



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03860/2019 (V)

THE IMMIGRATION ACTS

Heard at Bradford IAC by skype for business
On 9 December 2020

Decision & Reasons Promulgated
On 30 December 2020

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Everett, Senior Home Office Presenting Officer
For the Respondent: Ms Akinbolu, Counsel instructed on behalf of the respondent

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Randall) promulgated on 16 January 2020. By its decision, the Tribunal allowed the Appellant's appeal against the Secretary of State's decision, dated 6 April 2019, to refuse his human rights claim in the context of the decision to revoke his deportation.
2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to MC as the appellant, reflecting their positions before the First-tier Tribunal. The decision concerns the circumstances of a child who I will refer to as "child A".
3. I 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 him or members of his 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. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, *inter alia*, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.
5. The hearing took place on 9 December 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the appellant and his wife. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
6. I am grateful to Ms Everett and Ms Akinbolu for their clear oral submissions.

Background:

7. The Appellant is a citizen of Afghanistan. The procedural background is set out in the decision of the FtTJ at paragraphs 1.2-1.5.
8. He spent from November 1999 until 2005 in the United Kingdom claiming to be an Indian national. He claimed asylum as an Indian national after being refused leave to enter, and then lodge an appeal which is dismissed on 17 April 2001 by IJ Pullig. His subsequent human rights claim was considered and refused. He left the UK voluntarily in 2005.

9. He married his wife in Kabul in 2005. They have three children; and the date of the hearing the eldest child was 12 years of age, and of the three children was a “qualifying child” by reason of her length of residence. She and her parents had been in the UK since March 2010 and the two younger children were born in the United Kingdom. The appellant was also in the United Kingdom from 1999 to 2005 before he made a voluntary departure. None of the appellants have ever been granted leave to remain. The appellant and his family members follow the Sikh religion.
10. On 13 March 2010 he arrived in the UK with his wife and daughter A. As can be seen from the matters set out above, all three have been in United Kingdom since that date.
11. Shortly after his arrival he was convicted of immigration offences in relation to his family’s arrival and was sentenced to 18 months imprisonment.
12. His deportation appeal was allowed on 13 June 2013 but was only on the basis that the correct removal destination was Afghanistan rather than India.
13. A deportation order was made against the appellant on 17 October 2014 as a result of his conviction on 1 July 2010 in the Crown Court on two counts of assisting unlawful immigration, and, with intent, knowingly possessing a false or improperly obtained identity document belonging to another. The appellant was sentenced to 18 months imprisonment. On the same day decisions were also made to make deportation orders against other family members pursuant to section 5 (4) of the Immigration Act 1971. At the same time, their applications for asylum were also refused.
14. The family’s appeals against the refusal of asylum and their deportation were dismissed on 19 February 2015 by Designated Immigration Judge Woodcraft (DIJ) and they became “appeal rights exhausted”. They were not removed, and a fresh claim was submitted on 8 September 2016 which was rejected without a right of appeal on 11 November 2016. However, on 4 October 2017, further submissions/an application to revoke the deportation order was made and the refusal of which gave rise to the appeal that came before the FtTJ on 2 September 2019. It is recorded that the appeal was in the name of the appellant only.
15. The points raised in the fresh submissions are also summarised in the decision of the FtTJ at paragraph 1.4. I need not set out those issues, but they refer to the significant changes that had occurred since the decision made by DIJ Woodcraft in 2015. The principal change related to child A who had now been resident in the United Kingdom for a continuous period of seven years, having arrived in March 2010.
16. The application of 4 October 2017 was originally rejected in a decision dated 2 April 2018. On 27 April 2018, the appellant’s representatives issued another pre-action protocol challenging the decision of 2 April 2018. Following the lodging of judicial review proceedings, the consent order was sealed on 8 February 2019 whereby the respondent agreed to reconsider the submissions of 4 August 2016 within three months. Notwithstanding that timescale, the decision under appeal before the FtTJ was served on 6 April 2019, that was dated 29 March 2019.

17. The decision letter was summarised at paragraph 2 of the FtIJ's decision.
18. The appellant's immigration history is summarised in decision letter as set out above.
19. The respondent considered the present claim which was made on the basis that he and his family been resident in the United Kingdom for a significant number of years and thus had accumulated in total 12 years residence. His extended family, friends and parents were in United Kingdom and that he had no family or friends in Afghanistan; his relationship with his children as genuine and subsisting and there were exceptional circumstances and/or "insurmountable obstacles" to his return as an Afghan Sikh in light of the case of *TG and others (Afghan Sikhs persecuted) Afghanistan CG* [2015] UKUT 595. That decision post-dated the decision of DIJ Woodcraft.
20. The decision letter noted the principles in *Devaseelan* and the decision of DIJ Woodcraft and quoted extensively from it and concluded that there was nothing in the present submissions which caused the respondent to go behind those findings. Consideration was given to the country guidance decision but it was noted that the appellant was male and could financially support himself in Afghanistan (having taken into account that he voluntarily returned there to marry in January 2005 and remained in five years running a shop) that he could find gainful employment and would have help from his family there.
21. Reference is made to the three different claims for asylum made over time based on his fear of the Taliban, a land dispute, and his Sikh religion; all of which had been dismissed. His account of the land dispute was described as a fabrication by IJ Osborne in 2013. His fears based on his ethnicity/religion and land dispute were considered and dismissed by DIJ Woodcraft (partly on the basis he was found not to be credible by IJ Pullig and IJ Osborne), and that at different times he claimed to be both Sikh and Hindu.
22. It was acknowledged that there was a risk of discrimination for the Hindu and Sikh communities there and consideration was given to whether the appellant's children would have access to appropriate education in light of that discrimination for Sikh and Hindu children. Reference was made to the respondents CPIN.
23. The circumstances of the children were addressed individually. For the purposes of this decision, child A was considered but at the date of the decision, had not lived in the UK continuously for seven years but in any event it would not be unduly harsh are expected to leave United Kingdom she had no legal right to be in the UK and would be removed with her family. It was considered that her circumstances had not changed since the decision of DIJ Woodcraft.
24. For the reasons set out in the decision letter the decision to deport was maintained and his protection of human rights claim was refused.

The decision of the FtTJ:

25. The appellant appealed that decision by notice dated 18 April 2019. The basis upon which he appealed related to a breach of articles 2, 3 and 8 of the ECHR and that there were “exceptional circumstances” in that he had two children in the UK and that his eldest daughter had lived in the UK for a period of nine years.
26. The FtTJ heard evidence from the appellant and his wife and as can be seen from the decision had a large amount of objective and subjective evidence advanced on behalf of the appellant which included an expert report by Mr Foxley, a country expert (see decision from paragraphs 4- 10).
27. In a decision promulgated on 16 January 2020 the FtTJ allowed the appeal on human rights grounds (Article 8).
28. The FtTJ began his consideration by applying the principles in *Devaseelan*, and the previous findings of the IJ’s and in particular the decision of DIJ Woodcraft in 2015. For the reasons set out in the decision at [16] onwards, there had been a significant number of developments since that decision which affected the extent to which those findings were the starting point of this judge.
29. The judge took into account that there was now a CG decision (*TG and others*) which post-dated DIJ Woodcraft’s decision, there was now an expert report prepared in 2019 and that the case law concerning return to Kabul was in flux following the decision of the Court of Appeal in *AS (Afghanistan)*. There were new UNCHR guidelines in 2018 but also that child A had been in the United Kingdom in excess of seven years, having arrived in March 2010 which required a different approach under section 117C (5).
30. Having identified the new issues, the judge stated that following a review of the evidence specific to the appellant and his family, he concluded that except for the material concerning child A there was “very little new material which had not been put before DIJ Woodcraft”. However, the judge did identify some evidential points.
31. Those points were as follows:
 - Whilst the judge was surprised at the lack of clarity on whether the appellant was a Hindu or Sikh, the judge found that both suffered in Kabul and little turned on that.
 - His fears based on a land dispute and of the Taleban had already been rejected and no new evidence had been provided to depart from the early adverse findings.
 - The appellant and his wife emphasised the growing independence of their eldest daughter A outside of her education and in her daily life. There was evidence from the school which describe the impact of forced removal upon

her as one of “turmoil”, to the detriment of emotional well-being and indicating that a voluntary departure would require pastoral care.

- At [17.4] the judge recorded that the appellant stated he would not send his daughter to school in Kabul as a result of bullying from the majority children and that the Sikh school in Kabul had closed.
- The judge found that he had not been satisfied that the appellant had told the truth about the whereabouts of his wife’s parents and that this damaged the credibility of their claim to have no one to assist them in Kabul.
- At paragraphs [18]-[18.5] the FtTJ summarise the expert report. The judge concluded at [23] that there had been new evidence from the appellant and more up-to-date objective material and developing case law which suggested the possibility of “different findings”.

32. At [24]-[26] the FtTJ addressed the refugee claim but found that the appellant had not established that his individual circumstances as a Sikh on return to Kabul would be such that he would face ill-treatment amounting to persecution, as opposed to discrimination.
33. The FtTJ also recorded the submissions made on behalf of the appellant that persecution of the appellant’s wife and children could also amount to persecution of the appellant. The judge rejected that at [25].
34. At [26] the FtTJ address the issue of the children and whether their return to Kabul replace them at risk of persecution. He focused particularly on child A as the eldest girl and “therefore the most vulnerable child.” The judge noted that the expert found the risk to children difficult to assess but had found that they were at risk of low-level discrimination and prejudice and stated that they would need to exercise care of leaving the house. The judge stated, “I find that this is significant”. Having taken into account the evidence and in the light of the country guidance decision *TG and others*, which concerned the denial of access to secondary education being potentially persecutory, depending on the causation, and taking into account the oral evidence from A’s parents who are strongly in favour of education in the UK to secondary level, the judge concluded that whilst there was a risk of adverse treatment of A is a Sikh girl, a limitation of her freedom of movement, and the likelihood of a denial of access to secondary education, the factors even combined with the unquantified risk of other more serious ill-treatment as a Sikh girl, were not sufficient for the appellant to establish a level of seriousness of risk amounting to persecution.
35. At [27]-[28] the FtTJ considered the issue of humanitarian protection but did not find that the family were in need of international protection by way of humanitarian protection.
36. The assessment made of article 8, and relevant to this appeal is set out at paragraphs [29]- [47].

37. The FtTJ considered the circumstances of A who had now lived in the country for over 10 years and was now in her second year of secondary school. Significant new evidence been provided of her private life and the argument centred on “the effect on her private life of his deportation, based on the argument that she could not enjoy a private life in Kabul”.
38. At [31] the FtTJ undertook a “Best interest’s assessment of child A” as a primary, but not paramount consideration. The judge found that it was still in the interests of the two younger children to be with their parents, wherever they would be but in the case of child A, there were a number of factors that pointed to a different conclusion.
39. The FtTJ stated “ I note the evidence of the independent life she has developed and is continuing to develop here; her length of residence here (nearly 10 years, since the age of two); that she is now the second year of secondary school system; the letter of support from the school and the reference therein to the turmoil and the need for pastoral care to which her forced removal would give rise; her own views as expressed in her letter; the poor (if not persecutory) prospects to her secondary education and any career in Afghanistan: that she doesn’t speak Pashto, albeit she can understand some; and the conditions to which she would return to in Kabul, especially as they impact differentially upon a girl, (soon to be a teenager) who has grown up enjoying a much freer life here, including the need to be accompanied by male relative and going out. Having considered these factors, leaving aside the circumstances of her parents, I conclude that it is in her best interests to remain in the UK. I find that the issues for A are significant wider than the acquisition of an education, even of a secondary education; as indicated above, they encompass the severe restrictions that will replace almost all aspects of a private life if she is returned to Kabul, as was explained in apparent statements, in their oral evidence, and by Mr Foxley’s report.”
40. At [32] the FtTJ reminded himself that the best interests of the child may be outweighed by the public interest in deportation and that the best interests were not “determinative”. The FtTJ went on to state “the life that she is described as enjoying in the UK is in very stark contrast to what her life will be in Kabul, where it would be highly circumscribed developmentally, socially and educationally; indeed Mr Foxley states that care must be taken whenever she leaves the home, and *TG and others* refers to the need to be accompanied by a male relative. She will have none of the freedoms which is described as having here. The adverse effect upon her would be that much greater now she’s old enough to have experienced those freedoms for herself.”
41. At [33] the judge reminded himself that there was a “strong public interest in deporting foreign criminals, even those with strong links with innocent families here”. The reference is made to “great weight given to Parliament’s view, set out in the rules and statute”.
42. There was no dispute and the judge found that the appellant was a “foreign criminal”, and the starting point was that it was in the public interest for to him to be

deported. The judge noted that it was nearly 10 years since offences were committed and it was accepted by the judge that his offences were committed to secure the entry of himself and his family to the UK to seek protection and not the gain. There was no propensity to reoffend and the sentencing remarks referred to him as being “hard-working, basically decent and upright person apart what you did here”. However he still was sentenced to 18 months imprisonment and met the threshold by “some distance”. The judge regarded that as a serious matter which would have “damaged public confidence in immigration control”. He also had a poor immigration history, involving illegal entry and deception. Thus “considerable weight” was given to the decision to deport. At [38] the judge set out his reasons for finding why the appellant had not established that there were very significant obstacle to his integration to Afghanistan. The section 117B factors were addressed at [39]]. At [40] the judge took into account that the deportation of foreign criminals in the public interest; and the more serious the offence committed by foreign law, the greater is the public interest in the deportation of the criminal.

43. The FtTJ then turned to considering the issue of undue harshness at [41]-[47].
44. After setting out the law and noting that the individual criminality of the parent was not a relevant factor when undertaking the section 117C (5) assessment, he was still considering the broad public interest in deporting foreign criminals. At [44] the judge set out his reasoning as to why child A was a “qualifying child” and at [45] made a self-direction to the decision of the Supreme Court in *KO (Nigeria)* and at [45] made a self-direction as to the “high threshold “ appropriate to the “unduly harsh “ test.
45. Having made those directions, at [47] the judge set out his conclusions on the issue as follows:

“I have set out and discuss the evidence concerning the prospects for A on return, even with her family, in some detail above, when considering the position under section 55, and whether she is a refugee. Some of the conflicts in the objective evidence remain unsolved, and I have of course concluded that the evidence is not established that what A would face in return is serious enough, or likely enough, for me to conclude that, on the lower standard of proof, she has a well-founded fear of persecution on return. However, even taking into account the hardship necessarily involved in an 11 year old child being deported with a criminal parent to a place she left when she was two, I find that the adverse effects on A of her enforced return at this age are sufficiently bleak and her life sufficiently circumscribed to be aptly described as “unduly harsh”. This is not inconsistent with my findings on refugee status. Notwithstanding the general high-level principle that there is a significant public interest in deporting foreign criminals, and notwithstanding my other findings, I conclude that the high threshold set out in section 117C and section 117D is met in respect of the effect of deportation on A... the public interest does not require the family’s deportation. For completeness, I have also to

consider the prospect of A remaining here without the risk of family. This would clearly be unacceptable for a child of 12.”

46. The FtTJ therefore allowed his appeal. Permission to appeal was issued on a number of grounds and permission was refused and on 6 March 2020 permission was granted by UTJ Kebede who stated:

“the judge’s decision is a detailed and lengthy one and, whilst it may ultimately be found that the grounds are no more than a disagreement with the judge’s decision, I grant permission on the basis that there is arguable merit in [4] and [5] of the ground in regard to the judge’s reasoning in concluding that it would be unduly harsh for the eldest child to return to Afghanistan with her family. The grounds are arguable.”

The hearing before the Upper Tribunal:

47. Ms Everett on behalf of the respondent, relied upon the written grounds of appeal, and written submissions sent by her colleague and dated 1 June 2020.
48. A Rule 24 response was filed on behalf of the appellant dated 26 May 2020 by Ms Akinbolu.
49. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions. I intend to consider those submission in my assessment of the issues and the grounds of challenge.

Discussion:

50. There is no dispute as to the applicable legal framework. The FtTJ summarised the relevant issues at [11] and that the decision to refuse his protection and human rights claim was in the context of refusing to revoke a deportation order made in 2014.
51. Thus when a person who is not a British citizen is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months, section 32(5) of the UK Borders Act 2007 requires the Secretary of State to make a deportation order in respect of that person (referred to in the legislation as a "foreign criminal"), subject to section 33. Section 33 of the Act establishes certain exceptions, one of which is that "removal of the foreign criminal in pursuance of the deportation order would breach a person's Convention rights": see section 33(2)(a).
52. The right protected by article 8 is a qualified right with which interference may be justified on the basis of various legitimate aims which include the prevention of disorder or crime. The way in which the question of justification should be approached where a court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 is governed by Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by amendment in 2014).

53. Section 117B lists certain public interest considerations to which the court or Tribunal must have regard in all such cases. These include the considerations that:
- "(1) The maintenance of effective immigrations controls is in the public interest.
?
(4) Little weight should be given to -
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
?"
54. Section 117C lists additional considerations to which the court or Tribunal must have regard in cases involving "foreign criminals" (defined in a similar way to the 2007 Act). These considerations are:
- "(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where - (a) C has been lawfully resident in the United Kingdom for most of C's life, (b) C is socially and culturally integrated in the United Kingdom, and (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or Tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."
55. "Foreign criminals" who fall within section 117C(3) because they have been sentenced to a period of imprisonment of at least 12 months but less than four years have been referred to in the case law as "medium offenders" - in contrast to those

with a sentence of four years or more, who are described as "serious offenders". By reason of his sentence, the appellant fell into the former category.

56. Section 117D (1) provides that:

“Qualifying child” means a person who is under the age of 18 and who-

- (a) is a British citizen; or
- (b) has lived in the United Kingdom for a continuous period of seven years or more.

57. In its application to “qualifying child” within the meaning of section 117D of the NIAA 2002, section 117C (5) imposes the same two requirements as are specified in paragraph 399 (a) (ii) of the immigration rules. On the facts of this appeal the focus was on whether “it would be unduly harsh” for the child A to live in the country to which the person is to be deported. Thus the focus of the FtTJ and that of the advocates was on Exception 2 based on the appellant’s daughter A who was a “qualifying child” by reason of her length of residence in the UK. As the appellant had been sentenced to a period of imprisonment of more than 12 months but less than 4 years, he would need to show that the effect on his child of his deportation would be “unduly harsh”: s117C(5) of the Nationality, Immigration and Asylum Act 2002. Given the circumstances of this particular claim, it was accepted that the requirement for the child A to remain on her own and in the absence of her family was not a realistic option.
58. In *KO (Nigeria)* at [23], the Supreme Court held that: ‘... the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level.
59. Since the decision of the FtTJ under challenge, there have been two relevant decisions of the Court of Appeal in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 (4 September 2020) and *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 (9 October 2020).
60. In *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 (4 September 2020), the Court of Appeal has given important clarification and guidance on the application and meaning of *KO (Nigeria)* and *NA (Pakistan)* .
61. So far as ‘undue harshness’ is concerned, the analysis is about identifying concerns above the ‘commonplace’ elements of family life. *KO (Nigeria)* should not be read entirely literally: ‘... it is hard to see how one would define the level of harshness that would "necessarily" be suffered by "any" child (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the

child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest' [§44]; '...

62. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.' [§51];
63. Ultimately, the analysis of 'undue harshness' (or 'very compelling circumstances') is an evaluative exercise for the Tribunal, on the individual facts before it: 'Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise [of the kind required by section 117C (5)] that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value' [§53];
64. The exercise is acutely fact-sensitive (even where factual scenarios appear to be similar: KO (Nigeria) did not therefore set down any possible factual precedent [§82-3], cases are never truly identical and a Tribunal must make an assessment on the basis of the case before it); '... if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with by the degree of a child's emotional dependence on the parent; by the financial consequences of his deportation, by the availability of emotional financial support from the remaining parent and other family members; by the practicality of maintaining a relationship with a deported parent, or of course by all the individual characteristics of the child" [56].
65. In the conduct of this evaluative exercise the focus is on the individual child, and the effect on them of deportation; and whether the terms of the relevant test are met: '...Tribunals [considering the parent case under Exception 2] should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh...' [§57];
66. This approach is echoed in the second, shorter judgment of Peter Jackson LJ. The analysis must be adequately informed and specific to the individual child and look at matters from the perspective of that child; the question for the Tribunal is explicitly

about the effect on that child [§155]. It would be an error to focus on the position of children generally rather than the best interests of the individual child. The reference in *KO (Nigeria)* to the effect on 'any child' did not set up a notional comparator, because the circumstances of individual children differ.

67. Physical harm is not intrinsically more significant in that analysis than emotional harm [§156]. The Children Act defines harm as 'ill-treatment or the impairment of health or physical, intellectual, emotional, social or behavioural development. Reflecting our contemporary understanding of the importance of emotional development and mental health, there is no hierarchy as between physical and non-physical harm.' [§159]; '... it may be easier for decision-makers to envisage the harm that may be done by expecting a family to experience precarious or even dangerous physical conditions than to factor in at full worth the lifelong emotional harm of terminating the relationship between a child and a close parent during the child's minority and possibly forever. Both situations are grim but for the child neither is intrinsically grimmer than the other.' [§159]
68. In *AA (Nigeria)* at [10] – [14] the Court of Appeal summarised the approach that should be adopted by the Tribunal in an appeal like the present one:
10. "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 this court in *HA (Iraq)*. The former addressed this issue notwithstanding that the main question in that case was not the meaning of "unduly harsh" but whether it involved consideration of the seriousness of the offence. At [23] he said:
- "23. On the other hand, the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show "very compelling reasons". That

would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

11. At paragraph [27] he said:

"27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

12. As explained in *HA (Iraq)* at [44] and [50] to [53], this 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). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], 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".

69. Having considered the grounds advanced on behalf of the respondent, I do not accept the submission that the FtTJ erred in law in his consideration of whether it would be unduly harsh for the child A to live in the country to which the appellant was to be deported, namely Afghanistan.
70. The grounds advanced on behalf of the respondent centre upon the FtTJ's assessment of the circumstances in Afghanistan and in particular as to the issue of education for child A in Afghanistan.
71. It is submitted that the effect upon A's education would not be "unduly harsh" nor in the alternative, would it amount to an unduly harsh outcome if she were to return to Afghanistan with her father and other family members. This is because she was only at secondary school and that the judge gave inadequate reasons as to why any

disruption to her education would amount to “unduly harsh consequences” (I refer to the written grounds at paragraph (4)).

72. It is also submitted that the FtTJ did not resolve the “conflict on the evidence” referred to at paragraph [47], nor made any firm findings as to the availability of secondary education for A in Kabul. The respondent submits that this was a crucial element of the assessment of the interference to A’s private life caused by the family’s removal to Kabul and therefore could not be left as it was without any clear findings.
73. I have considered those submissions in the context of the evidence before the judge and the decision reached. Whilst the grounds centre upon the educational aspect of A’s return to Afghanistan, the FtTJ in fact considered a number of elements including A’s private life established outside of her country of nationality, the impact of removal upon her, the length of residence in the UK and the stage that she had reached in her education, alongside the circumstances in Afghanistan for a young female child of the Sikh religion. This being a country that she had no knowledge of having left the country at the age of two and being unable to speak the language.
74. As to the evidence in relation to the issue of education, the judge considered a number of different source material. When reaching the decision as a whole, I do not consider that it can be said that there was such an unresolved conflict on the issue of education as the written submissions assert.
75. The FtTJ began his consideration by reference to the country guidance decision of *TG* at paragraph 20.5. The FtTJ set out as to access to appropriate education for children in light of the discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them in *TG* the following was stated:

“such education is only provided however up to and including primary level with the requirement that at secondary level children will be taught within the state system where they become exposed to problems referred to in the evidence unless an individual’s family has the means to pay them to be educated privately. If credible evidence is provided of a real risk of such ill-treatment and harassment to a child on return sufficient to prevent them receiving a proper education, which is shown to be a fundamental element of their personal identity, that they wish to pursue, rather than a child not being further educated as a result of the traditional belief that they will continue within a family business and therefore do not require to be further educated or for some other reason, then this may amount to such serious discrimination either on its own or curative lay with other forms of discrimination such as to cross the threshold of persecution. However, this is a fact sensitive issue that must be considered in each case.”

76. The judge noted that the appellants in the decision of *TG* failed to establish a risk of persecution on any basis including a child’s access to education in Kabul.

77. The FtTJ went on to state “the evidence before me on access to education is mixed”. The judge then went on to consider the state of the evidence from the different sources; noting that both the UNHCR guidelines and the respondent’s CPIN dated May 2019 referred to the existence of government public schools for Sikh children (at [21] of the FtTJ’s decision). The judge also noted that there had been widespread evidence of intimidation in other public schools and further noted that the expert whose report post-dated that material had made no reference to a government funded Sikh school.
78. However the judge later went on to state:
“no source suggests that, contrary to *TG*, there is a government funded Sikh secondary school for girls. I conclude that, on the lower standard of proof, there is no such facility.” Thus the FtTJ did resolve the conflict as to education.
79. While the respondent’s ground refer to paragraph [47] and the observation made by the judge that there were some “conflicts in the objective evidence”, I do not read that paragraph to be referring to education or whether secondary school education was available but to what the judge had said at [26] and whether denial of access to education was potentially persecutory as set out in the country guidance decision of *TG*, and that this was the feature or “conflict” that had not been addressed in the report of Mr Foxley, the expert.
80. I do not consider that the judge ignored the evidence in the CPIN (May 2019). At 7.1.2 it stated “a privately funded Sikh school continues to operate in Jalalabad (although the place of return for child A would be Kabul and not Jalalabad) and there is reference to Sikh children continuing to attend private international schools. At 7.1.3 it was stated that members of the Sikh and Hindu communities continue to refuse to send their children to public school due to harassment from other students, although there were only a few private school options available to them due to the decreasing sizes of the two communities and their members declining economic circumstances. Two schools in Kabul remained operational (as at report 2017). At 7.1.4 it was noted that the majority of Sikh families are unable to afford private school fees which range from 4000 to 5000 Afghani per child.
81. In any event, I accept the submission made by Ms Akinbolu that the issues identified by the FtTJ went beyond the issues of education and whether child A could attend school.
82. At paragraphs [26], [31] and [32] the FtTJ set out other factual findings made from the evidence which concerned the circumstances as they related to child A. They can be summarised as follows. A is a female child and as a consequence is vulnerable, whilst risks to children are difficult to assess and whilst the expert stated children were at risk of low-level discrimination and prejudice and would need to exercise care if leaving the house, the FtTJ stated “I find this significant”. The FtTJ identified that there was a risk of adverse treatment of A as a Sikh girl, limitation of her

freedom of movement and the likelihood of a denial of access to secondary education. Whilst the judge did not find that they were sufficient to amount to persecution at [26] they were factors that were relevant and could rationally be taken into account when reaching conclusions on the issue of “undue harshness”.

83. At [30] the judge considered A’s private life, A having lived in the UK since the age of two and now being in the second year of secondary school. The judge stated, “significant new evidence of her private life was provided”.
84. At [31] the FtTJ made reference to that private life established during her residence and that she had developed “an independent life and was continuing to develop it”. The judge took into account her length of residence (10 years since the age of two), the stage that she had reached her education being the second year at secondary school, the letters of support from the school which referred to the detrimental effects upon her if removed to Afghanistan and “turmoil”, the prospects of secondary education, that she could not speak Pashto and the general conditions that she would return to in Kabul not only as a female child but also as a Sikh.
85. The point also made by the judge in this context was that conditions on return would adversely impact upon A as a girl who had grown up enjoying a freer life in the UK and that she would need to be accompanied by male relatives whenever she went out. This is further considered at [32] where the judge considered that “the life she described as enjoying in the UK is in very stark contrast to what her life would be like in Kabul, where it would be highly circumscribed developmentally, socially and educationally, Mr Foxley states that care is taken whenever she leaves the home and *TG and others* refers to the need to be accompanied by a male relative. She will have none of the freedoms which is described as having here. The adverse effect upon her will be that much greater now that she is old enough to have experienced those freedoms for herself.”
86. Thus the conclusion at [31] reached by the FtTJ was that the issues facing A “are significantly wider than the acquisition of an education, even of a secondary education; as indicated above, they encompass the severe restrictions that will be placed on her in almost all aspects of a private life if she is returned to Kabul, as is explained in her parents statements, in their oral evidence, and by Mr Foxley’s report.”
87. In this context the judge expressly had regard to the evidence of the appellant’s parents which centred upon the descriptions of their daughter’s independent life which had been established away from the family; that she enjoyed time going out alone with friends and attending parties, that she was highly interested in her education. There was also a letter from A herself.
88. Consequently, whilst the grounds advanced on behalf of the respondent centre upon the issue of education, in my judgement the submissions fail to address the other factual matters relied upon by the judge which formed the basis of the conclusion at

[47] that the adverse effects of a return for A at this age were “sufficiently bleak and her life sufficiently circumscribed to be aptly described as “unduly harsh”.

89. A point raised in the written grounds but not relied upon by Ms Everett was that when looking at the appellant’s private life, the reference to covering herself and being accompanied outside were standard features of life for all women in Afghanistan and that the judge was required to consider this especially where the child was an Afghan national and not a British citizen.
90. I would accept that the nationality of A was an important factor. However in my judgement the submission fails to consider the factual assessment made by the judge which I have summarised above and set out at paragraphs 26, 31 and 32. It was not simply the restrictions faced by women in general but seen in the context of this particular child’s life and the nature of the private life that she had established over a very lengthy period in the United Kingdom. The fact that she was a “qualifying child” was because Parliament had chosen to make a child who lived in the UK for a continuous period of over seven years as A to be such a “qualifying child” for the purposes of section 5A irrespective of nationality. This is because such a length of residence is seen as significant for a child.
91. Insofar as the grounds assert that the judge did not say anything more about the pastoral care that she would require, a proper reading of the decision and the evidence before the tribunal did not require the appellant to demonstrate that she needed any particular type of “pastoral care” of any positive kind because the importance of that evidence rested on the detrimental effects of the removal of A from the United Kingdom. This was set out in the letter from the school and the judge was entitled to place weight upon the detrimental effects of removal upon A at this stage in her life having been in the UK since the age of two and having no recollection of life in Afghanistan. The effects of removal were described as leading to “turmoil” for her and was in this context of the reference was made to pastoral care.
92. In this context I have also considered the submission made by Ms Everett that with the support of her family this would have the effect of mitigating any problems that A may have on removal. However, this was expressly addressed by the FtTJ at [32] where the judge stated, “the presence of family members would not assist A in overcoming those wider issues”.
93. Ms Everett on behalf of the respondent submitted in her oral argument that the FtTJ conflated the best interest’s consideration set out at [31] with the assessment of “undue harshness” at [47]. She submitted that the best interest’s consideration was entirely different from the undue harshness test and whilst there might be some overlap in the evidence, the judge did not recognise that this was a different test and relied upon the findings made at paragraph [31].

94. I am not satisfied that there is any such conflation as submitted by Ms Everett. The decision in *HA (Iraq)* properly accepted that the best interests of any child must be analysed. The relevant various factors pertaining to harshness and particularly undue harshness should be factored into any assessment. I accept the submission made by Ms Akinbolu that the FtTJ properly considered the best interest assessment at [31] solely from the child's perspective. The "unduly harsh" test considered by the FtTJ was informed by that best interest assessment. The judge did not elevate that assessment to be "paramount" but properly had regard to that best interest's assessment as a "primary consideration".
95. The FtTJ did not have the advantage of the case law in *HA (Iraq)* and *AA (Nigeria)* but on my reading of his decision, his approach and his analysis were to adopt a fact sensitive approach and consider the particular child with whom he was concerned. The case law demonstrates that such an analysis should be adequately informed and specific to the individual child, looking at matters from the perspective of the child. That includes a wide range of considerations- not only physical well-being but also psychological and emotional well-being and risk of future harm and effects upon socialisation, effects upon their education and adverse impairment of their relationship with others. When reading the decision as a whole and in the context of the evidence, the judge undertook his analysis with that in mind.
96. Whilst it is argued on behalf of the respondent that the FtTJ erred in law by failing to have regard to the decision in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213, paragraph [9] of *AA (Nigeria)* states "It will usually be unhelpful to refer first instance judges to other examples of their application to the particular facts of other cases and seek to draw factual comparisons by way of similarities or differences. Decisions in this area will involve an examination of the many circumstances making up private or family life, which are infinitely variable, and will require a close focus on the particular individual private and family lives in question, judged cumulatively on their own terms".
97. In my judgement in reaching his decision Judge Randall, properly applied the correct test. Whilst the threshold is a high one, the assessment made by the FtTJ properly took that threshold into account. Given that the role of the tribunal is to make an informed evaluative assessment of whether the effect of the deportation on A would be "unduly harsh" in the context of strong public interest in the deportation of foreign criminals, and requires a careful analysis of all the relevant factors specific to the child, I am satisfied that that evaluative assessment was one that was undertaken by the judge and one that properly took into account the relevant material, both objective and subjective.
98. This was an unusual case which centred upon the circumstances of A as a "qualifying child" by reason of her long residence in United Kingdom as a child from the age of two. The assessment of such a claim is a highly fact sensitive task and the judge was required to consider the evidence a whole and I am satisfied that the judge clearly did so and contrary to the grounds, gave adequate reasons for his decision.

99. The question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.
100. The judge had the advantage of considering all the evidence in the case. As the Supreme Court stated in Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62]:

“It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

101. In any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. It has not been advanced on behalf of the respondent that the decision of the judge or his assessment of the evidence (including the expert evidence) was either irrational or perverse. As UTJ Kebede observed, it may ultimately be found in the grounds are no more than a disagreement with the decision. That is what I have found for the reasons set out above.
102. Consequently, it has not been demonstrated by the grounds as argued by the respondent that the decision of the FtTJ involved making of an error on a point of law.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal stands.

Signed *Upper Tribunal Judge Reeds*
Dated : 10 December 2020

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.