



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13971/2017

THE IMMIGRATION ACTS

Heard at Bradford by Skype
On 16 September 2020

Decision & Reasons Promulgated
On 22 October 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

LEON [P]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Fisher instructed by Kitty Falls Immigration Law.

For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

DECISION AND REASONS

1. In his judgment of 30 June 2020 the President of the Upper Tribunal set aside the decision of the First-tier Tribunal which dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom on human rights grounds, relied upon as an exception to the order for his deportation pursuant to section 33 UK Borders Act 2007.

Background

2. The appellant is a citizen of Australia born on 2 July 1957.
3. The appellant entered the United Kingdom in 1983 as the grandchild of British grandparents. The appellant asserts he was granted indefinite leave on arrival. He was accompanied on the flight by Barbara [F], also an Australian citizen, and her two children Kim (aged 12) and Keith (aged 17).
4. On 6 December 1984, the appellant married Barbara [P] (formerly [F]). Mrs [P] became a naturalised British citizen on 15 November 2012 and holds dual nationality.
5. On 26 January 2015 at Guildford Crown Court the appellant was convicted of Conspiracy to Defraud (make/supply articles for use in fraud) to which he pleaded guilty and on 19 August 2015 was sentenced to 42 months imprisonment. A confiscation order was made in the sum of £850,981.87. The appellant did not appeal against either conviction or sentence.
6. On 25 September 2015, the appellant was served with a decision to make a deportation order at which point his ILR was curtailed.
7. The appellant initially indicated he was not challenging the deportation decision but later withdrew his consent to being deported on 6 February 2017 and indicated that he will be relying on Article 8 ECHR in support of his challenge to the respondent's decision.
8. The appellant was released on licence on 19 May 2017 and resides with Mrs [P] in a rented property in Surrey.
9. Evidence was received from both the appellant and Mrs [P] via Skype, who were cross-examined by Mrs Pettersen.

Summary of the appellants submissions

10. On behalf of the appellant it was submitted that Mrs [P] is 83 years of age with deteriorating health conditions and increased medical needs, and that she will not get better. It was argued Mrs [P] has an entitlement to state assistance from Social Services or Homecare by Mrs Patterson. It was submitted on the appellant's behalf that the real question was whether in practice she would receive the same.
11. It was submitted Mr and Mrs [P] have been together for a long time and that the effect of the appellant's deportation will be that they will be unlikely to see each other again.
12. It was submitted that even putting aside Covid 19 issues, the reality is that if Mrs [P] falls, she is unable to get up. She has real difficulties if she is on the ground which would be concerning if she did not have her telephone on her which meant she could lie there for days.
13. It was submitted that the appellant's daughter was not currently in Australia. In Australia, the daughter works in a supermarket and the appellant's son-in-law in a warehouse. It was submitted there was no evidence of their financial means and insufficient evidence to show they could assist with rehousing the appellant if he were deported. It was submitted there is also the issue that Mr [P] described his

relationship with Kim as having changed when he left Mrs [P] in 2009, although they are back together now.

14. Mr [P] argued he could not re-establish himself in Australia, a country he has not lived in for 30 years. He has also had approximately 37 years of ordinary residence in the United Kingdom which he claims was more than half of his life and that he is culturally and socially integrated. Mr [P] argues that he faces significant obstacles to integration as it will be very difficult for him to start again. Being a person in his early 60s makes it more difficult to adjust as opportunities are limited and had not built up the type of relationships that may assist in obtaining employment and re-establishing himself when he has been out of the country for 37 years.
15. It was argued by Mr [P] that social services could not offer his wife emotional support and that it will be unduly harsh in the context of the couple if he was to be deported from the United Kingdom.
16. In the alternative, it was argued on the appellant's behalf that even if deportation were not unduly harsh it could still be disproportionate when considering all the competing factors.

Discussion

17. In AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 it was found that it would usually be unnecessary for a tribunal to refer to anything other than the leading Supreme Court and Court of Appeal authorities. They are confirmed as being KO (Nigeria) v SSHD [2018] UKSC 53; R (Kiarie and Byndloss) v SSHD [2017] UKSC 42; NA (Pakistan) v SSHD [2016] EWCA Civ 662; and HA (Iraq) v SSHD [2020] EWCA Civ 1176.
18. There are no dependant or minor children in this appeal. The only relevant UK based adults are the appellant and Mrs [P].
19. Paragraph 398(b) of the Immigration Rules provides: (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months.
20. The appellant was sentenced to 42 months imprisonment indicating a sentence at the upper end of the 12 to 48-month range to which 398(b) applies.
21. The exception to deportation most commonly relied upon is that contained in section 33(2)(a): that removal of the individual would breach his or her rights under the European Convention on Human Rights (ECHR), and in particular the right to family and private life under Article 8. That is the appellant case too.
22. The exceptions to the respondent's ability to deport the appellant are to be found in section 117(c)(4) and (5) Nationality, Immigration and Asylum Act 2002 which read:
 - '(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'

23. As a 'medium' offender who falls within Paragraph 398(b) the appellant will be deported unless he is able to show he can bring himself within any of the exceptions or his circumstances make any interference with a protected right disproportionate (the burden being upon the respondent to show that it is proportionate).
24. In relation to the private life exception Mr [P] needs to show he had been (a) lawfully resident in the UK for most of his life, (b) socially and culturally integrated into the UK and (c) there are significant obstacles to his integration to his home country, or, a relationship with a British or settled person (someone with indefinite leave to remain), and that it would be unduly harsh for the partner to travel with the deported partner, AND it would be unduly harsh for the partner to remain in the UK without the deportee, or, there are very compelling circumstances.
25. The point of the 'lawful residence' test is to remind decision makers that little weight should be given to a private life developed when an individual had no right to be here. I find on the evidence that this requirement has been shown to be met by Mr [P].
26. "For most of his life" means more than 50%: see AS v Secretary of State for the Home Department [2017] EWCA Civ 1284 and Secretary of State for the Home Department v SC (Jamaica) [2017] EWCA Civ 2112 at [53]. On the basis the appellant was born on 2 July 1957, entered the UK in 1983 when he was 26 years of age and lived here lawfully with ILR until it was curtailed in 2015 which is a period of 32 years, I find Mr [P] has shown this requirement to be satisfied.
27. "Socially and culturally integrated" means the acceptance and assumption of the culture, core values, customs, and social behaviour of the UK: see [57] of Binbuga v SSHD [2019] EWCA Civ 551. Whilst it accepted that a period of imprisonment can weaken integrative links it was not made out the nature and quality of the appellant's private life is reduced such that he does not have a private life of sufficient substance to engage Article 8 in this appeal. I find this requirement to be satisfied.
28. The "Very significant obstacles" test requires an assessment of whether the appellant is "enough of an insider" to form a meaningful private life in Australia: Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813.
29. It is also settled law that it should not be assumed that an individual will have a knowledge of the 'cultural norms' of his country of origin. Whether this is the case depends on the evidence.
30. In this regard the appellant relies upon the following factors:
 - He is 63 years of age.

- He has worked and lived in the UK for 38 years having permanently settled during his time here.
 - He has no family support on return.
 - He is nearing retirement and the ability to start afresh in Australia where he has no family, work, or social contacts or commitments would be a significant obstacle to reintegration.
 - He has not lived in Australia since he came to the UK.
 - Neither the appellant nor his wife own property in the United Kingdom or elsewhere and have no access to capital that he would require to fund and set up another business in Australia.
 - At his age and downturn in employment opportunities in Australia make finding employment challenging.
 - The issue of whether having worked most of his adult life in the United Kingdom he will be entitled to any welfare benefits in Australia including a state pension.
31. As the appellant was born after 1 January 1957, he will not be eligible for a retirement pension in Australia until he reaches 67 years, if eligible. In relation to eligibility, generally a claimant must be an Australian resident for at least 10 years before they are eligible for the age pension. Out of this 10-year period, they must also have lived in Australia for at least 5 years in a row. The appellant is unable to fulfil this criterion and will therefore be reliant upon an exception. This may apply to a person if they have lived or worked in a country which has an international social security agreement with Australia. The agreement with the United Kingdom ended on 1 March 2001. It is therefore not made out the appellant will be entitled to claim an old age pension in Australia; although it was submitted on the respondent's behalf by Mrs Petterson that even if the appellant is not entitled to a pension from the Australian government he will be entitled to claim a UK retirement pension as a result of the National Insurance contributions made and his settled status. It was not made out the appellant could not have his UK state pension to be paid to him in Australia. The full basic UK State Pension is £134.25 per week which converts to approximately \$242.467 per week, less than the basis state pension in Australia of \$860.60 per fortnight or \$430 per week.
32. Whilst the appellant claims he is unfamiliar with modern life in Australia, 'culture shock' does not amount to a very significant obstacle: SSHD v Olarewaju [2018] EWCA Civ 557.
33. The evidence shows there are family members in Australia namely the daughter Kim, her husband, and her family. The evidence shows Kim works in a supermarket and her husband in a warehouse. They have children. Whilst it was submitted these family members are currently in the United Kingdom as a result of their having travelled over to visit a relative on the husband's side, it appears that once Covid 19 arrangements permit they will return to Australia with there being no evidence of an entitlement or intention to settle in the United Kingdom from them at the date of the hearing. Whilst the appellant also claimed that his

relationship with Kim had come strained as a result of his leaving her mother during an earlier part of their relationship, as acknowledged in the appellant and Mrs [P]'s statements, they are now reconciled to living in the same household and there was insufficient evidence to warrant a finding that any ill feeling that may have been present previously still exists to the extent that the appellant would not have the benefit of family support and assistance if returned to Australia.

34. Whilst the appellant sets out a number of negative factors which he asserts will hinder his reintegration it is also the case that the appellant ran a very successful business in the United Kingdom, albeit one that led to his conviction, and that he had a previous business opportunity in Italy albeit it was not suggested in the evidence the same was still available to him. The appellant still has his business acumen and a CV that would reflect the same, and even though Australia, like any country affected by Covid-19, has seen an increase in its rates of unemployment and difficulties for certain sectors in securing employment, the evidence did not support the appellant's claim that he would face very significant obstacles in obtaining employment. The appellant has his own health needs but there was insufficient evidence to show that he would not be able to receive medication required in Australia or that his health prevented him securing employment even if not in his chosen field. It was not made out employment opportunities in other industries that have appeared more robust than others during the Covid 19 pandemic will not be able to provide a potential opportunity for the appellant on return.
35. The appellant also fails to make out he will not be entitled to JobSeeker Payment whilst looking for work. There is a residence requirement but in this regard the definition of an Australian resident is a person who lives in Australia and are either:
- an Australian citizen
 - a permanent residence visa holder
 - a protected Special Category visa (SCV) holder.
36. 'Living in Australia' means Australia is a person's usual place of residence which it will be if the appellant is deported from the UK. The appellant satisfies the citizenship requirement too. The relevant authority in Australia has announced that they have removed the newly arrived resident's waiting period until 31 December 2020 as a result of Covid-19. The appellant adduced insufficient evidence to show he will not be entitled to such assistance on the facts of this case.
37. The guidance of the Court of Appeal in Kamara relied upon by the appellant reads:

"In my view, the concept of a foreign criminals "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to mere ability to find a job or to sustain life whilst living in another country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court of tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of

understanding how life in the society in that other country is carried on and a capacity to participate in it, so far as to have a reasonable opportunity to be accepted there, to be able to operate on a day to day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individuals private or family life."

38. Whilst there are cultural differences between the UK and Australia they are similar when it comes to having an individualistic culture which roughly translates into a high self-image and a loose-knit society when people generally look after themselves and their immediate families. The appellant speaks the common language, English, and society in Australia thrives upon what an individual can do rather than qualifications. It is not made out, especially with family still in Australia, that the appellant has become so separated from his understanding of life there that he would be effectively an outsider. I do not find it made out the appellant does not understand how life is carried on in Australia or that he has established he would not be able to participate in it. The appellant is a sociable individual and it was not made out he would not be accepted in either employment or society in general or that he lacks the capacity and ability to participate and operate on a day-to-day basis there. The appellant's experience and skill sets will enable him to build up new relationships and contacts and re-establish his private life which will include his relationship with family members in Australia.
39. Whilst accepting that any transition will be difficult, I do not find on the basis of the evidence made available to the Upper Tribunal that the appellant has established very significant obstacles to his reintegration into Australia.
40. Whether there is a "genuine and subsisting relationship" between the appellant, and Mrs [P] is a question of fact. I find having considered the evidence made available and find that whatever problems the appellant and Mrs [P] experienced in their relationship in the past, which resulted in Mr [P] leaving the matrimonial home and setting himself up elsewhere between 2009 and 2017, at the date of decision they are living together and are in a genuine and subsisting relationship. The respondent made no persuasive submissions that this was not the case. I find it made out that the appellant and Mrs [P] are in a genuine and subsisting relationship.
41. The issue in the case is therefore whether the effect of the appellants removal would be unduly harsh upon Mrs [P].
42. In relation to the question whether this would be so were she to remain in the UK, the appellant relies heavily upon his wife's medical needs and his claim he needs to remain to provide her with care and assistance and to meet her emotional needs.
43. There is a large volume of medical evidence which I have considered in full, but the current position is summarised in the most recent letter from Mrs [P]'s GP, which reads:

'7 September 2020

TO WHOM IT MAY CONCERN

Medical Update Report Re:

Mrs Barbara [P]

...

I can confirm that as the GP of the above patient, the following report is taken from her medical records and interactions with Barbara.

1. On February 13th, Barbara reported issues with urinary symptoms at night and decreasing eyesight. She was confused as having a urine infection.
2. In July and afterwards, she had recurrent thrush infection of ther [sic] mouth.
3. On the 12th August, she reported having a fall and injuring her left elbow. She has previously had issues with left shoulder. She had an x-ray at hospital which showed no fractures but she had extensive bruising and haematoma formation and has required follow up for this.

As with previous medical reports, I can confirm that Barbara has moderate frailty (0.25 on the eFI frailty score) and has reported that she is dependent on Leon for significant amounts of help at home and for transport to appointments and investigations. I believe this to be the truth.

During lockdown for Covid-19, Barbara self-isolated as she would be classified as being in the increased vulnerability category due to her medical condition and age. Going forward, with the distinct possibility of a re-emergence of Covid-19, she will need to take care and will need to ensure social distancing and may need to self-isolate again. She will then obviously be reliant on Leon even more. As can be seen, Barbara is at increased risk of falls and has suffered these in occasions.

The risks will not lessen as time goes by. I have been asked to comment re: future long-haul travel. I think that due to her frailty and medical condition, this would be very difficult for her and certainly if attempting above. During [sic] Covid-19, I would not advise this unless absolutely necessary.

Yours faithfully

Dr D Watts'

44. The eFI (Electronic Frailty Index) is stated on the NHS website not to be a clinical diagnostic tool; "it is a population risk stratification tool which identifies groups of people who are likely to be living with varying degrees of frailty but it is not able to do this for specific individuals. Therefore, when the eFI identifies an individual who may be living with severe or moderate frailty, direct clinical assessment and judgment should be applied to confirm a diagnosis".
45. Mrs [P] confirmed in her evidence that she has not had any such assessment. It may have assisted if a health and social care assessment had been carried out by social services to find out what help and support is needed – such as healthcare, equipment, help in her home or residential care. No evidence that contact has been made with the adult social services department of Mrs [P]'s local council to ask for a care assessment was provided either. The letter from the GP refers to 'self-reporting' of needs which, whilst an important part of any assessment process, is

- not assessment by a trained practitioner. The GP believes this to be true but provides no evidential basis for how this conclusion is reached in clinical terms.
46. It is accepted Mrs [P]'s concerns relating to falling are subjectively justified as once a person has had a fall, they are more likely to fall again and such falls often cause injuries. It was not disputed before me that Mrs [P] might find it difficult to get up after a fall on her own which is a common problem often due to injury, stiff joints, weak muscles, or a number of other factors. Mrs [P] can clearly raise herself and get up if she has access to a stool or chair to right herself but, if the same is not available, she has been dependent upon the help of the appellant.
 47. The subjective fear of falling and being left unable to get up for days, whilst understandable, is also speculative and, in part, a concern based upon the failure to explore options. The trend to facilitate those who are elderly remaining in their homes for as long as possible means there are many with or without health issues living alone. Falling is a common issue with the elderly. There are a number of affordable products on the market meaning that if a person suffers from a fall or has a medical emergency then all they need to do is to either press a button on a device on a pendant they wear around their neck or press on an alarm base unit which sends a medical alert message through to the suppliers Response Team, who are available 24 hours a day, 365 days a year. Most systems operate by trying to speak to the caller once an alarm has been triggered over the alarm's loudspeaker, to assess the situation and once they understand what has happened to act immediately by calling nominated emergency contacts or, if needed, the emergency services. The assertion the appellant's deportation will effectively result in Mrs [P] being 'abandoned' in such circumstances is not made out. There is nothing from the GP to say such services are not available, or that they or the Surgery's help will not be adequate, or to indicate they will not be able to assist in relation to both physical and emotional/mental health issues that may arise if Mr [P] is deported and Mrs [P] remains in the UK.
 48. In relation to Mr [P] it is acknowledged he has health issues of his own but it was not made out that he will not be able to obtain the required medication or assistance in Australia without which he would suffer an irreversible decline in his physical or emotional health which might adversely impact upon Mrs [P] if she was to remain in the United Kingdom.
 49. Although it is claimed that if the appellant is deported Mrs [P] will never see him again, I find this to be an exaggeration. Whilst immediate physical face-to-face contact may be only something that can be achieved by actual visits the availability of online video services such as Skype, Teams, and other similar facilities enables people to see and speak to people in real time, as occurred in this hearing. Many with family on the other side of the world only have the ability to see each other physically infrequently but can communicate as often as they wish by using such means of communication.
 50. Mrs [P] has already been able to access and enjoy the services of the NHS including attending courses/presentations part of the "Be Stable" programme and in relation to the ongoing shoulder problems. It is not suggested she will not be able to receive prescription medication, which many pharmacies deliver to an elderly person, and has demonstrated an ability to live without the appellant in

- the past. Whilst I appreciate that Mrs [P] will not be able to enjoy the companionship of the appellant and the assistance he provides to her it has not been made out that the consequences of not having such assistance make the appellant's deportation unduly harsh. Although it was said that the appellant prepares their meals, services such as Home Help, meals on wheels, or other similar services could be provided if deemed necessary following a formal assessment by social services. Mrs [P] is entitled to the same as a result of her British national.
51. Mrs [P] also coped without the appellant whilst they were separated between 2009 and when the appellant was released from prison on licence to Mrs [P]'s address in 2017. It is accepted that at the time when the appellant went to prison in 2015 Mrs [P] was 77 years of age and in better health and that she had not suffered falls prior to the appellants release in 2017.
 52. There is insufficient evidence to support the claim Mrs [P] needs one to one help in washing, dressing or day-to-day activities, nor is it made out she could not adequately feed herself if the appellant was not present and doing so.
 53. In relation to the claim there will be no visits as Mrs [P] will be unable to fly to Australia as the journey will be too much for her, the letter from the GP states that long haul travel may be too much. There is no definitive statement it will be such that this option would not be available and no examination of whether it was feasible if the journey was broken up as flights to Australia could be by stays in Dubai, Singapore, or elsewhere. The GP also refers to such flights being an option if they were absolutely necessary which is a judgement call for Mrs [P] to make herself.
 54. Although the appellant's deportation will result in changes to Mrs [P]'s living arrangement, insufficient evidence has been provided to warrant a finding that the effects upon her go beyond that which would necessarily be involved by a person faced with deportation on a partner. The argument that the required test was to undertake a comparison between the impact upon Mrs [P] and what the impact would be upon a person who had no such health needs is, arguably, incorrect. As found in AA (Nigeria) "it is undesirable to approach the issue by trying to identify what is "the norm" and what in the individual case goes beyond that: almost all cases are different, involving a multitude of individual factors, and it is impossible to measure objectively a norm or baseline as the comparator against which the individual case is to be judged".
 55. It is a fact sensitive assessment relating to whether the effect upon the subject being considered, in this case Mrs [P], would be unduly harsh. I accept the impact may be harsh, but it is not made out it will be unduly harsh.
 56. It also emerged during the course of the evidence that Mrs [P] had fallen whilst being out working in her garden. As Mrs Petterson submitted, it was not made out this was a necessary activity or one for which appropriate aids could not be provided as part of a Social services review. Grab rails and other items are often provided to assist an individual's mobility in their property, if required.
 57. In relation to whether it will be unduly harsh for Mrs [P] accompany the appellant to Australia so they may continue their family life are together, the comments made above in relation to the economic reality are equally pertinent.

58. It has not been made out Mrs [P] could not fly with the appellant to Australia even though that may be a difficult trip for her including the need for a wheelchair. If she returns with the appellant this will only require a one-way journey.
59. Whilst the appellant refers to the prospect of continued deterioration of Mrs [P], it is the position prevailing at the date of this hearing which is the relevant position and it is not appropriate to speculate what may be the case in the future, unless reasonably foreseen on the available evidence.
60. It is also the case that if Mr and Mrs [P] return as a couple the assistance currently made available for Mrs [P] will continue from either the appellant or other family members if living locally.
61. Living in Australia in addition to her daughter Kim, are her husband and Mr and Mrs [P]'s grandchildren. The finding of a lack of evidence that the Australia-based family would effectively refuse to assist the appellant is more pertinent if they are returned as a couple, when both Mr and Mrs [P] will be seeking to reintegrate themselves into Australian society.
62. Mrs [P] appears to be able to manage without the benefit of state funding in the UK indicating a private source of income which, whilst not substantial has not been shown to be insufficient to meet their needs on return to Australia as it has been in relation to rent and associated living costs in the United Kingdom.
63. The family members currently in the United Kingdom as a result of their inability to return to Australia due to the Covid-19 pandemic restrictions have no settled status and nor is there any evidence they have applied for the same. Any interaction between the same forming part of the appellant's and his wife's private life can therefore continue in Australia.
64. I note that in HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176 the court cautioned against conflating "undue harshness" with the far higher test of "very compelling circumstances". The underlying concept is of an "enhanced degree of harshness sufficient to outweigh the public interest in the medium offender category".
65. I find it not made out, when considering the evidence holistically that the appellant has established that Mrs [P] returning with him to Australia or remaining in the United Kingdom whilst he returns alone is unduly harsh. I come to this conclusion being aware that when assessing the question of undue harshness this threshold is not as high as s. 117C (6): see HA (Iraq) at [52]:

"However, while recognising the "elevated" nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of "very compelling circumstances" to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary

immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders."

66. In AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 Lord Justice Popplewell confirmed at paragraph 10 that in relation to what is meant by "unduly harsh" in section 117C(5), the authoritative guidance is now that given by Lord Carnwath JSC in KO (Nigeria) and by the Court of Appeal in HA (Iraq). At paragraph 12 he explained that the expression "unduly harsh" does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). He concluded that it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness".
67. What remains in issue is the difficulty in reconciling the approach of the court of Appeal with the judgment of Lord Carnwath in the Supreme Court in KO (Nigeria) where he stated:
- "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... 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."
68. As the Supreme Court is the higher courts whose decision are binding on those below until the Supreme Court itself clarifies this apparent contradiction, the risk for potential confusion remains. Judges below are often criticized for suggesting an interpretation of the wording of a judgement given by a Senior Court on the basis it is for that court to say what they mean and not for those below to suggest an alternative meaning.
69. In this appeal, however, on either interpretation the appellant cannot succeed on the facts.
70. The outcome of this appeal must be to produces a final result compatible with Article 8. That comes down in the end to the question of the proportionality of the decision.
71. The appellant is not able to succeed on either of the exceptions to be found in section 117 C or the Immigration Rules. Considering the substantial weight to be placed upon the right of the State to deport foreign criminals sufficiently strong reasons are required to outweigh the strong public interest in the appellant's deportation.
72. British citizenship is important. Whilst it is a "weighty and significant" factor it is not determinative but has been factored into the assessment of Mrs [P] who holds joint British/ Australian citizenship.
73. In relation to question of rehabilitation, the appellant states he has not and will not reoffend in the future. I accept that where a potential deportee can establish

no/low risk of reoffending this will be relevant to proportionality balancing exercise, although will rarely be of great weight bearing in mind public policy/deterrence. In this case it has been factored in but does not outweigh the public interest.

- 74. Having undertaken an informed evaluative assessment of whether the effect of the deportation of the appellant would be "unduly harsh", I find it will be not and the respondent's decision proportionate, in the context of the strong public interest in the deportation of foreign criminals. I find that on the facts of this case that whilst there is sympathy for Mrs [P] who is not in any way culpable for the appellant's offending, the respondent has discharged the burden on her to the required standard to establish that notwithstanding the difficulties that may be faced by this family unit the result of the required holistic assessment of the competing arguments show that the scales weigh heavily in favour of the respondent. It has not been shown there are sufficient compelling circumstances to warrant the appeal being allowed. The appellant's deportation is proportionate and a decision compatible with the accepted interference with the protected article 8 rights.

Decision

- 75. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

- 76. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 14 October 2020