Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01043/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2021	**On 4 November 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MR SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms E Lanlehin, Counsel instructed by JF Law Solicitors

DECISION AND REASONS

Appellant's immigration history and History of the appeal

1. The appellant is a citizen of Democratic Republic of Congo, born on 11 February 1993. He is currently 26 years old.

2. He entered the United Kingdom with his family on 30 July 2004 when he was 11 years old. His father claimed asylum in the UK with the appellant as a dependant on the claim. The application for asylum was refused and the appeal against that

decision was dismissed, however on 5 September 2007 the family were granted indefinite leave to remain in the UK exceptionally outside the immigration rules.

3. Between 22 July 2009 and 25 October 2012, the appellant accumulated 5 convictions in relation to 8 offences including the index offence. On 25 October 2012 the appellant was convicted of robbery and commission of a further offence during the operational period of suspended sentence at Manchester City Crown Court, for which he was sentenced to a total period of three years' imprisonment.

4. As a result of this conviction the Secretary of State served on him a Notice of intention to deport on 28 November 2012. The appellant raised human rights grounds as to why he should not be deported, but the Secretary of State concluded that a deportation order should be signed against him and this was done on 11 June 2013. On 12 June 2013 the Secretary of State made a decision that Section 32(5) of the UK Borders Act applied and that the appellant was liable to automatic deportation as a foreign criminal. The decision was withdrawn following R (on the application of P) DRC [2013] EWHC 3879. A fresh deportation order was served on 29 May 2014 and a fresh decision to deport was served on 30 May 2014.

5. The appeal against the deportation decision was allowed on human rights grounds by First-tier Tribunal Judge Swaniker on 6 May 2015. Subsequently, the Upper Tribunal upheld First-tier Tribunal Judge Swaniker's decision on 1 September 2015, finding that although she had applied the wrong immigration rule there had been no material error of law. The appeal then went up to the Court of Appeal, who by consent allowed the appeal by the Secretary of State and remitted the appeal to the Upper Tribunal for reconsideration of the Secretary of State's appeal against the decision of the First-tier Tribunal. On 31 May 2019 the Upper Tribunal made a direction to set aside the decision of Upper Tribunal Judge Blum so as to give effect to the Court of Appeal's order and the appeal was relisted for hearing with standard directions. The appeal came before me on 6 September 2019. The issue before me was whether the decision of First-tier Tribunal Judge Swaniker should be set aside and if so, whether to proceed to remake the decision or whether to remit the appeal to the First-tier Tribunal giving directions.

6. At the error of law hearing, it was agreed by both parties that the decision of First-tier Tribunal Judge Swaniker sent on 6 May 2015 allowing the appellant's appeal against the decision to deport should be set aside. It was agreed that she had made an error of law by applying a previous version of the immigration Rules and that her approach to the issue of "unduly harsh" was flawed, given subsequent case law including **KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53** as well as **RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC)**.

7. I set aside the decision on the basis that there had been a material error of law for the reasons in the decision dated 5 August 2020 appended to this decision at Annex A.

8. The appeal was adjourned for re-making on the Article 8 ECHR issue with none of the findings preserved. There had been a considerable passage of time since the decision and appeal and the Secretary of State accepted that the appellant's circumstances would have changed in the intervening 7 years.

Decision under appeal

9. The decision to which this appeal relates is a decision made on 29 May 2014 that Section 32(5) of the UK Borders Act applies and that the appellant is liable to automatic deportation as a foreign criminal.

10. The respondent's position is that the deportation of the appellant is in the public interest because he is a foreign criminal. The decision is proportionate and is not outweighed by any family life that the appellant has in the United Kingdom. Neither of the exceptions pursuant to s117C of the Nationality, Immigration and Asylum Act 2002 apply to the appellant. The impact on the appellant's child would not be unduly harsh. There are no very compelling circumstances above and beyond the exceptions in the statute and immigration rules.

Summary of the appellant's case

11. It is the assertion of the appellant that his deportation from the United Kingdom as a result of the decision would be a disproportionate breach of his Article 8 ECHR rights and would thus be unlawful under Section 6 of the Human Rights Act 1998 because he has family life with his current British partner and three British children.

12. The appellant's circumstances have changed since the original appeal was heard in 2015. The appellant now has a new partner and has a second child with his partner. His current partner is mentally unstable and as a result he is heavily involved with the care of his young baby who is looked after by his partner and himself. His mother and sisters also assist him with the baby. He also has a close relationship with his partner's child. His older daughter lives with his former partner in Stockport but he has regular contact with her. She has three half siblings. It is the appellant's contention that he falls within paragraph 399(a) of the immigration rules and that Exception 2 of s117C applies. It is said that the appellant has a genuine and subsisting parental relationship with three children under the age of 18, all of whom are British citizens and that it would be unduly harsh for all of the children to live in the Democratic Republic of Congo ("DRC") and it would be unduly harsh for the child to remain in the United Kingdom without the appellant.

New matter

13. At the outset of the appeal Mrs Isherwood pragmatically consented to the appellant raising his new family and employment circumstances as a "new matter" pursuant to section 85(6)(a) of the Nationality, Immigration and Asylum Act 2002. I agree with this approach as it is not possible to determine whether the appellant's deportation is disproportionate because he meets the relevant Exception without undertaking an assessment of his current circumstances and in particular the effect on the children

affected by the decision under appeal. The relevant date for the consideration of Article 8 ECHR is the date of the appeal.

Evidence before the Tribunal

14. The evidence before me consisted of a 46-page appellant's bundle of documents including a Social Work Report prepared by an Independent social worker Nikki Austin dated 28 June 2021, a Family and Children Report prepared by Kent County Council completed in June 2020 and the witness statements of the appellant, his partner and his sister. The appellant's representative also handed up a further letter from Guy's and St Thomas Hospital. The appellant and his sister gave oral evidence. The appellant explained that his mother was unable to attend the hearing because she was self-isolating, having been on a church pilgrimage to Jerusalem and that his partner was too unwell to attend the hearing. I also had before me the respondent's bundle. Both parties submitted position statements which were included in the appellant's bundle. The respondent also produced the CPIN on Democratic Republic of Congo: Unsuccessful Asylum Seekers - version 4, January 2020.

Oral evidence of the appellant

15. The evidence of the appellant from his written statements and oral evidence is in summary as follows:

16. He regrets his previous criminal behaviour which took place when he was a teenager. Since being released from prison and released on immigration bail on 20 March 2014, he has not been convicted of any further offences. The experience of prison made him realise the impact of his behaviour on his family and made him to decide to change his lifestyle and associates. After leaving prison, he moved away from the Manchester area and away from his previous associates and now lives in Kent where his family have all settled.

17. Since leaving prison he has always worked. Initially it was difficult to find work because of his criminal record and he worked cleaning trains where there had been a suicide. He then worked as a builder and is currently working as a docker. He described his current job as difficult to obtain. He has been doing this job for about 2 years and takes home about £1,600 per month. The job changes from day to day as it is shift work and dependent on the tides, weather and incoming boats. Some days he will work early shifts and sometimes nights. The length of the shifts vary, as do the days of work. He can be called in at short notice.

18. Prior to going to prison, he had a relationship with CM. The appellant was not aware that he was the father of his daughter KM until after she was born. The mother then informed him that she thought he was the father and they carried out DNA tests which proved positive. KM was born on 4 February 2010 and is now 11 years old. The appellant has always had a relationship with this child. His ex -partner brought the baby to see him in prison. He continues to have a close relationship with the child. She lives in Stockport with her mother. She has three siblings from her mother's other relationships. The appellant talks to his daughter on social media on

an almost daily basis. He keeps in contact with his daughter via FaceTime or WhatsApp and text and also speaks to her by telephone. She comes down to stay with the appellant in the holidays and he sometimes visits her in Stockport. When he is with his older daughter, they spend time together shopping at Bluewater, ice-skating and swimming, although the current arrangements have been disrupted by Covid. His daughter is going through problems to do with her identity as a biracial individual. His daughter also has a relationship with her baby half-sister and the appellant's family.

19. The appellant entered into a relationship with his current partner RPM in about 2015 after being released from prison. They have been in an on/off relationship for 5 years or so. RPM has longstanding mental health issues which have been compounded by the birth of her daughter RM on 5 December 2020 who is the child of the appellant. RM was 6 months old at the date of the hearing.

20. The appellant's partner RPM lives close by to his mother and siblings. Sometimes the appellant stays overnight with her but if RPM wants a break or is finding things difficult, he will take the baby and care for the baby at his mother's house. He frequently takes the child for several days in a row and has taken the child for longer periods more recently. When the baby is with him at his mother's home, his mother and sisters assist to look after the baby whilst he is at work, and he takes responsibility for the baby when he is at home.

21. The appellant comes home for lunch and spends time with his child and looks after the child when he finishes work, changing her nappies, feeding her, dressing her, bathing her and putting her down for the night.

22. Over the time that he has been in a relationship with RPM, the appellant has formed a strong bond with her older child R with whom he has a close relationship. R was born on 16 January 2015 and is now 6 years old. The appellant describes R as his "stepson". R calls the appellant either "S" or "Daddy". R does not have a relationship with his own biological father. The appellant sees R when he is at his partner's home and occasionally the child comes to his mother's home. He sometimes takes the child to school.

23. The appellant was questioned about the Family and Social Work Report which listed various incidents when the police had been involved with the appellant after allegations of violent behaviour including ABH and domestic violence. The appellant admitted that he has on occasion become angry and that he has had a few arguments with his mother and sibling to which the police had been called. He also confirmed that there had been incidents with his partner, RPM which have led to police involvement. The children have not been present at these incidents.

24. He claimed that some of these incidents had been inaccurately recorded because his partner does irrational things due to her mental health problems. She can become angry and emotional. There was a recent incident where the police had been called but the appellant was released after the neighbour had produced video evidence

showing that it was in fact RPM who had been the aggressor rather than the appellant. The appellant claimed to know nothing about a reported incident with a third party and gave evidence that he felt he was targeted unfairly by the police.

25. He explained that over the years he has learned how to deal with RPM. She had a very difficult upbringing and has a lot of problems. He does not want to let her down. He has learnt how to deal with the stressful situations by walking away, cooling down and talking to other people.

26. The appellant's evidence was that it would be unlikely that his two children would spend time together if he were deported because their mothers did not see "eye to eye". It was put to the appellant that he was like a childminder rather than a parent. His evidence was that he is not a childminder because he actually looks after his children, loves them, speaks to them and provides them with financial support. He gives guidance to his stepson, who is in year 1 at school, who is finding things difficult at the moment and says things like "I wish you were my real dad". His stepson has been affected by the birth of the new baby and is jealous that the appellant takes the baby away to his family home.

27. It was the appellant's evidence that his daughter and ex-partner in Manchester were unable to attend the hearing because his daughter was having her induction day at Stockport Grammar School. The appellant's evidence was that he discussed with CM what school his daughter should attend. He was involved in which name to call his baby and the baby has his surname. He makes financial decisions in respect of his stepson such as deciding who pays for which items, for instance, he pays for the school uniform. In respect of his baby daughter, he buys milk and nappies and discusses with his partner which tasks they should do. His mother's house is close to his work and close to RPM's home.

28. He earns between £90 to £165 per day, which roughly equates to £1,400 to £1,600 per month. He gives his mother £200 each month towards the rent and spends money on the children and the baby. He does the shopping for RPM, buying the baby items including nappies, wipes, clothes and medications.

29. The appellant also has a very close relationship with his older sister, who is close to him in age. She has sickle cell. With regard to his temper, he describes arguing with his siblings about silly things such as tidying up but described himself as becoming more mature along with his siblings and learning how to control his temper. The appellant's father is separated from the family.

30. The appellant describes having panic attacks when he thinks about going back to DRC and being separated from his child. These are triggered when he reports at Croydon every month. He states that his heart starts beating faster, his chest feels tighter and he feels breathless and lightheaded. He was recently taken to A and E in an ambulance but discharged himself.

SM's sister's evidence

31. The appellant's sister then gave evidence as follows. She is currently finishing an Open University Degree. She lives in North London but stays at her mother's house with her brothers and sisters in the holidays and has been there more often during the Covid pandemic. She confirmed that the family rarely discussed the appellant going back to the DRC because all members of the family were afraid of this happening. She agreed that if the appellant were to be deported, she would try to help facilitate the relationship between the siblings, but this would be difficult for her because she has sickle cell disease and is often ill. She has never returned to the DRC and has no family that she knows of there because all of her family are here and the extended family live in France. She speaks English, French and a little bit of Lingala.

32. She confirms that her brother brings the baby over for several days a week to give RPM a rest. If her brother is at work, she, her mother and her sister take turns to look after the baby. She confirmed that as soon as her brother comes home from work the baby is handed to him for him to take over. He also looks after the baby at the weekends when he is not working. Her evidence is that her brother went up to Manchester recently at short notice to assist his ex-partner with a racist incident at school involving his elder daughter. The appellant's elder daughter came to visit in the second lockdown in December or January 2021.

33. Her evidence is that the appellant's stepson came to her mother's house and stayed for a few days at the beginning of the year. Her brother takes him out to Bluewater. He comes to the appellant's home sometimes because there is a back garden. She confirmed that the appellant sometime drops him off and picks him up from school and that the stepson calls the appellant "Dad".

34. She has not experienced any violent incidents involving her brother. Although there have been a few misunderstandings between the siblings she has never witnessed the appellant being violent. There have been no arguments in front of the children. She is aware that the appellant's partner has mental health problems.

35. She also explained that she has long standing sickle cell for which she receives treatment from Guy's and St Thomas' Hospital. She has frequent sickle cell crisis episodes and is often hospitalised. In 2021 she has had six crises, the shortest was three days and the longest went on for six weeks. Her brother assists her during these crises and will often come to her house to clean it, get in the shopping for her as well as fix things. She confirms that she is very close to her brother because they were born only eleven months apart and she has a strong emotional attachment to him, having been together with him all of her life. They get on very well. Her sickle cell crises are precipitated by stress and the stress of her brother being deported will impact on her emotional and mental health, which in turn will impact on her physical health. She explained that when her brother was in prison, she had to see the psychologist and she struggled to cope.

36. In re-examination she clarified that it would be very difficult for her to look after the baby consistently because of her frequent sickle cell crises. In view of the number of

times she attends hospitals and her own commitments she would not have very much time to either look after the baby or facilitate contact between the appellant's elder child and the young baby.

Submissions

37. Ms Isherwood asked me to dismiss the appeal. Her submission is that the appellant does not meet the requirements of the rules and has not demonstrated that there are any very compelling circumstances as to why he should not be deported. She pointed to the fact that the appellant is not an asylum seeker and that he would not be returning to the DRC in the context of being persecuted. Her submission is that the appellant had shown no remorse for his actions and has disputed his violent behaviour. She pointed to the fact that the Kent police are concerned about the appellant's violent temper. She submitted that he is a danger to his child and is unwilling to address matters. She said that the attitude of the appellant was that he was blaming the Home Office for losing his job when it was himself that put had put himself in this situation by carrying out an offence and going to prison.

38. The appellant has exaggerated how important he is in the lives of his children. He has not seen his daughter in Manchester very recently and she is not visiting her father every other weekend. Covid does not stop parents from visiting their children. She stated that he had exaggerated his relationship with his stepson. The appellant did not mention his stepson, when asked a direct question about his children which indicates that the appellant does not consider him to be his own child. She pointed to the fact that the stepson has a good relationship with his own paternal grandmother.

39. She submitted that there was conflicting evidence in relation to his youngest child. Her submission was that the appellant has failed to demonstrate that he has a genuine and subsisting parental relationship with his children. There was a lack of detail about his relationship with his children and no evidence that he is involved in taking important decisions in their life. She submitted that the relationship between the appellant and his children is more akin that of a carer who is nice and "buys lots of things for his children".

40. She asked me to attach limited weight on the Social Work report. She submitted that the report did not refer to the appellant's violent behaviour and therefore was not a proper assessment. She pointed to the fact that the writer referred to the immigration rules and law and quoted sources from 1979. She also referred to the limited medical evidence in respect of RPM and asked me to place little weight on the letter from the doctor which she stated was obtained via a video assessment. She pointed to conflicting evidence as to where the appellant lives. The evidence of the appellant's partner has not been tested because she did not attend court. She submitted that the appellant is not in a genuine and subsisting relationship with RPM.

41. Although Miss Isherwood did not make any vigorous submissions that it would not be unduly harsh for the three children to accompany the appellant to DRC, she argued that it would not be unduly harsh for any of the children to remain in the

United Kingdom without the appellant. She submits that the appellant does not take any decisions in respect of the children, he is not very important in their lives and he does not see his daughter in Manchester very often. The family as a whole take responsibility for the younger child and the mother of the younger child has her own mother and support network to whom she can turn for support.

42. She pointed to the fact that unduly harsh was a high threshold and that all of the appellant's children could remain in the United Kingdom with their own mothers without the appellant. The Tribunal must honour the expression of Parliament.

43. Ms Lanlehin's submissions are set out in the record of proceedings. She pointed to the consistent evidence between the appellant and his witness which is that the appellant is involved significantly with all three children. The appellant's relationship with his children cannot be characterised as that of a carer. He is a committed and involved parent.

44. It would be unduly harsh for all three children to remain in the UK if the appellant were to be deported. In particular the baby's mother RPM has very poor mental health and is receiving a lot of support. Her mental health would deteriorate in the absence of the support being provided to her by the appellant. He is the glue that holds the family together.

45. She addressed me on Ms Isherwood's submissions and I made a note of the submissions in the record of proceedings.

The Law

46. The burden of proving that he meets the requirements of the immigration rules is on the appellant and the standard of proof is to a balance of probabilities.

47. Section 117A of the Immigration Act 2014 applies where a court of UK Tribunal is required to determine whether a decision under the Immigration Acts breaches the person's right to respect for private and family life under Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. By Section 11A(2) the court or Tribunal in considering the public interest question is required to have regard in all cases to the considerations listed in Section 117B and in cases concerning the deportation of foreign criminals to the considerations listed in Section 117C.

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and

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

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

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

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

48. The maintenance of effective immigration control is in the public interest. Pursuant to Section 117C(1) it is in the public interest to deport foreign criminals. The will of Parliament as expressed in primary legislation requires the automatic deportation of foreign criminals, into which category the appellant fits. With regard to 117C(2) I note that the appellant's conviction in October 2012 which precipitated the deportation action against him led to him being sentenced to a total term of three years' imprisonment. Since the appellant is sentenced to a term of imprisonment of less than four years I am required by virtue of Section 117C(3) to consider whether Exception 1 or 2 applies to him.

49. Paragraph A398:

"These Rules apply where

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention."

Paragraph 399:

"399. This paragraph applies where paragraph 398(b) or (c) applies if -

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the United Kingdom and

(i) the child is a British citizen; or

(ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen or settled in the United Kingdom, and

(i) the relationship was formed at a time when the person was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

Paragraph 399:

"This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

Unduly harsh

50. In relation to the test of unduly harsh, I repeat Lord Popplewell's words at [10] to [12] of AA(Nigeria) v SSHD [2020] EWCA Civ 1296;

[10] In relation to what is meant by "unduly harsh" in section 117C(5), the authoritative guidance is now that given by Lord Carnwath JSC in KO (Nigeria) and by this court in HA (Iraq). The former addressed this issue notwithstanding that the main question in that case was not the meaning of "unduly harsh" but whether it involved consideration of the seriousness of the offence. At [23] he said:

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6) , taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1) , that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2017] 1 WLR 240 , paras 55 and 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

[11] At paragraph [27] he said:

> "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563 , para 46, a

decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

[12] As explained in HA (Iraq) at [44] and [50] to [53], this does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness".”

50. Later Lord Justice Poppleworth states at [35]:

> “In any event, I would suggest that guidance on the unduly harsh test can now confined to KO (Nigeria) and HA (Iraq). The latter is a necessary adjunct to the former both because it explains aspects of Lord Carnwath's observations and because it provides additional guidance on the application of the unduly harsh test. There is no justifiable basis in the language used in the FTT decision for suggesting that the FTT Judge failed to apply the correct test as expounded in these two subsequent cases.”

Discussion and analysis

Findings of Fact – Facts not in dispute

51. I start by making findings of fact of those issues which are not in dispute. It is not in dispute that the appellant came to the United Kingdom at the age of 11 with his family. He was dependent on his parent’s claim for asylum in the United Kingdom. Although the asylum claim was initially refused, by 2007 the whole family had been granted indefinite leave to remain. The appellant was lawfully in the United Kingdom from this date. At that time, he was aged approximately 14 years old.

52. The appellant moved to the Manchester area with his family when he was about 12 where it seems that his problems in relation to associations with negative peers started from the age of 15 to 16.

53. From 2009 he was convicted of several offences including destroying and damaging property for which he received a Youth Referral Order for 3 months, theft from a person for which he received a Referral order for three months on 29 July 2009, another unspecified offence on 5 August 2009 when his referral order was extended by three months, possession of a class A drug on 9 March 2011 for which he received a conditional discharge and robbery on 4 July 2011 for which he received a 10 month sentence suspended for 24 months. All of these offences took place when the

appellant was a minor. Ultimately, the index offence which triggered the deportation action was a very serious incident which occurred when the appellant was at the age of 19. The appellant was convicted with others of the robbery of a taxi driver at knife point for which he received a sentence of two and a half years. The offence took place during the currency of a suspended sentence, and he received an additional 6 months for the suspended sentence. There have been no further convictions since that of October 2012.

54. It is also not in dispute that the appellant is the biological father of KM who is now aged 11, and who lives in Stockport with her mother and three siblings and that he is the also the biological father of RM who is now aged six months. Both children are British citizens.

Facts in dispute

55. The appellant's evidence was that it was going to prison which made him determined to change his lifestyle. He spoke of how when his baby came to visit him in prison and they searched her nappy it had a great impact on him and he resolved to do better. During his time in prison, he was said to be a model prisoner working in the library and learning carpentry and he was commended for his good behaviour. After leaving prison, he left the Manchester area and moved away from his former associates. He and his family moved to Gravesend in Kent. He has had no arrests, charges or convictions for any of the previous types of offending including robbery and possession of bladed instruments. There have been no further convictions since his release from prison in 2014. The index offence itself took place in May 2012, over 9 years ago which indicates that the appellant has left behind his involvement with this type of criminal offending and matured. I am satisfied from his evidence that he does regret his previous behaviour.

56. He has been working in paid employment consistently since his release from prison over the past 7 years, which is to his credit. The respondent did not challenge his evidence that he has been working full-time as a docker for the last 2 years and that he earns £1,400 to £1,600 per week. I am satisfied that the appellant does financially support his partner, his young baby as well as contribute towards his mother's household and that he is also providing some financial support for his oldest daughter because this was the consistent evidence before me in the witness statements and reports.

57. Although the appellant has not been convicted of any further offences in the last 9 years, there have been alleged incidents of domestic violence. In April 2020 a referral was made to Social Services by RPM's midwife because of concerns regarding RPM's mental health and because of her own history of involvement with social services. RPM was pregnant at the time and social services had previously been involved with RPM because she was a care leaver and had previously been homeless. She had also confided in the midwife that she had attempted suicide (she later denied this). The report was carried out with the express aim to ensure the wellbeing of the appellant's unborn baby and the appellant's stepson R. The purpose of the assessment was to

explore the family's circumstances and ensure that the child of the family and unborn baby were being safeguarded.

58. The resulting report is very thorough. Social services contacted the police, and the reports sets out details of all of the allegations made against the appellant in respect of incidents of domestic violence. In terms of his family there were two incidents when the police were called in October 2017 and March 2018. The appellant admitted that there had been disagreements and arguments in his family. No further action was taken. There was a reference to an incident with a third party in October 2019, but the appellant had no knowledge of this incident and was not able to give any evidence about it and the incident was not particularised in the report. There was also evidence of three incidents of domestic violence between the appellant and his partner RPM in July 2019, November 2019 and December 2019 (plus another of malicious communication). The incident in July 2019 followed a break-up between the couple and involved the appellant repeatedly dragging RMP in the carpark and biting her finger. In November 2019 there was a verbal argument. In December 2019 he smashed a windscreen. None of these incidents resulted in charges or criminal prosecutions. The appellant admitted to becoming angry at times. He spoke of his partner's mental health difficulties to which I will refer later on. I find that the appellant has a volatile temper and that on occasion he becomes angry. I find that there were at least two incidents which involved his family and at least three others involving his girlfriend.

59. However, I also find that the last of these incidents took place in December 2019, over a year before the report was compiled and 18 months prior to the date of the hearing. I find that the appellant has become more mature over this time and has effectively found ways to control his temper and put strategies in place to cool down. This is his oral evidence and it is consistent with the Family and Social Work report which was included in the appellant's bundle and with the lack of recent incidents.

60. The writer of the report, who is a trained professional who was not writing the report for these proceedings, concluded;

> "Having taken into consideration all of the evidence of the various incidents that this was not a relationship of domestic violence."

61. She concluded that the relationship between the appellant and his partner was volatile and that both the appellant and his partner have feisty personalities. She noted that that RPM was not in fear of the appellant and that he was supportive to her. She also noted that there had been no further incidents over the last year and that the appellant had taken on board strategies for managing his temper such as withdrawing himself from the situation, going elsewhere and asking his sister to intervene to help calm himself down and that the couple would need to utilise strategies they have identified as a couple to manage their conflict.

62. The overall conclusion of the report was that there were no safeguarding issues in relation to R. The report categorically states that there were no violent disagreements in front of R and no negative impact on him. From this report, I am satisfied that

although there have been incidents and the police have been called, these are very much in a domestic setting, they have not been characterised as incidents of domestic violence by Social Services but rather as a volatile relationship which is worsened by naturally feisty personalities and that strategies have been put in place to minimise the appellant's anger, and that there have been no such incidents for over a year.

63. This sat well with the appellant's evidence about his partner's mental health issues as well as his evidence about his own behaviour and that of his partner. I do not minimise these incidents, but I do not agree with Miss Isherwood that the appellant is a danger to his children. The evidence from social services categorically does not support her submission and indeed the evidence is that the appellant in fact assists his partner and his presence in R's life is a positive factor. There are no factors identified as affecting the child from the parents in June 2020. Domestic violence is not listed as an area of concern where the child is concerned. Had social services considered the appellant to be a danger to children they would have taken immediate steps to prevent the appellant from being involved with R and to protect the unborn baby.

64. I turn to the evidence in relation to the RPM's mental health. Ms Isherwood sought to persuade me that the evidence was not compelling and that because RPM did not attend the appeal, her evidence could not be tested. However, I had before me both a Children and Families Social Services Report which, as I have already stated, was prepared independently from these proceedings and to which I attach significant weight because an independent professional prepared the report in the context of a statutory responsibilities for safeguarding children. Two different social workers were involved in preparing the report which involved various telephone calls to RPM, the appellant and a video call with R. Checks were also made with midwifery and the police. The report is detailed and does not shy away from dealing with difficult and sensitive issues and I give it significant weight.

65. From the report, it is manifest that the appellant's partner, RPM is a very vulnerable individual who has had an extremely difficult life. The report refers to her being taken into care after an electrician who visited the property where she lived as a child with her mother expressed concerns about the conditions, which were said to be "squalid". The property was considered unfit for a child to live in. RPM was treated as a neglected child, subject to a full care order and then lived with foster parents. She was known to Social Services prior to meeting the appellant, having become pregnant at the age of 17 when subject to the full care order at a time when she was living in a long-term foster placement. There were considerable concerns about RPM's welfare at that stage. In December 2015 RPM was referred to social services after the placement with her foster carer broke down.

66. I find that RPM disclosed both to her midwife and social services that she felt low in mood in mid-2020, that at that time she was being investigated for bi-polar and was waiting for counselling.

67. There was also a doctor's letter before me dated 15 June 2021 which was contemporaneous to the appeal hearing. Ms Isherwood submitted that I could not rely on this letter because it was obtained by a telephone conversation between the doctor and RPM. I am not in agreement. The author Dr Elizabeth Best is described as a consultant perinatal psychiatrist. She is manifestly a trained professional and well qualified to assess RPM's mental health. The fact that during the pandemic she assessed her patient by an alternative method does not lessen her professional judgement. RPM had already communicated her concerns about her mental health to her GP and midwife a year earlier in 2020. A consultant perinatal psychiatrist would in my view be well placed to assess RPM's mental health. The letter states as follows:

> "I was glad to be able to speak to you today as planned. You report you have been feeling very low in mood for one week now. You are finding it very hard to even get out of bed and have been relatively neglecting yourself eg not feeling able to make the effort to have a shower as you would normally. You are sleeping as much as you can but still feel fatigued. You report you can function in looking after you 6-year-old son R as he doesn't need much from you, but cannot manage looking after your 6 -month-old baby girl RM, so your ex-partner and father of RM has agreed to keep her longer that he usually would. You feel as though you have been overeating, although others say you are not eating enough.
>
> RPM, you state you want to sleep as much as possible "as you don't want to be here" but not with suicidal intent or plans. You conversed well with me and sounded tearful. You described that since your pregnancy with RM you have felt worse in mood and more of a failure in being a mum. This is affecting the relationship and feelings you have towards both children, wanting to distance yourself from them and not wanting to be with them.
>
> You described how your difficulties with moods began around age 12 (secondary to long term adverse childhood experiences). You have noticed a long-tern pattern with low mood lasting up to a week, with the occasionally more elevated mood states lasting a few hours, which you believe are part of a concerted effort on your part to try and cheer yourself up eg by spending money.
>
> The only treatment prescribed to you previously has been propranolol for panic attacks over a year ago (by your GP) which have improved since".

68. The consultant's opinion is that RPM has Emotionally Unstable Personality Disorder and a possible depressive episode currently impacting on her feelings towards the children.

69. The consultant recommends psychological therapies. She also agreed to prescribe RPM sertraline and ask her nursing colleague to offer some further sessions to her.

70. The independent social worker also spoke to RPM. RPM informed her that she struggles with looking after her child and that in the past she was diagnosed with bi-polar disorder but that "the professionals are moving towards a diagnosis of Personality Disorder". Her evidence to the independent social worker is that her condition affects how she looks after RM and that she is receiving a high level of professional support including weekly visits by health care professionals from the

postnatal mental health team as well as waiting for counselling. She is currently taking antidepressants.

71. Miss Isherwood did not submit that this is not an accurate record of what RPM stated to the independent social worker.

72. Viewed in the round, I find that RPM has had a difficult childhood and has chronic and long standing mental health problems which cause her low mood and suicidal thoughts. I am satisfied on the balance of probabilities that whilst RPM was pregnant there were concerns about her mental health, but she was said to be "managing". However, since the baby has been born it is clear that RPM's mental health has deteriorated to the extent that she is finding it very difficult to cope and that this has been impacting on her ability to look after and relate to her children. There is some indication that she will be diagnosed with a personality disorder and at the time of the appeal hearing, I find that she was struggling with her children and receiving a high level of support from not only health professionals but from the appellant. I am satisfied that this explains why she did not attend the hearing.

73. I am satisfied that RPM supports the appeal despite her absence because she completed and signed a witness statement in support of the appellant, took part in a conversation with the independent social worker in which she was positive about the support provided by the appellant and also discussed his input in detail to social services. I do not agree with Ms Isherwood that there is insufficient evidence of RPM's health problems or of her support for the appellant and her dependence on him to assist her with caring for the children particularly the baby. I also note and take into account that the appellant's own description of RPM's difficulties is entirely consistent with the independent evidence before me and the independent social worker.

74. At this stage I turn to the evidence from the independent social worker. Miss Isherwood levelled a number of criticisms at the report including that the social worker referred to the immigration rules, referenced old research and most importantly, failed to mention the incidents of domestic violence in report. She submitted that the report carried little weight.

75. The expert has provided her CV. She qualified as a social worker in 2011 and has considerable experience working as a social worker in a number of settings. As was evident from the Independent Social Work Report, the social worker also confirms that she understands her duties to the court. I find on this basis, that the social worker is an appropriate expert to prepare such report. The interview for the report was conducted remotely however I do not find that this impinges on the quality of the report. The expert confirms that she has considerable experience in assessing families in limited timeframes and had the ability to make observations and enquiries via the video link and indeed points to various observations in her report. I agree that it is not helpful for the expert to refer to the immigration rules as she is not an immigration expert and I disregard her comments on any rule or immigration law. Nevertheless, I accept that she has the expertise to assess the bonds between the

various family members and the effect on the children of their father being absent from their lives.

76. The social worker refers to various pieces of research in her section on references. These range from research from 1950's to 2014. I disregard Miss Isherwood's submission that just because a report cites old research that it should be disregarded. What is important is the quality of the research. Further the research referred to also includes much more recent research.

77. The independent social worker, contrary to the submission of Miss Isherwood, does note that the relationship between the appellant and RPM can be tumultuous with break ups following arguments and that the police have been in attendance. The independent social worker also notes that the couple have developed strategies to deal with their arguments; with SM leaving the house and sitting in his car or going for a walk and notes that the appellant had stated that living separately has helped lessen the frequency of the disagreements. I am not satisfied that any of the respondent's criticisms undermine the report and I give weight to the report.

78. There is more than sufficient evidence before me from the Family and Children's Report, the consultant and the independent social worker report to support the appellant's evidence that RPM has had an extremely difficult life, is struggling significantly with looking after her young baby and requires considerable support. I assess the appellant's relationship with his partner and his children against this background.

Genuine and subsisting relationship with partner RPM

79. Ms Isherwood submitted that there is no genuine and subsisting relationship between the appellant and his partner and pointed to inconsistencies in the evidence. In his statement the appellant said: "Our plan is to live together as a family as soon as we have put the necessary arrangements in place". This is inconsistent with the evidence from the doctor where he is described as an "ex-partner". Having considered all of the evidence, I find that the situation is fluid and complex. The appellant's evidence is that he loves his partner, he hopes that they will be able to live together but that she is unwell and that sometimes she will tolerate him and sometimes she will not. He has learnt to understand the reason for her problems in view of the difficulties she had in growing up and that this has assisted him to be able to deal with her emotions and manage his temper and lessen the conflicts between them. His evidence came across as very natural and unrehearsed.

80. In June 2020 Kent social services described the relationship as "intermittent" and there were references to "break ups". RPM stated that "he basically lives with me but doesn't" from which the report writer understood that he does not formally live there but stays over very often. The independent social worker referred to the appellant as living at his mother's home and later recorded that the appellant had stated "we are not really together at the moment. I'm just her to help her support be there for the kids that's my main focus. Today we will be together and tomorrow not together."

81. The couple do not live together full time and are not married, but on balance I find that they are in some kind of a relationship with each other, since they have a child together and they do not have any other partners. The relationship is clearly up and down and depends to some extent on the mental health of RPM.

82. Although I find that the relationship is genuine, I am not satisfied that it is currently subsisting. The evidence before me is that that the couple are not together at the present time with the appellant living mainly at his mother's home and taking the baby there often.

83. Since I am not satisfied that the appellant has a genuine and subsisting relationship with a partner for the purposes of the immigration rules, he is unable to meet the Exception 2 in respect of partners or paragraph 399(b) of the immigration rules. I state for completeness however that given RPM's difficult childhood, poor mental health and her current vulnerability that I am satisfied that it would be unduly harsh for her to relocate to the DRC where she would be entirely without the support that she needs in a country where she has no connection, no knowledge of the culture or language and no relatives. I am satisfied that her mental health would deteriorate in these circumstances which would be to the detriment of her children.

Genuine and subsisting relationship with the children

RM

84. It is against this background that I assess SM's relationship with his young baby RM. The social services report was completed prior to the birth of the child. The appellant is recorded as being involved with discussions about the baby's name which is his evidence as well as making plans for arrangements after the birth particularly in respect of assisting RM's older sibling to adjust to the arrival of a new baby.

85. I am satisfied from the evidence before me that the appellant is playing a large part in the care of his 6-month-old baby and has done since the baby's birth. His evidence is that when the partner cannot cope, he takes the child away. His sister gave evidence that in the last few weeks the baby has been living with the appellant and his paternal family for most of the time. This is consistent with the account that RPM gave to the consultant and the amount of support she is receiving. I accept the appellant's evidence that he carries out parental tasks including bathing, dressing, washing, and feeding the baby, preparing bottles, cleaning, buying medications, buying clothes, changing nappies as well as playing with, soothing and putting down his child.

86. The independent social worker was able to view the physical relationship between the appellant and the baby and witnessed him sooth her, hold her, rub her back and sing to her as well as put her down to change her nappy ensuring that she was in a safe position. It is said that his voice calmed RM when she was distressed. She also witnessed him preparing her food and cooling it down appropriately before feeding her.

87. The submission of Ms Issherwood on part of the respondent was that this relationship cannot be characterised as parental because the appellant is working. I do not agree with this submission. Going to work manifestly does not preclude an individual from having a parental relationship with their children and many parents work full time and juggle their parenting and work responsibilities. It is ridiculous to suggest that the primary carer of a child is not simultaneously able to be a parent and in employment at the same time. There is nothing in the evidence to suggest that the appellant is merely a childcare provider for the child. The relationship is clearly one of a parent carrying out all of the fundamental necessary tasks for their child including providing for their essential living needs. This relationship cannot be characterised as one that is not a parental relationship.

88. The appellant's employment has assisted him with his rehabilitation because it provides a structure and keeps him away from his previous associates. Employment also assists him to financially support his family and children. This cannot be held against him. The appellant is lucky in that he has the assistance of his family to help him with the childcare when he is at work. His older sister normally lives away from home but is currently living in the family home because her university degree has come to an end. She has also spent more time at the family home in Gravesend because of the Covid situation. A younger sister also lives in the household as does the appellant's younger brother and his mother, who has worked as a carer. Between these individuals there is sufficient provision to look after the child whilst the appellant is undertaking his shift work as a docker.

89. I accept the compelling evidence of the appellant's older sister, that as soon as the appellant comes home from work, the family have a strict rule of handing the baby over to him as the baby is his responsibility and he is the person who prepares bottles, feed the child and put the child down to sleep in the evenings. On this basis, I accept that the appellant is currently jointly responsible for his child with the child's mother and were he not to be there, I find that things would become very difficult for her and that on balance that she would not be able to cope with looking after the baby on her own which would result in more social services involvement. RPM also confirmed that she relies on the appellant financially as he pays for R's necessities.

90. I find that the appellant has a genuine and subsisting parental relationship with his 6-month-old baby.

R

91. I turn to the appellant's stepson R. This child is now 6 years old having been born on 16 January 2015. As set out above the child was born in difficult circumstances when RPM was aged 17 and herself a vulnerable child living with foster parents under a care order. The evidence before me is that the child does not have a solid relationship with his own biological parent. Ms Isherwood's submission was that the evidence in this respect was inconsistent in that the appellant stated that the child last saw his own father a few years ago on his birthday whereas elsewhere it is said he has no relationship with his own father. The appellant's evidence was that when the child's

father turned up out of the blue and joined his birthday celebration, the little boy did not want to speak to his father and had not seen him since then. I do not find this evidence to be inconsistent with the social services report which states that the child does not have an established relationship with his own father and that this has been the case since birth. The independent social worker also reports that he does not have a firm relationship with his biological father. On this basis I find that this 6-year-old child does not have a strong relationship with his own biological father.

92. The appellant has been in R's life for five years since R was a few months old. Given he has been living at R's home on and off during this period, it is inevitable that he has spent significant time with this little boy. Kent social services interviewed R to ascertain his wishes and his feelings. He said;

> "his favourite thing to do at home with Mummy and S is to play hide and seek. He also said that he is excited to have a baby. R smiled when S's name was mentioned and says he gets excited to see him".

93. During the social services interview there was evidence that the appellant and RPM had discussed what they could do to ensure that R did not feel left out after the baby was born such as doing fun activities, so he feels valued and prioritised.

94. The consistent evidence before me from the Family and Social Services report, the independent social work report, the appellant and the appellant's sister was that R considers the appellant to be his father and calls him either "Daddy" or by his first name. This strongly indicates that the child considers that the appellant is a parental figure in his life and important to him. The social services report states;

> "It is acknowledged that [SM] has been a father-figure role to R for most of his life having entered R's life when he was less than a year old and this will likely to be promoted more so after the arrival of the unborn baby. SM reported the child saying things such as "I wish you were my real dad".

95. The appellant reported to the independent social worker that over the years he has decorated R's room, taken him to school, prepared meals, read stories, bathed and cleaned him and played games together. R has also joined KM on shopping trips, going swimming and to the park ice skating etc. RMP also stated that as a family they would go for walks in the park and out for dinner and that the appellant took both children out when KM would come to visit. She recalled the appellant building a tent for R to sleep in the living room.

96. Ms Isherwood placed a great deal of emphasis on the fact that when the appellant was asked about his children, he did not refer to his stepchild, but the appellant clarified that he thought that Ms Isherwood was referring to his biological children.

97. I accept that in the context of a slightly incoherent family situation where the appellant is in and out of RPM's home, there is a new baby who is living between two homes and in the midst of the Covid pandemic that it is difficult to precisely characterise how often and on what days the appellant sees R, but I do accept his evidence that he does spend time with R, especially if he is at R's home at the

weekends and that he goes shopping with him, takes him out for instance to McDonald's and talks to him. I also accept his evidence that he does provide financial assistance for the child including purchasing the school uniform and that he has on occasion taken him to school. The appellant spoke of how the little boy is currently feeling jealous because his younger sibling is being taken away from his mother's home to the appellant's home. Given that the child calls the appellant "daddy", has no meaningful relationship with his own father and the extent of the appellant's involvement in his life, I also find that the appellant has a genuine and subsisting parental relationship with this child.

KM

98. I next turn to the appellant's older daughter, KM who was born on 4 February 2010. She is now 11 years old and lives with her mother CM in Stockport with three siblings from different fathers.

99. The respondent accepted in the decision of 30 May 2014 that this child is the biological child of the appellant and that he had a genuine and subsisting relationship with her at that time because there were records of prison visits. Although the appellant has never lived with this child, he has been an important presence throughout her life. She has visited him frequently in the holidays and sometimes at weekends and communicates with her father every day.

100. At the age of 11 she was able to express her views to the independent social worker. She told the social worker about the relationship with the appellant and that she enjoys and looks forward to being with her father and recalled shopping for clothes, toys and gifts. She also informed the social worker that;

> "she likes to seek advice from her father and messages him several times a day when they are not together. She told me that she seeks advice and support with regard to homework friendships, feelings and other aspects of her life from her father".

101. She described making pancakes, tie-dying and watching films with her father. She also expressed her enjoyment at spending time with her baby sister and that she would be sad if she could not see her father. Her mother CM also confirmed to the expert social worker that KM and the appellant have an "amazing" relationship, he contacts her every day and that the appellant will come and fetch KM for a couple of days if she needs a break from her siblings. The independent social worker states that the appellant has taken on responsibility for his daughter and that he has maintained a strong bond and presence in KM's life.

102. This evidence was consistent with that that of the appellant and I see no reason not to accept it. There was also consistent evidence before me from the independent social work report, the appellant and his sister that the appellant went up to Stockport at short notice after a race related incident involving KM at school. This evidence was given spontaneously by the appellant's sister.

103. I do not agree with Ms Isherwood that this relationship is characterised by a relationship which involves shopping. The appellant was involved in making a

decision about which school the child would attend and went up to Stockport at short notice to discuss an incident of racism. He sees the child on a regular basis and listens and advises her on her life. I find that the appellant has had regular and frequent contact with his oldest child throughout her life with visits taking place in the summer holidays as well as at weekends. It is the appellant who travels to Stockport to collect his daughter. It is unsurprising that these visits are not taking place every other weekend at the present time due to the COVID situation and also due to the appellant's responsibilities in caring for his youngest child. However, there has been an ongoing relationship since the child's birth. This is manifestly also a genuine and subsisting parental relationship.

104. In summary, I am satisfied on the evidence before me that the appellant has a genuine and subsisting parental relationship with all three children, both his two biological children and his stepchild. The strongest relationship is with the baby, with whom the appellant spends much more time than the other two children, and by virtue of the child's age requires a good deal of care.

Unduly harsh for the children to live in the country to which the person is to be deported.

105. I first note that a consideration of undue harshness will entail a consideration of what is in the best interests of all three children and that this is a primary but not determinative consideration.

106. As a general rule it is in the best interests of all children to grow up having a loving and meaningful relationship with both parents and I am satisfied that it is in the best interests of all three children for them to remain in the UK where they can continue to live with their mothers and have contact with their wider extended families as well as continue in the education system in the case of the oldest two children. I also find that it is in all three children's best interests for their father to remain in the UK with them so that he can continue his meaningful and supportive role in all of their lives.

107. However, this is not determinative of the appeal and I go onto consider the issue of undue harshness.

108. Mr Whitwell for the respondent in the position statement withdrew the previous concession that it was accepted that it was unreasonable for these children to go to the Democratic Republic of the Congo because they are British citizens. He referred me to the case of Patel (British citizen child – deportation) [2020] UKUT 00045 (IAC). This states that each case is fact-specific and that British nationality on its own will not necessarily make it unduly harsh for a child to accompany its parents to another country.

109. Ms Isherwood did not attempt to make any submissions in respect of this issue. She did not strongly submit that it would not be unduly harsh for the children to relocate to the Democratic Republic of Congo.

110. All three children are British. All three children have grown up in the United Kingdom. None of them speak French or Lingala or have any cultural connection to the Democratic Republic of Congo apart from the appellant having been born there. None of the children have any extended family members in the Democratic Republic of Congo. The children all reside mainly with their mothers who are their primary carers.

111. In the case of the eldest child, who is 11, to require her to reside in the DRC would be to sever her from her relationship with her mother and primary carer as well as her three other siblings and to deprive her of the opportunity to attend Stockport Grammar School. It would interrupt her education as well as affect her identity. It is not suggested by the respondent that the appellant's ex-partner and his daughter's three British half siblings would be expected to relocate to DRC along with the appellant and RK. In my view it would be manifestly unduly harsh to expect this child to relocate to the DRC in these circumstances.

112. RPM is not familiar with the culture in DRC and is struggling to cope in the UK as a result of her complex background as set out above. It would be unduly harsh to expect her to relocate to the DRC for the reasons set out above. She would find herself in a very difficult situation without any mental health or professional support and in financially difficult circumstances when she is not a robust individual. I accept that n these circumstances her mental health would deteriorate significantly to the extent that she would not be able to look after her child. It would be unduly harsh for the British baby to go to the DRC as this would either separate her from her vulnerable mother and older sibling and even if she went with them as a family unit would expose her to an uncertain future in terms of support, accommodation and access to healthcare. She would be in a situation where there is no wider support and no professional help for her mother which would impact on her mother's ability to care for her and her relationship with her mother . It would also be unduly harsh for R to go to the DRC with the appellant. His mother is his primary carer and this would involve a separation from her or alternatively a separation from his paternal extended family, would interrupt his education in a situation where he is well-settled at school and requiring extra support and expose him to the same difficulties as the baby in respect of a difficult economic situation and his mother's deteriorating mental health. The child has no familiarity with the language, culture, society or education system and no connection with the DRC at all.

113. In the case of all three children, to require them to go to the DRC with the appellant would mean separating them from their mothers or in the case of the younger two exposing them to very difficult, insecure and bleak circumstances. I have no hesitation in finding that it would be unduly harsh for all three children to live in the DRC.

Unduly harsh for the children to remain in the UK without the appellant

114. I turn to the real crux of this appeal, which is whether it would be unduly harsh for the children to remain in the United Kingdom without the appellant.

RM

115. I start with the youngest child. The child is a British citizen. A child at 6 months old is unable to express its opinions and will normally be expected to be where its parents are. I have found that it would be unduly harsh for the child's mother to relocate to the DRC. She is struggling to cope in the UK where she has accommodation, financial support from the state and the appellant, wider family connections and significant input from post-natal and mental health services. She is very vulnerable given her childhood and poor mental health.

116. I have found that the child's mother has deep-rooted and chronic mental health problems and that since the child was born the father has had a very significant role in making sure that the child is well looked after, healthy and safe. The implication from the medical evidence and the evidence as a whole is that there are some days when the child's mother is not physically or mentally able to actually take care of the child and that the appellant steps into this role with the assistance of his family.

117. The situation for this baby is unique and exceptional because of the poor mental health of the mother. This is not a situation where the baby's mother is healthy, robust and coping and will be able to safeguard the child and care for the child properly in the absence of the father. The evidence from the consultant is stark. The mother's mental health is affecting her ability to look after both of her children and means that she distances herself from them. She really cannot cope with looking after the baby at all when she is low in mood.

118. I am satisfied from the evidence that RPM is not in a position to cope with the baby alone. RMP informed the independent social worker that she relies on the appellant "a lot in terms of everything". The independent social worker finds that the impact on RM of the appellant's absence given her mother's mental health difficulties would be "profound".

119. Ms Isherwood pointed to the fact that RPM has a supportive relationship with her own mother and does have some other support available from her foster parents, but I also note that these observations were made in the report which was completed prior to the birth of the second child in June 2020. There was insufficient evidence before me to find that any potential support from RPM's own mother, friends or foster-family would be able to replicate the quality and quantity of attention and care provided by the appellant to his own child. If RPM's family were able to assist with the baby, I find that they would already be providing this support, but they are not. I also note that RMP's mother was unable to look after RMP to the extent that she was taken into care, and I treat the submission that she would be able to look after her grandchild with some scepticism given RPM's own childhood.

120. There was some suggestion by Ms Isherwood that the appellant's family could continue to care for the child in the absence of the appellant, but I find that that would be not realistically be possible. Firstly, it is the appellant's responsibility to provide financially for the child which is reported to alleviate some of the stress from the mother. Given that the appellant is already providing financial support to his

own family, they are unlikely to provide this financial support. Secondly, and very importantly they will not be able to provide the emotional support that the baby's mother needs which is being supplied by the appellant and is important in allowing RPM to keep on coping and looking after her children. Thirdly the family members have other commitments. His mother and siblings are not the child's biological parent. The older sibling's evidence is that she normally lives away from the family home in North London and is frequently in hospital due to her ill health. Another sister is at university and working part time. His younger brother attends school and has a part time job, and his mother has worked as a carer. The appellant's mother siblings have their own lives and although they assist, it is the appellant who is primarily responsible for taking care of the baby and taking the baby back and forth to the mother's home and collecting the baby when needed.

121. On balance, I find that it is probable that social services would need to step in to take care of the child in the absence of the appellant and I find that this is a bleak prospect for this child. Even if RPM were able to bring up RM and R on her own, RPM's mental health would deteriorate, which would in turn negatively impact on the child. Social services support is no substitute for the loving and supportive relationship that the child has with her own father and the contrast between the outcomes for the child are stark. I accept the independent social worker's opinion which is based on academic research that the loss of the appellant I's life would have a negative impact on her wellbeing which in turn will have a negative effect on her health, education and development. This is compounded by RPM's poor mental health and ability to cope.

122. I also find that were the appellant to be deported this would be a permanent severance with the baby. He would not be permitted to visit the UK and RPM given her poor health, lack of financial resources and links to the DRC would not be able to visit with the baby.

123. Additionally given the age of the baby this would affect the development of the relationship. Social media is clearly no replacement for physical bonding and touch at the age of 6 months. The independent social worker gives evidence of the strong physical bond between them and points to tasks such as feeding, cleaning and tending to the children at night supporting positive cognitive development.

124. I also find that without the presence of the appellant who is the pivot between the baby and her older sister that the baby is likely to lose the opportunity of having the important relationship with her half-sibling in Stockport because it is the appellant who facilitates this relationship practically and physically and the two mothers are not on good terms.

125. I find that there would be a severe negative impact on the future prospects for this child were her father to be deported. I find that cumulatively these factors would make it unduly harsh for this child to remain in the UK without her father.

KM

126. I turn to the appellant's older child KM. I have found that it is in her best interests for her father to remain in the UK and be part of her life. This is not determinative of the unduly harsh issue.

127. This child is a British citizen, now 11 years old and she has three siblings from 3 different fathers. She is biracial. She is entering adolescence and is just starting secondary school which is an important stage in her education. She sometimes needs a break from her siblings.

128. The evidence of the expert and KM's mother is that KM is having problems at school suffering racial discrimination. The appellant's sister spontaneously gave evidence that her brother had gone up to Manchester at short notice following a racial incident which supports this evidence. This was also the consistent evidence of the appellant.

129. The child's mother states that KM has expressed concerns about her identity. KM is said to have told a school counsellor that if there was anything she could change it would be "her skin colour". She is on a waiting list for counsellor, The independent social worker states;

> "In my professional opinion this is clearly a child who is already experiencing a degree of emotional distress and difficulty"

130. I give weight to the views of the independent social worker on this issue. She stresses the importance of a child's development between the ages of 12 and 18 when adolescents try to work out who they are, how they fit into society and what their self-beliefs values and goals are. She states;

> "For a child who is already struggling with her identity, added emotional distress will only compound her turmoil and increasingly encroach on other areas of her life"

131. She points to research which demonstrates that adolescents suffering an identity crisis may withdraw from normal life and may turn to negative activities, such as crime and drugs.

132. The independent social worker states that stability in the home environment is key to minimise negative outcomes.

133. I find that KM has a long-standing, secure and important bond with her father who gives her guidance and speaks to her on a daily basis. Her connection with her Congolese family is via her father. Her bond with her father allows her to explore her paternal cultural heritage. It also allows her to have an independent space away from her 3 siblings and develop a relationship with her baby sister. I find that KM's relationship with her father is very important to her and her view of her identity. I accept the social worker's view that;

> "in my experience spending time with her father and his side of the family will allow KM to have that visual connection with her heritage and increase her acceptance of her ethnicity lessening her distress".

134. I find that the presence of her father in her life lessens her distress and assists her to deal with her identity problems and that conversely the absence of her father will be a destabilising factor which will increase her identity problems causing her increased distress. I find that this is a difficult age for a child to lose a parent.

135. I also accept that it will be less easy for this child to have a relationship with her paternal family in the absence of the appellant because it is her father who collects her and takes her to Kent from Stockport. I give weight to the independent social worker's view that the loss of the appellant will have a negative impact on KM's emotional wellbeing, will cause her distress which in turn will have a knock-on negative effect on her health, education and development. I also find that without the appellant's presence the child will not be able to maintain a relationship with her half-sibling because of the enmity between the two mothers and the other commitments of the appellant's family.

136. I find that given that this child is already suffering issues around her identity and has emotional distress (even with her father's presence in her life) and given her crucial age in terms of her development, that the absence of her father will cause her more distress, cause her further identity issues, make it more difficult to discover her paternal identity, sever her relationship from her half-sister and is likely to lead to negative outcomes in terms of her future health and educational development. I find that contact over social media from DRC will not be easy to facilitate because the appellant will need to find work to pay for this without connections in DRC nor a a familiarity with the culture. On balance I find that the contact would be much reduced to what it is now. In any event social media contact is not an adequate replacement for the physical presence and company of her father and for instance his presence at meetings with school and during family crises. I find that cumulatively these difficulties amount to more than something unpleasant or uncomfortable and will lead to significant problems for this child. I find that it would be unduly harsh for the child to remain in the UK without her father.

R

137. I turn to R. The appellant has been involved with R throughout his life. Kent Social Services recognise that the appellant has a paternal relationship with the child. R is in a similar position to his baby sister. His mother is currently unwell and finding it difficult to look after him and his sister and distancing herself from them. I accept from the appellant's evidence that the child is currently going through a confusing time where a new sibling has recently arrived, but the sibling is often taken away by the person he perceives to be his father, which invokes feelings of jealousy. I find that the situation for this child is a difficult one. He is 6 years old, his mother is unwell, his younger sibling is in and out of his house and his biological father plays no part in his life. He has some issues at school as reported by his mother to the independent social worker including behaviour, listening and taking instruction for which, he receives support. On a positive note, he also regularly visits his paternal grandmother and has a good relationship with his mother's family, but he is already experiencing a period of profound change. He is already missing one parental

relationship with his biological father and the absence of the appellant would be akin to losing a second father with the negative potential consequences set out in the social work report.

138. Further, as I have set out above the absence of the appellant is likely to lead to a deterioration in his mother's mental health because she will not have the support which she is currently receiving from the appellant, which will affect her already fragile mental health and diminished ability to look after him and his sister. I have already found that it is likely that without the support of the appellant, social services will need to step in. I give weight to the view of the independent social worker that the absence of the appellant will have a significant detrimental effect on R. Without the appellant he will have lost two father figures and potentially his mother. I find that the situation for this child without the appellant to assist and support his mother is as bleak as that for his younger sister for the reasons set out above. I find that it would be unduly harsh for R to remain in the UK without the appellant for these cumulative reasons.

139. Since I have found that it is unduly harsh for all three children to remain in the UK without the appellant, this means that he can satisfy paragraph 399(a) of the immigration rules and Exception 2 of section 117C(5) of the 2002 of the Act. This is dispositive of the appeal. I find that the public interest does not require the appellant's deportation from the UK where he meets one of the Exceptions. I am satisfied that it would be a disproportionate breach of the appellant's family life with his children to deport him from the UK.

140. Since I have allowed the appeal on this basis, I see no need to go onto consider whether there are "very compelling circumstances".

Notice of Decision

The appeal is allowed on human rights grounds.

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

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

Signed *R J Owens* Date 1 November 2021

Upper Tribunal Judge Owens