Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00753/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons sent out on**
On 23 May 2019	**On 16 June 2020**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

RJE
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Moriarty, Counsel, instructed by Luqmani Thompson & Partners Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who was born in May 1983, is a national of Jamaica. He entered this country in April 2001 as a visitor with entry clearance valid until three weeks later. A day before that leave was due to expire, an application was made on his behalf for further leave to remain as a visitor until October of that year. This application was refused on 29 May 2001 and an appeal against this decision was dismissed in May 2002. Although the appellant sought leave to remain thereafter as a student on the

basis of his rights under Article 8, these applications were refused and he was appeal rights exhausted in 2002. Since then, he has remained as an overstayer.

2. Since arriving in this country, and despite having no leave to be here since shortly after his arrival, the appellant has been convicted of numerous criminal offences, of increasing seriousness. He has been convicted on seven occasions for a total of twenty known offences. His first conviction was on 3 March 2003 for being concerned in the supply of controlled Class A drugs and handling stolen goods, driving otherwise than in accordance with a licence and using a vehicle while uninsured. For these offence he was sentenced to twelve months' imprisonment at a Young Offenders Institution. On the same occasion he was also convicted of supplying a controlled Class A drug and possessing a controlled drug with intent to supply, for which offences he was sentenced to two concurrent sentences of imprisonment of eighteen months, but these sentences were consecutive to the twelve month sentence received in respect of the offences previously referred to. He was also convicted of possession of ammunition without a certificate for which he was sentenced to a further three month imprisonment, to be served concurrently. His total sentence for all these offences was two years and six months' imprisonment.

3. In October 2003 the appellant was convicted of a lesser offence of possessing a controlled Class B drug, for which he was fined £100 and ordered to pay £50 costs. A year later, in November 2004, he was convicted of fraudulently using a vehicle without a licence, driving a vehicle otherwise than in accordance with a licence and also being uninsured while driving this vehicle. He was fined in respect of these offences.

4. In August 2009, the appellant was convicted of again driving while uninsured and otherwise than in accordance with the licence, for which he was also fined.

5. The following year, in April 2010, the appellant was convicted of having an article with a blade in a public place for which he was sentenced to six weeks' imprisonment, but this sentence was suspended for twelve months. During the period of this suspension in November 2010 he was again convicted of having in his possession a controlled Class B drug for which he was fined; on the same date he was also convicted of using a vehicle (yet again while uninsured) and also of having committed a further offence during the operational period of a suspended sentence order, resulting from the original conviction in April 2010, for which he was fined £400.

6. Not very long afterwards, on 31 May 2011, the appellant was convicted of two counts of possession of a Class A controlled drug with intent to supply, the drugs being heroin and crack cocaine, together with a failure to comply with the community requirements of a suspended sentence order. For these very serious offences the appellant was sentenced to two concurrent terms of six years' imprisonment. The appellant had been stopped by police in the street in August 2010 (that is under four months after the suspended sentence was imposed in April 2010) when he was found to be in possession of 2.48 grams of heroin and 1.66 grams of crack cocaine, which drugs were hidden down his trousers in a net bag. He did not cooperate during

interview, answering "no comment" to all the questions and he put forward a prepared statement which he relied on at his trial, but he was disbelieved by the jury which rejected his claim that the drugs were for his personal consumption. This was the third time the appellant had been convicted of either supplying or being in possession with intent to supply Class A drugs and the length of the sentence imposed reflected the judge's view of the seriousness of such offences.

The appellant's subsequent immigration history

7. Following this conviction, on 12 July 2011, the respondent served on the appellant a notice of liability to automatic deportation, dated 12 July 2011.

8. On 27 August 2013 the appellant claimed asylum, the basis of this claim being that he feared being the victim of gang violence in Jamaica because of actions done by a cousin. He was then served with a further notice of liability to automatic deportation, dated 20 September 2013 and he had a substantive asylum interview in August 2014. His asylum claim was refused on 22 June 2015. That claim was also certified under Section 72 of the Nationality, Immigration and Asylum Act 2002. On 15 July 2015 a decision was made to deport the appellant and to refuse his human rights claim.

The appellant's appeal

9. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Ford, sitting at Birmingham, on 29 April and 7 November 2016, but in a Decision and Reasons promulgated on 1 December 2016 Judge Ford dismissed the appellant's appeal on all grounds, being asylum grounds, humanitarian protection grounds and human rights grounds. So far as the asylum/Article 3 grounds were concerned, Judge Ford analysed the appellant's claim in some detail, finding at paragraph 50 of her Decision that "I do not find his account to be credible even to the lower standard of proof applicable", and she gave detailed reasons justifying her decision on this point. That aspect of Judge Ford's decision has not been challenged subsequently.

10. The appellant's Article 8 claim was founded on his relationship with his current partner and (at the time) three children in the UK, which will be considered below.

The appellant's appeal against the decision of the First-tier Tribunal

11. The appellant appealed against Judge Ford's decision and his appeal came before UTJ Blum, who in a decision promulgated on 24 March 2017, identified what he regarded as material errors of law in Judge Ford's decision such that there needed to be a re-hearing. Judge Blum had noted (and this is referred to in his subsequent Decision to which reference is made below) that there had been no challenge to Judge Ford's decision dismissing the appellant's appeal against the respondent's Decision to refuse his asylum/Article 3 claim.

The re-hearing

12. Judge Blum re-heard the appeal on 3 May 2017 and promulgated his Decision shortly after on 19 May 2017. He considered the evidence before him with exemplary care and made findings of fact with regard to the family life enjoyed by the appellant in this country which findings will be referred to below and are not to any material degree now in dispute between the parties, save that it is now asserted on behalf of the appellant that his ties with his children have become "stronger in the period that has elapsed since Judge Blum's decision was promulgated". He has also had another child.

Key findings

13. Having set out the evidence, Judge Blum made certain findings. In particular, at paragraph 26, he was satisfied that the appellant had a genuine and subsisting relationship with his current partner and that he had a genuine parental relationship with his three daughters (two at that time by his current partner and one by another lady after a "one night stand"). He accepted that it was "clear from the totality of the evidence that the appellant has a strong bond with all three of his daughters" (at paragraph 26). He also accepted that the appellant "is a good and committed father" and "that it is in the best interests of all the appellant's daughters for him to remain in the UK".

14. So far as the risk of reoffending was concerned, at paragraph 31, Judge Blum found as follows:-

> "31. I am satisfied, based on the above evidence, that the appellant has genuinely addressed his drug misuse and has taken active steps to rehabilitate himself and to remain drug-free. Despite the conclusions of the OASys report I am satisfied that the appellant is at low risk of causing serious harm to the public and that he is at low risk of reoffending."

15. Judge Blum rightly set out at paragraph 24 of his Decision that it was "not in dispute" that "under the Immigration Rules (paragraphs 398, 399 and 399A), the public interest in his deportation is only outweighed by other factors if there are "very compelling circumstances over and above those described in paragraphs 399 and 399A", which mirror what is set out in Section 117C of the Nationality, Immigration and Asylum Act 2002 (introduced by the Immigration Act 2014).

16. Section 117C of Part 5A of the 2002 Act provides as follows:

> **"117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

17. In this case, it is not disputed that Exception 1 cannot apply, because this appellant has only been lawfully resident in the United Kingdom for a very short period indeed. Judge Blum accordingly approached the appeal on the basis that even though he had found that the appellant had a genuine and subsisting relationship with his current partner and also a genuine and subsisting parental relationship with his children (who are all qualifying children, being British citizens) the appellant's appeal could still only succeed if he was able to establish first that the effect of his deportation on either his partner or any one of his children could be shown to be "unduly harsh". Also, because this appellant had been sentenced to a period of imprisonment of over four years, it would be necessary for him to establish further that there were very compelling circumstances "over and above" those described in the Exceptions.

18. Judge Blum analysed the evidence very carefully and considered the position of the appellant's partner and children separately. He took account in particular of the statements and evidence provided by the various witnesses, including the medical evidence regarding the appellant's partner and also the lengthy independent social worker report of Christine Brown, Judge Blum having accepted (at paragraph 42) "that Ms Brown is suitably qualified and experienced to provide an expert opinion on the effect on the children of the appellant's deportation".

19. Having considered all of this evidence very carefully, Judge Blum found that the effect of the appellant's deportation would not be unduly harsh on either his partner or his children, and he accordingly did not need to go on to find whether there were compelling circumstances over and above the Exceptions, because the appellant had not got over even the first hurdle.

20. It is not necessary for me set out in full Judge Blum's reasoning which led him to make the findings he did, because, as appears below, I will have to make my own individual assessment of this evidence.

21. At the time of the hearing before Judge Blum, he was bound by the Court of Appeal decision in *MM (Uganda)* [2016] EWCA Civ 450, as he stated, clearly and at the time correctly, at paragraph 27 of his decision, as follows:

> "27. In order to determine whether there are very compelling circumstances "over and above" an unduly harsh impact on [the appellant's partner] as a result of the appellant's deportation, I must first determine whether the effect on her would be unduly harsh. I will focus my attention on whether it would be unduly harsh for [the appellant's partner] to remain in the UK without the appellant. In determining whether the appellant's deportation would be unduly harsh, I am bound by the Court of Appeal decision in *MM (Uganda)* [2016] EWCA Civ 450 (holding that wider public interest considerations must be taken into account when applying the "unduly harsh" criteria)."

22. Judge Blum's finding that the effect on the appellant's partner would not be "unduly harsh" took into account these factors, including the seriousness of the appellant's offending, as he made clear at paragraph 39, as follows:

> "39. In light of the above assessment, including the various public interests identified, the seriousness of the appellant's offending, the appellant's rehabilitation, the respondent's delay, and the possibility of [the appellant's partner] being unable to continue her studies or find employment, I am not satisfied that the effect of the appellant's deportation on the [the appellant's partner] would be unduly harsh."

23. Judge Blum also took account of the seriousness of the appellant's offending when finding at paragraph 52, that the effect of the appellant's deportation on his children, would not be "unduly harsh" either, as follows:

> "… having considered all the factors that weigh in the appellant's favour, and balancing those against the strong public interest factors that I have already identified, **including the nature and seriousness of the appellant's offending** [my emphasis], I find that the impact on the appellant's children would not be unduly harsh."

24. As I have already indicated, at the time he heard this appeal, and promulgated his Decision, Judge Blum was indeed bound by the Court of Appeal authority to have regard to the seriousness of the offending when considering or not whether the effect on the appellant's partner and/or children could properly be said to be "unduly harsh".

25. In light of the subsequent decision of the Supreme Court in *KO (Nigeria) & Others v SSHD* [2018] UKSC 53, which was handed down on 24 October 2018, Judge Blum had as a matter of law been wrong to have regard to the seriousness of the appellant's offending when considering whether the effect on his partner or children could properly be said to be "unduly harsh". The Supreme Court decided that the

issue of whether or not the effect on either a partner or child could be said to be "unduly harsh", while undoubtedly a high hurdle to be overcome, had to be evaluated with regard solely to the effect on the partner or child, and without regard to the nature of the offending.

26. For this reason, on the appellant's appeal against Judge Blum's Decision, the appeal having initially been stayed pending the decision of the Supreme Court in *KO (Nigeria),* following that decision and the parties having agreed that this would be the appropriate course, the Court of Appeal ordered that the appeal should be re-heard in the Upper Tribunal.

Hearing on 10 April 2019

27. The appeal was then listed before me for a full hearing on 10 April 2019.

28. It was only on receiving notice of this hearing that the appellant's solicitors wrote to the Tribunal indicating that further evidence would be necessary and for this reason they requested an adjournment.

29. I reluctantly agreed to convert the hearing into a Case Management hearing and gave a Note of Hearing and further directions immediately following the hearing. Having noted that it had been agreed that the appeal be re-heard in the Upper Tribunal, at paragraph 3 of my Note of Hearing I set out what the parameters of the re-hearing would be, as follows:

> "3. It was in the judgement of this Tribunal clear that would be required at the re-hearing would be for the Upper Tribunal to consider as at the date of the hearing first whether Exception 2 set out within Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 would be satisfied, having regard to the guidance given by the Supreme Court in *KO,* but also, if it was, whether [pursuant to Section 117C(6)] there were very compelling circumstances over and above Exception 2 such as to outweigh the public interest in deporting this appellant. This is because this appellant had been convicted and sentenced to a period of six years' imprisonment in respect of serious drug offences. Pursuant to Section 117C(6) it would only be in circumstances where there were very compelling reasons over and above Exception 2 that the public interest in his deportation could arguably be outweighed. This Tribunal would also have to consider the effect of Section 117C(2) in these circumstances (that is, where an appellant has been sentenced to a period of imprisonment of over four years) which provides that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal"."

30. I also noted that because the Decision would have to be taken in light of the circumstances as they were at the time of the hearing, the Tribunal would have to have regard to any relevant matters which there might now be indicative of there being such very compelling reasons which may or may not have been in existence at the time of the original decision. Accordingly, it ought to have been clear to the appellant's solicitors that there might well be a need to adduce further evidence in order that the Tribunal when it re-heard the appeal would be in a position to have

regard to matters which had not been before the Tribunal at that earlier stage. That is, of course, provided within the Tribunal Procedure (Upper Tribunal) Rules 2008 at Rule 15(2A), pursuant to which the appellant's solicitors ought to have served notice to the Tribunal and the respondent indicating the nature of the evidence, explaining why it had not been submitted to the First-tier Tribunal (which in the circumstances of this case would not have been very difficult, because it would have post-dated that hearing) and the Tribunal would then have to consider whether or not there have been unreasonable delay in producing the evidence.

31. I considered that it was obviously in the interest of justice to allow further evidence to be adduced so that the Tribunal would be in a position to consider the position as at the date of the hearing, and accordingly gave directions as to the service of further evidence.

32. At paragraph 14 of my Note of Hearing I recorded as follows:

> "14. Following discussion it was agreed between the parties that while such findings of fact as were made by Judge Blum would be the staring point of the appeal, the appellant would be permitted to adduce such further evidence as he was advised to adduce with a view to enabling the Tribunal to have up-to-date information as to his circumstances such that proper consideration could be given to whether or not at the date of the hearing the appellant was able to establish such compelling circumstances over and above Exception 2 as would make his deportation unlawful, notwithstanding the public interest in deporting persons convicted of serious criminal offences."

33. Amongst the directions which I gave was the following, at (4):

> "(4) It is the Tribunal's intention that the starting point would be the findings previously made by UTJ Blum and that the purpose of the evidence to be adduced is to enable the Tribunal to consider whether or not at the time of the hearing:
>
> (i) Exception 2 set out within Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 would be satisfied (having regard to the decision of the Supreme Court in *KO),* and
>
> (ii) If it would, whether (pursuant to Section 117C(6) there are very compelling circumstances over and above Exception 2 such as to outweigh the public interest in deporting the appellant."

The Hearing of 23 May 2019 – delay in giving this Decision

34. Whatever criticisms I may have had previously regarding the preparation of this appeal, the preparation for this hearing was excellent on behalf of both parties. Both Mr Moriarty, who had represented the appellant throughout these proceedings, from before the hearing before First-tier Tribunal Judge Ford and Mr Steven Whitwell, the Presenting Officer originally instructed on behalf of the respondent, had prepared skeleton arguments, which set out the parties' respective cases with precision and clarity. In accordance with the directions that I had previously given, the appellant's

solicitors prepared a bundle for the hearing containing all the relevant material. This included the relevant evidence which had previously been before Judge Blum, as well as more recent statements from the appellant, his current partner and the mother of his oldest daughter, together with the birth certificate of his fourth daughter, born since the previous proceedings in October 2018 and supporting evidence from his daughters' school, the appellant's probation officer and a record producer who believes that the appellant "has the potential of international success". At the hearing, a further letter was submitted from the appellant's father, who had previously given a witness statement in support of his son, who stated in his letter that he intended to employ his son as a driver in his family business importing Caribbean produce from abroad. The appellant and his partner, as well as his former partner (the mother of his oldest child) gave oral evidence and I heard submissions on behalf of both parties.

35. At the conclusion of the hearing I reserved my Decision, and within a matter of days, having given anxious scrutiny to the submissions which had been made, the evidence I had heard and all the documents within the file, I had reached my Decision. I had not found this a difficult decision to make, for the reasons which I now set out below, but regrettably the file was then mislaid and the promulgation of this Decision was overlooked and for this reason the Decision was not finalised or promulgated when it should and but for the mislaying of the file would have been. No communication was received from either party with regard to the delay in promulgating a Decision until the end of January, when the appellant's solicitors wrote to the Tribunal asking if the Tribunal staff could check whether there had been any oversight or whether the Decision was still outstanding. Following this request, the file was found, but just before I was able to finalise my Decision the court was locked down which has occasioned a further delay. Although the Decision which I am now promulgating is the one which I had originally intended to give, the Tribunal apologises to the parties for the delay.

The appellant's case

36. The appellant's case is summarised concisely and clearly in the skeleton argument prepared for this hearing. Mr Moriarty relies on the findings made by UTJ Blum referred to above which are not in dispute, that the appellant is the primary carer for his two daughters with his current partner, that he is a "good and committed father" who shares "a strong bond with all three of his daughters" and that his deportation would also have a "significantly detrimental impact" on his partner who would lose "the direct emotional and practical support" that he provides. Mr Moriarty also relies on the finding that the appellant has a "strong parental relationship" with his daughters and that it would be in their best interests for him to remain in the UK.

37. The appellant has also subsequently had a third daughter, the fourth qualifying child (being also a British citizen) and his case is now stronger than it was at the time of his earlier appeal.

38. It is submitted on the appellant's behalf that had Judge Blum not had regard to seriousness of the appellant's offending when considering whether or not the effect

of his deportation on his daughters could properly be said to be "unduly harsh", "he might well have reached a different conclusion", which he might have done had the Supreme Court's subsequent Decision in *KO (Nigeria)* been available to him at the relevant time. It is noted that Judge Blum appeared to accept at paragraph 40 of his Decision that it would be unduly harsh to expect the appellant's daughters to relocate with him to Jamaica in all the circumstances and assessed the issue of undue harshness on the basis of whether it would be unduly harsh for them to remain in the UK without him.

39. Mr Moriarty refers to the level of reliance which the appellant's daughters place on their father, the impact on their personal education and development of his removal and that he has been "a constant and hugely significant part of their lives, particularly following his release from detention five years ago" which all tend to show that the effect of his removal could properly be said to be "unduly harsh". It is submitted that the practical reality is that if the appellant is deported, the effect of that deportation "would be an indefinite separation from all four of his daughters". This would "inevitably have a significantly detrimental – and therefore unduly harsh – impact on [the appellant's partner] and his daughters".

40. As he did before Judge Blum, Mr Moriarty continues to rely on the independent social worker report of Ms Brown, dated 3 March 2016 (which has not been updated, but which I accept would be unlikely to have changed) the conclusions of which included that the damage to his then 7 year old daughter "may well prove irreparable", that even in the "unlikely event" that any of his daughters were able to visit the appellant in Jamaica, such visits could be "devastating" for the children and that his removal would have a "devastating impact" on his current partner, their children and "various other parties, including his partner's mother".

41. Although it is appreciated that the appellant needs to show that there are very compelling circumstances over and above the unduly harsh consequence on the appellant's children and his current partner it is submitted (at paragraph 15 of the skeleton argument) that the Tribunal should consider "the cumulatively harsh impact that it would have on up to four British citizen children and their mothers, when the correct legal test is applied". This cumulative impact is said to be such that on the facts of the present case they are "sufficiently compelling to outweigh the public interest" in the appellant's deportation.

42. Mr Moriarty asks the Tribunal to take into consideration that the appellant has been rehabilitated since his offending and also (at paragraph 20) that while the appellant's offending "was undoubtedly serious in nature, it is noted that he received a significant custodial sentence for what the Sentencing Judge described as "quite a small quantity of drugs"." Mr Moriarty also refers to Judge Blum's finding that the appellant's response to his custodial sentence had been described as "exemplary" and that he had "genuinely addressed his drug misuse" such that "he now poses a low risk of serious harm and a low risk of reoffending". I note that in the most recent report prepared for this hearing by the appellant's probation officer (at B17 and 18 of the bundle) it is considered that "the current static risk of likelihood of serious reoffending (Risk of Serious Recidivism), over two years, is assessed as low,

calculated as 1.4%" which assessment of risk "is based entirely on statistical evidence and does not include any clinical factors".

43. Essentially, therefore, the appellant's case is that he is a reformed character, who now poses a very low risk indeed of reoffending, he has very close ties in this country, the effect on his children in particular would be severe and weighing all these factors together, it can properly be said that the cumulative effect of these factors is that there are very compelling reasons over and above the unduly harsh consequences which his removal would have on his children such as to outweigh the public interest in his removal.

The respondent's case

44. Mr Lindsay relied on the skeleton argument prepared by Mr Whitwell for this hearing, referring initially to the lengthy procedural history and setting out the basis upon which this appeal had been sent back to the Upper Tribunal by the Court of Appeal. At paragraph 8, of this skeleton argument, it was noted that the appeal had been allowed by consent in the following terms:

> *"Permission to appeal be granted and the appeal against the decision of the Upper Tribunal be allowed to the extent that the decision of the Upper Tribunal is set aside and the matter remitted to the Upper Tribunal for determination" the parties having previously agreed that "… the Upper Tribunal erred in its assessment of whether removal would be "unduly harsh" on the appellant's child under s.117C(5) of the Nationality, Immigration and Asylum Act 2002 as it took into account the seriousness of the appellant's offending as part of that assessment, which is not in accordance with the approach now set out in KO. Although this was a case where there was a requirement for "very compelling circumstances" to justify a decision not to deport, that assessment required consideration through the lens of the "unduly harsh" test."*

45. It was the respondent's case (and this was not disputed on behalf of the appellant) that the hearing before me was a resumed substantive hearing "limited to the issue as to whether the decision of 15 July 2015 to remove the appellant from the United Kingdom would be unlawful under s.6 of the Human Rights Act 1998".

46. The skeleton argument then (at paragraph 2 of the Submissions) set out the facts which were not in dispute, which included:

    (a) Other than his original stay in 2001, the appellant had remained unlawfully as an overstayer;

    (b) the appellant was properly to be defined as a "foreign criminal" who had been sentenced to a period of imprisonment of over four years;

    (c) he had been convicted on seven occasions spanning twenty offences, which had culminated in the most recent serious convictions for possession of Class A drugs with intent to supply;

    (d) that the public interests required the deportation of this appellant and would only be outweighed by other factors if there were "very compelling circumstances" over and above those proscribed in paragraphs 399 and 399A of

the immigration rules as now enacted in sub-sections 117C (4) and (5) of the Nationality, Immigration and Asylum Act 2002;

(e) the respondent accepted that the appellant had a genuine and subsisting relationship with his current partner and a genuine and subsisting parental relationship with his daughters, who are all British nationals;

…

(g) the respondent also accepted that it was in the best interests of the appellant's three older children (the position of the most recently born child was not considered within this skeleton argument) that the appellant should remain in the UK in order to "retain the continuity of the parental relationship".

47. It followed that the task for the Tribunal would be to consider first whether it would be unduly harsh for the appellant's partner and/or his children to remain in the UK without the appellant, but even if it was, the appellant would still have to establish that there were "very compelling circumstances" over and above this as to outweigh the public interest in deportation.

48. With regard to the appellant's partner, the respondent noted that she had been aware that he had had no status to remain in the UK but had "proceeded to solidify their family life nonetheless" (as had been found in the First-tier Tribunal), that she had coped during the long period during which the appellant had been imprisoned, that she was able to rely on assistance from the appellant's extended family and also a wide circle of friends and family in Birmingham, that she had a good employment history and that there was no medical evidence that she had any mental or physical health issues.

49. With regard to the appellant's daughters, it was noted that they will continue to go to the same school, live in the same homes and retain the same circle of "friends, neighbours and acquaintances" (again as found in the First-tier Tribunal), that none of them had any mental or physical health issues such as to make them particularly vulnerable as a result of separation from the appellant, that the appellant's two younger children (not including the recent arrival) the children of the appellant's current partner could still rely on their mother, who remains their primary carer; they could also rely on their extended family being their grandfather, two great aunts in Birmingham and one in London, and second cousins. The appellant's oldest child would continue to rely on her mother, who remained her primary carer and she lived very close to the appellant's current partner. That child's grandparents and three aunts and uncles also lived in Birmingham. Insofar as contact between the half siblings was concerned, even if the respective mothers of the appellant's daughters might find this difficult to maintain, it could be facilitated by the appellant's father. (I note at this point that the reason why full cooperation between the respective mothers might be difficult is because of the circumstances of the oldest child's birth, she having been born following what the appellant has described as a "one-night stand" with this child's mother at a time when he was living with his current partner.)

50. Mr Whitwell in the skeleton argument relied upon by Mr Lindsay, referred to the guidance which had been given by the Presidential Tribunal in *MK (Sierra Leone) v SSHD* [2015] UKUT 223, referred to with approval in *KO* at paragraph 27, in which it is made clear that the test of what is meant by "unduly harsh" is an extremely high one. Further reference will be made to this guidance below. It was further submitted that the test in Section 117C(6) that there had to be "very compelling circumstances, over and above those described in Exceptions 1 and 2" "is extremely demanding". It was also submitted that (as had been agreed by consent in the Court of Appeal) if the Tribunal had to consider this aspect of the case, "at this point as opposed to considering the test of undue harshness within Section 117C(4) or (5), a Tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest". This was common ground between the parties.

51. At the time the skeleton argument was prepared, the OASys report, which had been before Judge Blum, had presented the appellant as a "medium risk to the public and the community and otherwise a low risk" but as I have noted above, a more recent report was submitted to the Tribunal.

52. Mr Lindsay, relying on Mr Whitwell's skeleton argument, continued to rely on the submission that no material weight was added by the appellant having not committed further offences, first because that was what would be expected of him by society and secondly in circumstances where the consequence or consequences of further offending would be his almost certain deportation, this would be an artificial assessment.

53. Insofar as delay was said to have a bearing on the assessment of "very compelling circumstances", the delay factors fell largely outside the control of the respondent. The appellant had been in prison until May 2014, and had then claimed asylum which claim had been found by the First-tier Tribunal to be fabricated (and, as I have noted above, there was no challenge to this aspect of the First-tier Tribunal's Decision). Subsequently, the appellant could not be removed until the statutory appeals process had been completed.

54. In summary, therefore, the respondent's position was first that the effect on neither the appellant's current partner nor his daughters would be unduly harsh and secondly even if it was, having regard to all the circumstances, there could not on any view be said to be "very compelling circumstances" over and above the effect on the appellant's wife and daughters such as to "conceivably outweigh the very large public interest in deporting him".

The evidence

55. I do not propose to set out all the evidence contained within the bundle, but I have had regard to all of it. As already indicated, in addition to the evidence which had been before Judge Blum, there were further witness statements from the appellant,

his current partner, and the mother of his oldest daughter, who were all tendered for cross-examination.

56. The appellant and the respective mothers of his daughters confirmed the evidence I had been given previously which was to the effect that the appellant and his daughters and the appellant's current partner would all be devastated were he to be deported, because the most important thing in his life was his daughters, and he was very important in terms of the care and love he provided to them all. The appellant's partner continued to insist when questioned that the appellant had not known he did not have leave to be in this country although this was challenged on behalf of the respondent.

57. In cross-examination, the mother of the appellant's oldest child confirmed that her current partner assisted her with the upbringing of his own children, and agreed that it was fair to say that if that was needed he could help with the parenting of all her children. They had been together now for six years.

58. So far as the appellant's youngest daughter was concerned, she had been born in September 2018.

59. In cross-examination, when asked why the Tribunal should believe the appellant now in light of his previous history, the appellant replied that after his second child had been born, while he was in custody, he had realised that he needed to be a father to his children and that he had to be there for her and not "on the wrong side of the law". He said this had made him realise how important it was and so he had made a promise to himself.

60. When Mr Lindsay pointed out to the appellant that he had been found by a judge to have fabricated a claim for asylum, the appellant replied that he "wouldn't say this was a lie" because "I was in danger then". He claimed that he needed to see his children on a daily basis and if he did not it would break both him and them as well.

61. As I have already indicated, the social worker's report was very positive and the appellant's close relationship with his daughters was noted in letters from his daughters' school as well.

Closing submissions

62. On behalf of the respondent, Mr Lindsay noted that aspects of the factual matrix remained the same as they had been before Judge Blum, although he accepted that the Tribunal had to look at the situation as it was now. However, it remained the case that for almost the entire period the appellant had been in the UK he had been without leave, that his offending had escalated and that possession of heroin and crack cocaine with intent to supply, during the currency of a supervision order were extremely serious offences, as reflected in the length of sentence received. In view of the appalling offending history, committed while the appellant had no right to be in this country, these were factors which were relevant if the Tribunal got to the stage of considering whether there were very compelling reasons "over and above" the Exceptions. On the facts of this case, even if the effect on the appellant's current

partner or children could be said to be unduly harsh (which was not accepted) this appeal could not succeed.

63. Notwithstanding the appellant's claim to have become more mature and so on, such that he was confident he would not reoffend, it remained the case that he was prepared to lie in order to attempt to remain in the UK, and no credence should be given to his bare assertion that he would remain out of trouble. With regard to the appellant's current partner, the claim that neither she nor the appellant himself had been aware that he was unlawfully present in the UK was clearly false. This was a transparently dishonest attempt to improve the appellant's position.

64. So far as the mother of the appellant's oldest child is concerned, she had eventually accepted in evidence that the father of her younger children could assist her if necessary.

65. With regard to the possible argument that unless the appellant was to be allowed to remain, his daughters (the half siblings) would not see each other, Mr Lindsay referred the Tribunal to Judge Blum's finding at paragraph 47 (which it was agreed was the starting point for this Tribunal) that the appellant's father would be capable of "facilitating communication and interaction between the appellant's three daughters".

66. Mr Lindsay's primary submission was that in light of current jurisprudence, the effect on neither the appellant's current partner nor his daughters of his deportation could properly be said to be "unduly harsh", but even if it was, just, the requirement to establish that there were "very compelling circumstances over and above" this Exception could not possibly be satisfied. There was nothing relied upon by the appellant other than those difficulties which all families in these circumstances would undoubtedly face. There was nothing so exceptional or compelling about the circumstances in this case that could possibly meet the further elevated threshold.

67. On behalf of the appellant, Mr Moriarty repeated an argument which he had made before Judge Blum (which Judge Blum rejected) that "on lesser facts" than those in this case, undue harshness had been found by other courts. He expanded on the submission which had been contained in the skeleton argument to the effect that if the Tribunal was to find that the effect of more than one of the appellant's partner or children was "unduly harsh" the Tribunal could look at the cumulative effect of his deportation on all of these people. That is that the cumulative effect on more than one would be over and above what was necessary to establish that the effect was "unduly harsh".

68. So far as the respondent's suggestion that the Tribunal should not accept at face value the appellant's "bare assertion that he is a reformed man" because he had previously been found to have fabricated an asylum claim, there was a wealth of evidence in support of this, which is contained within the bundle. Reliance was particularly placed on the most recent report from his probation officer at B17 and 18. It was submitted that part of the "very compelling circumstances" in this case was that the appellant had turned his life around.

69. Following the primary submissions made on behalf of both parties, there was further discussion as to the authorities, and in particular to the Decision of the Presidential Tribunal (the President, Mr Justice Lane, UTJ Gill and UTJ Coker) which had been reported as *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 00123, which had been promulgated just two months before this hearing, on 4 March 2019.

My assessment

70. As already indicated above, the issues I have to determine are in a very narrow compass. It is effectively accepted both that the appellant has a genuine parental relationship with all of his daughters, who are qualifying children and also that his relationship with his partner is genuine and subsisting. As provided within Section 117C of the 2002 Nationality, Immigration and Asylum Act, the public interest requires his deportation "unless there are very compelling circumstances, over and above those described in Exception … 2", that Exception being that the effect on any one of his partner or children would be "unduly harsh".

71. The starting point for consideration of whether the effect on a partner or child can properly be said to be "unduly harsh" (which has to be considered independently of the circumstances of the appellant's offending or immigration history) must be the Supreme Court's adoption at paragraph 27 of *KO* of the guidance given by the Upper Tribunal (McCloskey J President and UTJ Perkins) in *MK (Sierra Leone) v SSHD*. At paragraph 27 of *KO*, giving the judgment of the court, Lord Carnwath stated as follows:

> "*The earlier cases*
>
> 27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal … in *MK (Sierra Leone) v SSHD* [2015] UKUT 223 (IAC), … a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the Tribunal:
>
> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.""

72. As Lord Carnwath went on to note, that definition "did not apparently depend on any view of the relative severity of the particular offence".

73. When considering "the standard that needed to be applied when considering the meaning of "unduly harsh" ", at paragraph 35, Lord Carnwath stated further as follows:

> "35. Miss Giovanetti for the Secretary of State takes issue with that alternative reasoning, [suggested by the Upper Tribunal in *KO*], which she criticises as applying too low a standard. I agree. The alternative seems to me to treat

> "unduly harsh" as meaning no more than undesirable. Contrary to the stated intention it does not in fact give effect to the much stronger emphasis of the words "unduly harsh" as approved and applied in both *MK* and *MAB*."

74. In other words, the test is an extremely high one.

75. As stated not only within the text but also within the head note of *RA*, the decision made most recently before this hearing by the Presidential Tribunal, rehabilitation of an offender will not ordinarily bear material weight in favour of a foreign criminal. At paragraph 22 of *RA*, the Tribunal found as follows:

> "22. It is important to keep in mind that the test in Section 117C(6) is extremely demanding. The fact that, at this point, a Tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest, does not in any sense permit the Tribunal to engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of Section 117C. Not only must regard be had to the factors set out in Section 117B, such as giving little weight to a relationship formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years."

76. An important finding in *RA* was that the way in which a court or tribunal should approach Section 117C remains, *post-KO*, as set out in the judgment of Jackson LJ in *NA (Pakistan) & Another v SSHD* [2016] EWCA Civ 662. At paragraph 23 of *RA*, the Tribunal set out what Jackson LJ had stated at paragraphs 33 and 34 of *NA (Pakistan)* as follows:

> "33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
>
> 34. The best interests of children certainly carry great weight, … Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *SSHD v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:
>
> > "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional

> circumstances which outweigh the public interest in his deportation"."

77. I also must have in mind the often repeated dictum of Sedley LJ in *AD Lee v SSHD* [2011] EWCA Civ 248, in which he stated as follows:

> "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."

78. It is in the light of this guidance which has been repeatedly given by the higher courts, that I have to consider first whether the effect on the appellant's current partner or children could properly be said to be not just "severe" or "bleak" but so beyond severe or bleak as could properly be said, in light of judicial guidance to be "unduly harsh". Even if I were to find that it could be so described, I would then have to find that the circumstances of this case were so compelling that despite the seriousness of the appellant's offending (and I would have to give full account to this, in particular that he was convicted of an offence that did not just merit a sentence of imprisonment of four years, but a higher sentence, because he had been in possession of Class A drugs with intent to supply) such as to outweigh the very large public interest in his deportation.

79. In my judgement, the appellant has not come close to establishing that the effect on either his partner or his daughters could properly be described as "unduly harsh" in the sense of those words posited by the former president of this Tribunal in *MK*. While it is accepted that the children and the appellant's partner have a genuine relationship with him, in essence, there is little about their circumstances as would make their case any more severe or bleak than that of other families whose parents or partner are to be deported. Neither the children nor the appellant's partner have any particular vulnerabilities, and will have the assistance of an extended family as well as school friends and other friends within the community. They will all undoubtedly miss the appellant considerably, and their lives will be poorer because of his absence. However, the effect on the children (who are blameless) and his partner (who I did not believe when she said that neither she nor the appellant appreciated that he was in this country unlawfully) cannot, in my judgement, be truly said to be more severe or bleak than in hundreds or thousands of other deportation cases where the effect of deportation is to split up a loving family. As Sedley LJ remarked, sadly "that is what deportation does".

80. On these facts, not only do I find that the effect on the appellant's partner and his daughters cannot properly be said to be "unduly harsh", but I do not consider that it would be open to any judge, on these facts, so to find.

81. Even were it to be just arguable on these facts that a judge could properly find the effect on the children to be so severe or bleak as to cross the threshold of a standard even higher than an elevated standard, I would need to go beyond this and find very compelling circumstances beyond the unduly harsh effect this appellant's deportation would have on his partner and/or children. When looking at this aspect of the case, as agreed by the parties before the Court of Appeal, I would have to have

regard to the seriousness of the offending when conducting the overall proportionality exercise, and I would have to find that not only was the effect on any one of the children or the appellant's partner "unduly harsh" but also the circumstances were so compelling that notwithstanding the very great public interest in deporting someone with a long criminal record which has culminated in convictions for possessing with intent to supply crack cocaine and heroin, offences furthermore committed whilst the appellant was subject to supervision from his previous offending, this public interest was outweighed by the "very" compelling circumstances. On the facts of this case, that is a conclusion which, in my judgement, no Tribunal could reach.

82. It follows that this appeal must again be dismissed, and I so find.

Decision

The appellant's appeal against the respondent's decision to deport him is dismissed, under Article 8, his appeal on other grounds having previously been dismissed.

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 their 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.

Signed:

Upper Tribunal Judge Craig Dated: 22 May 2020