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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 03 May 2017	**On 19 May 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

R.J.E.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr M Moriarty, in-house Counsel, instructed by Luqmani Thompson Solicitors
For the respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a remade appeal against the respondent's decision served on 15 July 2015 to refuse the appellant's human rights (article 8) claim. On the same date the respondent also made a decision to deport the appellant under the automatic deportation provisions of the UK Borders Act 2007. In a decision promulgated on 24 March 2017 I identified material errors of law in the earlier decision of Judge of the First-tier Tribunal Ford (FtJ) who dismissed the appellant's appeal. In brief summary, I found that the FtJ failed to ascertain whether deportation

would actually result in unduly harsh consequences for the appellant's partner and children, a necessary step in order to then determine whether there were 'very compelling circumstances' over and above consequences that were unduly harsh pursuant to paragraph 398 of the immigration rules (see *Greenwood (No. 2) (para 398 considered)* [2015] UKUT 00629 (IAC)), it being accepted that, as a result of his 6 year prison sentence, the applicant could not meet the exceptions in paragraphs 399 and 399A. I additionally found the FtJ's decision unsafe on the basis that she may have applied an unlawfully high threshold by misquoting the requirements of paragraph 398 of the immigration rules and section 117C(6) of the Nationality, Immigration and Asylum Act 2002. Finally, the FtJ's conclusion that the appellant's partner (NT) was not a full-time student was reached in circumstances where the FtJ failed to indicate this concern to the parties, which amounted to a procedural irregularity. Although the FtJ also dismissed an appeal by the appellant against the refusal of his asylum claim he has not sought to challenge this particular decision of the First-tier Tribunal.

2. In light of further evidence that has been served by the appellant in accordance with rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I adjourned the appeal for a further hearing before myself.

The appellant's immigration history

3. The appellant is a national of Jamaica, born on 27 May 1983. He entered the United Kingdom on 7 April 2001 as a visitor aged 17 with entry clearance valid until 28 April 2001. On 27 April 2001 his representatives made an application on his behalf for further leave to remain as a visitor until October of that year. This application was refused on 29 May 2001 and an appeal against this decision was dismissed on 15 March 2002. Thereafter the appellant sought leave to remain as a student and on the basis of his rights under article 8 ECHR. These applications were refused. The appellant has been an overstayer since his appeal rights were exhausted in 2002. A notice of liability to automatic deportation dated 12 July 2011 was served on the appellant. He claimed asylum on 27 August 2013. His claim related to a fear of being targeted in Jamaica by a gang as a result of actions of his cousin. A further notice of liability to automatic deportation, dated 20 September 2013, was then served on the appellant. The appellant underwent a substantive asylum interview in August 2014. He was served with the refusal of his asylum and human rights claims on 15 July 2015. In refusing the appellant's asylum claim the respondent also certified it under section 72 of the Nationality, Immigration and Asylum Act 2002.

The appellant's criminal history

4. Since arriving in the United Kingdom the appellant has received 7 convictions for 20 known offences. He was first convicted on 3 March 2003 for being concerned in the supply of a controlled Class A drug and handling stolen goods, driving otherwise than in accordance with a licence, and using a vehicle while

uninsured. He was sentenced to 12 months imprisonment at a Young Offenders Institution. On the same occasion the appellant was also convicted of supplying a controlled Class A drug and possessing a controlled drug with intent to supply. For these offences he received two 18 month sentences of imprisonment, which were served concurrently, but consecutively with the 12 month sentence. He was also convicted of possession of ammunition without a certificate and sentenced to a period of 3 months served concurrently. He therefore received a total sentence of two years and 6 months imprisonment.

5. On 10 October 2003 the appellant was convicted of possessing a controlled Class B drug and was fined £100 and ordered to pay £50 costs. On 9 November 2004 the appellant was convicted of fraudulently using a vehicle without a licence, driving a vehicle otherwise than in accordance with a licence, and using a vehicle while uninsured. He received fines in the sums of £20, £30, and £250 respectively. On 1 August 2009 the appellant was convicted of using a vehicle while uninsured and driving otherwise than in accordance with a licence, for which he was fined £100. On 20 April 2010 the appellant was convicted of having an article with a blade in a public place and received a suspended sentence of 6 weeks, wholly suspended for 12 months. On 29 November 2010 the appellant was convicted of having in his possession a controlled Class B drug and fined £100. On the same date he was convicted of using a vehicle while uninsured and of having committed a further offence during the operational period of a suspended sentence order, resulting from the original conviction on 20 April 2010, and fined £400.

6. On 31 May 2011 the appellant was convicted on 2 counts of possession of a Class A controlled drug with intent to supply - heroin and crack cocaine, and a failure to comply with the community requirements of a suspended sentence order. He was sentenced to two concurrent terms of 6 years imprisonment for the two counts of possession of the Class A drugs. The circumstances of the offence related to an incident on 11 August 2010 when the appellant was stopped by police in the street and found to be in possession of 2.48g of heroin and 1.66g of crack cocaine. These drugs were hidden down his trousers in a net bag. He made a no comment interview and put forward a prepared statement that was bogus. The jury rejected his claim that the drugs were for his personal consumption. This was his third conviction for Class A drugs, although the other offences took place some years previously. The sentencing judge noted that possession with intent to supply Class A drugs was a very serious matter.

The respondent's decision

7. The appellant's article 8 human rights claim rests on his relationship with his British citizen partner, NT, their two daughters, N (born in October 2011) and A (born in June 2015), and his relationship with another daughter, K, born to another British National (KJ) in November 2009. The respondent accepted that the appellant had a genuine and subsisting parental relationship with N and K

(A had not been born at the date of the respondent's decision), that he had a genuine and subsisting relationship with NT, and that his partner and children were British citizens. The respondent was nevertheless satisfied that the appellant's offending was so serious that his deportation would not result in an unduly harsh impact on his children or his partner and that there were no very compelling circumstances over and above the exceptions in paragraphs 399 and 399A of the immigration rules that would outweigh the public interest in his deportation and render his deportation disproportionate.

The evidence

8. The applicant provided a large bundle of documents that included, *inter alia*, a statement from him, two statements from NT, two statements from KJ, a statement from HE (the appellant's father) dated 19 November 2015, two statements from MR (the appellant's mother in law), documentation relating to NT's studies, an OASys report dated 03 November 2016, a probation report dated 23 May 2011, the pre-discharge report dated 26 January 2014, a number of documents relating to rehabilitative courses completed by the appellant in prison, passports and birth certificates relating to the appellant's children, a letter from the Nursery Manager of the Yvonne Kerr Childcare Group, a letter dated 23 February 2016 from the Head Teacher of St James's Church of England Primary School, medical evidence and evidence relating to the award of Disability Living Allowance in respect of MR, a number of family photographs (showing, *inter alia*, the appellant and his daughters with extended family members), several educational and vocational certificates relating to the appellant, an Independent Social Worker (ISW) report prepared by Christine Brown dated 3 March 2016, and a number of background reports on Jamaica, with a focus on the dangers posed by criminal gangs.

9. At the hearing the appellant adopted his statement which was signed and dated 22 February 2016. In his statement the appellant described the chaotic lifestyle that caused him to commit offences. He had not taken drugs since his release in 2014. He did not wish to do anything to jeopardise his relationship with his family. If allowed to remain in the UK he would work to support his family. He was a qualified painter and decorator as well as a motor mechanic and music engineer and producer. He and NT commence their relationship around 2006 or 2007. The applicant described how he was involved in his children's lives. The only family he had left in Jamaica where his grandparents who were in a care home.

10. In examination in chief the appellant indicated that he last took illegal drugs in 2011. He completed a number of rehabilitation programs in Rochester prison and Kent prison. Since being released he stayed indoors most of the time and spent time with his children. He was the primary carer for A and N. He picked up his other daughter, K, from school 2 or 3 times a week as KJ had a part-time job. On an average day he would get up early because NT went to college and

he had to get N ready for school. He did regular "*daddy stuff*" with A involving changing nappies, play and nap time.

11. Prior to his release from detention A and N had no contact with K. Now they would see each other at least twice a week. The appellant did not believe there was anyone else who could facilitate the interaction between his 3 daughters. No one else in his family was acquainted with K because they were busy people and he mainly saw his other family members on a Sunday. NT and KJ did not associate with each other. The appellant did not think A or N would be able to visit him in Jamaica because NT would not be able to afford it. K was even less likely to visit because KJ was not financially stable and was in a relationship with another man. If his daughters were not able to visit him it would be emotionally devastating for them.

12. In cross-examination the appellant confirmed that he remained in custody from 20 April 2011, the date of his conviction, until released from prison on 19 May 2014. He could not recall whether NT or KJ were working during this time but believed that NT was in receipt of benefits. Both NT and KJ were born in the UK and had family members in the UK. If allowed to stay the appellant would seek employment. He rejected a suggestion that this would expose him to temptations of criminality. If he had a job he would not be misled. He began to take cannabis quite early in life and started on the "*hard stuff*" (Class A drugs) around 2005 or 2006. When asked again whether any of his other family members would be able to facilitate interaction between his 3 daughters the appellant explained that his family were hard-working, that they had mortgages to pay off, and that it was quite difficult for them to look after children. he had 3 aunts in the UK with children, the youngest of which was 17 years old. None of his family would be able to even occasionally assist in bringing his 3 daughters together. The appellant's father imported goods into the UK and never seemed to be willing to take his grandchildren and have them. The appellant had 2 aunts living in London and one aunt living in Birmingham with grown up children. The appellant had never asked the Birmingham aunt whether she could arrange get-togethers between his 3 daughters but it was unlikely that she would be prepared to do so. The appellant confirmed that he had only met the independent social worker on one occasion.

13. In response to questions from me the appellant said that both NT's parents lived in Birmingham. She had a sister with whom she did not get along. NT also had a half-brother but the appellant did not know where he lived. NT did not socialise a lot with her cousins. KJ also had her parents in Birmingham. KJ had a sister and 2 brothers who also lived in Birmingham.

14. NT adopted her two statements in which she described how her relationship with the appellant commenced and his involvement in childcare and the household (cooking, cleaning, taking the children to school, getting them up, putting them to bed, taking them out and playing with them). She found it

difficult as a single mother when the appellant was in custody. She was unable to study or work and found it exhausting. She was currently enrolled full-time on an Early Years Foundation Course, was at college from Monday to Wednesday and on Thursday and Friday she was on a placement at a nursery. After graduating in July 2017 she wanted to obtain a BA in integrated working with children and families. She had a limited income, was reliant on a student loan, and would be unable to pay for childcare. Whilst she had family members who enjoyed looking after the children occasionally she could not rely on them to take care of them 4 days a week while she studied or was on placement, and she had to care for her mother who was reliant on her for emotional and practical support. She could not relocate to Jamaica because she feared her former husband, had no family there, grew up and was educated in the UK, and would have difficulty finding employment. The appellant's deportation would be devastating for her and her children and she could not afford to visit.

15. In examination-in-chief she confirmed that she was currently undertaking a full-time Early Years Foundation Course at university. This would finish in July 2017. If she successfully passed the course she would attain a Level 5 Early Years Foundation degree which would enable her to act as a teaching assistant, a nursery manager, or a family support worker. She would like to do a further year of study to enable her to qualify as a teacher. While NT was at university the appellant was the primary carer of their 2 daughters. NT relied on him to do everything such as taking and collecting their oldest child from school and looking after the baby. The appellant was a good father and dedicated to his children. NT did not speak to KJ. N, A and K got to see each other through their father. The 3 children would see each other 3 times a week, sometimes more. If the appellant were deported NT would be traumatised. Things would be very different without his help. For example, he helped his mother-in-law after her knee operation. NT's mother could not stand for too long and needed help with various things such as cooking, cleaning, and being taken to appointments. NT provided care to her mother with the assistance of the appellant. NT's grandparents were too old to help their daughter and she had no other children of her own.

16. It would be expensive and difficult to take her daughters to see the appellant if he were deported. The effect on her daughters would be devastating as they both loved their father. NT would be unable to afford the expense of childcare. Although childcare vouchers were available this would not be enough. Later in her evidence, in response to questions from me, NT stated that the childcare vouchers would be available when her youngest daughter turned 2 (in June 2017) and that these would cover 15 hours' worth of childcare a week.

17. In cross-examination NT said that she had 2 half siblings - Julia and Matthew. One lived in Birmingham, the other in Essex. The appellant had been influenced by a bad crowd when he arrived in the UK. Her mother lived a 15 to 20 minute car journey from their home. Between 2011 and 2014 (when the appellant was in

custody) NT was unemployed and received social benefits. She did not receive help from her family with childcare. Her mother was unable to look after the children and she did not have a good relationship with her half siblings. When asked whether the appellant's family could not act as 'go-betweens' in terms of facilitating interaction between the 3 children, NT answered, "*no, I don't know of any reasons why*."

18. NT began her full-time studies in 2015. She had been aware since 2011 that the appellant had been the subject of a notice of automatic deportation. She was additionally aware that the appellant made an asylum claim in 2013, which was refused in 2015. When asked whether she was aware that the Home Office were intending to deport the appellant when her current course of studies commenced, NT said, "*I'm not really sure what I was aware of*." She didn't really have friends and her mother and her partner and children were her world. In response to some questions from me NT indicated that she had a few convictions a long time ago for shoplifting. When I informed that the appellant said she had a sister NT said that they were waiting for DNA proof. The person who may or may not be a sister somebody her father found out about. NT's mother does have other children but they live with their father abroad NT did not know why the appellant didn't refer to the "sister" as a half-sister or in respect of whom a question remained of her relationship. When I asked whether any approach had been made to the local authority to obtain support for her mother NT said "*they don't do that anymore, they scrapped it*." In re-examination my attention was drawn to a letter from Disability and Carer's Service, dated 31 December 2015 and addressed to NT's mother, relating to her claim for DLA. NT once again stated, "*they don't do that anymore*."

19. KJ adopted her two statements. In addition to K she now had a son. She lived very close to the appellant's home. She and the appellant were committed to bringing up their daughter together. KJ was working part-time and the appellant would often do the school run with their daughter. He picked her up from school 3 or 4 times a week. On days they did not see each other they would chat on the phone. K enjoyed the time she spent with the appellant and talked about him all of the time. She has seen a big change in the appellant since his release. His focus now is on his family. It would be devastating if he were deported and would have a massive negative impact on K's ability to focus and her emotional well-being. K was also attached to her half-sisters and the children loved spending time together. If the appellant was not present the girls would hardly see each other. The father of her son was in the UK and KJ would not consider moving anywhere else. KJ could not afford to pay the plane tickets.

20. In examination in chief KJ said that the appellant sometimes collects K from school, takes her to gymnastics on Thursday, and takes her to his house so that K could interact with her half-sisters. On average K saw her halfsiblings 3 or sometimes 4 times a week, although sometimes it is only twice a week. The appellant was described as a very good father who was a big help to KJ. She did

have family but couldn't really depend on them. She had no relationship with NT. When the appellant was first incarcerated K was very young. Because she had not seen him for a while she became cold to the "*whole father/daughter situation*". Since then the relationship has been rebuilt. If the appellant were deported it would break K's heart. It would also place great stress upon KJ because she would have to deal with her daughter's emotions. There will be virtually no chance of K visiting the appellant in Jamaica because KJ had a son as well and it will be too expensive. The father of her son was currently on remand in respect of a firearms offence and had no present role in her son's life.

21. In cross-examination KJ said that both her parents lived in the UK as did her 3 siblings. They all lived in Birmingham. Her siblings, who were 13 years old, 20 and 21 years old, lived with KJ's mother. Between April 2011 and May 2014 KJ received benefits. Although she received help from her family during that time she still struggled. If she worked past school hours there was no one else who could pick K up. Although anything was possible JK did not believe it will be possible for her and NT to take their daughters to a park so that they could play without any interaction between the adults.

22. Both representatives made submissions which have been fully recorded by me and which I have fully taken into account. Mr Moriarty relied on both the skeleton argument prepared for the 1st Tier Tribunal hearing and the skeleton argument prepared for the error of law hearing.

My assessment

23. It is for the appellant to prove that the decision under appeal interferes with article 8, and the standard is the balance of probabilities. Once there is an established interference with article 8 it is for the respondent to justify that interference.

24. It is not in dispute that the appellant is a foreign criminal who received a sentence of imprisonment of more than 4 years. Nor is it in dispute that, under the immigration rules (paragraphs 398, 399 and 399A), the public interest in his deportation is only outweighed by other factors if there are 'very compelling circumstances' over and above those described in paragraphs 399 and 399A. The appellant therefore has to demonstrate that there are very compelling circumstances over and above a finding that it would be unduly harsh to expect his partner and his children to remain in the UK without him, or for them to live in Jamaica with him.

25. I must additionally take into account the public interest factors relevant to the article 8 proportionality assessment identified in sections 117A to D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). s.117C(6) establishes that, in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, the public interest requires

deportation unless there are very compelling circumstances over and above those described in exceptions 1 and 2. Exception 2, which is the only relevant exception, applies where a foreign criminal has a genuine and subsisting relationship with the qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of the foreign criminal's deportation on the partner or child is unduly harsh. As this appeal involves minor children I must apply s.55 of the Borders, Citizenship and Immigration Act 2009 and treat the best interests of the children as a primary consideration, although it is not a paramount consideration. I remind myself that in *EJA v SSHD* [2017] EWCA Civ 10, Burnett LJ, having cited the judgment of Lord Reed in Hesham Ali [2016] UKSC 60, observed, "*It is abundantly clear that Hashem Ali (sic) has not lowered the significant hurdle which must be overcome by a foreign criminal to succeed in demonstrating that it would be disproportionate to deport him from the United Kingdom.*" I further remind myself that in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239 The Court of Appeal confirmed that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result which is compatible with that article.

> In particular, if in working through the structured approach one gets to section 117C(6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is one to which the tribunal is bound by law to give effect. (per Sir Stephen Richards, at [14])

26. I am satisfied, and indeed it was not challenged by Mr Jarvis, that the appellant has a genuine and subsisting relationship with NT, and that he has a genuine parental relationship with K, N and A. NT and the appellant's daughters are British citizens, and all were born in the UK. An undated letter from the Nursery Manager of the Yvonne Kerr Childcare Group confirmed that the appellant was very active in N's life and that she had a close bond with him. A letter dated 23 February 2016 from the Head Teacher of St James's Church of England Primary School confirmed that the appellant attended all parental workshops and parent carer partnership meetings and was well known to all staff associated with K. The letter additionally indicated that the appellant dropped and collected her from school. Even though the appellant does not live with K, and sees her less regularly then his other 2 daughters, it is clear from the totality of the evidence that the appellant has a strong bond with all 3 of his daughters. Whilst NT is studying during the week he is the primary carer of N and A, although N now attends school. I accept that the appellant has been active in the lives of all his daughters and that he is a good and committed father. I am satisfied that it is in the best interests of all of the appellant's daughters for him to remain in the UK. The appellant does not have a relationship with KJ, although they communicate

well with each other in respect of facilitating the relationship between the appellant and K.

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

28. I accept that the appellant's deportation would have a significantly detrimental impact on his relationship with NT. They have been in a relationship for approximately 10 years, although for some of this time the appellant was in prison and, prior to his arrest for his index offence, was living in London while she remained in Birmingham. NT would lose the direct emotional and practical support provided by her partner and the intimacy that is a vital component of any partner relationship. Although NT claims that she would be traumatised if the appellant were deported there is no medical evidence supporting this assertion.

29. I have taken account of the evidence relating to the appellant's rehabilitation. The sentencing judge recognised that the appellant had done "*a great deal*" to kick his habit. He had, at the time of his sentence, liaised with the CARAT Team and had a positive letter written on behalf by a councillor from the community drug service. The documents before me indicated that the appellant completed, amongst others, a heroin workshop, a 'triggers and cravings' workshop, a number of drug awareness sessions and the 'stepping stones drug program'. According to the ISW report the appellant, whilst in custody, became a prison mentor and qualified for Category D's status early into his sentence. He spent 6 months going through a controlled detox program with continued testing throughout this period. He informed Ms Brown that the impending birth of his child with NT was the impetus for him seeking treatment. I note in addition the City and Guilds and OCR certificates awarded to the appellant.

30. I have considered the various probation and prison documents and reports in the appellant's bundle. In a NOMS report that appears to have been completed sometime in 2012 the appellant was assessed as being at low risk of serious harm to the public and at low risk of reoffending, and that his behaviour whilst in custody was described as being "exemplary". The November 2016 OASys report noted that the appellant admitted his responsibility for his criminal offences and did not seek to diminish his actions, that he came across as a positive young man, and that he appeared to have gained some valuable lessons from his prison sentence. This OASys report reiterated the appellant's low risk

of recidivism but identified him as posing a medium risk of harm to the public. This does not sit comfortably with the earlier NOMS report. I take account of the fact that it is over 6 years since the appellant's last conviction.

31. I am satisfied, based on the above evidence, that the appellant has genuinely addressed his drug misuse and has taken active steps to rehabilitate himself and to remain drug-free. Despite the conclusions of the OASys report I am satisfied that the appellant is at low risk of causing serious harm to the public and that he is at low risk of reoffending. I take this into account in the appellant's favour in assessing the existence of very compelling circumstances under both paragraph 398 of the immigration rules and section 117C(vi) of the 2002 Act, but also, following *MM (Uganda)* [2016] EWCA Civ 450, in determining whether the impact on NT would be 'unduly harsh'.

32. When assessing whether the impact on NT would be 'unduly harsh' I additionally take account of the delay in making an immigration decision, which reduces the weight of the public interest factors. I note that the appellant was first informed of his liability to deportation in July 2011 and that a decision to deport was not made until 10 July 2015. The appellant was however a serving prisoner until released on licence in April 2014 (when he entered immigration detention). In response to further notices of his liability to deportation sent to him in July and September 2013 he made a number of further representations, and made an asylum claim in August 2013 which necessitated the application of the asylum determination process. Whilst I take account of the delay in reducing the public interest, this must be balanced against the various public interest factors in his deportation.

33. I note from the ISW report that NT was previously employed as a nursery nurse and a shop assistant. I appreciate her natural desire to improve her financial circumstances by wishing to become a teacher. With the exception of the care she claims to provide for her mother and childcare issues, there does not appear to be anything preventing her from seeking employment as a nursery nurse or shop assistant or, with the Level 5 certificate that she hopes to achieve after the completion of her current studies, as a teaching assistant, nursery manager or family support worker. Even if she is, for whatever reason, unable to complete her current studies, she could seek alternative employment, part-time if necessary, in order to manage her child care commitments (I note that she would have access to 15 hours' worth of childcare support once her youngest child reaches the age of 2). Despite NT claiming at the hearing that she had no friends her account of her circumstances to Ms Brown was different (see 3.29 of the ISW report where NT informed Ms Brown that she had many family members and friends in the Birmingham area).

34. Even if it were entirely impossible for alternative childcare arrangements to be made, and NT had to give up any hope of further employment (which I do not accept), the fact of being made unemployed is not sufficient, in the particular

circumstances of this appeal, to amount to undue harshness. There is no medical evidence that NT has any mental or physical health issues. Whilst I fully appreciate the undesirability of being unemployed, and the difficulties in being a single parent looking after two young children, it must be remembered that NT entered into a relationship with the appellant at a time when he was unlawfully present in the United Kingdom. Indeed I find that NT must have undertaken her studies in the full knowledge of the appellant's criminal convictions and the knowledge that his immigration status was, at the very least, precarious. NT (and KJ) managed to cope for the 3 year period during which the appellant was incarcerated. During this time she received benefits. There is no evidence, medical or otherwise, suggesting that the safety and welfare of NT or her children would be compromised if she were rendered unemployed, or that the family would be rendered destitute. I must additionally bear in mind the serious nature of the appellant's offence and the various public interest factors unconnected with a risk of re-offending (such as expression the public's revulsion of drug offending, the deterrent effect and the broad issues of social cohesion and public confidence in the administration of immigration control).

35. I have carefully considered the statements from MR and the medical and other documentary evidence relating to her. MR had full knee replacement surgery in April 2012 which gave rise to further complications requiring subsequent medical procedures and a lot of physiotherapy. She moved in with NT on 24 December 2013, although by the time the ISW report was prepared in March 2016 she had moved back to her own home. Ms Brown noted that MR wanted to retain as much independence and self-management and she could, and that NT had not yet needed to undertake any personal care for her mother. MR also suffers from serious arthritis, stress urinary incontinence and depression.

36. On 2 occasions during her evidence NT stated that the local authority no longer provided carers or appropriate support for her mother. My attention was drawn to a letter, dated 31 December 2015, issued by Disability and Carer Service and addressed to MR. This related to an award of DLA. MR was awarded the higher rate of £51.40 p a week from 23 November 2015 for an indefinite period because she was "*unable or virtually unable to walk*". MR was not however awarded a DLA carer component. This was based on information contained in her DLA claim form and from her hospital, including details of her treatment, her medication and test results and symptoms. The letter indicated that, although she had difficulty with standing, MR could sit from time to time when preparing food and didn't need help preparing a cooked main meal for one person. MR could safely get in and out of bed, get up and down stairs and get in and out of a chair using suitable aids at her own speed. She didn't need help from someone for about an hour a day or several times right through the day. She was not at risk of falling. There is nothing in the evidence before me supporting NT's claim that the local authority or social services no longer provides appropriate care for individuals in her mother's position. The letter

from Disability and Carers Service indicates that MR was simply not entitled to the carer component of DLA because she did not have the requisite care needs.

37. Mr Moriarty drew my attention to a GP letter, dated 18 February 2016, written some 3 months after MR's DLA award. This letter, headed "*to whom it may concern*" indicates that MR suffers from severe osteoarthritis of both knees needing replacements. She had post-operative pain in her left knee needing manipulation under anaesthesia. She also suffers from lower back ache due to arthritis, depression and urge incontinence. These conditions affect her ability to carry out activities of daily living. She does suffer from falls and urinary incontinence and severe pain secondary to arthritis, and needs help with cooking, cleaning, shopping and to attend hospital appointments. Her depression also negatively impacts on her ability to go out. She was said to be very much dependent on her daughter and the appellant to carry out activities of daily living. I note in the ISW report, prepared in March 2016, that NT had not yet had to undertake some degree of personal care for her mother (for example toileting her or bathing her) and that MR was now mobilised with walking sticks provided by the aids and adaptions team within the local authority. Surprisingly there was no more recent medical evidence relating to MR, despite the GP letter being dated over a year before the hearing.

38. The GPs letter focuses on the mobility problems afflicting NT's mother. The earlier letter from Disability and Carer Service indicates that NT's mother was capable of cooking meals, that she was capable of getting in and out of bed and going up and down stairs, and was not at risk of falling. There was nothing in the GP letter to indicate that there had been a significant and serious deterioration in MR's condition in the intervening 3 month period. If there had been a significant deterioration in MR's condition I would have reasonably expected to see more up-to-date medical evidence, or evidence indicating whether she had applied for or been awarded the DLA carer component. Even if no further application for the relevant benefits was made there is nothing to indicate, if indeed there has been a significant deterioration, that the local authority and social services would not honour their legal obligations to provide the appropriate assistance and support to MR. MR does not live with NT suggesting that she does have a degree of independence. Even if MR does require a higher level of care then I have found, this can be provided by NT. There is nothing preventing MR from moving back to her daughter's home, as she did previously. Even if NT has to give up her employment in order to provide her mother with additional assistance, this would not render the impact on NT unduly harsh in light of the appellant's very serious offending and the strength of the public interest in his deportation.

39. In light of the above assessment, including the various public interests identified, the seriousness of the appellant's offending, the appellant's rehabilitation, the respondent's delay, and the possibility of NT being unable to

continue her studies or find employment, I am not satisfied that the effect of the appellant's deportation on NT would be unduly harsh.

40. I must now consider whether the effect of the appellant's deportation on his 3 daughters would be unduly harsh. I will again concentrate on the question whether it would be unduly harsh for the children to remain in the UK without the appellant. In making my assessment I have again considered the various public interest factors described above, the public interest factors in s.117B and 117C of the 2002 Act, the evidence of the steps taken by the appellant to rehabilitate himself, his low risk of re-offending and low risk of harm to the public, and the respondent's delay in making a deportation decision.

41. I have accepted that the appellant has a strong parental relationship with all 3 daughters, that he is the primary carer of N and A as their mother is studying full-time, and that it is in best interests of all his children for him to remain in the UK. I remind myself however that, although a primary consideration, the best interests of the children is not a paramount consideration and may be outweighed by very strong countervailing public interest factors in a proportionality assessment.

42. I have carefully considered the ISW report. I accept that Ms Brown is suitably qualified and experienced to provide an expert opinion on the effect on the children of the appellant's deportation. Her report was based on documents provided to her including draft witness statements, the respondent's refusal of the asylum and human rights claims, various medical letters relating to MR, school letters and a single interview with the appellant, NT and their children. In section 3 of her report Ms Brown extensively sets out the family chronology including the appellant's immigration and criminal history, the history of his relationship with NT, and his relationship with his daughters. At 3.15 Ms Brown notes that the appellant had no significant contact with K during her early life. At the time the ISW report was prepared the appellant was having weekly contact with K although she often spent her weekends at her maternal grandmother's home where she saw other family members. K spent little time at the home the appellant shared with NT, N and A. Ms Brown notes the stresses that NT feared including the prospect of becoming a lone parent and the need to care for her mother, and, at 3.29, notes NT's account of having many friends and family members in the Birmingham area. Ms Brown records the concerns of NT and the appellant in respect of the impact his deportation would have on his daughters.

43. In section 4, headed 'current circumstances', Ms Brown notes the appellant's proactivity caring for his daughters since his release and his diligence in rebuilding and re-establishing his relationship with K. Ms Brown stated that K, at 6 years of age, would be too young to understand why her father had once again gone from her life if deported and that a 2nd loss may prove irreparable. Whilst acknowledging Ms Brown's expertise I find this conclusion is

speculative. K is now 7 years old. There appears to be no reason why the appellant's deportation could not be explained to K in terms which she would understand and which would not necessarily generate a sense of abandonment. Any possible severance of the relationship must, in any event, be balanced against the various strong public interests in the removal of individuals who have received long custodial sentences for drugs offences.

44. At 4.3 Ms Brown states that remote or electronic means of communication are not sufficient or tangible and cannot provide comfort to a child who needs the physical and palpable presence of their parent or carer. At 4.9 Ms Brown states, with reference to her professional experience of children visiting parents in other countries, that this "… *can be devastating for children*", and refers to a recent case where the children were in despair having travelled to the country to see their father in the belief and hope that they were to bring him home. I accept that a relationship conducted through remote methods of communication can never compare to a relationship of close physical proximity. This is clearly to the detriment of the appellant's children, and a weighty factor in determining whether the impact of the deportation is unduly harsh. There was however no suggestion or evidence that communication would be severed. The appellant would be able to maintain contact with his children through telephone calls, Internet based communication, and letters, and, perhaps in the future when finances permit, visits. I accept Ms Brown's professional view that family visits to a parent "*can*" be devastating, but this will depend on the particular circumstances of the visit. The only example she cites is of children who visited their father in the belief that they would be bringing him home. If the appellant's children were to visit him in the future their mothers can be reasonably expected to inform them that it is purely for a visit and that their father will not be coming home with them.

45. At 4.16 Ms Brown states that the appellant's deportation would "… *have a devastating impact upon* [NT], *the children concerned and also other parties, including* [MR], *who may have to become reliant on other, less reliable and inconsistent sources of support*." At 5.6 Ms Brown states that the appellant's absence would have "… *far-reaching effects on the children, depriving them of the stability of* [sic] *parental relationship they enjoy with him as well as the stability of the family unit as a whole*." I have already dealt at some length with the position of MR. Whilst I accept that the appellant does provide some assistance to his mother-in-law, and that he has a relationship with her as the mother of his partner, their relationship is not one that contains any significant elements of reliance or dependence and is one that can be maintained through remote forms of communication. Whilst there will clearly be a detrimental effect on the appellant's relationship with NT and with his children Ms Brown does not provide any further detail or particularisation in respect of the "*devastating impact*", or the nature of the '*far-reaching effects on the children*'. Neither NT nor the appellant's children have any mental or physical health issues making them particularly vulnerable to separation from the appellant. They will not be rendered destitute in the event of the appellant's

deportation. The children will continue to live with their mothers who will continue to ensure their welfare and safety. From 4.7 to 4.2, and then in section 5, Ms Brown notes that the appellant and his partner have done much to create a stable environment and she refers to a number of studies relating to child and adolescent development. I have considered the extracts provided and accept that the loss of a physically close relationship is likely to have a negative effect on the children's development emotionally, socially and psychologically. This negative effect is however expressed in only general terms and there is no indication of the degree of the impact on these particular children.

46. Ms Brown notes that the appellant was "unsure" whether or not his daughters would continue to see one another if he was no longer involved in their lives. In his oral evidence the appellant claimed his father worked hard with an importation business and did not seem to be a person who would take his grandchildren. I note that the appellant's father, HE, gave evidence on his behalf at the First-tier Tribunal hearing. In his statement dated 19 November 2015 HE indicates that he lives 4 miles or so from the appellant and that he sees the appellant and his family very frequently, sometimes everyday but mostly every other day. He drops by the house and spends time with the appellant and his daughters and partner. He sees all of his grandchildren very often and treats them to ice cream and takes them to playgrounds and parks. He sees K with the appellant about 2 or 3 times a week, either at her house or on the street when she comes back from school. He and the appellant often take K to a games arcade. When the appellant was in prison HE took K to see him.

47. HE did not give evidence at the Upper Tribunal hearing. No explanation was offered for his failure to do so (and I do not draw any adverse inference from the absence of oral evidence), but there was no suggestion that there had been a falling out within the appellant or the appellant's family. There was no evidence from any of the witnesses to suggest that HE's father circumstances had materially changed. HE's statement was not formally withdrawn. When asked whether there was any reason why the appellant's family could not facilitate interaction between the 3 children NT answered, "*No, I don't know of any reason why.*" If there had been a material alteration in the relationship between the appellant's father and his grandchildren I would have reasonably expected NT to have made mention of this in her evidence. I consequently fins that HE remains, in accordance with his statement, a frequent visitor to the appellant's family home and someone who has direct knowledge of and involvement with K. In the absence of anything to indicate any material change in the circumstances of the appellant's father I find that he would be capable of facilitating communication and interaction between the appellant's 3 daughters.

48. Even if I were to find that none of the appellant's family members are able or willing to facilitate interaction between his 3 daughters, and that neither NT nor KJ have any family members who are similarly able to assist, it is a question of choice that prevents the children from playing together. Whilst I can appreciate

why NT would wish to have no involvement with KJ, it is her decision that prevents her 2 daughters from interacting with K. If she chooses to allow the 3 children to play together then the relationship between the half-siblings can continue. The fact that NT chooses not to allow her daughters to play with K in the appellant's absence, even with minimal interaction with KJ, is a relevant factor in determining whether the impact on the children would be 'unduly harsh', and in determining the existence of very compelling circumstances. Whilst the children cannot in any way be blamed for their parents' intransigence the reality is that it would be NT's choice that the half-siblings do not interact. I find that it is not necessary for the appellant to be present in the United Kingdom in order for his 3 children to interact.

49. Even if I am wrong in the above assessment, and NT avowedly chooses not to facilitate interaction between her 2 daughters and K, I have to consider whether this would amount to an unduly harsh impact on the children in light of the serious nature of the appellant's offending and the strong public interest in his deportation. Whilst it would clearly be in the children's best interests to interact with each other, and the absence of any such interaction may jeopardise the continued or future relationships between them, all of the children are in good health, and there is little to indicate that depriving K of the opportunity to see her half-sisters would have any particular impact on her welfare, her well-being and health, or on that of N and A.

50. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, Lord Justice Jackson stated, at [33] and [34],

> Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
>
> The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:
>
> > "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

51. In *Secretary of State for the Home Department v AJ (Zimbabwe)* [2016] EWCA Civ 1012, having reviewed case law considering the impact on children following deportation decisions, Lord Justice Elias stated, at [17]

> These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests.

52. The Court of Appeal explained that, whilst it will virtually always be in the best interests of the child for the parental relationship to continue, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary. Having regard to the evidence concerning the relationship between the appellant and his children, and the evidence relating to the relationships between the half-siblings, and having carefully considered the ISW report and the evidence of the appellant's rehabilitation, and noting the respondent's delay, I am not satisfied there are any additional features affecting the nature or quality of the relationships in the factual matrix before me. Having considered all the factors that weight in the appellant's favour, and balancing those against the strong public interest factors that I have already identified, including the nature and seriousness of the appellant's offending, I find that the impact on the appellant's children would not be unduly harsh.

53. Having found that the effect of the appellant's deportation would not be unduly harsh on either his partner or his children, *a fortiori*, I find that there are no very compelling circumstances over and above such an effect.

54. Mr Moriarty submitted that there were significant analogies to be drawn between the facts of *KD (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 418 and the present appeal (both appellants received sentences of over 4 years for drug-related offences, both had ceased taking drugs for over 5 years and achieved full rehabilitation, both played significant roles in their children's lives, both had experienced delays by the respondent in making deportation decisions, and that it was in the best interests of the children, whose behaviour deteriorated in their father's absence, to have their father remain),and that I should follow this decision. Whilst the Tribunal in *KD* was rationally entitled to reach its conclusion that the deportation of that appellant was disproportionate, I am not bound by its conclusions, either by way of analogy or otherwise. Two different decision makers may rationally reach two different decisions on the same or similar facts. In any event, I am not satisfied that the facts are sufficiently analogous. Mr Dennis, the appellant in *KD*, received a slightly lesser sentence (one of 5 years) and his history of offending was not as serious as that of the present appellant, and the appeal was decided under a version of the immigration rules that did not require the

existence of an 'unduly harsh' effect and was decided in the absence of the greater specificity attaching to public interest factors identified in s.117B to 117C of the 2002 Act. In these circumstances I do not find the decision in *KD* to be sufficiently relevant to my decision.

Notice of Decision

The appeal against a refusal of a human rights claim (article 8) is dismissed.

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

Unless and until a Tribunal or court directs otherwise, the appellant and his family are 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.

17 May 2017

Signed Date

Upper Tribunal Judge Blum