



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/04735/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34 (P)

Decision & Reasons Promulgated

On 13 July 2020

On 22 July 2020

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

G S

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: Ms E Rutherford of Counsel instructed by CK Solicitors

For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Haria on 14 January 2020 against the determination of First-tier Tribunal Judge Phull, promulgated on 1 October 2019 following a hearing at Birmingham on 5 August 2019.
2. The appellant is an Indian national born on 25 December 1982. He claims to have entered the UK in April 2003 by lorry from France and a subsequent asylum claim made some months later on the basis of a claimed fear of the police in Punjab was refused. He married a British citizen the very next day. His appeal against the refusal of asylum was determined in his absence at the request of his representatives. No supporting evidence was put forward and no details were provided even though the appellant had failed to submit a SEF. Unsurprisingly, the appeal was dismissed. He then sought leave to remain as the spouse in April 2004 but in November 2005 notified the respondent that he wished to make a voluntary departure. He was removed on 14 January 2006. Just three days later he made a successful entry clearance application and re-entered the UK in February 2006. In February 2008 he was granted indefinite leave to remain.
3. On 15 April 2011 the appellant, with five other co-conspirators, was convicted on a guilty plea of kidnapping a young woman and holding her against her will for two days. The offence occurred in July 2010 shortly before the birth of his second child that September. On 28 October 2011, he was sentenced to two years' imprisonment. He did not appeal against his conviction or sentence. A deportation order was signed on 29 June 2012 after the consideration of representations. After an unsuccessful asylum claim, this time on the basis of a land dispute, and an unsuccessful appeal, he failed to abide by his reporting conditions, was listed as an absconder and was eventually apprehended and detained. He then commenced judicial review proceedings and the removal directions that were in place were cancelled. The judicial review claim was refused on 25 August 2015. The evidence is contrary to whether he was then deported on 28 August 2015 or whether he left voluntarily but it was clarified at the start of the hearing that he left of his own accord whilst the deportation order was in force.
4. The appellant was accompanied by his current wife (the sponsor), then his girlfriend, with whom he had cohabited since November 2014 after the breakdown of his marriage. She too was married to someone else and had a daughter but was experiencing marital problems. Her divorce was finalised in May 2016. The appellant's first wife had been a British citizen and they had two children born in August 2006 and September 2010. His divorce was finalised on 25 August 2017. The

sponsor remained in India with the appellant until May 2017 (with a break during which she vacationed in Canada with his parents) and returned pregnant to the UK. Their son was born here on 22 July 2017. In September 2017, the sponsor and child travelled to India and on 7 March 2008 the appellant and sponsor underwent a religious marriage followed by a civil marriage on 15 March 2008.

5. On 25 November 2018, his solicitors requested revocation of the deportation order. This was refused on 11 February 2019.
6. The appeal came before First-tier Tribunal Judge Phull. Following oral evidence from the sponsor and submissions from the parties and taking the earlier determination as her starting point, she dismissed the appeal. She rejected the claim that the sponsor had no family support in the UK, noting that she had told the social worker the exact opposite. The judge found that the sponsor had the support of her family and that her brother, for whom she worked, allowed her to work from home and to take extended periods of leave. She noted the claims of stress and anxiety but found living with the appellant in India would alleviate some of that stress and that she would be able to access treatment for her conditions if required. She found that the child was very young and had spent time in India with the sponsor and that both could be expected to continue their family life with the appellant by living there or by making extended visits as they had been doing. The judge found that the evidence did not support the contention that the child had serious health issues. She had regard to the seriousness of the appellant's offence and his failure to rebut the s.72 certificate in his deportation appeal. She had regard to the OASys report. She noted that the appellant had shown no remorse or contrition for his crime and that there was no evidence that he had undertaken any rehabilitation since. She found that there were no compelling circumstances which outweighed the public interest in maintaining the deportation order.
7. Permission to appeal was granted by First-tier Tribunal Judge Haria on the basis that the judge had arguably not dealt with the issue of the sponsor's ongoing contact proceedings through the Family Court to have access to a daughter from a previous relationship. The other grounds criticize the judge for her approach to the social worker's report, for reaching a different conclusion on the best interests of the child and for finding that it would not be unduly harsh to expect him to go to India.

Covid-19 crisis

8. The appeal was listed for hearing at Birmingham on 20 March 2020 but due to the Covid-19 pandemic and need to take precautions against its

spread, the hearing was adjourned and directions were sent to the parties on 30 April 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

9. The Tribunal has received written submissions from both parties. The respondent does not raise any objections to the matter being considered on the papers but the appellant has. I now consider whether that course of action is appropriate.
10. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "to enable the Upper Tribunal to deal with cases fairly and justly". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).
11. I have had careful regard to the submissions made and to all the evidence before me before deciding how to proceed. The appellant maintains that "*the lack of interaction with the judge and being able to respond to questions and judicial comments about the arguments being put forward means that the parties lose the opportunity to make oral arguments that address any judicial concerns and this does adversely affect the fairness of the proceedings to both parties*". I note that there is nothing specific of concern in his case and that no reason is put forward as to why he specifically requires an oral hearing at which he himself would not in any event be present as he is overseas. I take into account the general submissions made on the point but form the view that a full account of the facts are set out in the papers, that the arguments for and against the appellants have been clearly set out and that the issues to be decided are straightforward and have been fully addressed in the submissions made. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in his best interests and those of his family. I am satisfied that I am able to

fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

12. The appellant's submissions prepared by Counsel are dated 15 April 2020. They argue that when finding that it was not unduly harsh for the appellant's son to relocate to India or for him to remain in the UK separated from his father and that in the alternative that there were no very compelling circumstances, the judge failed to consider relevant evidence. It is maintained that there were a number of pieces of evidence that had simply not been referred to by the judge. For example, it is stated that the judge failed completely to refer in her findings to the ongoing family court proceedings in which the sponsor was seeking contact with her daughter although this was noted at paragraph 25 of the determination. It is also argued that the judge failed to consider the sponsor's oral evidence on why she could not look to her family in the UK for support. Further, it is argued that there was evidence, albeit not a clinical assessment, that the child had behavioural problems and was undergoing assessments at the time of the hearing. It is maintained that the judge failed to consider evidence from the sponsor as to the difficulties that she and the child faced whilst living in India. When concluding that the child could relocate to India, it is submitted that the judge made no reference to the fact that he was a British and not an Indian citizen. In assessing whether there were very compelling circumstances over and above those set out in paragraphs 399 and 399A, it is maintained that the judge made reference only to selective parts of the OASys report which did not reflect the overall conclusion that the appellant presented a low risk of harm and had a low risk of reconviction.
13. The second ground argues that the judge erred in law in her approach to the expert evidence. She had before her an independent social worker's report and despite no challenge to the author's qualifications or expertise, the judge reached a different conclusion as to whether the family could continue to be separated. It is submitted that whilst the judge was not obliged to accept the conclusions of the social worker, she was required to give clear and cogent reasons for rejecting them and that she failed to do so. It is submitted that whilst the judge accepted (at paragraph 33) that it was in the child's best interests to have input from both parents, she then found that it was not unduly harsh for him to live in the UK with his mother. Further, in reaching this conclusion she appeared to have disregarded the conclusion of the report that it appeared to be unsettling for the child to remain in the UK without his father and not ideal for his emotional and physical health for him to relocate to India. The Tribunal is asked to set aside the decision.

14. The Tribunal is informed that the sponsor's application for contact with her daughter is ongoing. A final hearing set for 23 April 2020 was adjourned to a date yet to be fixed. It is submitted that before the decision could fairly be made in this case the Tribunal would need to know the position in respect of the family proceedings and as such a further hearing would be required before the case could be justly determined.
15. A large amount of fresh documentary evidence is attached to the submissions none of which was before the First-tier Tribunal at the date of the hearing. It relates to a second application for contact made on 22 January 2020 by the sponsor in respect of the daughter from her previous marriage and to a speech and language assessment in respect of the son from her present marriage.
16. The respondent's submissions, prepared by Mr Avery, are dated 20 May 2020. They seek to argue that the judge made no errors of law and that her determination should be upheld. On the issue of support for the sponsor from her family, the submissions point out that the sponsor's claim that she had no such support was in stark contradiction to what she told the social worker who noted in her report the close relationship with the family and the support they provided. It was also noted that the sponsor's father had accompanied her to court, that she had spent considerable periods of time with her in-laws in Canada, and that she had support from her brother for whom she worked in that she had been given the flexibility to work from home and take leave for extended periods. The submissions argue that the judge took account of the sponsor's evidence with respect to her son's behavioural problems and was correct to note that there was no clinical evidence to support this claim (at paragraph 32). It is maintained that the assertion that the judge failed to have regard to the full OASys report was without substance because the judge gave detailed consideration to the report and the fact that the low risk of reoffending was not specifically referred to was not an indication that it had not been considered (at paragraph 37).
17. On the issue of the social worker's report, the submissions maintain that the judge did take this into account at paragraphs 28 to 31. She properly concluded that it would not be unduly harsh for this child to live in the UK with his mother. The submissions point out that the sponsor and the child had spent considerable time in India with the appellant in the past and that on the basis of the evidence this was a finding open to the judge to make. The submissions conclude that the grounds are a disagreement with the judge's findings. It is pointed out that the issues that were highlighted by the judge granting permission do not affect the findings of the first-tier tribunal that it would not be unduly harsh for the sponsor and the child to remain in the UK.

Reliance is placed on NA (Pakistan) [2016] EWCA Civ 662 and PJ (Jamaica) [2019] EWCA Civ 1213 and to the finding that the difficulties faced by families remaining in the UK are the natural consequence of deportation and did not amount to an unduly harsh outcome. It is submitted that there was nothing in this case which suggested that a different conclusion could have been reached.

18. The appellant's response to the Secretary of State submissions were prepared on 27 May 2020. The appellant reiterates that the judge had not considered all the relevant evidence in making her findings and that it cannot be assumed that she took into account the ongoing family court proceedings instigated by the sponsor. The judge had failed to refer to the evidence given by the sponsor as to the actual support she had available from her family. There had also been no attempt to engage with her evidence regarding the difficulties of her son or the difficulties that they faced whilst they lived in India. Although the judge had considered the OASys report, she made no reference to the conclusions of the probation service that the appellant was at low risk. This did not demonstrate a balanced assessment of that evidence. Whilst it was accepted that the judge had referred to the independent social worker's report in reaching her conclusions, she failed to give adequate reasons as to why she reached a different conclusion and rejected the report's conclusions.

The legal framework

19. Section 32 of the UK Borders Act 2007 states:
 - '32. Automatic deportation
 - (1) In this section "foreign criminal" means a person –
 - (a) who is not a British citizen,
 - (b) who is convicted in the United Kingdom of an offence, and
 - (c) to whom Condition 1 or 2 applies.
 - (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
 - (3) Condition 2 is that –
 - (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
 - (b) the person is sentenced to a period of imprisonment.
 - (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

- (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
- (6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless –
- (a) he thinks that an exception under section 33 applies,
 - (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or
 - (c) section 34(4) applies.
- (7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.’
20. Following amendments by the Immigration Act 2014, the relevant exceptions for most appeals will be section 33(2) (a breach of the European Convention on Human Rights or obligations under the Refugee Convention) and section 33(4) (a breach of rights under the EU treaties).
21. Paragraphs 390-392 of the Immigration Rules make provision for revocation of a deportation order.
- ‘390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
- (i) on the grounds on which the order was made;
 - (ii) any representations made in support of revocation;
 - (iii) the interests of the community, including the maintenance of an effective immigration control;
 - (iv) the interests of the applicant, including any compassionate circumstances.
- 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
391. In the case of the person who has been deported following conviction for a criminal offence, the continuation of the deportation order against that person will be the proper course:
- (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, when, if an application for

revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least four years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.'

Discussion and Conclusions

22. I have considered all the evidence, the determination of the First-tier Tribunal Judge, the grounds for permission and the submissions made by both parties.
23. This is a case where the appellant was sentenced to a term of imprisonment of less than four years. As the deportation order was made on 29 June 2012 and enforced on 28 August 2015, the ten year proscribed period has not passed but the rules permit consideration of an application for revocation on a case by case basis.
24. The first ground of complaint against the judge is that she failed to take the following relevant evidence into account: (1) ongoing family court proceedings brought by the sponsor, (2) the sponsor's oral evidence as to why she could not look to her family for support, (3) the sponsor's evidence as to her son's behavioural problems and that he was undergoing an assessment at the time of the hearing, (4) the sponsor's evidence as to the difficulties she and the child faced whilst in India, (5) the child's British nationality and (6) the OASys report as a whole.

25. I would note here that 1, 3, 4 and 5 of these alleged omissions (even if they were made out) are rendered otiose by the judge's finding that it would not be unduly harsh for the sponsor and child to remain in the UK without the appellant and for family life to continue at a distance, by way of visits and other forms of communication. Nevertheless, I consider them all.
26. At the start of the hearing the judge was given a postal receipt to show that an application for a contact order had been filed. The date is not recorded in the Record of Proceedings however the sponsor's oral evidence was that it had been filed just the week prior to the hearing. It appears that the sponsor's daughter had lived with her after she (the sponsor) separated from her first husband but that she decided to leave and live with her father when the sponsor began to cohabit with the appellant. They had not seen one another since 2015. I note that no application was made for an adjournment to await the outcome of the Family Court proceedings and the sponsor's daughter (in her mid-teens) still refuses to respond to the sponsor's letters and the alleged repeated attempts made by the sponsor's sister (who lives opposite the girl) to get in touch.
27. The judge's findings commenced at paragraph 20 and she referred to the sponsor's proceedings with the Family Court at paragraph 25. It cannot be argued, as the grounds maintain, that no regard was had to this. Given that the judge found that it would not be unduly harsh for the sponsor and her child to live in the UK apart from the appellant, the sponsor would still be able to pursue contact with her daughter. Of course, this would also be open to her were she to travel to India. Moreover, given the fact that the sponsor's daughter had refused to have any contact with the sponsor since February, the judge was entitled not to place weight on the proceedings that had been filed shortly before the appeal hearing. No explanation was provided for why no application had been made in the three preceding years.
28. In any event, although the evidence was not before the judge and so cannot be seen to impact upon her decision one way or the other, the order for contact was refused in November 2019 following the wishes of the sponsor's daughter. Another application was filed in late January 2020 but there appears to have been no change in circumstances since the refusal of contact by the last order.
29. I would note also that the evidence in the respondent's bundle shows that the appellant had also made an application for contact to see the children from his first marriage. The application was made in 2015 just after the appellant was detained for removal. No further information as to the outcome of that application is available but there is no suggestion that the appellant has been in contact with those children

and the appellant does not rely on his relationship with them in his present case.

30. With respect to the issue of family support for the sponsor, the judge had her evidence in mind (at 27 and 29). Although the sponsor claimed in oral evidence that she did not have the support of her family, that they were busy with other commitments and they had not accepted the appellant due to his past conduct, the judge noted that this was in contradiction to other evidence. For example, she had told the social worker that she had a close relationship with her family and they were supportive of her. The report refers to this repeatedly and at section 7 notes: "*At present her family live in close proximity to her, her aunt living with her...her family are there to offer her emotional and practical support should she need it, something that would not be available in India*" (added emphasis).
31. Whilst she had adduced evidence from an employer criticising her standard of work, it transpired in oral evidence that she in fact worked from home for her brother's cash and carry business. It is unclear whether this was the same employer who had criticized her work. However, the evidence before the judge was that her brother allowed her the flexibility of working from home and she had also clearly been allowed to take substantially long holidays and travel to India to be with the appellant (whether by her brother or a previous employer). The judge also noted that her father accompanied her to the hearing and that she lived with a maternal aunt (at 27 and 29). She was also receiving other support from various NHS sources (at 30).
32. The sponsor's evidence that her family were too busy to help her is contradicted by her claim that they helped her brother who had recently had a child. No reason has been offered for why they had time to help him but not her. It is further contradicted by what she told the social worker (above). Her claim that they had never accepted the appellant is contradicted by her witness statement of 4 June 2015 in which she states that her "*entire extended family stands by him. Everyone considers my partner a kind person having that special relationship with each one of them*".
33. Moreover, great emphasis is put in several of her witness statements to the fact that her family are in the UK and she would not want to be in India without their support. She refers in her statement of 23 July 2019 to being supported in India by family and to the help given to her by her sister who regularly sent her parcels by DHL. One of the reasons she gives for wanting to live in the UK is because her family is here. That does not suggest that she is isolated from them. There are also numerous supporting letters from family members in the evidence before the Tribunal all expressing concern for the sponsor. Were she to

be as isolated as she claims, it is difficult to see how all these individuals would be so aware of her circumstances.

34. The determination shows that the judge did have regard to the evidence from the sponsor but chose to find, nevertheless, that the true picture had not been presented. That was a finding she was entitled to make.
35. Much is made of the sponsor's worry for her son's speech development. The letter from the GP shows that given her worries, the child was referred for a review/assessment. There is also evidence that he was on a waiting list to see a speech therapist. I note that his hearing test showed no abnormalities. It is maintained that the proposed assessment was not taken into account. This is incorrect. The judge had regard to this at 25, 27, 28, 32 and 33. I note no suggestion was made by Counsel that the hearing should be adjourned to await the outcome of the assessment. Even were it to be found that the child required support for speech development, and I note that fresh, post hearing evidence has been adduced (which sets out daily strategies to be applied by the sponsor), this could not amount to a very compelling circumstance given the existing case law. Nor was there any evidence before the judge that any assessment or therapy, if required, could not be obtained in India. The brief reference to this in the social worker's report relies on a seven year old report on autism which was not produced but and which was not referred to in Counsel's submissions. Again, as the judge found that it would not be unduly harsh for the sponsor and her son to remain in the UK as an alternative to relocating to India, this ground does not advance the case to any extent.
36. For the same reason the appellant's case is not assisted by the complaint that the sponsor's evidence on the problems faced by her and her son in India were not taken into account by the judge. Additionally, the evidence on this point was vague. It is maintained that the sponsor had difficulties during her pregnancy but no further details are given. It is maintained that the child was ill and taken to a doctor several times but details are not provided and the doctor's letter does not give any information as to the nature of the problem. Nor does it suggest that remaining in India would have done the child any harm. It may be that any initial difficulties would have settled with time.
37. Contrary to what is claimed, the evidence from various witness statements shows that family support was available to the appellant and the sponsor in India, both from his sister who lives there and with whom they lived on return, and from his parents in Canada and the sponsor's family in the UK.

38. The grounds also argue that the judge did not take account of the child's British nationality. The judge was plainly aware that the child was British. This is recorded in the evidence (at 13), the submissions (at 17) and in the judge's findings (at 21). Given that the correct test of "undue harshness" was applied and in the absence of any particular disadvantages such a young child would face living outside the UK with his parents, I cannot see that referring in greater detail to his nationality leads to any material errors. It was not suggested that he would have any immigration problems in India because of his nationality. In any event, the judge found in the alternative that it would not be unduly harsh for the sponsor and the child to remain in the UK without the appellant.
39. The final piece of evidence the judge is said not to have considered as a whole is the OASys report. It is maintained that the judge did not refer to the author's conclusion that the appellant presented a low risk of harm and of re-offending. The judge clearly had regard to the report at paragraph 37 of the determination. She highlights several sections of it. It formed part of her assessment and there was no duty on her to cite every part of it in her determination. Indeed, given that the seriousness of the offence itself and the issue of re-offending have no bearing on any assessment of how deportation of a parent impacts upon a child (KO (Nigeria) [2018] UKSC 53, the judge's 'failure' to refer to the low risk of re-offending is wholly immaterial.
40. That brings me to the second ground which is a criticism of the judge's approach to the report of the social worker. It is maintained that the judge reached a different conclusion to the social worker as to the best interests of the child and that no cogent reasons were given for why she did so.
41. The judge engaged with the report at paragraphs 26, 27, 28, 29, 30, 31 and 33. The report was based on a two hour interview with the sponsor and though it refers to discussions with "the family" and "talking with them", it would appear that the only discussion that took place was with the sponsor. The judge noted this, observing that the sponsor's relatives had not been interviewed. Rather surprisingly, the social worker does not refer to having seen the sponsor's son or even to have observed his behaviour or any interaction between them so her conclusions on the child are based entirely on what the sponsor said and on the general texts that are alluded to towards the end of the report.
42. The social worker speculates on a two year old's inability to speak English or Punjabi and then jumps to the observation that "*research has found that language barriers can often lead to feelings of threat to self inadequacy*". This appears to completely disregard the very young age

of the child and the fact that were he to have such problems, those feelings would exist regardless of where he was. It is also maintained that the child would not be culturally aware of his new and very different surroundings. This again disregards his very young age, the fact that due to the sponsor's lack of social interaction, the child would have very little awareness of the world outside his home.

43. The conclusion, unsurprisingly, was that the child's best interest would be to be with both parents. I say unsurprisingly because that is the conclusion one would reach in the vast majority of parent-child relationships. The conclusions are, however, presented in very generalized terms (at section 8). The only specific conclusions relating to the child are the following: "*From what I have read and been informed, it appears to be unsettling for S to remain in the UK without his father and indeed not ideal for his emotional and physical health for him to relocate to India*" and : "*the quality of the relationship between S and his father would be negatively affected should they continue to be separated and this is not in S's best interest*".
44. I would note that no reasons have been given for why being in India would not be suitable for his emotional/physical health given that he would be with both parents and that the sponsor's own evidence in her witness statement was that the child was developing and thriving in India with his father, which contradicts her evidence to the social worker that he was constantly sick.
45. The judge accepted that the best interests of the child were to have input from both parents and to that extent she did not diverge from the social worker's report. It was, however, open to her, given all the other evidence, to conclude that such input could be obtained in two ways: either by the sponsor and child relocating to India or by them staying here and conducting family life by way of visits and social media as they have been doing on a daily basis. The judge then gives reasons for why she reached this conclusion. When the determination is read as a whole, it cannot be argued, as the grounds maintain, that a different view was taken from that of the social worker without any cogent reasons being given.
46. The judge's findings and conclusions must be considered in the context of the legal framework relating to revocation of deportation orders. The judgment in KO (Nigeria) [2018] UKSC 53 clarified that a decision maker must focus on the key question of whether the effects of the foreign criminal's deportation on a child or partner would exceed the level of harshness which would necessarily be involved for any child or partner of a foreign criminal facing deportation. Under rule 399, the judge must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign

criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without the foreign criminal.

47. Applying that guidance, the court in PG (Jamaica) [2019] EWCA Civ 1213 (referred to by Mr Avery in his written submissions) allowed the respondent's appeal and restored the deportation order against "PG", a father with six British children. It found that the impact of PG's deportation did not surpass the degree of harshness which was necessarily involved for the partner or child of a foreign criminal who was deported. It accepted that many parents would be faced with difficulties pertaining to children and that the foreign criminal parent would not be on hand to assist but that such circumstances could not mean that the effects of deportation are unduly harsh for the partner or children. Emotional and behavioural fall out were commonplace and whilst the court sympathised with the entirely innocent children involved, it noted that Parliament had deliberately legislated that, for foreign offenders who are sentenced to one to four years, deportation could only be avoided where the consequences for the children were "unduly harsh" and that decision-makers, tribunals and courts must honour that expression of Parliamentary will.
48. Certain adverse impacts on children, therefore are regarded as a necessary price to pay in pursuit of the public interest in deportation. The test applies regardless of the nature of the offence and regardless of whether the individual presents a risk of re-offending.
49. The appellant has been out of the UK for less than five years and indeed it was four years at the date of the hearing. Although the deportation order was signed in 2012, and although there is nothing in the wording of paragraph 391(a) to require the 'prescribed period' to be spent outside the UK (the appellant spent a lengthy period in the UK after the deportation order was signed challenging the decision), as pointed out in Smith (paragraph 391(a) - revocation of deportation order) [2017] UKUT 00166 (IAC) which was included in the appellant's bundle, the whole purpose of a deportation order is to exclude a person from the UK for a specified or indefinite period. "*A person should not be able to benefit from a clear breach of the order, which undermines the effectiveness of the system of immigration control*" (at 25). At the date of his application for revocation he had been away for just over three years. After his departure from the UK when all attempts at challenging the decision had failed, he married the sponsor and they had a child. Those events took place in the knowledge of the deportation order.
50. There was little evidence before the judge in respect of the appellant's two older children and no reliance was placed upon their rights in the

present appeal. I note in any event that a previous Tribunal found that the effect of deportation was not unduly harsh on them.

51. The judge properly found that the appellant could not succeed in showing that the public interest in the continuation of the deportation order was outweighed by very compelling factors. Whether considered individually or collectively, the matters relied upon by the appellant were insufficient to enable the judge properly to conclude that the effect of the decision to refuse revocation of the deportation order would be unduly harsh for either his present wife or their child. Accordingly, the judge acted correctly in dismissing the appeal and her determination contains no errors of law.

Decision

52. The decision of the First-tier Tribunal does not contain an error of law and it is upheld. The appeal is dismissed.

Anonymity

53. The First-tier Tribunal judge did not make an anonymity order but an order is sought by Counsel in her written submissions. To protect the identity of the appellant's child, and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order.
54. Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings of any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the content of the protection claim.

Signed

R. Kekić

Upper Tribunal Judge

Date: 13 July 2020