Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13271/2019 (V)

THE IMMIGRATION ACTS

Field House	**Decision & Reasons Promulgated**
On 3rd November 2020	**On 11th November 2020**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

ML
(ANONYMITY ORDER MADE)
Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr H Sarwar, of Counsel, instructed by D&A Solicitors

Interpretation:
Mr V Dinganga, Lingala interpreter

DECISION AND REASONS

Introduction

1. The claimant is a citizen of the Democratic Republic of Congo born in 1974. He arrived in the UK in February 2001 and claimed asylum. He was convicted of a number of criminal offences between 2004 and 2008. The index offence was one based on acts which took place 12 years ago, and led

to a conviction for having a false instrument with intent and knowingly possessing an improperly obtained identity document belonging to another for which the claimant was sentenced to 1 year and 3 months imprisonment. The claimant has not reoffended since 2008.

2. On 3rd March 2014 the Secretary of State made a decision to deport the claimant, his partner (N) and four children (W (b.2006), S (b.2008), K (b.2010) and G (b.2013) all born in the UK. His appeal against this decision was dismissed on asylum grounds by a Panel of Designated Judge of the First-tier Tribunal McCarthy and Mr G Sandall (Non-legal member) in a decision promulgated on 13th April 2015. A deportation order was signed on 9th August 2016 against the claimant. The claimant's relationship with his partner, N, broke down, and she was granted limited leave to remain on Article 8 ECHR grounds, under the 10 year route to settlement provided for in Appendix FM of the Immigration Rules, from 7th March 2019 to 26th August 2021. The two youngest children, K and G have the same leave to remain as their mother, N. The two oldest children W and S are now British citizens.

3. On 28th January 2018 further representations were refused as a fresh claim. On 3rd July 2018 the claimant made further submissions and on 1st November 2018 he made an application for further leave to remain in the UK. On 24th July 2019 the Secretary of State refused these submissions as a fresh human rights' claim with a right of appeal. The claimant's appeal against that decision was allowed on human rights grounds by First-tier Tribunal Judge Anthony in a determination promulgated on the 22nd November 2019.

4. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge Fisher on 12th December 2019 and Upper Tribunal Judge Sheridan found that the First-tier Tribunal had erred in law in a decision promulgated on 15th September 2020, the reasons are set out at Annex A to this decision, and adjourned the remaking of the appeal.

5. The sole issue to be remade is whether it would be unduly harsh to the claimants' children for him to be deported. Mr Sarwar conceded, in submissions before me, that if the claimant did not succeed on the basis of this exception to deportation, as set out at paragraph 399 of the Immigration Rules and s.117C(5) of the Nationality, Immigration and Asylum Act 2002, it could not be found that there were very compelling circumstances which outweighed the public interest in his deportation. The following key findings are preserved from the First-tier Tribunal decision: that the claimant sees his children on a daily basis and has a close loving relationship with them; that he plays a significant part in their lives and is "a joint primary care giver"; and that they would be devastated by his removal.

6. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly this remaking hearing took place via a remote Skype for Business hearing. Neither party made any submissions objecting to this mode of remaking, and there were no significant issues of connectivity or audibility during the hearing.

Evidence & Submission – Remaking

7. The claimant gave his evidence in English, without the assistance of an interpreter. He confirmed his identity and that his evidence was true and correct. In short summary his key evidence is as follows. He sees his children every day, is dedicated to them, and loves them dearly despite having separated from their mother 2015 due to the strain on the relationship of these deportation proceedings. He takes them to and collects them from school every day, attends parents' evenings and helps them with their homework, they play and have leisure trips together, for instance to the cinema or playing football in the park. The claimant believes that his children will suffer emotionally, physically and educationally if he is not there to support them in the UK. His son, W, is having problems sleeping due to worry about his not being allowed to remain in the UK; his son S is having difficulties with education and has been referred to the SENCO at school which S believes is due to worry about the claimant, his father, leaving the family; and the younger children K and G are very emotional about the issue of his pending deportation. The claimant explained that W is currently awaiting an operation for his nasal problems, there had been a telephone appointment (due to the Covid-19 pandemic) since the last doctor's letter regarding this issue which is included in the bundle, and it had been agreed that a further operation was the only way forward as medical management had not improved the situation.

8. The claimant describes himself as the frontline parent to his four children as their mother is significantly less educated than him and cannot speak, understand or read well in English. He said it was clear from the fact that the school and doctors' letters address him that he deals with these issues. He gave oral evidence that his ex-partner had registered the children with the GP, but said that this had meant she had collected the forms, he had completed them, and she had returned them to the GP. He is the parent who attends all appointments with doctors. He said he and his ex-partner are both primary parents, and ultimately have joint responsibility for the children. He did not believe that his ex-partner would get any assistance with the children from social services, friends or family if he were forced to leave the UK.

9. The claimant said that if he were allowed to remain in the UK he would try to obtain full time work in the health and social care sector as he had a qualification in this field, and his aim would be to support his family. He

accepted that this would mean that he would spend less time than currently with his children.

10. Ms N, the claimant's ex-partner and mother of his four children, confirmed her identity, address and gave evidence to the Upper Tribunal in Lingala through the Upper Tribunal interpreter, confirming her evidence was true and correct. She explained that her written statement was prepared by the claimant's solicitors and was read back to her in Lingala before she signed it.

11. Ms N's evidence, in short summary, is that the claimant plays a very important part in their children's lives. He sees them every day. He gets them ready for school, takes them to school and collects them. He attends parents' evenings and medical appointments, which is particularly important as her English is not good. Even if the claimant gets full time work it is her opinion that he would take time off to attend these meetings and appointments as she could not cope with them. She currently works as a cleaner between 3pm and 6pm, and these hours are not ones which can be changed. For her work she only needs to understand very basic words in English, which is in common with other cleaners she works with. She has shared parental responsibility with the appellant, and he is able to have unsupervised and unrestricted access to the children. She believes that if he were deported the children would suffer horribly as they would be devastated not having a father in their lives. She also feels that they listen more to the claimant that to her.

12. W and S have written their own letters in support of the claimant's appeal against deportation. W confirms that his father goes to parents' evenings and medical appointments. They say that the claimant has always been present in their lives and those of their siblings. He is a kind, caring and loving person and it would be a disaster for them all if he were forced to leave the UK and ceased to have a physical presence in their lives.

13. There are two social work reports submitted in support of this appeal. The first report was written in November 2015 by Ms H Prince and was in support of the application for N and the children to be granted leave to remain in the UK. It is clear from this report that the claimant acted as interpreter for his ex-partner for the social work interview. It is also clear that both parents have joint parental responsibility, and that the claimant attended parent-teacher meetings and provides support, although N was the main day to day carer at that time.

14. The second report is written by Ms A Seymour on 19th October 2020 and is to provide information about the social circumstances of the claimant and his family, and the bonds, links, ties and dependency between the claimant and his four children. This report was made following a video conference due to the Covid-19 pandemic.

15. From this report it is clear that the claimant cares for his children every afternoon whilst their mother, N, is at work and thus collects them from school and cooks for them and does their home work and plays and in non-Covid times takes them to after school activities. They also spend weekends together, staying at his house, playing football in the park, attending church and eating out. It is recorded that the claimant attends parents' evenings, sports days and school workshops. The children agree that they listen more to the claimant than their mother, and that he has more authority in sorting out fights and quarrels. W reported to the social worker that the threat of the claimant's deportation was causing him not to be able to sleep at night as the thought of it makes him sad and emotional, and he feels things will be tough without him, and he felt this was impacting on his studies at school. The claimant said both S and K had become increasingly emotional at school, and S was having some one to one support from the SENCO at school. Ms Seymour is concerned that W, S and K all require the claimant as a male role model in their lives, and that the claimant being absent could lead them to be open to exploitation by criminal gangs; she also expresses concerns about G and her need for a father figure. The claimant expressed his concerns about the children being brought up by N on her own as she is a cleaner on minimum wage and so would not be able to afford after school clubs, and her poor English would mean she could not cope with medical appointments or parents' evenings, and in addition she has very little authority over the children. Ms Seymour concludes that the claimant and his four children have a secure attachment, and to take this away could lead to an inability for the children to trust or maintain healthy relationships as adults. She also believes that he plays a pivotal role in their upbringing and concludes that N would struggle to cope as a single parent and this would negatively impact on the children. For these reasons it is found to be in the best interest of the four children that the claimant remains in the UK to be part of their lives.

16. Ms Isherwood, for the Secretary of State, relies upon the refusal decision, her skeleton argument, and oral submissions. In summary it is argued that it is accepted that there is a genuine and subsisting parental relationship between the appellant and his four children aged 6,10,12 and 13, the oldest two being British citizens. It is accepted that it would be unduly harsh for them to go with the claimant to the DRC as they live with their separated mother. It is not accepted that it would be unduly harsh for them to remain in the UK with their mother whilst the claimant is deported to the DRC. It is found that whilst this will increase the anxiety of his children, they will have support from their mother, the NHS, Social Services and friends. It might be that N could change her hours or her job so that she would be able to be available to the children after school.

17. It is submitted that the unduly harsh test is not met because there is nothing in this appeal which raises issues which would not necessarily be involved for any children faced with deportation of their parent, which does not

suffice applying KO (Nigeria) v SSHD [2018] UKSC 58. As set out in SSHD v PG (Jamaica) [2019] EWCA Civ 1213 the deportation of a parent who plays an important everyday part in his children's lives is insufficient to meet the unduly harsh test. It is submitted that all of the cases emphasis that this is an elevated threshold, and just being a good father and loving your children does not suffice, and neither does the desirability of children being brought up in a two-parent family. It is submitted that the new evidence in the social worker's report and medical letters shows that it is in the best interests of the appellant's children for the claimant to remain in the UK, but this does not show that his removal would be unduly harsh. It is argued that there is not a particularly strong parental relationship, and there are no other factors such as significant health issues which could make the claimant's deportation unduly harsh to the children. It is noted that there is no evidence from the schools about the claimed impact on the children's education of the claimant's deportation or about the claimant being the contact point or regarding the emotional impact of the claimant's threatened deportation; and further it was noted that there is no documentary evidence about W being on a waiting list for an operation.

18. In oral submissions of Mr Sarwar, and as set out in his skeleton argument, it is argued that the test of unduly harsh is met in the scenario that the children remain in the UK and the claimant is deported to the DRC. Mr Sarwar submitted that the guidance from the higher courts, most recently from the Court of Appeal in HA (Iraq) & Ors v SSHD [2020] EWCA Civ 1176 made it clear that whilst unduly harsh is an elevated test it is also lower than that set by very compelling circumstances, and further that there is no reason why it might not be commonly found that deportation is unduly harsh. Mr Sarwar observed that in AA (Nigeria) [2020] EWCA Civ 1296 a finding of unduly harsh on a very similar factual scenario to that in this case had been found by the Court of Appeal not to be challengeable on grounds of perversity.

19. It is argued that the claimant is particularly important because he sees his four children on a daily basis and has a close loving relationship with them, that he plays a significant part in their lives and is "a joint primary care giver" and they would be devastated by his removal. In addition attention is drawn to evidence that the mother of the children is not able to communicate as well as the claimant in English with the school and that he has a degree so he takes the lead role with education matters including homework and parents evenings; that the opinion of W is that his school work would suffer and he would miss shared activities with the claimant; that the claimant has taken a lead in medical matters for W with his doctors due to his speaking fluent English; that all of the children consider the claimant to be more authoritative and listen more to him. Further there is evidence that W, S and K have already suffered emotional harm due to the threat of the claimant's deportation and disruption of the contact arrangements causes upset to them. It is highly doubtful that N would be able to care to the children properly on her own and ensure that the children

maintain their school work and all of their extra-curricular activities as she works as a cleaner and so could not do so in terms of her hours or her income. It is unlikely that she would be able to negotiate different hours to suit her childcare arrangements given the low status of her work.

20. It is argued that the supporting medical notes show that "dad" is the person who brings W to his appointments and is managing his medical condition, and it is clear from the most recent letter that W has an on-going medical issue which is being managed. There is also evidence of S requiring help from the school SENCO in the bundle. The 2020 social worker's report provides direct evidence from the children as reported to her, as well as her professional opinion, on the dependency and vital bond between the claimant and his children.

21. At the end of the hearing I reserved my decision.

Conclusions – Remaking

22. The approach to the question as to whether the impact of deportation on a child is unduly harsh has been clarified by the Court of Appeal in HA (Iraq) & Ors v SSHD in a judgement which was promulgated after the decision finding an error of law by Upper Tribunal Judge Sheridan. The guidance is, in summary, as follows. Following KO (Nigeria) v SSHD it is clear that there is no balancing of the severity of the parent's offence, and that this test must not be equated with the high level required by the test of "very compelling circumstances". The degree of harshness was one which was sufficient to outweigh the public interest in the deportation of a foreign criminal in this medium category. As found in MK (Sierra Leone) [2015] UKUT 223 harsh denotes something severe or bleak. In HA (Iraq) & Ors v SSHD it was found that it was a wrong approach to undue harshness to look for harshness which is out of the ordinary or exceptional. It was found that undue harshness might in fact occur quite commonly. The degree of harshness might be affected by: whether the child lives with the parent; the degree of the child's emotional dependence on the parents; the financial consequences of deportation; the availability of emotional and financial support from the remaining parent and other family members; by the practicality of maintain a relationship with the deported parent; and the individual characteristics of the child. It is of course necessary to consider the best interests of the children, and this must be done from the child's point of view ensuring weight is given to emotional as well as physical harm, and to the very significant and weighty factor of the advantages of British citizenship.

23. I find that the witnesses, the claimant and his ex-partner N, both gave credible evidence. Their evidence was careful, for instance in the precise description of how the children were registered with the GP by the claimant, and they answered all questions put to them directly. Their evidence was also entirely consistent with each other and the documentary evidence

provided. There was no submission from Ms Isherwood that they should not be treated as credible witnesses. I also find that the social work reports should be given weight in my assessment. Ms Seymour and Ms Prince are appropriate expert with appropriate academic training and experience; their report shows they has had sight of all relevant documents; the reports explain the process by which they were written; and contains an explanation of their understanding of their duties to the Tribunal and statements of truth. Again, this was not dispute by Ms Isherwood.

24. As recorded in the introduction to this decision the following key findings are preserved from the First-tier Tribunal decision: that the claimant sees his children on a daily basis and has a close loving relationship with them; that he plays a significant part in their lives and is "a joint primary care giver"; and that they would be devastated by his removal. These findings are clearly correct from the evidence before me. In these circumstances I find that it will be in the best interests of the children for the claimant to remain in the UK, but this does not, of course, suffice to mean that he is entitled to do so without more on the test he must meet of it being unduly harsh to his children if he is deported.

25. I find that whilst the claimant lives separately from his four children in his own home he plays as full a role in their lives as any live-in parent. He has unrestricted access to them in their mother's home and is involved with their daily collection from school, providing meals, delivering to after school activities, helping with homework, going on leisure trips and playing football in the park, taking them to church and going with them to medical appointments. The children's birthdays and events such as sports day are celebrated as a family with both parents' present. The claimant also takes the children to his own home at weekends, where, they informed the social worker: "he has more interesting toys than here…we watch a movie and eat pizza…its more fun at dad's house".

26. I also find that whilst N, the mother of the claimant's children, undoubtedly plays a vital and equal role in their lives, providing their day to day home, that the claimant has skills that she does not possess. He is well educated and speaks, readings and understands fluently in English which she cannot. I find that he has attended parents' evenings and doctors' appointments for his children alone for this reason. As Mr Sarwar has argued the medical letters are littered with references to "dad" and "father", and this is the evidence of both witnesses which I have found credible. N also does low status (although very vital) cleaning work which is unlikely to have the flexibility that the higher status work a man with good English and qualifications is likely to be able to obtain in future, so I find that whilst schools and doctors might be able to provide interpreters that it would be very difficult for N to maintain her work and attend these functions in any case. I find that without the claimant that attention to medical matters (and I do find, based on the letter of 13th March 2020 and the claimant's evidence,

that W has an on-going issue of nasal obstruction with chronic rhinitis so this is not a theoretical problem but a current issue), and schooling would be very likely to suffer. In addition, matters like the advantage of assistance with homework for these children would also go without the physical presence of the claimant as N simply does not have the skills for this.

27. I also find that the children would suffer significantly emotionally without their father, as is preserved from the First-tier Tribunal, and that this would affect their schooling as this is the direct evidence of the children in their letters and to the social worker, that W and S reported sleep issues / found it difficult to focus on their school work with the threat of the claimant's deportation being even now a significant problem their lives. I find that the children have also indicated that the claimant is the parent with authority in the family, and has an ability to sort out fights and quarrels as well as provide love and comfort, and the loss of this will also be a significant detriment to the children if he is deported.

28. I conclude that the claimant has shown the highest degree of physical involvement in all spheres of his children's lives and that this has been the case for the whole of their lives. I find that he has very close emotional relationships with all of his children as a result of his dedication to their upbringing, and thus as the social worker Ms Seymour has concluded he has indeed a "pivotal role" in the family. I find that the deportation of the claimant is likely to significantly impact on the financial situation for the family as he is likely to be able to obtain reasonably well paid work if permitted to remain and without him N will have significantly reduced options to work due to lack of childcare outside school times and could not continue with her current work as childcare costs would be likely to be more than she earns from her cleaning job. I accept her evidence that she does not have friends or family to turn to assist her in this respect. I find that the quality of the parenting that the children receive will also be significantly diminished because there are four of them and this is in any case a large number for a single parent to deal with, and because N lacks the authority, educational and language skills which the claimant has and which undoubtedly advantage them generally, and with their schooling and in accessing help for medical matters, which in W's case are currently needed.

29. In all of these circumstances I conclude that the claimant's deportation can properly be described as bleak or severe for his four children, and that it is unduly harsh to his children for him to be deported from the UK as this goes significantly beyond what would necessarily be entailed by the deportation of any parent. Therefore, whilst noting as a neutral matter that the claimant speaks English and as a negative one that he is not currently financially self-sufficient, but has good prospects of being so if granted leave to remain in the UK given his qualifications and English skills, I find that the public interest in his deportation as a foreign criminal does not justify his deportation as he falls within the second exception to deportation, as set out

at s.117C(5) of the Nationality, Immigration and Asylum Act 2002, as the sentence he received was less than 4 years imprisonment and it would be unduly harsh to his children for him to be deported.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. The decision of the First-tier Tribunal allowing the appeal was set aside

3. I remake the appeal by allowing it on human rights grounds.

Signed *Fiona Lindsley* 5th November 2020
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.

2. The appellant is a citizen of the Democratic Republic of Congo ("DRC"). He has four children, born between 2006 and 2013, all of whom live with their mother in the UK who is his former wife. The eldest two children are British citizens.

3. A deportation order has been made against the appellant. This is because in 2008 he was convicted and sentenced to 15 months imprisonment for having a false instrument with intent and possession of an identity document with intent. He has not committed any subsequent crimes and has been assessed as being at low risk of reoffending.

4. On 24 July 2019 the appellant's human rights claim was rejected by the respondent. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Anthony ("the judge"). In a decision promulgated on 22 November 2019 his appeal was allowed. The respondent is now appealing against that decision.

5. On 16 April 2020 directions of Upper Tribunal Judge Allen were issued, expressing the provisional view that the error of law issue in this appeal could be determined without a hearing. The parties were given an opportunity to express a view on this. Neither expressed any concern with, or objection to, the error of law issue being determined without a hearing. I agree with Judge Allen's provisional view and therefore, having considered the opinion of the parties in accordance with rule 34(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, will now proceed without a hearing.

6. I have considered written submissions from both parties, which have been submitted in accordance with Judge Allen's directions. The respondent's submissions are dated 13 April 2020 and the appellant's submissions are dated 7 May 2020.

Decision of the First-tier Tribunal

7. The judge found that the appellant sees his children (who live with their mother) every day and that he has a close and loving relationship with them. The judge described the appellant as being a very significant part of his children's lives and their "joint primary caregiver". The judge found that the

children have never been without their father and that they would be devastated by his removal from their lives.

8. At paragraph 42 the judge stated that because the children would no longer see their father if he is deported it is highly likely that the anxiety they would suffer would not be within the parameters of what anyone would consider normal.

9. Based on these findings, the judge concluded that it would be in the best interests of the children for the appellant to remain with them in the UK.

10. The judge then considered whether the effect of the appellant's deportation would be unduly harsh on his children. The judge noted that the respondent conceded that it would be unduly harsh for the children to relocate with the appellant to the DRC and that the issue in contention was whether it would be unduly harsh for them to remain in the UK without him. For the reasons summarised above in paragraphs 7-8, the judge found that this would be unduly harsh.

11. The judge then considered whether, if he was wrong about undue harshness, there were very compelling circumstances outweighing the public interest in deportation. The judge's assessment of this is set out in paragraphs 51 – 56 of the decision, where the factors mentioned by the judge include that the offence was not violent and was at the lower end of the spectrum in terms of seriousness, the appellant is at low risk of reoffending, and the appellant is someone who in due course would be financially independent. The judge also noted that the effect of deportation would be unduly harsh on the children.

Grounds of Appeal and Respondent's Submissions

12. The respondent's case, in short, is that it was perverse for the judge to conclude that deportation would be unduly harsh for the appellant's children as on any legitimate view the high threshold for undue harshness under section 117C(5) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") was not satisfied.

The Appellant's Argument

13. The appellant argues that there is a high threshold to establish perversity that in this case has not been met. It is argued that a flexible fact sensitive approach is required to assess whether in a particular case the degree of harshness goes beyond what would necessarily be involved for any child faced with the deportation of a parent. The appellant notes that the judge found that the particular facts in this case went beyond the "common place" given the substantial role played by the appellant in his children's lives, that his absence would induce a traumatic reaction, and that the children need a stable home environment.

Analysis

14. The central question before the First-tier Tribunal was whether the effect of the appellant's deportation would be "unduly harsh" on his children under section 117C(5) of the 2002 Act.

15. The term "unduly harsh" in this context has been considered in a number of recent decisions. Lord Carnworth in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 explained that:

> *"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".*

16. In *Secretary of State for the Home Department v PG (Jamaica*) [2019] EWCA Civ 1213 the Court of Appeal found that the First-tier Tribunal was wrong to find that the undue harshness threshold was met in circumstances where, as in this case, the appellant was very involved in the day-to-day lives of his children and played an important part in their lives. Hickinbottom LJ stated at [45]:

> *'When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR . It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion: that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness.'*

17. In *Imran (Section 117C(5); children, unduly harsh)* [2020] UKUT 00083 (IAC) at [27] the Upper Tribunal stated that:

> *PG is authority for the proposition that the 'unduly harsh' test will not be satisfied in a case where a child has two parents by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and (therefore) of the emotional harm that would be likely to flow from separation.*

18. In this appeal, the judge did not make any findings which indicate that the appellant's children are anything other than healthy well-adjusted children who benefit from having two loving parents who share responsibility for their care. The judge did not identify any disability, medical issue or vulnerability in respect of any of the appellant's children.

19. The judge found that the appellant's children would suffer great trauma and distress as a result of the appellant's deportation. That may indeed be the case. But there was no evidence before the judge to support a conclusion that the trauma and distress that they would suffer would be greater than what would necessarily be involved for any child faced with the deportation of a loving and close parent. The judge found (at paragraph 42) that the anxiety the children would face "would not be within the parameters of what anyone would consider normal". However, this was not based on any identified vulnerability or issue with any of the four children but rather was a general comment, applicable to any child, on the effect of permanent separation from a loving and involved parent. It is not something that "goes beyond" what is a necessary consequence of deportation. Based on the findings of fact in this case (as well as the evidence upon which those findings were based) it was not open to the judge to find that the harsh effect on the children went beyond what is necessarily involved for any child faced with deportation in the sense explained in *PG* and *Imran*. It was not therefore consistent with *KO*, *PG* and *Imran* for the judge to conclude that the threshold of undue harshness in section 117C(5) of the 2002 Act was met.

20. The judge also erred in his assessment whether there were "very compelling circumstances" over and above undue harshness under section 117C(6) of the 2002 Act. This is because, although the judge framed his assessment of this question in the alternative (i.e. if he was wrong about undue harshness), it is apparent from paragraph 55 of the decision that one of the reasons the judge found there were very compelling circumstances was that he considered the effect of deportation to be unduly harsh on the appellant's children.

Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

22. The decision will be remade in the Upper Tribunal at a resumed hearing before any judge of the Upper Tribunal.

23. The findings of fact regarding the appellant's relationship with his children, as summarised in paragraph 7 above, are preserved.

Directions

24. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[1], I

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

have reached the provisional view that the hearing for the remaking of the decision can and should be held remotely, by Skype for Business.

25. No later than 7 days after these directions are sent by the Upper Tribunal the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and the Tribunal will then give further directions, which will either be:

    a. to list the date and time of the remote hearing, confirming the join-in details etc; or

    b. to give directions with respect to a face-to-face hearing.

26. The parties are permitted to rely upon evidence that was not before the First-tier Tribunal. Any such evidence must be served on the other party and filed with the Upper Tribunal by email at least fourteen days before the resumed hearing.

27. The parties shall notify the Upper Tribunal by email at least fourteen days before the resumed hearing of the names of the witness or witnesses (if any) that they intend to call to give oral evidence at the resumed hearing.

28. Skeleton arguments shall be filed and served by email at least seven days before the resumed hearing.

29. Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Direction Regarding Anonymity

30. 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.

Signed
D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 17 August 2020