



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24782/2018

THE IMMIGRATION ACTS

Heard at Field House
On the 21st January 2020

Decision & Reasons Promulgated
On 6th February 2020

Before

**MRS JUSTICE MOULDER
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE REEDS**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SP
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Presenting Officer

For the Respondent: Mr Hayward, Counsel instructed on behalf of the respondent

DECISION AND REASONS

Introduction:

1. On 30 March 2016 the respondent made an order that the appellant is to be deported from the United Kingdom ('UK'), following her criminal convictions as it was considered that her presence in the UK was not conducive to the public good. The respondent refused the appellant's human rights claim in a

decision letter dated 15th September 2016. On 15 November 2018 the decision was reviewed, and the refusal of her claim was maintained with a right of appeal under section 82 (1) of the 2002 Act.

2. The appellant, a citizen of Jamaica, appealed this decision to the First-tier Tribunal (Judge Rowlands) (hereinafter referred to as the "FtTJ"). In a decision sent on 6th September 2019, the FtTJ allowed her appeal on human rights grounds, and the Secretary of State has now appealed, with permission, to the Upper Tribunal.
3. We make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or members of her 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.
4. For the purposes of this decision, we refer to the Secretary of State for the Home Department as the respondent and to SP as the appellant, reflecting their positions before the First-tier Tribunal.

Background:

5. The appellant's immigration history is summarised in the decision of the FtTJ at paragraphs 1-3. The appellant first entered the United Kingdom on 11 September 1991 was granted leave as a visitor for six months. She remained for six years before making an application to remain based on her marriage to a British citizen in 1996.
6. On 4 May 2000 she withdrew that application which had not been considered by then and made an application to remain indefinitely based on her relationship with her child under a concessionary policy. Following further submissions, indefinite leave to remain was granted on 29 November 2000.
7. The appellant's offending history goes back to 1996 when she was first cautioned for an offence of theft. In 1998 she was convicted of attempting to obtain property by deception and theft and in 2000 she was again convicted of theft. On these occasions she was ordered to pay a financial penalty.
8. By 10 May 2002 she was convicted of offences theft and obtaining by deception and was made the subject of a community punishment order requiring her to undertake a total of 60 hours unpaid work. In 2009 at the Crown Court she was convicted of two offences linked to unlawful benefit claims and sentenced to 9 months imprisonment suspended for 18 months with a further unpaid work requirement and a specified treatment requirement. In 2009 she was convicted of theft and ordered to pay a financial penalty.

9. In 2010 she was convicted of driving whilst disqualified and without insurance and ordered to undertake 60 hours unpaid work and her driving licence was endorsed with six penalty points. The following year she was fined £65 for an offence of theft and in 2012 for a similar offence, she was again made the subject of a community order requiring her to do unpaid work.
10. In 2013 she was convicted of possession of a controlled drug and theft and given a curfew for an unspecified period.
11. In 2015 she was again made the subject of a community order requiring her to undertake a curfew for a specified period with a rehabilitation activity requirement for the offences of going equipped for theft and theft.
12. On 29 January 2016 she was convicted of entering into an arrangement to facilitate the acquisition, retention, use or the control of criminal property and sentenced to one year and nine months imprisonment which was varied on appeal to one year and three months prison imprisonment on 12 July 2016. This was the offence which led to the deportation order being made.
13. The circumstances of the offence are set out in the sentencing remarks of the Judge and summarised in the decision letter at paragraph 20. The appellant was a co-defendant alongside others who had been convicted by the jury of offences arising from a large, well-planned fraud involving large sums of money which involved a large number of innocent members of the public who had their confidential, financial and personal information stolen, sold and then misused and used to make fraudulent loan applications. The money lent by the lending company, Wonga, was then siphoned through numerous bank accounts in a large, well-organised money-laundering operation. In SP's case, she was sentenced based on her involvement with 35 accounts and from 21 of which took money from the fraud. A total of over £20,000 of which £19,000 was withdrawn in cash. The judge found that her involvement was of a medium nature at category five and having considered the mitigation and her previous offending history with a number of offences for dishonesty, imposed an immediate custodial sentence of 21 months (later reduced to 15 months).
14. In light of her conviction, a decision to deport her was issued on 30 March 2016. This was responded to by the appellant on 5 April 2016 and further evidence submitted on 14 April 2016. A decision was made on 15 September 2016 to refuse a human rights claim and this was certified under section 94B of the NIAA 2002.
15. The respondent sought her removal from the UK, but the removal directions were cancelled when on 4 November 2016 proceedings for judicial review were issued. On 5 December 2016 she was refused permission to apply for judicial review.

16. On 5 March 2017, an application was made for further leave to remain based on family and private life and a claim for asylum. An asylum interview was conducted on 10 March 2017 but that claim was later withdrawn.
17. On 8 June 2016 further submissions were submitted and in July 2017 she was granted bail with a reporting restriction. Following further representations sent in September 2018 the decision was reviewed which resulted in the decision of 15 November 2018 which maintained the earlier decision to refuse her human rights claim.

The decision of the Secretary of State dated 15 November 2018

18. The decision letter is a lengthy document extending to 26 pages. It is not necessary to set out all that letter and we shall summarise the salient parts relevant to the issues raised by the parties.
19. Consideration was given to her family life with her three children born in the UK; JB and JK who were over 18 years and were not “qualifying children” for the purposes of paragraph 399 (a) of the IR and J aged 15.
20. It was accepted that she had a genuine and subsisting parental relationship with the children and that prior to her imprisonment, her son was dependent on her physically and emotionally for his day-to-day care and well-being. However, following her imprisonment, the care of her two sons was taken over by their father and then her daughter. It was confirmed from children’s services that following her imprisonment, her husband assumed the care of the children and that an assessment was carried out which stated that the children were settled with their father although they reported missing their mother during the assessment. Further information received noted that the father of the children did not wish to continue to care for the children upon her release and that the younger children went to live with the appellant’s older daughter and she looked after J. When granted bail on 24 July 2017 the appellant went to live at her daughter’s home with her sons and children.
21. In the decision letter, the respondent reached the conclusion that it was not unduly harsh for J to live in Jamaica with his mother. The reasons given for that assessment was that whilst he was a British citizen, there was no evidence to demonstrate that he was not also a Jamaican citizen or that he could not apply for citizenship of that country. As to his educational needs, there was no evidence adduced which would indicate that it would be unduly harsh for him to attend school in Jamaica and that whilst it was noted he was at a critical point of preparing for his GCSEs and that relocation to Jamaica may cause a disruption to his education, no reasons had been given as to why he may not complete them following which a decision could be made as to whether he could relocate to live in Jamaica or remain in the United Kingdom. There was no expectation or obligation on him to relocate and it was a matter for the

appellant and her daughter to decide whether it would be appropriate for him to accompany the appellant to Jamaica or remain in the UK.

22. The respondent accepted that the appellant was currently residing in her daughter's house with the children but that the assessment by Children's services showed that her daughter could continue to provide for J with financial support and that if the appellant was deported, J would remain with his sister and she would obtain support from the extended family in the UK.
23. The respondent concluded that it would not be unduly harsh him to remain in the UK without the appellant as he had been in the care of his adult sister since his mother's imprisonment and following release from prison and could remain with her in the event of his mother's deportation J's sister had three children of her own and there were no concerns in relation to them and she would be able to access local authority Children's services for assistance. There was no reason why contact with J could not be maintained from abroad through the modern channels of communication.
24. Consideration was given to J's best interests (at [60 - 66]) but the respondent reached the conclusion that there was no evidence to conclude that her presence was needed to prevent J from being ill-treated, or that his health or development would be impaired. There was no evidence that deportation would result in J losing all contact with the appellant if deported. Whilst not the same as remaining in the family home or even living separately, it was considered that appellant could maintain contact with J and there was no evidence that J would be unable to visit her in Jamaica when old enough to do so. J would be able to stay in the United Kingdom with his sister. The respondent took into account the medical evidence and J's health concerns due to sickle-cell disease but noted that his sister managed J's medical needs adequately during the appellant's absence.
25. As to her private life, it was concluded that she had not been lawfully resident for most of her life; she had lived in the UK for 27 years but only lawfully resident for 18 years and four months since her arrival in September 1991. As a result of her offending it was not accepted that the appellant was socially and culturally integrated in the UK nor that there would be very significant obstacles to her reintegration to Jamaica- she left Jamaica when aged 21 years and was likely to have established social relationships there given her age upon entry to the UK. There was no evidence or reason why she could not establish a family or private life on return to Jamaica notwithstanding the length of time she spent in the UK and would be able to have support from her extended family members.
26. As the exceptions to deportation did not apply in her case, consideration was given to whether there were "very compelling circumstances" such that she should not be deported. The respondent set out that there was a significant public interest in her deportation because of her conviction and that the nature

of the offences suggested that she was unwilling or unable to support a lifestyle in the UK without resulting to criminal activities and there was insufficient evidence that she had adequately addressed all the reasons for offending behaviour. The respondent concluded that in the absence of evidence it was reasonable to conclude that there remained a risk of the appellant reoffending should she find herself in need of finances in the future and continuing to pose a risk of harm to the public, or a section of the public (taking into account the annual fraud report). There was no indication that wider family members depended on the appellant for their day-to-day health or well-being and that her removal would not impact on the wider family members or interfere with any family life. The respondent did not accept that her relationships with adult family members constituted "family life" for the purposes of Article 8 as the appellant had an older daughter who lived independently with her own two children and whilst she provided support, the appellant lived independently of all the family members prior to imprisonment. None of the private life claimed was of a significant or very compelling nature which would be disrupted by the appellant's removal and the appellant lived in United Kingdom illegally for nine years and two months prior to being granted indefinite leave to remain.

27. At paragraphs 102-123 J's medical circumstances were considered in the decision letter. Reference was made to the condition of sickle cell anaemia, its symptoms and the treatment generally required. It noted that J's condition had been managed effectively in the United Kingdom and that there was no evidence available that any support provided would be unique or essential or could not be provided by other family members or healthcare professionals in the UK. It was considered that J's sister would be able to guarantee his access to treatment and make decisions relating to treatment on his behalf.
28. It was concluded that there was no expectation that J should relocate to Jamaica but in the event that the appellant decided that it was in his best interests to accompany her to Jamaica, healthcare for sickle-cell disease was available (see paragraphs 111-123).
29. Consideration was given to the appellant's medical issues at paragraphs [124-154]. It was noted that the appellant had provided evidence that she was diagnosed with mild depression and was later prescribed medication but that no further evidence had been provided to confirm if she was currently on any medication for medical issues. However, treatment was available for depression in Jamaica and that the condition claimed did not approach the threshold for a breach of Article 3 or Article 8.
30. In conclusion, the respondent considered that her deportation would not breach the UK's obligations under Article 8 of the ECHR and the public interest in deporting her outweighed her right to a private and family life.

The Decision of the First-tier Tribunal:

31. The appeal came before the FtTJ on 18th July 2019. The FtTJ heard oral evidence from the appellant, her son and daughter which was summarised at paragraphs [4]-[12]. The FtTJ also had a bundle of documentation including a witness statement from the family members, including J, his sister and brother, medical evidence relating to his condition and the report of an independent social worker.
32. The FtTJ findings of fact and analysis of the issues are set out at paragraphs [19]-[27]. They can be summarised as follows:
 - (1) The FtTJ accepted the appellant's nationality, identity, immigration history and criminal history ([19]).
 - (2) As to her offending, the FtTJ was not satisfied that she accepted her wrongdoing. The judge found that she "seeks to blame her circumstances for offending. As a single mother with a small child she seeks to justify her stealing, there are many people in similar circumstances who do not get involved in crime. She cannot blame her circumstances and poverty on possession and misuse of drugs and certainly not on driving whilst disqualified. She also blames friends were influencing her, far from accepting her own responsibility she actually blames others all the time."
 - (3) As to the appellant's view of the index offence, "she says it was a bad relationship and at the tribunal hearing she still maintained that she didn't know what was going on despite a jury convicting her and the judge's sentencing remarks. I have little confidence in her staying out of trouble and can well see how the respondent reached the conclusion that removal is conducive to the public good." [(at [20]).
 - (4) The FtTJ recorded that the appellant expressed concern over her son's use of cannabis and that she was trying to bring up her children responsibly. The judge concluded "I am satisfied that if it was only her that I had to consider and I would absolutely reach the conclusion that her removal was conducive to public good and there was no reason why she should be allowed to stay in United Kingdom" (at [21]).
 - (5) The FtTJ then considered the family life established in the UK and the circumstances of J and her relationship with him. The FtTJ directed himself to the relevant law and paragraph 399 (a) (at [23]). The FtTJ found that the eldest two children were not "qualifying children" as they were both over the age of 18 and the only child qualified was J who the judge was satisfied was a British citizen and that the appellant and J had a genuine and subsisting relationship.
33. When considering paragraph 399(b), the FtTJ reached the conclusion that it would be unduly harsh for J to remain in the United Kingdom without the appellant, his mother. The reasons are summarised at paragraph [25] where the FtTJ stated as follows:

“25. There is absolutely no doubt the when she was imprisoned other family members stood in to ensure that J’s care needs were met. His sister [X] bore the main burden of doing this, but she says it took its toll on her and that she could not do so again. I doubt that she would leave J to fend for himself, but the truth is that J found the experience of being separated from his mother tough and it had an adverse effect on his health both physical and mental. This is clearly evidenced by all the witness statements in the report from the ISW. It is a shame that his mother did not consider this before getting involved in crime. Regardless of the fact that they seem to cope when she was imprisoned in the past I am satisfied to the required standard bearing in mind all of the evidence that is contained in the documents and statements, that it would be unduly harsh for J to remain in the United Kingdom without the appellant, his mother.”

34. At [26] the FtTJ considered the respondent’s argument that J could go with her to Jamaica. He stated:

“26. I have been presented by the respondent with an argument that it would be acceptable for J to go with her to Jamaica. Clearly, he is entitled to Jamaican citizenship and there is no legal barrier to him residing there. The appellant stresses that the respondent has not shown detail of the services available in Jamaica for children with sickle cell disease, but this, of course, ignores the fact that the onus was on the appellant to show that it would be unduly harsh and that the services did not exist not the respondent. Nevertheless, it seems the overwhelming view of the professionals is that his treatment would suffer by his removal to Jamaica and the interference of the treatment he now receives. I am satisfied that it would be unduly harsh for him to return to Jamaica with her.”

The Appeal before the Upper Tribunal:

35. The Secretary of State sought permission to appeal that decision and permission was granted by FtTJ O’Brien on 8 October 2019 for the following reasons:
- “The grounds assert that the judge erred in the following ways. The judge failed to give adequate reasons why deportation will be unduly harsh on the appellant’s son.
- The judge’s reasons for finding undue harshness are set out at paragraph 25 and 26. They are brief and arguably inadequate. It is argued that the judge did not direct herself to the high threshold undue harshness, giving rise to a further arguable error of law. All grounds are arguable.”
36. The appellant was represented before the Upper Tribunal by Mr Hayward of Counsel. The Secretary of State was represented by Mr Melvin, Senior Presenting Officer.
37. We heard submissions from both parties. Mr Melvin, on behalf of the respondent relied upon the grounds and the skeleton argument filed on the 12 December 2019 and did not seek to further elaborate upon them.

38. The points raised in the grounds and relied upon by the Secretary of State relate to the FtTJ's consideration of the issue of undue harshness and that the FtTJ had failed to give clear and cogent reasons as to how the high threshold of unduly harsh consequences were met in this appeal. It was submitted that it was unclear on what basis the threshold was met at paragraphs 25-26 of the determination and whilst the FtTJ was not obliged to list all the evidence, he failed to give clear reasons as to why the appellant's son could not remain in the United Kingdom with relatives as he did while she was imprisoned or why the difference in treatment in Jamaica if he was to accompany the appellant would not meet the required threshold.
39. In the skeleton argument it was submitted by the Secretary of State that the FtTJ failed to take account of the decision in PG (Jamaica) [2019] EWCA Civ 1213 at paragraph [46] which reflected the high threshold and that the decision was on "all fours" with the present appeal. In conclusion, it was submitted that having recognised that the appellant's children were looked after adequately by other family members during her imprisonment, the FtTJ did not have due regard for the high threshold as set out in the decision of KO (Nigeria) (appellant)v Secretary of State for the Home Department (respondent) [2018] UK 53, and in PG (Jamaica) and had such regard been had, the appellant could not have succeeded before the Tribunal.
40. Mr Hayward relied upon his Rule 24 response filed with the Tribunal. He submitted that the grounds were in essence a "reasons challenge" and did not seek to challenge the underlying evidence that was before the FtTJ and that there was sufficient material before him to conclude that it would be unduly harsh for J to live in Jamaica with his mother or for J to remain in United Kingdom without his mother.
41. He submitted that it was not necessary to set out every strand of the evidence and that when looking at the decision as a whole, it was structured in such a way that it demonstrated that the FtTJ had regard to all of the evidence that was before him; the submissions that were advanced by each side were set out and summarised at [16]-[18] and he recorded that reliance was placed upon the social work assessment and reports and that his attention was drawn specifically to the ISW report on the effect on J when his mother was detained which was significant in particular to J's health (at [18]). The FtTJ had correctly directed himself in law set out at [23] by reference to the relevant rule and went on to apply them in his findings of fact and analysis at [24]-[27].
42. In particular, at [26] the FtTJ considered the impact of separation between J and his mother and considered directly the previous impact of being separated from his mother and that it had an adverse effect upon his health, both physically and mentally, and this was evidenced by the ISW report and the witness statements before him. He submitted that this went beyond the normal impact upon a child being separated from a parent.

43. As to the position in Jamaica, the FtTJ also considered the impact upon J of residing there with his mother. The FtTJ acknowledged that he could live in Jamaica as he had the ability to acquire citizenship but that the factor which outweighed that consideration was that of his health and treatment.
44. In his submissions, Mr Haywood accepted that the reasoning set out at paragraphs 25 – 26 was brief but submitted that when seen in the light of the evidence before the FtTJ, it supported the assessment that the adverse effects would go beyond the normal impact upon a child when faced with the deportation of a parent.
45. In his response, Mr Melvin submitted that whilst there may have been documentation before the FtTJ there were only vague references made to that evidence and that there was an absence of reasoning.
46. At the end of the submissions we reserved our decision, which we now provide with our reasons.

Discussion:

47. We remind ourselves that we can only interfere with the decision of a judge if it has been demonstrated that there was an error of law in reaching that decision.
48. The effect of the provisions relating to the deportation of foreign criminals is that by Section 32(4) Parliament had decided that the deportation of foreign criminals is conducive to the public good. By Section 32(5), the Secretary of State is obliged to make a deportation order subject to Section 33. Section 33 identifies several exceptions, which if applicable, have the consequences that sub-Section 32(4) and (5) will not apply.
49. On the present facts, the only exception relevant was whether removal would breach her rights and those of her family members under the ECHR.
50. The Immigration Rules reflect the statutory obligation to deport foreign criminals whilst recognising that there may be cases where the making of a deportation order would be incompatible with Article 8 (see Rules 398, 399 or 399A).
51. The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider whether the appellant is a foreign criminal as defined by Section 117D(2)(a), (b) or (c). If so, does she fall within paragraphs 399 or 399A of the Immigration Rules and if not, are there compelling circumstances over and beyond those falling within paragraphs 399 or 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors in Section 117 A- C.
52. On the facts of the case there is no dispute that the appellant was a foreign criminal; she was not a British citizen and by reason of her offending history

was properly characterised as someone who had been convicted of an offence of at least 12 months imprisonment that and therefore in accordance with paragraph 398 of the Immigration Rules, the public interest required her deportation unless an exception to deportation applied.

53. Thus, the issue before the FtTJ was whether she could fall within paragraphs 399 or 399A. Paragraphs 399 and 399A of the Immigration Rules are reflected within section 117C (5) of the 2002 Act, which provides as follows: -

"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."

54. The question in s. 117C (5) as to whether "the effect" of C's deportation would be "unduly harsh" is broken down into two parts in paragraph 399, so that it applies where:

"(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."

55. As set out at paragraphs [21] and [22] of KO (Nigeria) exceptions 1 and 2 are "self-contained" and "leaves no room for further balancing". In other words, a foreign criminal sentenced to less than four years who can meet the three requirements in exception 1 or the requirements under Exception 2, is entitled to have his or her Article 8 appeal allowed. There is no additional obligation to conduct a balancing exercise that attaches little weight to that appellant's private or family life in the UK or balances private life against the public interest, including the seriousness of the offending.

56. Therefore, the judge was required to consider what was meant by "unduly harsh" "in the context of the law and in the context of specific factual circumstances of the Appellant and J (the relevant child).

57. The grounds advanced on behalf of the respondent submitted that the FtTJ failed to give clear and cogent reasons as to how the high threshold of unduly harsh consequences was met in this appeal and that it is unclear on what basis the threshold was met when considering paragraphs 25-26 of his decision.

58. We have given careful consideration to the decision of the FtTJ and have done so in the light of the material that was before the Tribunal. In our judgement, the FtTJ fully appreciated the applicable test that the appellant was required to satisfy to meet the requirements of Exception 2. The FtTJ expressly referred to this at [23] and cited the relevant parts of paragraph 399 (which is replicated at S117C(5)), and at [24] where he set out his conclusion that J was the only "qualifying child" by reason of his British nationality and being satisfied that he

had a genuine and subsisting parental relationship with his mother. The FtTJ then turned to the remaining subparagraph of 399 (a) (ii) and whether it would be unduly harsh for J to remain in the UK without his mother, who, at the date of the hearing was his primary carer.

59. Whilst Mr Melvin relied upon the skeleton argument where it was argued that the FtTJ failed to have due regard to the high threshold set out in the decision of KO (Nigeria) (appellant) v Secretary of State for the Home Department (respondent) [2018] UK 53, it is plain from the decision at [18] that the FtTJ placed reliance on the skeleton argument produced on behalf of the appellant which he took into account when reaching his decision. The skeleton argument before the FtTJ was a detailed document which set out the test in KO(Nigeria) at paragraph [19] and identified each strand of the evidence by reference to the relevant medical report, the report of the ISW and the witness statements and how that evidence met the necessary threshold.
60. The decision of KO (Nigeria) (appellant)v Secretary of State for the Home Department (respondent) [2018] UK 53 considered what was the correct approach relating to what is meant by “unduly harsh” within the context of the legislation. It gave particular consideration to paragraphs from the judgment of Laws LJ, with whom Vos and Hamblen LJ agreed, in MM (Uganda) v the SSHD [2016] EWCA Civ 450 and the Upper Tribunal decision in MAB (USA)v SSHD [2015] UKUT 435.
61. The decision of the Supreme Court which reaffirmed the definition of “unduly harsh” from the earlier decisions of MK and MAB at paragraph [33], stated as follows: -
- “Whether the consequences of deportation will be ‘unduly harsh’ for an individual involves more than ‘uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging’ consequences and imposes a considerably more elevated or higher threshold.
- The consequences for an individual will be ‘harsh’ if they are ‘severe’ or ‘bleak’ and they will be ‘unduly’ so if they are ‘inordinately’ or ‘excessively’ harsh taking into account all of the circumstances of the individual.” Although I would add, of course, that ‘all of the circumstances’ include the criminal history of the person facing deportation.”
62. As the Supreme Court stated at paragraph 23, the expression “unduly harsh” is 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.
63. The Supreme Court further stated at paragraph 23 as follows: -
- “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."

64. As set out in the decision of The Secretary of State v RA (S117C "unduly harsh", offence; seriousness) Iraq [2019] UKUT 123 (IAC) the President of the Upper Tribunal, Lane J (sitting in a panel with UTJs Gill and Coker) considered the correct approach to s. 117C(5) with the benefit of the guidance provided in KO (Nigeria) v SSHD [2018] UKSC 53 and NA (Pakistan). At paragraph 17, the following was stated:
- "17. As can be seen from paragraph 27 of KO (Nigeria), the test of "unduly harsh" has a dual aspect. It is not enough of 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)".
65. Whilst there is no express reference to the decision of KO (Nigeria), we are satisfied that the FtTJ was plainly aware of the test that he was required to apply and whether there was a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent in his analysis at paragraphs 25-26. Whilst that analysis was brief, in our judgement those paragraphs demonstrate that the necessary threshold test was in fact applied.
66. The FtTJ approached the task by recognising that it was child focused rather than balancing the severity of the offences committed and gave reasons, albeit briefly expressed, as to why the threshold was met by reference to the evidence.
67. The FtTJ had recorded the submissions made on behalf of the parties and at [16]-[17] recorded those made by the respondent that it would not be unduly harsh for J to remain in the UK without his mother on the basis that when she was imprisoned J's day-to-day needs were met by other family members and that this could continue in the event of his mother's deportation.
68. That submission was addressed at [25] and whilst accepting that other family members had "stood in" to ensure that J's care needs were met at that time, the FtTJ reached the conclusion on the more up-to-date evidence that this would not be the position now. The FtTJ referred to the evidence of J's sister and that this had "taken its toll on her" and that she was therefore not in the position to look after J in the event of his mother's deportation. As the FtTJ stated, this was evidenced in the witness statement filed in behalf of J's sister and set out in the report of the ISW (dated 25/5/19). The ISW report recorded the position of J's sister at paragraph 4.19 and that as a result caring for J and other siblings, she was at the point of "breakdown" and that her assessment (which the FtTJ

accepted) was that she had become “burned-out”. Contrary to the position of the respondent, she had not been able to provide all the necessary support for J as he had failed three consecutive review appointments between November 2016 – January 2017 leading to his hospitalisation in March 2017. No other family relative was available from the evidence before the FtTJ as J’s father had had no contact with him all the family in recent times.

69. The FtTJ also gave a second reason is to why the effect of the appellant’s deportation upon J would be unduly harsh. This related to the adverse effects upon his health, both physically and mentally, when previously separated from his mother (at [25]).
70. In this respect, the FtTJ referred to the evidence before him and that the adverse effects upon his well-being were “clearly evidenced by all the witness statements and the report of the ISW”.
71. There was no challenge made to the medical evidence relevant to J, which was set out in reports from the hospital, his medical records and summarised in the ISW report. J has sickle-cell anaemia (referred to as “SCD”) which is a chronic haemolytic disease resulting in anaemia progressive organ and vascular damage, which is punctuated by symptomatic and predictable and frequent crises of various types. The most common is vaso-occlusive crisis, where there is crystallisation of haemoglobin within the red cells become deformed and obstructing the blood flow to an area of the body, causing severe pain, which may last for 7 to 10 days. This pain is often sufficiently intense enough to require admission to hospital. The consequences are that the activities of daily living become limited or disrupted due to the unpredictable occurrences of episodic pain which is known as a crisis. Thus, the condition is complex and characterised by bouts of severe and occasionally life-threatening acute illness (crises) which increase susceptibility to infection, chronic fatigue, delayed growth and progressive tissue and organ damage. During these painful incidences the individual requires assistance with managing their lives, eating, washing and dressing. Due to the nature this condition this can be very hard for sufferers to maintain steady education or employment, due to the unpredictable nature of the condition, frequent hospital attendances or managing of crises in the home.
72. The reports refer to there being many triggers for a sickle-cell crisis which include stress and that such a crisis may be “mild or severe”. The evidence recorded that J had several admissions into hospital due to various crises on 28 October 2016, 11 January 2017, 5 March 2017 and 20 March 2017 and that it suggested that he has had a severe “phenotype or due to dramatic social changes experienced whilst his mother was incarcerated” (at [AB 49]).
73. The ISW report made reference to the medical evidence and that his condition was “reactive to stress” and “ that as he was immature in his development he

required a higher level of parenting and nurturing care than may ordinarily be expected for a child of his age” (at para. 4.25).

74. Therefore, the adverse effects upon J were well documented and the evidence was consistent in both the medical reports, the letters from the school and the ISW report. J had suffered several episodes or crises which had coincided with the appellant’s imprisonment and her subsequent immigration detention following the conclusion of her sentence. The medical evidence refers to the medical professionals being fearful for his health due to difficulties in stabilising him. All of which demonstrated the impact that stress or change had upon his medical condition (see ISW report at par.4.25). The effects upon J were also recorded in the evidence from the school by reference to his presentation in school attendance and in the witness statements from the appellant, J’s sister and from J himself (see witness statement at [AB 137]).
75. The FtTJ was entitled to place weight on that evidence and in our judgment the effect upon J as described in that evidence went significantly beyond the normal effects of separation of a child from his primary carer.
76. As to the alternative argument that it would not be unduly harsh for J to live with his mother in Jamaica, the FtTJ addressed this at [26]. The judge acknowledged the argument advanced by the respondent that J was entitled to Jamaican citizenship and correctly directed himself that the burden was on the appellant to show that it would be unduly harsh but nonetheless concluded that the evidence of the professionals contained in the reports which he described as “overwhelming” was that his treatment would suffer by his removal and would interfere with the treatment he received. That evidence was contained in the medical reports and summarised in the ISW report and referred to the continuity of both his healthcare and the educational provision, both critical to maintaining stability in mental health and his well-being. When viewed alongside his British nationality, his strong family ties with other family members including his siblings and that he was at a critical stage in his education, the conclusion reached by the FtTJ that the effect upon J would be unduly harsh if required to live in Jamaica with his mother, was one that was adequately reasoned in accordance with that evidence.
77. We would accept that the reasons given by the judge were in brief terms, but when viewed in the light of the evidence which the FtTJ plainly accepted, we are satisfied that the reasons given were both adequate and sustainable.
78. For those reasons, we are satisfied that the decision of the FtTJ did not involve the making of an error on a point of law. We therefore dismiss the Secretary of State’s appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

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 her. 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

Date 4/ 2/2020

Upper Tribunal Judge Reeds