IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003389
First-tier Tribunal No: HU/50003/2020
IA/00004/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 October 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JL
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Khan instructed by Parker Rhodes, Solicitors.
For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 4 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. In a determination promulgated on 24 February 2023 the Upper Tribunal set aside the decision of a judge of the First-tier Tribunal. The matter comes before me today for the purposes of enabling the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.
2. The appellant is a male citizen of the Democratic Republic of Congo (DRC) born on 5 October 1994. He arrived in the UK as an unaccompanied minor on 19 October 2010 and claimed asylum, which was refused, although he was granted discretionary leave to remain until 4

May 2012. Attempts to trace his father in the DRC were unsuccessful leading to his being granted refugee status with leave to remain on 19 May 2012 valid to 14 May 2017.

3. The Secretary of State in a letter dated 29 January 2019 set out the reasons why she revoked the appellant's refugee status and, in a letter dated 1 May 2020, refused his human rights claim.
4. The reason for the grant of refugee status is set out in a Home Office Minutes dated 12 May 2012 in the following terms:

> "Having taken into account the prevailing conditions for unaccompanied children in the DRC and the applicant's own profile it is considered that there is a reasonable likelihood that if returned to the DRC he would be at real risk of treatment contrary to Article 3 of the ECHR. As his vulnerability to such treatment arises from his age and lack of support it is considered that he falls into a particular social group, namely street children in the DRC (see LQ Afghanistan). Therefore it is considered that the applicant qualifies for a grant of Asylum."

5. The error of law decision dispelled any suggestion that the appellant had been granted refugee status on the basis of his having an adverse political profile in the DRC giving rise to an ongoing risk of persecution and/or ill-treatment.
6. The appellant came to the attention of the Secretary of State following his conviction at the Sheffield Combined Court Centre. In his sentencing remarks HHJ Moore stated:

> JL and MHZ, this was the second game that week between the complainant's soccer team and the defendant's soccer team in the local Sheffield leagues. Both games had plenty of tension and the result was important to both teams. The complainant's team won the match and immediately, upon the final whistle, almost all of the players squared up to each other. This was calmed down by the referee and the two coaches and everybody moved away. In other words, it was all over. No harm had been done and the heat of the moment was finished.
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> Then, suddenly, the first defendant JL came out, saw the complainant standing on his own and delivered a hard punch to his jaw. That caused total dislocation which had to be plated and wired, requiring six weeks of a liquid diet and leaving the 22-year-old with a loss of confidence and some permanent numbness. In guidelines terms this was a Category 2 s.20 offence.
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> Whilst the complainant was being helped up and was therefore in a state of being particularly vulnerable because of his immediate personal circumstances - one of the definitive requirements of greater harm in the s.47 sentencing guidelines - the second defendant MHZ attacked him with a sharp pointed metal on the end of a football pump into the top of his head, causing a puncture wound. By reason of the use of the weapon and him being particularly vulnerable, this was therefore a Category 1 assault occasioning actual bodily harm. In each case I am satisfied, so that I am sure, that the offence was so serious that only immediate custodial sentences can be justified.

7. The appellant was sentenced to a period of 23 ½ months imprisonment reduced to 15 months on appeal by the Court of Appeal Criminal Division. The Secretary of State seeks to deport the appellant from the United Kingdom as a result of this conviction.
8. In the error of law decision it was directed that the First-tier Tribunal's findings in relation to Article 8 ECHR being engaged on the basis of family life are to be preserved findings, as shall be the appellant's criminal and immigration history.
9. The Secretary of State, in an email submitted by Mr Young on 6 July 2023, confirmed that it was the Secretary of State's intention to maintain all grounds of challenge apart from it being accepted it would be unduly harsh for the children to live in the DRC, but not accepting it will be unduly harsh for the children to remain in the United Kingdom with their mother who is their primary carer, without the appellant.
10. The appellant has provided witness statements, his original statement of 16 June 2021 and a further updated statement dated 18 April 2023, together with a statement from his witness MLW, a letter from a doctor, various other related documents and country information.

11. The appellant also relies upon a Family Circumstances Report dated 24th July 2023 prepared by Lynn Coates, an Independent Social Worker.
12. It is noted in the report that the appellant, MLW was born on 1 January 1993, LLL was born on 18 October 2018 (now aged 5), and AML born on 3 November 2021 (now aged 23 months).
13. The appellant and MLW are the parents of LLL and AML. They met in 2013 at the church they attended and the report states they live together in a two bedroom property.
14. MLW advised Lynn Coates that they are engaged and plan to marry however due to their financial situation, as a result the appellant not being able to work, they have delayed their plans to marry, although hope to be able to do so once his immigration status is resolved. MLW confirmed that due to uncertainty and the pressure of the couple's situation she and the appellant separated for a short period in November 2022 but reunited in March 2023 although continued to have daily contact during the period of separation with the appellant maintaining his role with the two children. Both parents felt that arrangement was important for children's stability and sense of security.
15. Having provided background on each of the children Lyn Coates writes in the "Conclusion and recommendation" section of the report:

> "LLL and AML have stability and security as a result of them being in a stable, safe caring home environment within UK society. They are established within the UK society and culture and LLL is to begin primary school education with her friendship group. Information accessed as part of this assessment would indicate that these children have a positive attachment to their father, and although they are too young to express their views, I am confident if able they would desire their father to remain living with them in the UK.
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> Although I am not a country expert, I am aware that Congo is deemed as one of the poorest countries. UNICEF information states that "The lack of formal economic opportunities, combined with entrenched political conflicts and instabilities, as well as high rates of malnutrition, illness and poor education makes the Congo one of the hardest places on earth to raise a family". This in my professional opinion raises significant concerns for the welfare of these children should they reside in Congo.
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> Stability and security are two critical elements of a child's needs, and their social and emotional developmental opportunities have significant implications on their current and future growth in functioning, confidence, resilience, ability to trust and withstand the pressure and challenges of life. In depriving the right to these essentials, children's mental and emotional well-being can be at best compromised and, at worst, cause significant harm.
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> There is significant literature that pertains to the importance of fathers in their children's life. One such article written by The Children and Family Court Advisory and Support Service (CAFCASS) states 'All children, under Article 9 of the United Nations Convention on the Rights of a Child, have the right to have their views respected and to have their best interests considered at all times. They also have the right to live in a family environment and to have contact with both parents wherever possible. Overall, there is more general awareness of the importance of fatherhood these days and many fathers are playing a bigger part in the lives of their children than was the case in the past. This is positive and healthy for children and their families and should be encouraged. Children are entitled to a relationship with both parents and there must be a very good reason for a court to remove that right from a child.'
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> In a study examining the consequences for children who are raised without their fathers, or indeed mothers, researchers found that 'children's behaviour, self-esteem, emotional stability and mental health can be adversely affected and failure in psychological adjustment can lead to the risk of delinquency and substance misuse.' Ronald P Rohner PHD – Director of the Centre for the Study of Parental Acceptance and Rejection – University of Connecticut in Storrs. Mr Rohner goes onto state 'the presence of a father's love does more to boost a child sense of well-being and improve their emotional and physical health. A study published in 2006, by the US Department of Health and Human Services states 'even from birth, children who have an involved father are more likely to be

emotionally secure, be confident to explore their surroundings and, as they grow older, have better social connections with peers. These children are also less likely to become involved in criminality within their homes, education, and community. The issue has piqued in the US where, the Bureau of the Census, shows that 90% of homeless young people are from fatherless homes, whilst 71% of secondary school absentee's come from fatherless homes.' According to the Fathers Involvement Research Alliance 'girls with involved fathers have higher self-esteem and boys show less aggression, less impulsivity and more self-direction. As young adults, children are likely to achieve higher levels of education, find success in their careers, have higher levels of selfacceptance and experience psychological well-being. Adults who have been raised with fathers as a positive role model are more likely to be tolerant and understanding, have supportive social networks of close friends and have long term successful marriages.'

The future of this family lays in the hands of the Home Office/ Tribunal and the decision that is reached will, positively or negatively, have an impact on these children's lives. I have no hesitation in respectfully recommending that it would be in LLL and AML's best interest for their father to granted leave to remain in the UK."

Discussion and analysis

16. On behalf of the Secretary of State Ms Young submitted that the issue of asylum was no longer relevant as the appellant was not entitled to refugee protection as his grant of the same had been based upon the situation as it was then, i.e. the appellant as an unaccompanied minor, which has significantly changed.
17. The Secretary of State accepts it will be unduly harsh for the children to have to go to the DRC and so the evidence suggesting that accepted fact does not take the appeal any further.
18. There is reference in the Social Workers report to the appellant and the children's mother separating but the appellant's evidence to the tribunal was that they got back together in June/July 2023, confirming the period of separation referred to by Lynne Coates. Notwithstanding the claim they are back together MLW did not attend this hearing to support JL.
19. Ms Young referred the decision of the Supreme Court in HA (Iraq) [2022]UKSC 22 and specifically [40 – 46] in which that Court set out the applicable test when assessing undue harshness. In those paragraphs the Supreme Court found:

    40. Finally, all these highlighted difficulties reinforce the conclusion that Lord Carnwath cannot have been contemplating a notional comparator test. None of them are considered. Had it been intended to introduce such a test there is no doubt that many of these issues would have needed to be and would have been addressed. There is no hint of that in the judgment of Lord Carnwath, or indeed in the arguments before the court.

    41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:

        > "… '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."

    42. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - ie it involves a highly elevated

threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).

43. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.

44. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.

45. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State.

4. The very compelling circumstances test

46. Under section 117C(6) of the 2002 Act deportation may be avoided if it can be proved that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2".

20. It was submitted that JL's deportation is proportionate as he has been convicted of a crime of violence and the burden of proof based upon the appellant's circumstances had been discharged by the Secretary of State. Reliance was placed upon the refusal letter.

21. In relation to the cessation of refugee status was submitted by Ms Khan there would need to be a material change in the DRC. It was argued the appellant's account was accepted in relation to events that occurred to him in the DRC which is relevant to the issue of cessation and whether he is entitled to continue to be recognised as a refugee. The appellant claims that he was wanted by other groups and will be perceived as having an opinion contrary to the interests of the state and so face a real risk on return to the DRC.

22. The most recent country guidance case relating to the DRC is that of PO (DRC -Post-2018 elections) (CG) [2023] UKUT 00117, the head noted which reads:

Country Guidance

1. The change in Presidency, following the elections held on 30 December 2018 and the announcement on 10 January 2019 that Felix Tshisekedi was the winner of the elections, has led to a durable change to the risk of persecution to actual and perceived opponents of former President Kabila and current President Tshisekedi, such that the following general guidance applies:

(i) Actual or perceived opponents of former President Kabila are not at real risk of persecution upon return to the Democratic Republic of Congo ("DRC").

(ii) Generally speaking, rank-and-file members of opposition political parties or political opponents of President Tshisekedi and/or the Sacred Union are not reasonably likely to be at real risk. That must be distinguished from high-profile opponents who may be at risk in some circumstances.

2. The assessment of those at real risk of persecution for reasons relating to [1(ii)] requires a fact-sensitive analysis of the individual's profile, wherein the following (non-exhaustive) factors will be relevant:

a. Whether an individual is a sufficiently high-profile opponent of President Tshisekedi having regard to their role and profile, including involvement in activity that is likely to have brought them to the adverse attention of the Tshisekedi regime.

b. The political party of which the individual is an officer or member, or to which the views of the individual are aligned.

c. The position of the political party or the views of the individual towards President Tshisekedi and the Sacred Union.

d. The nature and frequency of the individual's activities in opposition to Tshisekedi's Sacred Union and to what extent the authorities know about him/her.

e. It is unlikely that a rank-and-file member of any opposition party or group will have a sufficient profile such that they will be at real risk upon return without more.

3. In particular:

(i) Members of the MLC and Ensemble pour le Changement are no longer at risk of being targeted.

(ii) Members or supporters and activists of the UDPS are no longer at risk upon return to the DRC. The country guidance set out in AB and DM Democratic Republic of Congo CG [2005] UKAIT 00118, endorsed in MK DRC CG [2006] UKAIT 00001 and re-affirmed in MM (UDPS members – Risk on return) Democratic Republic of Congo CG [2007] UKAIT 00023, as far as it relates to the risk of persecution of UDPS members and activists, should no longer be followed.

(iii) Leaders, members and activists associated with the Congolese Support Group ("CSG") are not at risk upon return to the DRC on account of their actual or perceived political opinion or sur place activities in the UK.

(iv) Simply being a journalist, media worker or blogger is not likely to lead to a person facing treatment that amounts to persecution or serious harm unless they are considered to be a sufficiently high-profile opponent of President Tshisekedi.

(v) Persons who have a significant and visible profile within APARECO (leaders, office bearers and spokespersons) may be at risk upon return to the DRC. Rank-and-file members are unlikely to fall within this category.

4. Failed asylum seekers are not at risk on return simply because they are failed asylum seekers and there is no basis in the evidence before us to depart from the guidance set out in BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293.

5. There is no credible evidence that the current authorities in the DRC are interested in monitoring the diaspora community in the UK; nor is there is any credible evidence that the intelligence capability exists, even if there were the appetite.

23. Ms Khan submitted that the headnote shows that not everything is changing the DRC and updated evidence showed there was a risk. Specific reference was made by Ms Khan to [57] in the judgement in PO in which it is written:

> 57. Dr Kodi also notes the security situation in the Eastern provinces of the DRC was dire last year (2021), prompting President Tshisekedi to call on the President of Uganda, Yoweri Museveni, to send troops to help defeat the numerous militia that roam the Ituri, North and South Kivu Provinces. Dr Kodi states that neither the state of siege declared in the region, nor the assistance of the Ugandan troops have succeeded in reducing the threat of the militias but have been used by the regime as an excuse to crush all dissenting voices in the region. Dr Kodi states that on the contrary, according to observers, the situation has significantly worsened, with more civilians being killed and displaced within and outside the country since the state of siege was declared in March 2021.

24. This paragraph is not a finding by the Panel who heard PO but a reference to part of the evidence given by one of the witnesses. Reference is also made to [64] of the decision but that relates to the period of the appeal in which Counsel for Secretary of State was cross-examining Dr Kodi.

25. At [116] the Panel set out a submission made by the Secretary of State's representative that the evidence of Dr Kodi was not reliable, based as it is on assertion, anonymous source, out of date material (as old as 2012) and unreliable evidence. Counsel representing PO stated

such evidence was genuine, straightforward, and the opinion should be given appropriate weight. At [117] the Panel, for the reasons stated, preferred the further submission made by the Secretary of State's representative regarding the correct approach to Dr Kodi's evidence. I do not therefore find the reference by Ms Khan to the evidence given in PO by this individual assists the appellant in this appeal.

26. Similar reference to [122] and [123] does not assist either. At [122] the Tribunal in PO refer to historic issues and confirm that the focus is upon the present position in the DRC which is also the focus in this appeal. At [123] is a reference to an addendum report prepared by Dr Kodi referring to resurgence in the North Kivu region by the M 23 rebel group and action by UN forces but the Panel, again, found Dr Kodi's opinion in relation to the significance of such developments to be nothing more than speculation writing in that paragraph "*As Mr Hansen was able to effectively demonstrate Dr Kodi's track record of speculating about the future of the DRC is not a good one, as the passage of time has demonstrated*".
27. Ms Khan also referred to [125] but yet again, in this paragraph, is a criticism by the Panel in PO of Dr Kodi and his statements in relation to risk within the DRC in relation to which it is written: "*He was prepared to accept that the vast preponderance (over 90%) of the violations take place in the east of the country. He accepted that he has not dealt with any of those positive developments in the DRC in his written reports, and failed to provide a plausible cogent explanation for this omission*". I find this again casts doubt upon the weight that can be given to the evidence from this source.
28. The key issue which arises from the examination of country evidence in PO is that a person needs to demonstrate an actual or perceived political opinion contrary to the current President and/or to have a profile of significant and active opposition to that person before they can establish a real risk on return. That is not the position of the appellant on the facts of this appeal.
29. As found in PO, risk that an individual is exposed to will continue to depend upon the person's political affiliations, profile, actions and attitude towards the government, taking into account as the Upper Tribunal has previously observed at [51 (iii)] in AB and DM Democratic Republic of Congo CG [2005] UKAIT 00118 that risk 'fluctuates in accordance with the political situation'.
30. The appellant is from North Kivu but will be returned to Kinshasa, the capital, which has not been identified as an area where there is any ongoing risk or to which it would be unreasonable to expect the appellant to relocate, to if needed. He has not provided adequate evidence to establish this fact, or to show he could not return to his home area.
31. My primary finding is that there has been a durable change within the DRC following the elections held on 30 December 2018 and that although some may continue to be at risk on return that is dependent upon their profile which is a fact sensitive assessment. I do not find it made out that the appellant, even taking at its highest what it claims occurred to him in the DRC as a child, is of interest to anybody within his home state and in particular has failed to establish he will face a real risk on return of persecution for a Convention reason or ill-treatment sufficient to engage an entitlement to international protection on any other basis. I find the reason the appellant was granted status initially was as a result of his being an unaccompanied minor not on the basis of an adverse political opinion. I find that the Secretary of State has established material change in the DRC of a sustainable nature such that the cessation decision is in accordance with the law and the facts of this appeal and is sustainable.
32. I do not find the appellant has established an entitlement to be recognised as a refugee at the date of this appeal or to be entitled to a grant of protection of Humanitarian protection or leave pursuant to Article 2 or 3 ECHR if returned to his home area on the basis of his previous activities and current presentation in relation to political issues.

33. An early decision of the Upper Tribunal in BM and Others (returnees – criminal and non criminal) DRC CG [2015] UKUT 00293 (IAC) found that a national of the DRC who acquired the status of foreign national offender in the UK is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC. The fact of the appellant's conviction does not, of itself, entitle him to a grant of international protection. JL's offending does not relate to offences committed by him in the DRC, and there is no evidence of any arrest warrant, or the commission of fraud when departing the DRC.
34. The appellant's offence was clearly an act of gratuitous violence against an individual JL came into contact with on the football field. There is a strong public interest in taking action against any type of violence on a football pitch or area associated with a football match or elsewhere. Figures released by the police in the public domain for the first part of 2020/2021 season show that almost half of all matches have incidents reported, including the use of pyrotechnics, missiles being thrown at players, and hate crime , and that arrests in and around football grounds increased substantially compared to those in the 2019/2020 season.
35. There was no excuse for the appellant's attack on the other player as recognised in the sentencing remarks. Although the character references claim that the offence was out of character the appellant was clearly culpable and demonstrated an element of his personality leading to violence which the evidence does not show has been resolved.
36. I find the only realistic avenue open to the appellant in opposing the proposed action to deport him from the UK, on the basis that to do so would be a breach of his rights under Article 8 ECHR, is whether he can establish it will be unduly harsh for his children and partner to remain in the UK if he is deported. The issue is therefore the proportion of the separation of this family unit.
37. There is reference in the Family Report to MLW's position in past regarding her own family, in relation to which Lynn Coates writes:

> During my discussions with MLW she stated that she had a difficult childhood, her mother having passed away when she was six years of age. This resulted in her having to be cared for by members of her extended family. This experience she shared has given her a heightened understanding and insight into children who are unable to have their parents care for them. She advised as a result she would not wish for her children to suffer the emotional harm and distress of not having their father available to them. She described her children's father as a "fantastic, caring, diligent and proactive father who shares the daily tasked attached to parenting their two children".
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> …
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> Historically during her pregnancy with the couple's second daughter MLW advised that she worked part time, however stated that the company she worked for closed and she was made redundant. Since this time, she has remained at home caring with the support of JL for their daughters. MLW advised that she intends to return to part time employment in the future once her partners immigration status is resolved.
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> Ms Watson described how difficult it was for the LLL and herself when her partner was in prison. Stating," I was so stressed and found being a single parent so very hard, not just emotionally but also financially". She went on to state that during JL's sentence she and her daughter visited as often as was possible. MLW said she was so shocked her partner had assaulted someone as he is a gently and non-aggressive person. MLW advised that her two daughters adore their father, and that LLL in particular is very much a "Daddy's girl", only wanting him to read to her at bedtime.

38. In relation to JL, Lynn Coates writes:

> During my discussions with JL, he spoke in detail regarding his worry and concern for his family should he be forced to return to Congo. He stated that it would be devastating for his children and partner. He went on to advise that Congo is a dangerous and unstable country which would not be

safe for his children, therefore the family would be separated, and he would not be able to maintain a close relationship with his children, who he described as his world.

He informed me of the routines and the care he affords his children, including play and stimulation opportunities, practical care and helping LLL develop educationally. On discussing his offence, he stated he is profoundly sorry that he hurt someone and informed that during his sentence he had requested restorative justice namely, to meet with victim to personally apologise. Prior to his offence JL advised that he had worked for Sheffield City Council as a support advisor and was earning a reasonable salary that provided for his family. If granted leave to remain in the UK, he feels confident that he will once again gain employment with the council and be able to meet his family's needs. MLW and JL present as committed and caring parents to their two children. They describe a family focussed lifestyle that meets their daughters emotional, social, and physical needs.

39. In relation to the children Lynn Coates writes:

LLL is four years of age and is a British Citizen. Her only spoken language is English, and she has not travelled outside of the UK. LLL has attended the local nursery but will be commencing full time primary education in September 2023 with her friends and peers from nursery.

Due to LLL's parents wish to protect her from the uncertainty pertaining to her father's immigration status and her young age my discussion with her were generic in nature. LLL appears mature for her chronological age with excellent speech and language skills. She talked freely about her likes and dislikes and her family. Throughout my discussions with her she actively sought her father out for such things as a drink for her younger sister and particular toys she wanted to show me. LLL talked about starting school and how excited she was to be going to school with her friendship group. In addition, she detailed the bedtime story books that her father reads to her each night. When asked what she would be doing following my visited she spoke with evident glee about her father taking her to a trampoline centre. LLL was physically affectionate towards her father, climbing on his knee for cuddles.

AML is 18 months of age, she is a British Citizen and has not travelled outside of the UK. AML presents as a bright and content young child who was observed to be affectionate a readily sought her parents out for her needs. She will be commencing nursery following her second birthday. From my discussions and observations of LLL and AML they would appear to have a positive and strong bond with their father which is reciprocated.

40. I have also seen within the bundle a letter from a Molly Biney, Probation Officer, dated 14 February 2020 in the following terms:

I am writing on behalf of JL. I was the allocated Probation Officer for JL during his licence and post sentence and supervision which expired on 24/11/2019. During this time, I understand that JL was advised he could commence employment after correspondence from the Home Office which was later retracted pending further assessments. JL has asked that I write a statement regarding the persistent attempts to try to determine whether JL is eligible for employment.

JL was released from prison on 23/11/2018 and his compliance and engagement throughout his order was excellent. JL attended every appointment offered to him. Offence focused work was carried out to promote desistance from offending behaviour in which JL engaged well. Employment was considered a positive factor for JL prior to his offence to promote further desistance. JL's previous employer, Rachel Ellis, kept the job open for JL throughout his custodial sentence and subsequently afterwards for a significant period whilst the Home Office determined JL's eligibility though I am advised that an outcome is yet to be reached.

JL remains unaware when it will be determined whether he is eligible for employment however, his previous employer mentioned above, Rachel Ellis has advised a job opportunity would be made for JL based at Sheffield City Council. Understandably JL and myself do not want this job opportunity to pass him by. If possible, would you be able to provide JL an update regarding the process of this assessment, if he is required to do anything for the timeframe to receive an outcome? Employment is a priority for JL if he is eligible to work, given his young family and resettlement in the community. I

appreciate workload but if possible, could JL's been prioritised as this has been ongoing since his release from prison.

41. The above letter was therefore written with a very specific focus. Whilst there is reference to work being undertaken with JL by his Probation Officer it is not in the form of an OASys report which will have contained a proper assessment of future risk. We know that the incident leading to JL's conviction was a deliberate act of violence and it may have been that work was undertaken with his Probation Officer to discuss different coping strategies if he finds a similar situation arises. These deal, however, with the effect rather than the cause of such behaviour which, on the evidence I have, has not been adequately addressed.
42. I have seen a number of letters of reference that have been written in support of JL which describe his character, referred to by MLW as a fairly easy-going individual who has played for a local football team as well as coached others and undertaken voluntary positions within the Sheffield community. A letter from a Yussuf Ali Kai describes the Care Manager with HSC Holistic Social Care, dated 15 June 2021, describes JL as coming across as a person with great integrity loved by anybody who is a very dedicated individual. I have also seen a letter from a person describing themselves as the President of the Sheffield Congolese community which, again, speaks highly of JL. All the letters of reference have been taken into account even though not specifically referred to above.
43. The material suggests that there is a lot of support and goodwill towards JL with surprise being expressed in places for his actions and conviction. That is a situation that is encountered frequently in many cases where people act in a manner discerned by others to be out of character but does not get over the fact that JL acted as he did, violently assaulted a 3rd party, was convicted in a criminal court, and is now subject to deportation order as a result of his actions.
44. Section 32 (4) of the UK Borders Act 2007 provides that the deportation of a "foreign criminal" is conducive to the public good and by section 32(5) that the Secretary of State for the Home Department must make a deportation order in respect of foreign criminals unless they are entitled to one of the exceptions found in section 33 of the Act. Of relevance to this appeal is section 33(2)(a) where "removal of the foreign criminal in pursuit of the deportation order would breach….. a person's Convention rights".
45. The Immigration Act 2014 introduced sections 117 as Part 5A the Nationality, Immigration Asylum Act 2002, section 117 C of which is specifically relevant to a deportation appeal which provides:

Section 117C is the relevant provision for the purposes of this appeal. It provides:

"117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where (a) C has been lawfully resident in the United Kingdom for most of C's life (b) C is socially and culturally integrated in the United Kingdom, and (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

46. It was not disputed before me that JL is in a genuine and subsisting parental relationship with LLL and AML who are 'qualifying children' as a result of their being British citizens.
47. It is not disputed before me that it will be unduly harsh for LLL and AML to leave the UK to go to the DRC.
48. Although MLW did not attend the hearing to support JL the evidence from the Social Worker and witness statements supports a finding that JL has a genuine subsisting relationship with her.
49. There has been discussion about the relevance of paragraph 398 – 399 of the Immigration Rules in light of the provisions of Part 5A of the 2002 Act. Lady Justice's Simler in a recent decision of the Court of Appeal of Sicwebu v Secretary of State the Home Department [2023] EWCA Civ 550, at [26], found that while section 117C(5) posed a single composite question "is deportation unduly harsh on the partner or child?" Paragraph 399 of the Immigration Rules, addressing Exception 2, breaks this down into a two-part question: would it be unduly harsh for the partner/child to live in the country to which the appellant is being deported (the "go scenario") and would it be unduly harsh for the partner/child to remain in the UK without the appellant (the "stay scenario"). Reference is made to the decision of the Supreme Court in HA (Iraq) [2022] UKSC 22 but it found both scenarios must be addressed and satisfied for an appellant to be successful.
50. The Supreme Court in HA (Iraq) gave authoritative guidance on the approach to the question posed by section 117C(5) of the 2002 Act, namely that when considering whether the effect of deportation will be unduly harsh the decision-maker should adopt the following self-direction namely 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*."
51. The Supreme Court at [41] and [44] also found that when applying this self-direction it involves an appropriate elevated standard and to make an evaluative judgement of the effect of deportation on the qualifying child and/or partner in order to judge whether the elevated standard has been met on the facts and circumstances of the individual case being addressed.
52. I accept that the seriousness of JL's offending is not a factor to be weighed in the balance when assessing the interests of children when applying the unduly harsh test, as the children are not responsible for the conduct of the parent, and that there is no "notional comparator" which provides a baseline against which undue harshness is to be evaluated.
53. The Supreme Court affirmed the approach set out by Lord Justice Underhill in HA (Iraq) before the Court of Appeal, neutral citation [2020] EWCA Civ 1176, at [56] which is as follows:

> "56…if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

54. In relation to MLW, I accept that Lynn Coates in her report refers to MLW having a difficult childhood and her claim that as a result of the loss of her parent she has a heightened understanding and insight into children who are unable to have their parents care for them.

Whilst MLW expresses her desire for the children to be bought up by both parents, and clearly demonstrates good insight into the needs of children, the evidence is lacking in relation to providing a clear explanation of exactly what the effect of deporting JL will be upon her from an emotional or psychological point, or its impact upon her as a dedicated and committed mother for the children.

55. The report states MLW would not wish the children to suffer the emotional harm and distress of not having their father available, but it is clear she was able to provide support for the children whilst JL was in prison and on a practical basis during the time they were separated. Whilst MMW expressed she finds it difficult as a single parent for the children, which is understandable, it was not made out that was or is will be unable to care for the children and to meet their needs in both a physical and emotional sense as a single parent.
56. In her witness statement MLW speaks of the strength of her relationship with JL and their dreams for the future, stating that she doubted her ability to be able to do all that JL does for the children if he was deported.
57. Having considered the evidence holistically, I find that even if MLW has established the effect of JL's deportation will be harsh, it is not made out it will be unduly harsh. It is not made out MLW will not be able to meet her own emotional and physical needs or that she will be unable to provide the children with the required standard of parenting support once JL is deported. MLW refers to a desire to return to work and in this respect she will be in the same position as many single mothers, who have to meet the needs of the children as a priority, but who will be able to return to work when the children are at school or nursery. LLL started her first school in September 2023 with AML starting nursery, indicating there will be time for MLW to either seek part-time employment or have time away from the children to get on with the number of jobs that being a single parent requires. It is not made out that MLW will not receive support from the State by way of benefit payments, assistance with housing if needed, or support from the GP, the school/nursery, the NHS or social services if required. It was not made out there will be any adverse financial consequences as a result of JL being deported or that the level of income available to the remaining family would in any way decrease. It is not made out MLW were not built to provide the necessary emotional financial support for the children.
58. In relation to the children, AML is still very young and although she will have an attachment to both the parents and may not understand why her father may no longer be in the house, it was not made out that the effect of his deportation upon the child will be unduly harsh. I accept, as referred to by Lynn Coates, a father can make a positive difference to a child's life, but the issue at large in this case is what will the effect be upon the child if JL is deported. The evidence does not show, although a period of readjustment will be required supported by MLW, that AML will be unable to adjust to the circumstances.
59. LLL, will understand more as she is older although her parents have protected her from knowing what JL's situation is. I accept the evidence of the bond between LLL and her father. I have seen the photographs showing JL with both his children and I do not doubt that the relationship between them is as seen by Lynn Coates.
60. LLL is now of school-age and like many children is likely to have been aware of her father's absence when he was in prison, and when he separated from her mother, albeit that she saw him on a daily basis to minimise any impact upon her. There is insufficient detailed evidence to demonstrate how JL's absence whilst he was in prison was explained to LLL or to show how she dealt with the same or that any reaction to JL's absence is illustrative of deportation resulting in unduly harsh consequences for the child.
61. I accept that LLL is like to become very upset if JL is deported and that at some point MLW will have to tell what is happening to enable her to try and understand why her father is no longer there.

62. It was not made out that contact could not be maintained remotely but I accept that is not the same as the current day-to-day relationship enjoyed between LLL and JL. There is insufficient evidence to show that the consequences of LLL only having in direct contact with the father will result in unduly harsh consequences for the child.
63. It is likely that if JL is deported MLW may require the assistance of professionals to enable her to help LLL understand. It is not made out that MLW is not capable of providing such support for her daughter or that if LLL turns against her mother, as a result of emotional reaction, professional assistance will not be available.
64. Having considered the evidence in detail, I conclude that although it establishes that it will be harsh for both LLL and AML if their father is deported the evidence does not establish that it will be unduly harsh on the basis that it is not made out on the material before me that the higher threshold identified in HA (Iraq) by the Supreme Court is met for either the children or MLW.
65. The majority of the submissions made on JA's behalf related to the Refugee Convention. In relation to the human rights situation Ms Khan submitted that it had been accepted that it would be unduly harsh for the children to go to the DRC and also for MLW, which is accepted and not in dispute.
66. I accept the issue in this appeal is the "go scenario" recognised by the Supreme Court and the separation of the family unit including children who have lived with their father from the day of their birth.
67. Ms Khan submitted that the evidence shows the family wished to stay together, which I accept, but I do not accept the submission that the evidence shows that JL needs to remain in the UK for the children's physical and emotional needs to be met. I accept that his presence in the property, preserving the status quo, will mean that the children can live in a family unit of both their parents who continue to meet their needs as per the current arrangement, but I do not accept that the evidence shows the consequences of JL's deportation will result in unduly harsh consequences for either the children or MLW.
68. I find JL has failed to make out an entitlement to remain based upon either Exception 1 or 2 contained within section 117C, or the above immigration rules, sufficient to be a bar to his deportation from the United Kingdom.
69. In relation to section 117C(6), that provides a further avenue for JL if he can establish very compelling circumstances over and above Exception 1 or 2.
70. It is important when considering this aspect to take into account the guidance provided by the Court of Appeal in Akinyemi v Secretary State for the Home Department [2017] EWCA Civ 236 at [14] that the term "compelling circumstances" means there are circumstances that are more compelling than the existing exceptions.
71. "Very" imports a very high threshold, "compelling" mean circumstances which have a powerful, irresistible and convincing effect – see Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225. It is an extremely demanding test require a wide-ranging exercise showing to ensure that Part 5A produces a result compatible with Article 8, involving a holistic evaluation of all relevant factors including those which might have already been assessed in the context of the exceptions.
72. In HA (Iraq) the Supreme Court endorsed the approach taken in Unuane v the United Kingdom - 80343/17 (24th November 2020, [at 72 – 74 in which the court found:

> 72. Nonetheless, even though Article 8 of the Convention does not contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of Article 8 of the Convention (see *Üner,* cited above, § 57, and the references therein). In *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion

measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria are the following:

– the nature and seriousness of the offence committed by the applicant;

– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period;

– the nationalities of the various persons concerned;

– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

– whether the spouse knew about the offence at the time when he or she entered into a family relationship;

– whether there are children of the marriage, and if so, their age; and

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

73. In *Üner,* the Court made explicit two further criteria implicit in those identified in *Boultif*:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

– the solidity of social, cultural and family ties with the host country and with the country of destination.

74. All the above factors should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction (see *Üner,* cited above, § 60).

73. Taking the above criteria in the order in which they are set out in the judgement I find as follows:

i. The nature of the offence committed by the appellant as an act of violence assaulting a third party leading to serious injury to that individual, sufficient to warrant an immediate custodial sentence.
ii. JL entered the UK on 17 October 2010 and has remained since.
iii. JL was convicted of an offence of wounding with intent to cause Grievous Bodily Harm on 15 February 2018. There is no evidence of further offending since JL was released from prison.
iv. JL is a national of the DRC, MLW has indefinite leave to remain in the United Kingdom following her being granted refugee status from the DRC, LLL and AML are both British citizens.
v. JL and MLW are not married but have a genuine subsisting relationship and are engaged to be married. The relationship started in September 2013.
vi. The evidence suggests effective family life between JL, MLW, LLL, and AWL cumulatively.
vii. MLW will have been unaware of JL's offending when their relationship started in September 2013 as he had not offended at that time. Notwithstanding, the relationship continued to the children were born on the date set out above, post offending.
viii. Details of the children and of their relationships are set out above.
ix. Difficulties MLW is likely to encounter in the DRC is not relevant as it is accepted by the Secretary of State that it would be unduly harsh for her and the children to go to the DRC.

x. JL has family ties set out above with the UK in addition to contact through his football and work as referred to in the references ,with no evidence of any such ties with the DRC.

xi. All relevant factors are being taken into account in reaching the decision both in relation to the question of whether deportation will be unduly harsh on the family members remaining and whether there are exceptional circumstances over and above the Exceptions.

74. In relation to the argument JL is rehabilitated as demonstrated by his lack of reoffending, whilst rehabilitation can be of relevance in relation to the proportionality assessment under section 117 C (6) of the 2002 Act it is of no relevance to the unduly harsh assessment. It is settled law that rehabilitation itself cannot constitute very compelling circumstances, and as found by the Court of Appeal in Valasquez Taylor v Secretary State the Home Department [2015] EWCA Civ 845 cases in which it could make a significant contribution are likely to be rare. I do not find this is a case in which the fact JL has not offended sufficient on its own to allow him to succeed but I have considered this together with all the evidence.
75. I note what is said in the references in relation to JL's work within the community but that adds nothing to the existing limited weight to be attached to rehabilitation – see Jallow v Secretary of State the Department [2021] EWCA Civ 788.
76. It is made out that JL can show that the "go scenario" will result in unduly harsh consequences for MLW and the children but I do not find it made out he can show that the "stay scenario" will result in unduly harsh consequences.
77. The seriousness of the offence is a relevant factor to be considered in deciding whether there are very compelling circumstances. As to how the seriousness of the offence should be assessed, the Supreme Court in HA (Iraq) at [67] found that the sentence is the starting point, and it would in general only be appropriate to depart from that if the sentencing remarks clearly explain whether and how the sentence was influenced by other factors such as mitigation.
78. In this case the Crown Court judges sentencing remarks show how serious the offence was, particularly by reference to the impact upon the victim.
79. The offence with which JL was charged, causing grievous bodily harm with intent carries a maximum sentence of five years imprisonment. His sentence, after its reduction by the Court of Appeal Criminal Division, is at the lower end of the range of sentences available albeit it was still a custodial sentence imposed as a first offence, indicating the seriousness of the same.
80. I accept the best interests of the children are for JL to remain in the UK within the family unit with whom he has family life recognised by Article 8 ECHR. I do not accept the submission made, however, that removal will be unduly harsh or that exceptional circumstances have made out based upon the personal profile of JL or the other family members such as to override the public interest in his deportation, arising as a result of the use of physical violence.
81. Whilst Ms Khan submitted that cumulatively the test is met, the weight to be given to the individual factors falls within the margin of appreciation available to the Secretary of State. The Secretary of State's view, as communicated by Ms Young, is that the public interest is not outweighed by the points relied upon by JL.
82. Although there are a number of points in JL's favour including his family ties to the UK, the fact he has not offended since 2018, and the difficulties he will have in reintegrated into the DRC (bearing in mind he left it at a young age with little or no evidence of family members there to support him on return) which will require a substantial readjustment, I find there is insufficient evidence that any problems he may encounter will be insurmountable obstacles

sufficient to make the decision disproportionate when weighing the strong public interest in this case against the factors JL relies upon to avoid his deportation from the United Kingdom.

83. Having sat back and thought about these issues very carefully I conclude that JL has not established there are exceptional circumstances in this appeal over and above the exceptions set out in section 117 or the Immigration Rules. Accordingly, the Secretary of State has discharged the burden upon her to the required standard to show his deportation from the United Kingdom as proportionate. On that basis I must dismiss the appeal.

Notice of Decision

84. Appeal dismissed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 October 2023