Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07321/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2019

Decision & Reasons Promulgated
On 21st May 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MA
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Ms A Smith, Counsel instructed by Staines & Campbell Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant throughout this decision as he was known before the First-tier Tribunal ("the FTT").

2. I have granted the Appellant's application for anonymity to protect the identity of the Appellant's child.

3. The Appellant is a citizen of Ghana whose date of birth is 15 August 1978. He claims to have entered the UK in 2006. He made an unsuccessful application under the EEA

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Regulations in 2007. He made an application on 6 October 2016 for leave to remain. On 6 December 2017 the Secretary of State made a deportation order pursuant to s5 (1) of the 1971 Act because his deportation is conducive to the public good (s.3 (5) of the 1971 Act). The order was made following the Appellant's conviction on 17 May 2017 for perverting the course of justice for which he was sentenced to a term of imprisonment of six months.

4. The Secretary of State's decision was that deportation was conducive to the public good because he has been convicted of an offence which causes serious harm. On 9 March 2018 the Secretary of State decided that the Appellant's deportation would not breach his rights under Article 8 of the 1950 Convention on Human Rights. The Appellant appealed against this decision on human rights grounds and his appeal was allowed by Judge of the First-tier Tribunal ("the FTT") Talbot following a hearing on 14 January 2019. The decision was promulgated on 31 January 2019. The Secretary of State was granted permission to appeal by FTT Judge I D Boyes on 27 February 2019. Thus the matter came before me. The details of the offence committed by the Appellant are disclosed in the judge's sentencing remarks which are as follows:-

> "If you stand, please [MA]. You decided to drive the vehicle in the early hours of the morning of Boxing Day in 2015. When, following an accident, the police attended, you deliberately chose to lie about your identity, knowing that you were not licenced to drive in England, that you were not insured in respect of that vehicle. You also chose not to comply with the Breathalyzer test in that time. When the police investigated the matter they discovered that the identity you had given was not the correct one and when they attended at the address they were able to track you down at, again, you sought to evade arrest by hiding behind the door. When speaking with the probation officer the view they have formed is that you were not entirely candid in regards to them, giving what they described, as I say, a confusing account. In coming to my sentence I have taken into account the maximum sentence for this offence and the guidelines issued by the Court of Appeal and, as has quite rightly been stated, the offence of carrying out acts intending to pervert the course of justice is an incredibly serious one, it goes to the heart of our criminal justice system and as a result sentences that are imposed must be of a deterrent nature because people cannot be allowed to do this. It is a very, very serious offence."

The decision of the FTT

5. At the hearing before Judge Talbot the Appellant gave oral evidence as did, JA, the mother of the Appellant's child (G) and the Appellant's ex-partner. In addition, there was a social worker's report relating to G. G is a British citizen. He was born here on 21 June 2008.

6. The judge set out the Appellant's evidence at paragraphs 6 to 12 and the evidence of JA at paragraph 13. The Appellant's evidence was that he and JA separated shortly after G's birth. He maintained regular contact with G. JA married another man on 14 March 2009. That marriage broke down in 2014 and she obtained a non-molestation order against her husband and they subsequently divorced. The Appellant and JA

had "revived" their relationship. The Appellant sincerely regretted his conduct which led to his arrest and was determined not to offend again. He was visited whilst in custody by JA and he spoke daily to his son on the phone. G was not informed of the true reason why his father was away. The Appellant has, since his release on immigration bail, on 23 February been living with JA and their son. He is involved in JA's daily life. He collects him from school and is in regular contact with the school about G's progress.

7. JA's evidence was that she and the Appellant had gradually revived their relationship following the breakdown of her marriage. It was very difficult for G to be apart from the Appellant whilst he was in prison. He would be very unhappy if the Appellant were to be deported. G is a sensitive child and would suffer emotionally. JA expressed her worry that she would struggle to raise him as a single parent and to keep him away from "bad influences." Her evidence was that she has no family in the UK to support her and depends on the Appellant for emotional and practical support. She gave an example of when she had to go to the hospital following an ectopic pregnancy and the Appellant arranged everything and looked after G. In respect of the Appellant's offending she described it as a "one-off incident".

8. The judge had before him the report of a social worker, Nicole Louis, who had been instructed by the Appellant's solicitors. The judge recorded the social worker's experience namely that she is a registered social worker with fifteen years' experience of working with children and families. She interviewed G and his parents separately and together in the family home. In addition, she interviewed staff from G's school and his GP, the Appellant's probation officer and a family friend.

9. The social worker set out in considerable detail the information that she had gained from the interviews and she also set out her conclusions. The judge set out what those conclusions were at paragraph 14 of the decision.

> "14. She finds that the Appellant plays an equal role with [JA] in caring for [G]. She directly observed the close rapport that the Appellant enjoys with his son. She notes that the family life suffered significant disruption and [JA] struggled to cope when the Appellant was imprisoned and then detained. This affected the family financially because [JA] had to cut down on her working hours. It also had an emotional impact. Ms Louis would be concerned that Ms [A] would struggle to cope mentally and emotionally if the Appellant were deported and this would in turn impact on her ability to meet [G's] emotional and psychological needs. She is clear that it would not be in [G's] best interests for him to be separated from his father and from her own experience she considers that indirect contact though social media would not be an adequate means to maintain the quality of the relationship. She states that at this stage in his life, [G] needs to feel secure and the impact of separation from his father would be far-reaching and significant. She is also clear that it would not be in [G's] best interests for him to have to relocate with his family to Ghana. He has expressed his own wishes to Ms Louis to remain in the UK where he can continue

enjoying his established relationships at home, in school and in his community."

10. The judge heard submissions from both Ms Hogben who represented the Secretary of State at the hearing before the FTT and Ms Smith who represented the Appellant. The judge recorded the submissions made. There is no reference in Ms Hogben's submissions to the social worker's report.

11. The judge made findings of fact and he found, at paragraph 21, that the Appellant and his partner have a genuine and subsisting parental relationship with G. This was an issue that was raised in the Reasons for Refusal Letter. The judge when assessing "unduly harsh" directed herself f in respect of KO at paragraphs 22 and at paragraph 23 the judge had made the following findings

> "23. In applying the 'unduly harsh' test to this particular case, I find firstly that I found both the Appellant and his partner to be generally credible witnesses and in particular to be credible in their evidence concerning the Appellant's relationship with [G]. I therefore accept that he has been an active father since [G's] birth (notwithstanding the fact that due to his irregular status in the UK, he has not been in a position to provide much in the way of financial support.) However, through the various ups and downs in his relationship with [JA] including her marriage to another man, the Appellant has been constant in maintaining regular contact with his son and continuing to perform an active paternal role. I accept that during his mother's marriage to a Swedish national, [G's] significant bond was with the Appellant rather than with his stepfather and I note that since the breakup of the marriage, there has in fact been no contact between [G] and his mother's ex-partner. The fact that the Appellant maintained regular contact with his son throughout this period suggests to me a commitment to his son which the Appellant genuinely intends to continue into the future. The detailed and well-argued report of the social worker provides further evidence of the importance of the paternal relationship and the close bond that has been established between father and son. Ms Louis has very clearly expressed her concerns that if father and son are separated, this will have a seriously adverse effect on the child's development. As well as the direct effect on the child of missing his father, there is also the indirect effect on the child in terms of the adverse effect on the mother's parenting that may follow from the Appellant's absence. The Respondent has acknowledged that the 'unduly harsh' test would be met if the child were required to leave the UK. On consideration of all the evidence before me and whilst taking into account the high threshold (as stated in the jurisprudence), I am satisfied that the 'unduly harsh' test would also be met if [G] were to be separated from his father by remaining in the UK whilst his father went back to Ghana. It follows that the additional test of 'very compelling circumstances over and above those described in paragraph 339' does not apply."

12. In relation to the wider Article 8 assessment the judge made the following findings at paragraph 24.

"24. This is a human rights appeal based on the family life of the Appellant with his son. Undoubtedly the Respondent's decision to deport the Appellant constitutes an interference with his family life rights of sufficient gravity as to engage the Convention. The countervailing public interest in the prevention of crime and disorder supports the Appellant's deportation as being in the public interest. I note the guiding principles in assessing Article 8 claims by foreign criminals set out in a series of important judgements of the ECHR including *Boultif v Switzerland (2001) 33 EHRR 50, Maslov v Austria [2009] INLR 47* and *Uner v Netherlands (2006) 45 EHRR 14*. I also note the dicta of the Court of Appeal in *AJ (Zimbabwe) (2016) EWCA, Civ 1012* concerning the three important facets of the public interest, namely: the need to deter foreign criminals from committing serious crimes; an expression of society's revulsion at serious crimes and building public confidence in the treatment of foreign criminals who have committed such crimes; and the risk of re-offending. (I also note the subsequent dicta of Lord Wilson in *Hesham Ali (2016) EWCA, Civ 662)*. However, these factors must be balanced against the interference with the Appellant's family life rights and in this connection the best interests of the child form a primary consideration. Taking due account of the seriousness of the Appellant's offence, I am satisfied that, as the consequences of the Respondent's decision would be 'unduly harsh' on his child [G], the public interest in his deportation is outweighed by the effect on the family life rights and most particularly the rights of the Appellant's child."

The grounds of appeal

13. The grounds of appeal assert that the judge failed to show how or why it would be unduly harsh on the child to remain in the UK without the Appellant with reference to MK (section 55(5) - Tribunal options) Sierra Leone [2015] UKUT 00223 as confirmed by the Supreme Court in KO Nigeria [2018] UKSC 53. It is asserted in the grounds that the judge relied on the social worker's report and the oral evidence of the Appellant and his partner. The purpose of the social worker's report was to identify the child's best interests and not unduly harsh (in the context of the Immigration Rules and the statutory framework).

14. Mr Kotas relied on the Respondent's skeleton argument and made extensive oral submissions. It was accepted that the judge directed herself correctly in relation to **KO**. However, the judge did not adequately reason how the demanding test had been satisfied. The judge's findings cannot support a conclusion that separation would be unduly harsh and that the elevated test had been satisfied. The salient findings are at paragraph 23. The two reasons given by the judge for finding that separation will have a seriously adverse effect on the child's development was, firstly; a concern raised by the social worker and, secondly; the indirect effect on G following the impact on his mother, JA, following from the Appellant's deportation. In Mr Kotas' view these two reasons are no more than the ordinary consequences of deportation and are inadequate to sustain a conclusion that separation would be unduly harsh. In relation to the social worker's Mr Kotas drew my attention to

section 5[1]. He submitted that there was a high degree of speculation by the social worker about what would happen in the absence of the Appellant. There were

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[1] 5) ANALYSIS

5.1 In this report, I have considered the relevant factors presented to me involved in [G] and his parents lives. I have taken account of the [G's] age, wishes and feelings.

5.2 I have conducted my interviews to answer the following questions:

HOW WOULD [G], AND THE FAMILY AS A UNIT, BE IMPACTED IF [MA] WERE DEPORTED TO GHANA?

5.3 This report has highlighted that [G] and his mother's life suffered significant disruption when [MA] was incarcerated and then detained.

5.4 In my view, this seems a fitting place to start to gain better insight into how [MA] unwanted absence from the home is likely to impact the family.

5.5 The dynamics of the family had been disrupted when [MA] was absent from the home, and they had changed for the worse. Specifically, [JA] said that she struggled to cope with managing day to day tasks, for example, taking and collection [G] to and from school.

5.6 This also impacted her financially as it meant she was unable to work as frequently as she would have liked. It also caused a great deal of stress which caused her to have high blood pressure.

5.7 [JA] described having to heavily rely on the practical, and likely emotional, support of her sister, who no longer lives in the UK.

5.8 Therefore, the disruption to the family was considerable and it had far-reaching impact, which included physical and emotional issues.

5.9 In addition, [JA] and [MA] both alluded to them having some difficulties in their relationship which contributed to him moving out of the home for a time. It is likely that the stress of his immigration status exasperates that, in particular, his inability to work to make financial contributions toward [G] and the household.

5.10 Considering this, it is my view that [JA] would be very unprepared for the responsibilities necessary to take adequate care of [G] without [MA] consistent input. I believe this to be especially true as she continues to recover from an ectopic pregnancy.

5.11 I would be concerned that along with the stress of the prospect of [MA] being deported, her ability to cope mentally and emotionally, would be limited.

5.12 [JA] has clearly depicted how much she relies on [MA] to help her raise [G], for example, he does the school run, cooks and cleans, which allows her the ability to work so they can have some level of financial autonomy and provide for [G], in terms of social activities which assists his development.

5.13 If she were unable to work, she would not be able to meet [G] basic care needs of food, shelter, clothing and social activities, all of which play a major role in his emotional and physical well-being.

5.14 Additionally, it is likely that [JA] could become depressed and anxious, as well as experience high blood pressure again due to stress if [MA] were to be deported.

5.15 Such symptoms are also likely to significantly impact her ability to meet [G] emotional and psychological needs because she would be emotionally unavailable to see or tend to him. This would undoubtedly leave [G] very vulnerable emotionally and practically.

5.16 For example, Miss [A] described [G] as being a very sensitive child who requires reassurance and consistent support. It stands to reason, therefore, that if [MA]were to be deported, and [JA] could not meet [G's] emotional or practical needs, he is likely to seek attention elsewhere, such as from a gang or other adult strangers, which is likely to place him at risk of exploitation and significant harm.

5.17 Some response by children to manage trauma in their life includes tearfulness, sensitivity, sleep problems, poor concentration, getting into trouble at school, withdrawal from loved ones, displaying attention-seeking behaviour, angry or violent outbursts, self-injury, developing distorted images of themselves, developing eating disorders or even substance abuse.[1]

5.18 Research highlights that by the age of six humans are starting to navigate the wider world and that emotional security is maintained when they take risks and chances in their exploration; but when they always know that their home environment is a place of safety.[2]

5.19 Research also highlights that the adolescence stage of the life cycle is the second most crucial stage of development, next to the first 3 years of life, as the forming of the individuals identity is being formed and external influences, such as family and peer groups, having a significant impact on the development of identity, self-esteem and sense of the world; all of which contribute to the development of a healthy emotional homeostatis.[3]

5.20 This stage is crucial for the children because one is at the stage of adolescence, whilst the other two are on the cusp of this development stage. In order to successfully manage the challenges that they will face, the children require the stability and support of their family. It is crucial for the boys that their father is able to assist them in the development of their identity through this stage of their development.[4]

[1] Crawford, K. and walker, J., 2005

[2] Howe, D., 2011

[3] Smith, P. et.al., 2011

[4] Crawford, K. and walker, J., 2005

5.21 This is pertinent as it relates to [G] as I would be concerned that he would likely display several of the symptoms, outlined in section 5.17 of this part of the report if his father were deported, and how this is likely to impair his learning, social, emotional and psychological development.

5.22 [G] needs stable attachment figures at this time in his life and a robust support network to assist them through this period of his life, and that includes both of his parents. If his father were to be deported, it is likely that his ability to make a successful transition to adolescent would be significantly compromised.

5.23 For example, [G] may struggle to develop a deep level of closeness and attachment to others because he may be fearful that they too will be sent away and that he will be abandoned. This is likely to have a greater impact on the relationships he will go on to have, both platonic and non-platonic.

5.24 Additionally, research has shown that, "Childhood circumstances such as poor attachment, neglect, abuse, lack of quality stimulation, conflict and family breakdown can negatively affect future social behaviour, educational outcomes, employment status and mental and physical health.339 Conversely, children and young people who have good personal and social relationships with family and friends have higher levels of wellbeing.[5]

5.25 Developments in theories around attachment also highlight that children do not require a secure emotional base to make positive changes. Rather, their caregivers having an understanding of the child's attachment behaviours at any given time and responding to those appropriately while nurturing the child to use healthy attachment behaviours in favour of destructive ones is key to helping them thrive in their overall development.[6]

5.26 Research also shows that "Parental mental illness is associated with increased rates of mental health problems in children and young people, with an estimated one-third to two-thirds of children and young people whose parents have a mental health problem experiencing difficulties themselves.[7]

5.27 As such, it is my view that at this stage in his life, [G] really needs to feel secure, which he does right now because his father resides with him, and his family is intact.

5.28 Having considered all of the above, it is my view that [G] would be very negatively impacted if his father were to be deported, owing to the significant disruption that the family would face if [MA] were to be deported.

5.29 The family would first be impacted emotionally, psychologically, financially and then practically. The impact would be far-reaching and significant enough to impair [G] in the immediate and distant future, and it is likely to disrupt his global development.

WOULD IT BE IN [G]'S BEST INTEREST FOR [MA] TO DEPORTED TO GHANA & COULD [G] RELOCATE WITH HIS FATHER?

5.30 [JA] and [MA] describe a much different picture now that [MA] has returned home on bail and since they have been residing together as a family again.

5.31 For example, they have a clear plan and structure which allows them to share the responsibility of raising [G], both practically and emotionally, which both view to be helpful for [G] and to them as his parent.

[5] Bell, R.et al., 2013 & NetCen Social research, 2013

[6] Critenen, P., 2012

[7] Manning, C. and Gregoire, A.2009; Royal College of Psychiatry, 2012 & Goodman R, et.al, 2003

5.32 I observed [G] and his father had a deep bond and this was exhibited in the way they communicated, for example, [MA]gave a particular whistle which [G] knew and responded to warmly.

5.33 In my view, [G] relationship with his father was one of respect and love, and he appeared to have a positive attachment to both his father and his mother.

5.34 If [MA] were to deported, [G's] relationship with his father would be severed because it is highly unlikely that they could maintain a long-distance relationship.

5.35 Furthermore, it is highly unlikely that he could find employment owing to his lack of formal education and possibly the countries inability to provide employment.

5.36 As such, [MA] would not have the means to maintain any form of contact with his son, either by phone, internet or post; so their relationship and attachment would be severed.

5.37 Furthermore, if he could, it is highly unlikely that he could maintain on a consistent enough basis, which is likely to cause [G] distress and worry for his father, and anxiety at the fact he could not see or speak to his father.

5.38 It would serve to be as negative input rather than positive as far as helping [G's] emotional and psychological development.

5.39 As a British national, [G] has visited Ghana once, and while he enjoyed his stay there, he clearly expressed having no desire to live there because he would miss his friends.

5.40 This demonstrates that [G] has an established and fulfilled life here in the UK, and he and his parents play an active role within their community.

5.41 For example, they go to and are active within their church community, and [G] attends a school where he has positive relationships with his peers and teachers.

5.42 If [G] were to live in Ghana, he would lose relationships in exchange for a life far more unstable, inconsistent and it would be lacking the security currently afforded him here as a British child living here with both is parents.

5.43 In order for [G] to have the best possible outcomes in life, he needs emotional stability and good network of support. His family, friends and church community provides both of these for him, so [G's] development in these areas would likely be impaired and his development negatively impacted if he were expected to go to Ghana with his father.

5.44 Having worked with numerous families over the past four years in similar situations to that of [G] and his family, it is my experience that communication by use of modern social media would be

matters which simply should not have been in the report and he referred specifically to 5.14 and 5.16. There is nothing, in his view, in the report which would take the consequences of deportation beyond what would be considered to be normal. Mr Kotas did not address me on the assertion in the grounds that the social worker's evidence was partial.

15. Mr Kotas referred me to the paragraphs of the decision in KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC), KMO which were approved by the Supreme Court in KO, at paragraph 33, and he submitted that the judge attached weight to the financial circumstances which are not a relevant consideration. He submitted that the Secretary of State does not understand why he lost the appeal.

16. Miss Smith made oral submissions relying on her detailed skeleton argument, save that in respect of the serious harm matter she conceded that this was not an issue before the Upper Tribunal. There had been no cross-appeal on that point. In her submissions the Secretary of State was simply rearguing the merits of the appeal and the grounds amount to nothing more than a disagreement with the findings.

17. Ms Smith submitted that the judge accepted the evidence of the Appellant and his partner she was entitled to do. They were both cross-examined at length by the Presenting Officer. She referred me to the Appellant's partner's evidence as set out at paragraph 13 of the decision. It was not a matter of the judge relying wholly on the evidence of the social worker. She referred me to the experience and qualifications of the social worker. The social worker had not simply relied on what the Appellant and his partner told her there were a number of other sources. She has specialist knowledge and that must be considered. It was not the Appellant's case that the social worker had carried out a psychological assessment however the conclusions within her remit were in her remit considering her qualifications and experience. There were a number of reasons why the judge concluded that separation of the family would be unduly harsh.

18. There was no challenge to the social worker's evidence before the FTT. The report and must be considered in its totality as must the decision of the judge. It is not right to focus simply on paragraph 23 the decision must be considered as a whole. It does not properly represent the judge's decision to say that he gave two reasons only for allowing the appeal (those identified in paragraph 23). There was before the judge evidence of the Appellant and his partner that was accepted and evidence from them and the social worker that G is a particularly sensitive child. The decision is

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grossly inadequate to repairing attachment fractures caused by separation. It is also an ineffective method for families to develop enough interpersonal interaction that maintains their relationship to the quality required for it to be of benefit to the child.

5.45 It is imperative that any decision being made about [G] does not prejudice his welfare but rather makes his welfare of paramount concern.

5.46 For these reasons, it is my view that it would be inappropriate for [G] to move to Ghana because it would not be in his best interest or for his ongoing development.

adequately reasoned and the factors considered cumulatively sufficient to satisfy the elevated test.

The Legal Framework

Automatic Deportation under UKBA 2007

19. Section 117C of the 2002 Act. Section 117D of the same Act and

"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.

(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.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

Immigration Rules

"Deportation and Article 8

"A398. These rules apply where:

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

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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 UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 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 UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) 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."

Application of the Legislation and the Immigration Rules

20. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 Lord Carnwath (giving the judgment of the Supreme Court) analysed the exception, based on the deportees relationship with a qualifying child, in Section 117C (5) NIAA 2002 and paragraph 399(a) (IR). At [15], he explained that he started from the presumption that the provisions were intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 per Lord Hodge at [10]). He concluded that the exception was self-contained and so, in deciding whether or not it applied, the decision maker should only consider the factors specified, and disregard the degree of seriousness of the parental offending and other public interest considerations (at [20] and [23]).

21. Lord Carnwath gave guidance on the meaning of "unduly harsh at [23] and

> "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*[2016] EWCA Civ 932, [2017] 1 WLR 240, paragraphs 55, 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."

22. Lord Carnwath cited with approval the guidance given by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC):

> "…'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 uncomfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated higher standard."

23. In the recent case RA (Section 117C: "unduly harsh"; offence: seriousness) (Iraq) [2009] UKUT 00123 the Upper Tribunal concluded as follows:-

> "(1) In KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53, the approval by the Supreme Court of the test of 'unduly

harsh' in Section 117C(5) of the Nationality, Immigration and Asylum Act 2002, formulated by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), does not mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it.

(2) The court decided that the way in which a court or Tribunal should approach Section 117C issue remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State [2016] EWCA Civ 662."

24. The Upper Tribunal said in respect of the test to be applied the Upper Tribunal in response to submissions that they were obliged to adopt the same approach as the Tribunal in MK (Sierra Leone) two children aged at or around 7 said as follows:-

"14. We reject the submissions although the application of a legal test to a particular set of facts can sometimes shed light on the way in which the test falls to be applied, it is the test that matters. If this were not so, everything from the law of negligence to human rights would become irretrievably mired in a search for factual precedence.

15. What might at first appear to be hard-edged findings of fact often turn out to be evaluative assessments. On analysing the above passages from MK (Sierra Leone), that is the position here. The Upper Tribunal's conclusion that children aged 7 are at a "critical stage of their development" was such an assessment, based on the facts before it. It was not the laying bare of an obvious fact, of which any other court or Tribunal must take "judicial notice". One could envisage an equally valid argument that a child of 2 or 3 is at a critical stage of its development; or a child at or approaching puberty, and so on. Childhood is a developmental progression towards becoming an adult.

…

17. As can be seen from paragraph 27 of KO (Nigeria), the test of 'unduly harsh' has a dual aspect. It is not enough for the outcome to be 'severe' or 'bleak'. Proper effect must be given to the adverb 'unduly'. The position is, therefore, significantly far removed from the test of "reasonableness", as found in Section 117B(6)(b)."

Conclusions

25. There is no challenge of substance to the findings of fact made by the FTT or to the judge's self-direction. There was before the FTT no challenge to the report of the independent social worker. Mr Kotas has before me raised challenges to the conclusions reached by the social worker. The thrust of the grounds is that her conclusion is inadequately reasoned. Mr Kotas in oral submissions asserted that in the alternative the conclusions reached by the judge are perverse. However, this was not an issue raised in the grounds.

26. In support of the Secretary of State's case Mr Kotas drew my attention to particular sections and conclusions reached by the social worker. There is no challenge to the experience or qualifications of the social worker. It has not been asserted at any stage by the Appellant that the social worker was instructed to consider the issue of

"unduly harsh" and indeed this would be beyond the social worker's remit as it is a legal test for the judge to assess. In this context the judge was unarguably aware having properly directed herself that the child's best interests as assessed by the social worker was not the determinative issue in this appeal. The evidence of the report was capable of carrying weight in the unduly harsh assessment. The judge was unarguably entitled to attach weight to the conclusions reached by the social worker. There are parts of the social worker's report which I was referred by Mr Kotas that may involve an element of speculation, but the matters to which the judge attached a particular weight (set out at paragraph 14 of the decision) were not those to which Mr Kotas referred drew my attention. In any event, it is difficult to see how an assessment of unduly harsh would not involve some degree of speculation. What the judge has done in this case is applied a legal test to a particular set of facts and made an evaluative assessment on the evidence before him

27. It is wrong to focus on the two reasons given by the judge at paragraph 23 of the decision. The decision must be read as a whole to be properly understood. JA described the difficulties which would arise from the Appellant's deportation and how that would affect G whom she described as a sensitive boy. I do not accept that the assessment of unduly harsh was informed by financial concerns in the event of the Appellant's deportation. This was simply a factor that was put into the mix in order to assess whether the cumulative effect of deportation would be unduly harsh on G. The judge identified a number of adverse effects arising from deportation. She was entitled to take the view that cumulatively they amount to unduly harsh.

28. The decision whilst not inevitable was a decision upon which the judge was entitled to reach based on the lawful and sustainable findings. In the case of Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225, there was no material misdirection and all relevant considerations were taken into account, but the SSHD challenged the weight given by the FTT to various factors, and the FTT's conclusion. I am mindful of what McFarlane LJ said at [28] and [30]:

> "28….an appellate court must afford due deference and respect to the evaluation of an expert tribunal charged with administering a complex area of law in challenging circumstances (per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 at paragraph 30)… There is no error of law …The appeal solely turns on the attribution of weight. The tribunal heard oral evidence…
>
> "30. Whilst another specialist tribunal might have reached a contrary conclusion, it is, in my view, not possible to hold that the FTT in the present case arrived at a conclusion which was insupportable on the evidence or otherwise perverse…"

29. There is no error of law and the decision of the judge to allow the appeal under Article 8 is maintained.

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 their 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 *Joanna McWilliam* Date 15 May 2019 May 2019

Upper Tribunal Judge McWilliam