’s position was correct and at the conclusion of the hearing we informed the parties that the judge had erred in law and that his decision should be set aside, with written reasons to follow.

### **Discussion and conclusions**

12. At paragraph 23 of in KO (Nigeria) [2018] UKSC 53; [2019] Imm AR 400, Lord Carnwath, JSC, held:

“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.”

13. This passage led to a certain amount of judicial discussion as to the nature of the undue harshness test. One of the issues arising was the extent to which the undue harshness assessment should focus on the impact of separation from a parent on any child, or whether it should be directed on the particular child in question. At paragraph 56 of HA (Iraq), Underhill LJ said the following:

“56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond “that which is ordinarily expected by the deportation of a parent”. Lord Carnwath does not in fact use that phrase, but a reference to “nothing out of the ordinary” appears in UTJ Southern’s decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold “acceptable” level. It is not necessarily wrong to describe that as an “ordinary” level of harshness, and I note that Lord Carnwath did not jibe at UTJ Southern’s use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, “ordinary” is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above.

There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

14. Jackson LJ provided further reasoning on the same point at paragraphs 155 to 158:

"155. The assessment that has to be carried out is therefore one that is adequately informed and specific to the individual child as a person distinct from the offending parent. It requires the decision-maker, as part of the overall assessment, to look at matters from the child's point of view – in the case of Exception 2, the question explicitly concerns undue harshness *to the child*.

156. There are two broad ways in which it seems to me that a decision-maker may inadvertently be deflected from giving primary consideration to the best interests of the child of a foreign criminal. One is by focusing on the position of children generally rather than on the best interests of the individual child. The other is by treating physical harm as intrinsically more significant than emotional harm. I will take these in turn.

157. In order to maintain focus on the individual child, it will be helpful for the decision-maker to apply the words of the statutory tests themselves. By their nature, commentaries on the tests may be illuminating, but they are not, as Underhill LJ has shown at [56], a substitute for the statutory wording. For example, Lord Carnwath's reference in paragraph 23 of *KO (Nigeria)* to undue harshness to "any child" cannot have been intended to set up a notional comparator, if only because it is not possible to know what the circumstances of such a child might be. For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent where face to face contact cannot continue may be akin to a bereavement. A decision that gives primary consideration to the best interests of the child will instead focus on the reality of that child's actual situation and the decision-maker will be more assisted by addressing relevant factors of the kind identified by Underhill LJ at the end of [56] than by making generalised comparisons. Likewise, as explained in the footnote to [48], the aphorism "That is what deportation does" is an important truth, but it is not a substitute for a proper consideration of the individual case. The full citation from Sedley LJ in *Lee* makes this clear:



"The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge."

158. It can be seen that the aphorism frames the question; it does not provide the answer. In that case, the parent was a supplier of Class A drugs who had received a seven year sentence and was facing deportation to Jamaica, and the balance not surprisingly fell in favour of deportation despite the impact on the two young children. In the same way, I agree with Underhill LJ's observations at [34] and [35] that decision-makers should be cautious about transposing statements of principle from one statutory context to another; likewise his consideration at [129] of the limited value of cross-checking outcomes in more or less similar cases. The task of the decision-maker in this respect is to consider the effect of this deportation on this child."

15. This guidance clearly aligns the focus of the undue harshness assessment to the particular child, not by reference to generalities or a "notional comparator".
16. Returning to the judge's decision, it is apparent to us, as it was to Mr Lindsay, that the wording employed in paragraphs 18 and 21 discloses an approach which both sought to require something very specific or "severe" by way of a detriment to T resulting from separation and set his circumstances against what was in effect a "notional comparator". By way of examples contained in paragraph 18, reference is made to deportation of a partner or parent being "inevitably harsh for the remaining partner or any child" and harshness which "necessarily" followed from deportation. Paragraph 21 states in terms that there was "no evidence to show that the separation from [T's] father will produce some specific and severe detriment, beyond the natural consequences of such a separation...", a clear indication that the judge was doing what HA (Iraq) says he should not have done. Although paragraph 21 was concerned with whether very compelling circumstances existed, the final sentence confirms a nexus between the words just quoted and the undue harshness assessment undertaken in paragraph 18.
17. The judge cannot of course be faulted for failing to have regard to HA (Iraq): it was not handed down until several months after his decision was promulgated. However, the important additional guidance given by the Court of Appeal was plainly relevant to the central issue in the present case. The judge's approach to the undue harshness assessment and T's circumstances was erroneous and on that basis alone his decision falls to be set aside.
18. The remaining grounds of appeal can be dealt with relatively briefly. We see no merit in the assertion that the judge's adverse credibility findings had a material impact on the undue harshness assessment. The judge was fully entitled to say what he did and he set those findings out at the appropriate place within his decision. There is no indication which begins

to suggest that these adverse findings somehow infected everything that followed. Indeed, it is clear from the decision itself that this argument is misconceived: the paragraphs following the findings in question show that the judge went on to conclude certain factual matters in the Appellant's favour.

19. Equally, there is no merit in the assertion that the judge erred in relation to the Appellant's wife's circumstances and whether it would be unduly harsh for her to remain in the United Kingdom without him. What is said in paragraphs 14 to 17 disclose a detailed and fact-specific consideration of the evidence relating to her.
20. In respect of the country information on Zimbabwe, the judge properly took this into account when concluding in paragraph 19 that the situation in Zimbabwe was "undoubtedly very difficult". More could perhaps have been said on this, but what is set out is in our view sufficient.
21. A final point was one raised by Mr Lindsay of his own volition and in respect of which we commend his candour. At the end of paragraph 22 the judge concluded that due to the Appellant's lack of status for part of his residence in the United Kingdom "little weight" was to be attached to his private and family life. Whilst that might have been correct in relation to the private life and his relationship with his wife, the same did not apply, at least with regard to the relevant statutory provisions, to his family life with T and the other two children. There is an additional error here, but it is not necessary for our conclusion that the judge's decision should be set aside.
22. In terms of disposal, it is appropriate to retain this appeal in the Upper Tribunal and set it down for a resumed hearing following which the decision in the Appellant's appeal will be re-made. In light of the conclusions set out in our decision, certain findings made by the judge can properly be preserved for the purposes of the resumed hearing. The findings are:
  - (a) it would be unduly harsh for the Appellant's wife and T to relocate to Zimbabwe;
  - (b) it would not be unduly harsh for the Appellant's wife to remain in the United Kingdom if he was deported to Zimbabwe.
23. The core issue is whether it would be unduly harsh for T to remain in the United Kingdom if the Appellant was deported to Zimbabwe, or, in the alternative, whether the Appellant can demonstrate that very compelling circumstances exist in his case.

### **Anonymity**

24. An anonymity direction has been in place since the initiation of proceedings before the First-tier Tribunal. This was done at his

representative's request and on the basis that protection issues had been raised and a teenage child was involved. Whilst the maintenance of such a direction in the Upper Tribunal is not automatic, we have concluded that it is appropriate to do so in this case, notwithstanding the important public interest consideration of open justice.

### **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**The decision in this appeal will be re-made by the Upper Tribunal following a resumed hearing, to be listed in due course.**

### **Directions to the parties**

- 1) **No later than 4pm on 30 November 2021**, the Appellant shall file and serve in electronic and physical form a consolidated bundle of all evidence relied on, with any evidence not before the First-tier Tribunal being the subject of an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008;
- 2) **No later than 4pm on 7 December 2021**, the appellant shall file and serve in the electronic and physical form a skeleton argument;
- 3) **No later than 4pm on 21 December 2021**, the Respondent shall file and serve a skeleton argument;
- 4) **No later than 5 days** before the resumed hearing, the Appellant may file and serve in electronic and physical form a reply to the Respondent skeleton argument;
- 5) With liberty to apply.

Signed H Norton-Taylor

Date: 26 October 2021

Upper Tribunal Judge Norton-Taylor