Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: HU/14689/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2022	**On the 30 March 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

NIZAM SALIM BAGUS
(Limited Anonymity Order Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Lam, of counsel, instructed by MRKS Solicitors
For the Respondent: Ms Ahmed, Senior Presenting Officer

DECISION AND REASONS

1. On 2 February 2021, I issued my first decision in this appeal. I held that the First-tier Tribunal (Judge Keane) had erred in law in allowing the appellant's appeal against the respondent's refusal of his human rights claim. I ordered that the appeal would be retained in the Upper Tribunal for remaking, although I preserved the judge's primary findings of fact as to the appellant's relationship with his partner and daughter and the best interests of the latter.

2. It is not clear to me why there was a delay of a year between the issuance of my first decision and the resumed hearing. I can only assume that the need for a face-to-face hearing and the vicissitudes of the pandemic were responsible.

Background

3. In my first decision, I said this about the background to the appeal:

> [3] The appellant is a citizen of Malawi who was born on 29 June 1991. He arrived in the United Kingdom in 2004. He held entry clearance as a student which was valid until 31 August 2007. He was granted further leave to remain in the same capacity until 31 October 2009. A subsequent application for leave to remain was refused because of the appellant's convictions but an appeal was allowed and the appellant was granted leave to remain until 2 May 2011. The appellant did not attempt to regularise his status thereafter.
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> [4] The appellant has a number of criminal convictions. His first was on 19 May 2009, his last on 25 February 2020. The helpful summary at the start of the PNC record shows five offences against the person; two theft and kindred offences; two offences relating to police, courts and prisons; three drug offences and three miscellaneous offences. The respondent summarised the sentences received by the appellant in the following way, at [20] of her decision:
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> *You have received a combination of orders to pay costs, compensation and victim surcharges, fines, Community Orders, Referral Orders, Unpaid Work Requirements and Supervision Requirements. You have also been sentenced to 2 months imprisonment which was wholly suspended for 15 months.*
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> [5] It was as a result of these convictions that the respondent concluded that the appellant was a persistent offender and that his deportation was deemed to be conducive to the public good. On 20 March 2019, he was served with a decision to make a deportation order on that basis. Submissions against that course were made by the appellant on 5 April 2019 and 31 May 2019.
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> [6] On 12 August 2019, the respondent wrote to the appellant to state that his human rights claim had been refused. It was not accepted that the appellant had a genuine and subsisting parental relationship with his daughter, B, who was born on 6 November 2014. In any event, it was not considered to be unduly harsh on B or her mother, C, to deport the appellant. They could live with him in Malawi or remain in the UK without him. It was not accepted that the appellant had spent most of his life lawfully in the UK. Nor was it accepted that the appellant was socially and culturally integrated into the UK or that he would encounter very significant obstacles to his re-integration into Malawi. The respondent finally considered whether there were very compelling circumstances which outweighed the

> public interest in the appellant's deportation. She concluded that there were not.

4. The judge in the First-tier Tribunal accepted that the appellant had a genuine and subsisting relationship with C and B and that it would be in B's best interests for the appellant to remain in this country with her. As I have noted above, there was no error of law in those findings, which are accordingly preserved for the purpose of this hearing.

5. I should note two further matters by way of introduction. The first is that the appellant now has a further conviction, beyond those which are detailed above. On 26 April 2021, he was convicted of possessing cannabis and was sentenced by East London Magistrates' Court to a fine of £200, costs of £400, a victim surcharge of £34 and forfeiture and destruction of the drugs.

6. The second additional matter results from an observation I made at [27] of my first decision. I noted that the FtT had not considered whether the appellant was a persistent offender (or an individual whose crime had caused serious harm) and I suggested that this statutory question, as posed by s117D(2)(c) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") was for future consideration. I also noted that "the appellant is not liable to deportation if neither label is held to apply".

7. At the start of the hearing before me, Ms Ahmed helpfully indicated that it was her intention to submit that the appellant was a persistent offender and not that his offending had caused serious harm. She did not accept that the additional observation I had made (without the benefit of argument) was an accurate or complete statement of the law. She directed me to the Upper Tribunal's decision in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 350 (IAC) and submitted that the correct approach was to be found in the final two paragraphs of the headnote to that decision:

> (1) In a human rights appeal, the decision under appeal is the refusal by the Secretary of State of a human rights claim; that is to say, the refusal of a claim, defined by section 113(1) of the Nationality, Immigration and Asylum Act 2002, that removal from the United Kingdom or a requirement to leave it would be unlawful under section 6 of the 1998 Act. The First-tier Tribunal is, therefore, not deciding an appeal against the decision to make a deportation order and/or the decision that removal of the individual is, in the Secretary of State's view, conducive to the public good. It is concerned only with whether removal etc in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights.
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> (2) The Secretary of State's decisions under the Immigration Act 1971 that P's deportation would be conducive to the

> public good and that a deportation order should be made in respect of P would have to be unlawful on public law grounds before that anterior aspect of the decision-making process could inform the conclusion to be reached by the First-tier Tribunal in a human rights appeal.

8. Mr Lam did not disagree with this analysis. It was therefore agreed that the issues which fell for consideration were: whether the appellant is a persistent offender; if so, whether his deportation is proportionate having regard to the public interest considerations in s117B and s117C of the 2002 Act; or, if not, whether the appellant's removal is proportionate, having regard to the considerations in s117B of the 2002 Act.

9. Mr Lam required further time to consider the PNC record upon which Ms Ahmed proposed to rely. He had additional time, after which he confirmed that the record of the convictions was agreed.

10. Mr Lam stated that he did not propose to call his client to give evidence, given the preserved findings of fact. I indicated that I was somewhat surprised by that indication, given that the impact of the appellant's deportation on his partner and child remained very much in issue. I noted that there was a preserved finding as to the relationships and the best interests of the child but that the statutory test in s117C(5) was still to be applied. Mr Lam reflected on that observation and decided to call his client to give evidence.

11. The appellant gave the only live evidence before me. He was asked questions by Mr Lam and was cross-examined at some length by Ms Ahmed. I do not propose to rehearse his oral evidence. There is a full note of it in the Record of Proceedings and it was also digitally recorded. I will refer to what he said insofar as it is necessary to do so to explain my findings of fact.

Submissions

12. Ms Ahmed submitted that the appellant was a persistent offender, as defined in Binbuga v SSHD [2019] EWCA Civ 551; [2019] Imm AR 1026, SC (Zimbabwe) v SSHD [2018] EWCA Civ 929; [2018] 1 WLR 4474 and Chege ("is a persistent offender") [2016] UKUT 187 (IAC); [2016] Imm AR 833. He was plainly a person who kept breaking the law. He had received 11 convictions for 17 offences, including robbery and drug related offences during his appeal. He had no regard for the law, as was evidenced by his continuous offending in the face of deportation proceedings and his failure to comply with criminal court orders.

13. Ms Ahmed understood Mr Lam not to pursue any argument in relation to the first statutory exception to deportation. Mr Lam confirmed this to be the case as he was unable to submit that the appellant had been lawfully present in the UK for most of his life. He intended to submit, however, that the appellant was socially and culturally integrated to the UK and that there would be very significant obstacles to his reintegration to Malawi.

14. In response to that indication, Ms Ahmed submitted that the appellant's offending suggested that he was not culturally and socially integrated and that there were no very significant obstacles to his re-integration to Malawi. He had been schooled there until he was 13 years old and he had been supported by his father for many years. Ms Ahmed submitted that I should reject the evidence that the appellant had given about his father being in exile; this had never previously been said and it was a last-minute embellishment.

15. The appellant had been an inconsistent and evasive witness, Ms Ahmed submitted, when it came to his family in Malawi and the true extent of his family connections had not been revealed. There were bare assertions that his relationship with his family had broken down. He had studied and worked in the UK and he would be at an advantage on return. He was enough of an insider to Malawian society.

16. As for whether the appellant's deportation would be unduly harsh on the appellant's partner and child, the respondent maintained that neither the 'go scenario' nor the 'stay scenario' would be unduly harsh. The appellant's daughter was seven and there was no reason that she could not adapt to life in Malawi. She could live with both parents there, although she does not do so in the UK. She had no health concerns. The appellant would be able to work there and he had a support network. The appellant's daughter could maintain contact with her family in this country.

17. Turning to the stay scenario, Ms Ahmed submitted that there would inevitably be some degree of distress felt by the appellant's partner and their daughter in that event. Her age was relevant and her expectations could be managed. They lived an hour or so apart at present and it would be open to the appellant to maintain contact via telephone and social media as he did at present. There were other family members who could assist, as they did at present. The appellant's child was supported financially by his sister.

18. The appellant had stated that his daughter had needed extra tuition as a result of his imprisonment but there was no evidence in support of that statement and it had not been mentioned by the child's mother. Deportation would not be unduly harsh on the appellant's child, or on his partner. It was to be recalled that the appellant had entered into a relationship with his partner when he was present unlawfully. The conclusions in the respondent's decision were correct. There was no evidence to show that the appellant's partner was her father's carer.

19. Ms Ahmed submitted that there were no very compelling circumstances over and above those in the exceptions to deportation which outweighed the public interest in that course. The appellant had been resident in the UK unlawfully since 2011. He was not socially and culturally integrated to the UK. There remained a risk of reoffending according to the evidence and it was notable that further offences had been committed after that opinion had been expressed.

20. In the event that I concluded that the appellant was not a foreign criminal, Ms Ahmed submitted that his removal would not give rise to

unjustifiably harsh consequences. Although the finding that the appellant's presence was in his daughter's best interests had been preserved, that was a primary consideration; not the paramount consideration. It was outweighed in this case by the appellant's offending and the public interest in its prevention. The decision in Arturas (child's best interests: NI appeals) Lithuania [2021] UKUT 237 (IAC) contained a useful distillation of the relevant considerations. Section 117B of the 2002 Act militated strongly against the appellant.

21. For the appellant, Mr Lam relied on his skeleton argument and noted that it was no longer contended by the respondent that the appellant's offending had caused serious harm. He submitted that the appellant was not a persistent offender. There had been significant gaps between the convictions, many of which had been drug offences of possession. The offence of robbery was not as serious as it sounded when the FtT decision from 2010 was considered. The latest offences had all taken place on one occasion. The pattern was not of escalation. A number of the offences, including the most recent ones, had been minor. He had explained that he self-medicated with cannabis and it was clear that he was adversely affected by his current predicament. Taking into account the guidance in R (Mahmood & Ors) v SSHD [2020] EWCA Civ 717; [2020] QB 1113, the appellant was not a persistent offender.

22. It was not submitted that exception one was met. The appellant had been in the UK for most of his life but his presence had not been lawful throughout. He was socially and culturally integrated, however, and he would face very significant obstacles on return to Malawi. After the amount of time he had spent outside the country, there was no reason to doubt that he had no contact with those who remained.

23. The real issue, Mr Lam submitted, was whether it would be unduly harsh on the appellant's partner and child for him to be deported. It was accepted that there were genuine and subsisting relationships at stake. The FtT had articulated powerful reasons that the family life could not continue in Malawi and those points were adopted. It was a third world country and it would be very difficult for them. The appellant's daughter's education would be interrupted, as would the appellant's partner's job. The only potential course would be for the appellant to leave and for his family to remain. It was accepted that there was an 'elevated' threshold but it was not appropriate to compare the appellant's child to a notional comparator child; there was no 'baseline' of acceptable harshness.

24. The appellant had stated that his daughter had encountered problems when he was in prison and there was no reason to doubt that evidence. There was no report from an Independent Social Worker but the appellant was not legally aided and it had not been feasible. Mr Lam queried whether it would have been feasible in any event, given that the appellant and his partner were trying to hide the threat of deportation from their daughter. It was very important for the appellant to remain with his daughter, who was vulnerable and sensitive.

25. In the event that I did not accept that exception two applied, Mr Lam submitted that s117C(6) did. Taking into account all of the factors mentioned in Unuane v The United Kingdom (80343/17); [2021] Imm AR 534, the balance sheet analysis required clearly produced an answer in favour of the appellant and his family.

26. I reserved my decision at the end of the submissions.

Analysis

27. The appellant has never been sentenced to a period of imprisonment of at least twelve months. It is not contended by the respondent that he has been convicted of an offence that has caused serious harm. The only part of the statutory definition of a 'foreign criminal' which might apply to him, therefore, is to be found in s117D(2)(c)(iii): a person who is not a British citizen, who has been convicted in the UK of an offence and who *is a persistent offender*. It was rightly agreed between Mr Lam and Ms Ahmed, therefore, that the first question for me to confront was whether the appellant is a persistent offender.

Is the Appellant a Persistent Offender?

28. In R (Mahmood, Estnerie and Kadir) v UTIAC & SSHD, the principal question considered by the Court of Appeal was the correct construction of the test in s117D(c)(ii) ("an offence that has caused serious harm"). By a respondent's notice in the second appeal, however, the SSHD sought to submit that the appellant was a persistent offender. That submission caused Simon LJ (who gave the judgment of the court) to summarise and apply the learning on s117D(c)(iii) in the following way:

> [71] The test in *Chege v. SSHD* [2016] UKUT 187 (IAC), approved in *SC (Zimbabwe)* and *Binbuga v. SSHD* [2019] EWCA Civ 551, pithily summarised a persistent offender as someone who 'keeps on breaking the law'. There can be no doubt that this is an apt description of Estnerie: his offending encompassed six separate criminal offences committed over a period of 14 years (from 2002 to 2016). While we recognise that there may be some cases where a person who was a persistent offender can show, through remorse or rehabilitation, that they are no longer properly categorised as such, the cases are likely to be exceptional. As Hamblen LJ noted in *Binbuga* at [46], this would usually involve 'keeping out of trouble for a significant period of time'. This cannot apply to Estnerie because his last offence was committed only a year before his conviction; because the FtT heard his appeal less than a year after he was convicted and sentenced; and because even at that appeal hearing he was found to have lied in his evidence to try and improve his position (see paragraphs [53]-[58] of the FtT judgment), which lies were consistent with the dishonest behaviour of which he was convicted ([59]). The evidence is therefore irrefutable that Estnerie has kept on breaking the law and is manifestly neither remorseful nor rehabilitated. He is

> therefore a persistent offender within the meaning of s.117D(2)(c)(iii).

29. In order to answer whether the appellant is a persistent offender, it is necessary to consider his whole history from the commission of the first offence to the present: Chege refers, at [57]. Andrews J, as she then was, went on to explain at [57] of Chege that:

> Factors to be taken into account will include the overall pattern of offending, the frequency of the offences, their nature, their number, the period or periods over which they are committed, and (where relevant) any reasons underlying the offending, such as an alcohol or drug dependency or association with other criminals.

30. It is therefore necessary to consider the appellant's offending in a little more detail. He received his first conviction, for robbery, in May 2009. As Mr Lam noted, the offence was not the most serious robbery. It was described at [7] of the appeal determination from September 2010 as an incident in which the appellant took a mobile telephone from a friend in lieu of the repayment of £20. He pleaded guilty at Havering Magistrates' Court and was sentenced to a Referral Order for 12 months, plus compensation and costs.

31. The robbery was committed on 18 March 2009. Nine months later, on 2 December 2009, the appellant committed an offence of theft. He pleaded guilty and was sentenced by Havering Juvenile Court to an Attendance Centre Requirement for 12 months.

32. There followed a period of more than three years in which the appellant committed no further offences. On 26 February 2013, he committed burglary and theft from a dwelling. He pleaded guilty at St Albans Crown Court and, on 18 July 2014, he was sentenced to a Community Order of 18 months, a Supervision Requirement, an Unpaid Work Requirement of 120 hours and a victim surcharge.

33. The appellant failed to adhere to that order on 18 July 2014 and he subsequently pleaded guilty to an offence of failing to comply with the requirements of a community order. No additional sentence was imposed.

34. There was another substantial gap before the appellant committed further offences. On 18 December 2016, he committed offences of being drunk and disorderly and criminal damage. He pleaded guilty to those offences and was sentenced by North Essex Magistrates to a Compensation Order of £247 and costs of £85.

35. On 25 November 2016, the appellant was arrested in possession of cocaine. He pleaded guilty to the offence on 3 March 2017 and was sentenced by the North East London Magistrates' Court to a non-custodial disposal which included a Drug Rehabilitation Requirement. On 17 May 2017, the appellant was convicted, following a trial, of obstructing a search for drugs. He was sentenced to a fine of £120, costs and a victim surcharge.

36. The appellant made a third appearance at East London Magistrates' Court on 4 July 2018, when he pleaded guilty to possession of cannabis and received another sentence of a £120 fine, plus costs and a victim surcharge. Later that month, the appellant appeared in the Crown Court again. He pleaded guilty at Inner London Crown Court to four offences of criminal damage which he had committed on 29 August 2017. He was sentenced to 2 months imprisonment, suspended for fifteen months, plus a Drug Treatment and Testing Order, an Alcohol Treatment Requirements Order and Rehabilitation Activity.

37. On 10 October 2019, whilst this appeal was underway, the appellant committed three further offences. He drove a vehicle without a driving licence and which was uninsured and he committed those offences during the operational period of a suspended sentence. For these offences, he was sentenced on 25 February 2020 to a fine of £180, six penalty points, costs and a victim surcharge.

38. On 26 April 2021, the appellant was convicted after a trial for possession of cannabis. He received a sentence of a fine of £200, costs of £400 and a victim surcharge.

39. I have taken account of the submissions made orally and in writing by Mr Lam. At [30]-[37] of his helpful skeleton argument, he draws attention to the gaps between the various offences and to the fact, as he then understood it to be, that the appellant had committed no further offences since 1 February 2018. I accept the former submission and have attempted in my summary above to reflect the gaps between the various offences. There can be no doubt that there have been some extended periods during which the appellant has committed no offences. It is not correct, however, in light of the more recent PNC report on which Ms Ahmed relied, to state that the appellant has no committed offences for the last four years. As I have noted above, he committed a motoring offence shortly after this appeal began and he received a more recent conviction for possession of cannabis.

40. I have detailed the nature and number of the offences and the period over which they were committed. There is no real pattern to those offences; some are acquisitive, some relate to drugs, others to disorderly conduct including criminal damage. The appellant stated that he was previously addicted to drugs and alcohol and the imposition of treatment programmes by the criminal courts suggests that this was indeed the case. The appellant stated that he is no longer using hard drugs and that he uses cannabis to 'self-medicate' when he craves drugs of class A.

41. In my judgment, the picture which emerges could hardly be clearer. On any proper view, the appellant is a man who keeps on breaking the law. There might have been lengthy gaps on occasion but the offending behaviour always seems to return. I consider it to be particularly significant that the appellant chose to drive a vehicle without a licence or insurance whilst he was under threat of deportation and during the operational part of a suspended sentence. That incident (of which the appellant made light in his evidence before me) cements my

impression of a man who has little respect for the laws of the United Kingdom, who has broken the law for many years and has continued to do so until very recently. Whilst none of the offences have been serious, he is and will continue to be a persistent offender.

42. That conclusion means that the appellant is a foreign criminal as defined in statute and it is accordingly necessary to consider the exceptions to deportation in s117C(4)-(5) of the 2002 Act.

Exception One – s117C(4)

43. Mr Lam accepted that the appellant could not meet this exception because he had not been lawfully resident in the United Kingdom for most (meaning 'more than half') of his life. It is nevertheless necessary, as a result of the structured enquiry prescribed by NE-A (Nigeria) v SSHD [2017] EWCA Civ 239; [2017] Imm AR 1077, to consider the extent to which the appellant is able or unable to meet the remaining parts of the exception, since those considerations might ultimately be relevant to the holistic exercise required by s117C(6) of the 2002 Act.

44. Section 117C(4)b) requires the appellant to show that he is socially and culturally integrated in the United Kingdom. Mr Lam submitted that the appellant plainly socially and culturally integrated to the UK, having lived in this country since he was thirteen years old. For the respondent, Ms Ahmed submitted that the appellant's criminality showed that he had not integrated into UK society.

45. Each of these competing submissions has a proper basis in the authorities, although I propose only to cite one: CI (Nigeria) v SSHD [2019] EWCA Civ 2027. Leggatt LJ, as he then was, gave the only substantive judgment in that case. The Senior President of Tribunals and Hickinbottom LJ agreed. The appellant in CI (Nigeria) had arrived in the UK as a one year old child and had spent the remainder of his life here. The judge in the Upper Tribunal had concluded, *inter alia*, that the appellant had previously been integrated to the United Kingdom but that his integration had been broken by his offending and imprisonment in later years. At [56]-[82], Leggatt LJ considered that conclusion in some detail and found that the Upper Tribunal Judge had erred. Whilst he felt sure that integrative links to a host state could be broken by offending and imprisonment, he concluded that the Upper Tribunal had given no reasons for concluding that this was the effect of the appellant's imprisonment in that case: [75]. At [80], Leggatt LJ underlined that the use of the word 'broken' in such cases might obscure the real question posed by the subsection, which was concerned "solely with the person's social and cultural affiliations and identity."

46. Having considered what was said by the Court of Appeal in CI (Nigeria), I conclude that the appellant is socially and culturally integrated to the UK notwithstanding his persistent offending. He has been in the UK since the start of his teenage years. He received his secondary education here. He speaks English as his first language, and does so with the familiarity of a native English speaker. He has certainly put

down roots in this country, in that he has a long-term relationship with a British woman and they have a British daughter who is now 7 years old. His mother, brother and sister all live in this country. The appellant gave evidence that he had taken a qualification to become a personal trainer, that he had worked as a mechanic and that he had volunteered at Cancer Research. None of that evidence, which was given spontaneously and plausibly, was challenged by Ms Ahmed.

47. Whilst the appellant's offending has undoubtedly been 'anti-social', it was explained by the Court of Appeal in CI (Nigeria) that applying that label to a potential deportee's criminal conduct does not resolve the question of whether they are socially and culturally integrated. It still falls to the Tribunal to consider whether the offending has led or contributed to a state of affairs in which the offender is not socially and culturally integrated. In my judgment, the appellant's persistent, low-level offending does not extinguish the integration which is otherwise apparent from the facts I have set out in the preceding paragraph. He has never served a term of imprisonment and the offending in itself does not detract from the fact that the appellant has established and maintained a private life in the UK. It was explained in CI (Nigeria), at [57], that it is important to keep in mind that the rationale behind the 'social and cultural integration' test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under article 8. In my judgment, there is only one proper answer to that question in a case such as the present.

48. As with the other elements of this exception, there has been a good deal of learning on the words in subsection (c): "there would be very significant obstacles to C's integration into the country to which C is proposed to be deported". The Court of Appeal gave guidance on the concept of integration in SSHD v Kamara [2016] EWCA Civ 813; [2016] 4 WLR 152 and subsequently gave additional guidance on the 'very significant obstacles' threshold in Parveen v SSHD [2018] EWCA Civ 932. I do not propose to set out exactly what was said by Sales LJ in the former decision or by Underhill LJ in the latter but I have certainly taken those *dicta* into account in reaching the conclusions which follow.

49. Ms Ahmed justifiably asked the appellant a good number of questions about his remaining ties to Malawi. She based those questions partly on what had been said by the appellant to Immigration Judge Ievins in the appeal against the refusal of further leave to remain as a student. The appellant had given evidence to Judge Ievins that he had always been supported by his father since he came to the UK, and he produced a bank statement in his father's name, showing that the latter had more than £63,000 in Malawian currency in his bank account: [5] and [17] of that determination refer. The appellant also told Judge Ievins that his father had been in government in Malawi and that he ran an import and export company. The evidence given by the appellant at that stage caused Ms Ahmed to ask him what ties he had remaining in Malawi at the present time. The appellant stated that he had no contact with his father, who was living in exile and whose house in Malawi had been burned down.

50. Ms Ahmed pointed out that the appellant had mentioned nothing of this in his witness statement. He became quite confrontational, asking Ms Ahmed why she expected him to have included such matters in his statement. Shortly after that, he began to refuse to answer perfectly proper questions about his family, saying that he should not have to do so because he had already given an account in writing.

51. I consider that the appellant was deceitful and evasive in his response to these questions. He has been represented by the same firm of solicitors since the respondent first indicated her intention to deport him from the United Kingdom. It is apparent from the material filed for this appeal, as it was from the correspondence exchanged the parties at an earlier stage, that the extent of any difficulty the appellant would face on return to Malawi was a matter in issue in a case such as this. It was expressly submitted in the letter sent to the Secretary of State on 5 April 2019 that there would be very significant obstacles to the appellant's re-integration to Malawi. There was reference at that stage to the appellant's claim that he had no ties to his country of nationality but there was nothing to suggest that his once-wealthy and powerful father had left the country, let alone that he had been forced into exile by people who had burned down the family home. That claim was not made in the appellant's witness statement, nor has anything ever been said about it by the appellant's sister, who has previously provided a statement in support of the appeal.

52. In my judgment, the appellant created this account when he was reminded that he had relied on his father's wealth and willingness to support him in his evidence before Judge Ievins. Were that not the case, I have no doubt that this evidence would have been given in the appellant's witness statement and that some effort would also have been made by his solicitors to support this important aspect of his account with evidence that a minister (or former minister) had been driven out of his constituency and forced into exile. The appellant has previously given his father's name as Salim Bagus and it would have been a simple matter to undertake internet research to show that he has been forced into exile. The reason that this simple step was not taken by the appellant's solicitors is because the claim that his father is in exile was an invention at the hearing.

53. I accept Ms Ahmed's submission that the appellant is unlikely to have lost all familial and cultural ties to Malawi. I do not accept that his father has been forced to leave the country for the reasons above. I consider it more likely than not that the appellant remains in contact with his father, who supported his British education for some years and was clearly a man of some considerable means when Judge Ievins heard the first appeal in 2010. It is also more likely than not, in my judgment, that the appellant has other relatives in Malawi with whom he is either in contact or could rekindle a relationship in a reasonable space of time. I also accept Ms Ahmed's submission, supported as it was by the appellant's reference in his oral evidence to Malawi's colonial past, that English is spoken widely there. On return to Malawi, I consider that the appellant will have the support of his wealthy father and that he will have no significant linguistic impediment to integration. Whilst I do not lose sight of the fact that the appellant left

Malawi as a teenager and has not returned for many years, I consider that he will have support on return and that any obstacles he might encounter to becoming an 'insider' will not be very significant.

Exception Two – s117C(5)

54. It was accepted by the FtT that the appellant enjoys a genuine and subsisting relationship with his partner and child. By this exception, the appellant is entitled to succeed in his appeal if he can establish that the effect of his deportation on his partner or child would be 'unduly harsh'.

55. In AA (Nigeria) v SSHD [2020] EWCA Civ 1296; [2020] 4 WLR 145, Popplewell LJ noted that there had been a proliferation of case law on the application of the unduly harsh test in s117C(5) of the 2002 Act: [9]. He suggested (and Baker and Moylan LJJ agreed) that it should usually be unnecessary to refer to authority beyond KO (Nigeria) v SSHD [2018] UKSC 53; [2018] 1 WLR 5273, R (Kiarie & Byndloss) v SSHD [2017] UKSC 42; [2017] 1 WLR 2380, NA (Pakistan) v SSHD [2016] EWCA Civ 62; [2017] 1 WLR 207 and HA (Iraq) v SSHD [2020] EWCA Civ 117; [2021] 1 WLR 1327. At [10], he noted that that the authoritative guidance was that given in KO (Nigeria) and HA (Iraq).

56. In MI (Pakistan) v SSHD [2021] EWCA Civ 1711, Simler LJ cited what had been said by Lord Carnwath in KO (Nigeria) and by the Upper Tribunal in MK (Sierra Leone) before summarising the effect of HA (Iraq) in this way:

> [21] First, [Underhill LJ] said that Lord Carnwath's reference to "*a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*" could not be read entirely literally since it was difficult to see how one would define the level of harshness that would "*necessarily*" be suffered by "*any*" child: see [44]. I agree. The cohort of children encompassed by this provision will all have a genuine and subsisting relationship with the parent in question but there will inevitably be a spectrum of infinitely differing relationships within that cohort. For example, as Underhill LJ said, the deportee parent might be living separately from the children (while still retaining a genuine and subsisting relationship with them), the child might be on the verge of leaving (or have left) the family home, or there might be a baby who does not know the parent. It simply cannot be assumed that the majority have a close bond with the deportee parent or that there is some objectively identifiable standard of closeness (reflecting an "ordinary degree of closeness") against which comparison might be made. As Peter Jackson LJ put it in his supporting judgment in *HA (Iraq)* at [157]:
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> "For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent whose face-to-

face contact cannot continue may be akin to a bereavement."

[22] Instead, Underhill LJ held at [44], the underlying concept is

"of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category"

(i.e. those sentenced to a period of imprisonment of more than 12 months but less than four years)

[23] The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals, including medium offenders. The question for the fact-finding tribunal is whether the harshness which deportation will cause for the children is of a sufficiently enhanced degree to outweigh that public interest – the essential point being that "*the criterion of undue harshness sets a bar which is* "*elevated*" *and carries a* "*much stronger emphasis*" *than mere undesirability*": see [51].

[24] Secondly, and plainly in light of the statutory provisions, "*the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal …. and the (very high) level applying to serious offenders*": see [52]. Plainly, the threshold for medium offenders is not as stringent as that imposed by the "*very compelling circumstances*" test which applies to serious offenders: see [53].

[25] Thirdly, as Underhill LJ explained:

"There is no reason in principle why cases of "undue" harshness may not occur quite commonly … How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness"."

Because it is not possible to identify a baseline of normal or ordinary harm endured by a child in consequence of a parent's deportation against which to assess whether there is an enhanced level of harshness involved in a particular parent's deportation, and because such generalised comparisons may be dangerous, the decision maker should instead focus on the reality of the child's actual situation. By way of example, as Underhill LJ explained, factors that *might* affect the analysis include the child's age, whether the parent lives with the child, the degree of emotional and/or financial dependence, the availability of emotional and financial support from a remaining parent and/or other family members, the practicability of maintaining a relationship

> with the deported parent, and all the individual characteristics of the child (see [56]). I emphasise the word *might* because it would plainly be wrong to infer that a decision that does not address each of these factors is necessarily deficient. Given the infinitely variable range of circumstances that might apply in any given case, no universally applicable factors can be identified, and the weight of a particular factor in a particular case will be affected by the individual circumstances. In her respondent's notice in this case the SSHD challenges as perverse the FTT's asserted failure to have regard to a number of the factors identified by Underhill LJ. But as he explained at [57], a fact-finding tribunal will make no error of law if a careful evaluation of the likely effect of the parent's deportation on the particular child is conducted and a decision is then made as to whether that effect is not merely harsh but unduly harsh, applying *KO (Nigeria)* in accordance with the guidance in *HA (Iraq).*
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> [26] Fourthly, as Peter Jackson LJ emphasised, in considering harm, "*there is no hierarchy as between physical and non-physical harm*" (see [159]) and there can be no justification for treating emotional harm as intrinsically less significant than physical or other harm. A failure to appreciate this is likely to result in a failure to focus on the effect of a parent's deportation on the particular child.
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> [27] Finally, referring to a number of earlier decisions of this court that followed *KO (Nigeria)*, including *PG (Jamaica) v SSHD* [2019] EWCA Civ 1213 and *KF (Nigeria)* [2019] EWCA Civ 2051, Underhill LJ found nothing in any of them inconsistent with what he had said in *HA (Iraq)*, in particular as summarised above: see [61].

57. Given that guidance, I propose to focus on the reality of the appellant's partner and child's situation and to consider whether it would be unduly harsh for them to leave the UK with the appellant or to remain in this country without him.

58. The appellant does not live permanently with his partner and their child. As I understand it, they have never lived together permanently. He explained at the hearing that he lives in Beckton with his sister and that they live in Romford, with his partner's parents. He stated that it takes around one hour and twenty minutes to travel between the two places. He makes the journey by public transport or, on occasion, she will drive and collect him. He stays at their house on occasion. His sister says in her statement that they sometimes stay in her house. There is confirmation in the appellant's bundle that he sometimes collects his daughter from school, and that assertion was accepted by the FtT. There are photographs in the bundle showing the appellant and his daughter looking relaxed and happy together in a variety of locations. His partner C describes the appellant as 'the best father' in her statement, and describes how he has always taken an active role in B's life since she was born. C states that B was 'so upset' when the

appellant was detained in immigration detention because he was away and was unable to collect her from school. She had changed and was a 'happy girl' now that the appellant was back from detention. They had both missed him during that time.

59. C works part time at a local supermarket. She undertakes shifts during the week whilst her daughter is at school. She sometimes takes shifts on Saturdays as well. The appellant sometimes picks his daughter up from school. Her grandmother also does so; she does not work and lives in the same house as C and B, as the appellant explained at the hearing. None of this evidence was contentious between the parties and I accept it. I accept, therefore, that the appellant has a genuine and subsisting parental relationship with his daughter; that she is attached to him; and (as the FtT found) that it is in her best interests for the appellant to remain a part of her life.

60. Ms Ahmed submitted that it would not be unduly harsh for C and B to follow the appellant to Malawi in the event of his deportation. She noted (as I have accepted above) that English is spoken there and that there is no evidence put forward by the appellant to substantiate the claim he made in oral evidence that Malawi is a third world country in which his daughter would receive little by way of a decent education. She also noted that C and B would be able to live with the appellant there, whereas they do not do so in this country.

61. In this respect, I am unable to accept Ms Ahmed's submission. C and B are British citizens and a child's nationality is a particularly important consideration in assessing her best interests: ZH (Tanzania) v SSHD [2011] UKSC 4; [2011] AC 166, at [30]. In the event of B's relocation to Malawi, she would move away from the education system and the support structure with which she is familiar. She lives with her grandparents and they play a role in her life, as confirmed by the appellant's oral evidence that she is sometimes collected from school by her grandmother. Having spent the first eight years of her life in this country, she is culturally British as well as being a British passport holder. All of this would be left behind, and left behind permanently in the event of her relocation. Although I have found that there would be familial support for the appellant on return to Malawi, I do consider that the total cost to B of such a permanent relocation would be such as to meet the elevated threshold described by the Upper Tribunal in MK (Sierra Leone).

62. It remains to consider what has been described as the 'stay scenario', of the appellant being deported to Malawi whilst his partner and child remain in the UK. In considering that scenario, it is often instructive to consider what happened when the potential deportee was in prison: MI (Pakistan) refers. In this case, of course, the appellant has not served a period of imprisonment but he has spent time in immigration detention.

63. Ms Ahmed drew my attention to the immigration history given in the decision under challenge, which stated that the appellant had been detained pursuant to immigration powers between 9 March 2019 and 15 April 2019. She asked the appellant about the assertion in his witness statement that his deportation would have an adverse effect on

his daughter's mental health. The appellant said that his daughter had 'always' been crying during this time, asking for her father and that she had not performed well at school.

64. I accept that B would have started in Reception class in September 2018. She would still have been in Reception, aged five, at the time of the appellant's detention. The appellant went on to assert that the upset caused by his detention had caused his daughter to fall behind at school, to the extent that she had been required to stay 'extra hours in school, to catch up with the rest of the kids'. He stated that she was still undertaking this extra tuition, of one extra hour every Tuesday 'in order to catch up'. Ms Ahmed suggested to the appellant that his absence might not have necessitated any such extra tuition. The appellant disagreed.

65. I note that there is no prior reference to B requiring extra tuition, whether in the appellant's witness statement or in the statement made by C. The appellant suggested that there was a direct relationship between his absence and the need for this extra tuition. He stated that he had discussed it with C and that she had felt 'not good' about it. I consider that B's mother would have made reference to this significant point about her daughter if there had been a direct correlation between the appellant's absence and the need for extra tuition. Whilst I do not discount the possibility that extra tuition is required, I do not accept that there is any relationship between the appellant's absence and the additional support from the school. There might be any number of reasons why B needs additional support at school but I do not accept that it is because she was adversely affected by the appellant's absence. In asserting as much, the appellant was dishonestly attempting to portray his daughter as having already been much affected by the actions of the respondent.

66. Be that as it may, I do accept that C and B would have been upset by the appellant's detention and that it would have taken the family some days to adjust to his absence. In making that adjustment, however, C and B would have had the assistance of C's parents, with whom they have lived throughout and who are acknowledged to be supportive and to collect B from school, amongst other things. There was a suggestion in the evidence that C's father had recently had cancer but there is no supporting evidence of that assertion and I note that the appellant did state that his partner's mother collects B from school on occasion. In my judgment, the circumstances in which C and B would find themselves in the event of the appellant's deportation would be broadly comparable to those which obtained when the appellant was in immigration detention. I take into account the considerations listed (non-exhaustively) by Underhill LJ at [56] of HA (Iraq) in deciding whether those circumstances would be unduly harsh.

67. B turned seven in November 2021. She has never lived with the appellant on a full-time basis. Although he is a presence in her life and they have a good bond, he lives an hour or more away from her and is required to maintain some of his contact with her by telephone and social media. I accept that there is a degree of emotional dependence between the appellant and his daughter but it is natural, and I find, that

her primary emotional bond will be with the cohabiting family members; her mother and her maternal grandparents. The appellant does not support his daughter financially and I do not understand him ever to have done so. C works at a supermarket and supports her daughter. Financial support is also provided by the appellant's sister. This is not a case in which the deportation of the appellant is likely to imperil the family financially. C can continue to work part time whilst B is at school. B can be collected from school by her grandparents, if necessary. Support from the appellant's sister can continue.

68. I am required by [56] of HA (Iraq) to consider the practicability of B maintaining a relationship with the appellant in the event of his deportation. I approach that exercise with caution in light of what has been said by the Upper Tribunal and the Court of Appeal in cases such as Omotunde [2011] UKUT 247 (IAC); [2011] Imm AR 633 and SS (India) v SSHD [2010] EWCA Civ 388.

69. In the former decision, Blake J said that it was 'wholly unrealistic' to suggest that a relationship between a young child and their parent could be maintained by modern means of communication. Whilst that decision was issued before the exponential increase in video calling and although the appellant and his daughter already conduct some of their relationship through such modern channels of communication, I accept that it would be very difficult for them to maintain their relationship exclusively through video calls in the longer term. Contact could be maintained in that way but it would serve as little comfort for B or C (or for the appellant), since both would naturally crave the physical contact to which they are accustomed.

70. Given B's age and the support structure she has around her, I conclude that she would be likely to miss her father intensely for a short period but that this would be unlikely to cause her any longer-term emotional harm. She would, in my judgment, adjust to the appellant's absence and would thrive in the sole care of her mother. I do not accept that the appellant's absence during immigration detention caused her to fall behind the other children in her school year and I do not accept that the appellant's deportation would give rise to any such consequences.

71. Considering the elevated threshold described in the authorities, and having considered all the circumstances of the family, I do not consider that the appellant's deportation would give rise to unduly harsh consequences for B. Nor, for like reasons, do I consider that it would give rise to unduly harsh consequences for C. She has a support network around her, comprising her family members and the appellant's sister. She works and can continue to do so. She has assistance with childcare in the event that it is required. She will miss the appellant enormously but there is no evidence before me which could justify a conclusion that the consequences she will experience would meet the elevated threshold in MK (Sierra Leone).

72. For the reasons above, I come to the clear conclusion that the appellant cannot meet either of the statutory exceptions to deportation.

Very Compelling Circumstances – s117C(6)

73. In order to succeed in his appeal, therefore, the appellant must establish that there are very compelling circumstances, over and above those in the statutory exceptions, which outweigh the public interest in his deportation, as required by s117C(6). It is clear from the authorities that the exercise required by the subsection is a proportionality assessment, albeit one in which the scales are heavily weighted in favour of deportation. In order to conduct that proportionality assessment, it is necessary to have regard to the factors set out in the Strasbourg authorities, as reviewed and endorsed at [72] of Unuane v The United Kingdom (Application no 80343/17); [2021] Imm AR 534.

74. The first of those factors is the nature and seriousness of the offences committed by the appellant and it is appropriate to consider that factor first, alongside the other matters which fall on the respondent's side of the balance sheet.

75. I have already set out a comprehensive analysis of the appellant's offending history. None of those offences has been particularly serious and none has attracted a custodial sentence. I am satisfied, however, that the appellant is a persistent offender and that it is more likely than not that he would continue to commit criminal offences in the event that he remained in the United Kingdom. His daughter was born in 2014 but he continued to commit offences. Neither a suspended sentence of imprisonment nor the threat of deportation has deterred him from committing further offences.

76. I was struck by the appellant's blasé attitude towards the penultimate offence, which took place whilst the appeal was underway. He said that he had been driving his girlfriend's car up and down the road. He offered no explanation of why he had chosen to do so and what had prompted him to break the law in this way whilst he knew that he was under the threat of deportation and separation from his family. The impression I formed, having listened to the appellant's evidence over the course of the morning, was of a man who simply had no respect for the law of the United Kingdom whatsoever. A Senior Probation Officer assessed him as representing a medium risk of reoffending and a medium risk of serious harm to the public in April 2019. Considering the appellant's subsequent behaviour and his attitude to that offending when he came before me, I consider it likely that he will continue to commit offences in this country, as he has done for the past 12 years. Whilst his convictions are not at the serious end of the spectrum, therefore, I consider that there is a very cogent public interest in the appellant's deportation, rooted in not merely his offending past but also in the ongoing risk of re-offending.

77. It is also appropriate to consider the public interest considerations in section 117B of the 2002 Act on the respondent's side of the balance sheet. The appellant has not had leave to remain since May 2011. Nor has he made any applications for leave to remain since his appeal was allowed by Judge Ievins in 2011. He has remained in the UK, establishing a family life and committing a range of criminal offences.

Quite aside from the public interest considerations in s117C, there is a cogent public interest in the removal of the appellant from the UK in light of the statutory importance attached to the maintenance of immigration control and the little weight which should be attached to a relationship with a partner which was established at a time when the person was present unlawfully in the UK.

78. Against these considerations, I balance the matters on the appellant's side of the scales. In doing so, I return to the list of factors set out at [72] of Unuane v The UK. The appellant has been in the UK for many years, having arrived here at the age of 13. His presence here was lawful whilst he was a child but has been unlawful since 2011. His sister and his mother are entitled to remain in the United Kingdom and there is no suggestion of any criminality on their part. The appellant said that his mother is Zambian. I have no reason to doubt that. The reality is that she and the appellant's sister will remain in the United Kingdom in the event that he is deported. C and B are British citizens and will also remain in this country, with the benefit of the support network I have considered above. The relationship between C and the appellant will be put under immense strain by his deportation. The appellant has committed offences for many years, however, and there is no suggestion that C was unaware of his offending (or of his unlawful presence in the UK) at the time that they entered into a family relationship.

79. The appellant's daughter is seven years old. It would be unduly harsh for her and her mother to relocate to Malawi notwithstanding the support I have found there would be for the appellant there. Although it is in B's best interests for the appellant to remain in the UK, this is not a case in which it might properly be said that it is overwhelmingly so. As I have already explained, B is young and will adapt to the absence of her father, given the fact that they have never lived together on a full-time basis and given the support network she and her mother have around them.

80. Drawing these threads together, the factors which are uppermost in my mind in the appellant's favour are the effect on his family life with his partner and his daughter and, to a lesser extent, the separation of the appellant from the country in which he is socially and culturally integrated after many years' residence. However, given the cogency of the public interest in the appellant's deportation, buoyed as it is by his persistent offending and clear propensity to continue on that course, I find that there are no very compelling circumstances over and above those in the statutory exceptions which suffice to outweigh the public interest. The appeal will accordingly be dismissed on Article 8 ECHR grounds.

Notice of Decision

The decision of the FtT having been set aside, I substitute a decision to dismiss the appellant's appeal.

Order Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant's partner and his child are granted anonymity.

No-one shall publish or reveal any information likely to lead members of the public to identify the appellant's partner and child without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 March 2022