Neutral Citation Number: [2021] EWCA Civ 1566

Case No: C5/2020/1822

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)
Upper Tribunal Judge Mandalia

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between :

SM (ZIMBABWE)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Stephen Vokes and **Olumide Sobowale** (instructed by **CB Solicitors**) for the **Appellant**
Émilie Pottle (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 8 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2 p.m. on Friday 29 October 2021.

Lord Justice Underhill:

INTRODUCTION

1. The Appellant is a national of Zimbabwe, now aged 52. He came to this country on a student visa in 2001 and overstayed. He subsequently made an unsuccessful asylum claim. In 2009 he formed a relationship with another Zimbabwean national, MM, who was born in the UK and has been resident here all her life. They were married in August 2011. In July 2012 he was granted discretionary leave to remain.

2. MM has a son, to whom I will refer as S, from another relationship, born in September 2004. He has always lived with her and has no relationship with his father. He became a British citizen in 2017. When the Appellant and MM started living together the Appellant assumed a parental role towards S. The Appellant and MM now have two children of their own, a son born in May 2011 and a daughter born in May 2013.

3. On 13 December 2013 the Appellant was convicted of cruelty towards S. For the purposes of this appeal it is unnecessary to set out the details. In bare outline, he was found to have repeatedly beaten S with a belt or a cane, occasioning him actual bodily harm, and also to have restrained him using inappropriate violence. The sentencing Judge accepted that the beatings were not sadistic, but they were done in anger: this was not simply a case of "excessive chastisement". He was sentenced to two years' imprisonment.

4. Care proceedings ensued following the discovery of the Appellant's conduct, and when he was released from prison in late 2014 he was not at first permitted to return to live with his wife and the children. In many, perhaps most, such cases that might have remained the position permanently, but in September 2015 he was permitted to do so and the care order was in due course discharged. We were not shown any of the reports, but self-evidently social services and the Family Court would not have allowed that to happen unless they were satisfied that there had been a fundamental change in the Appellant's attitude and that there was no risk of any further violence towards S (or indeed the other children). As will appear, the evidence is that there is now a strong and loving parental relationship between the Appellant and all three children, despite his past behaviour towards S.

5. Because he had committed an offence attracting a sentence of imprisonment for twelve months or more the Appellant was a "foreign criminal" within the meaning of section 32 of the UK Borders Act 2007 and subject to the automatic deportation regime under that Act: I will return to the relevant provisions later. On 14 November 2014 the Secretary of State made a deportation order against the Appellant pursuant to section 32 (5).

6. The Appellant appealed against the deportation order to the First-tier Tribunal ("the FTT"). After various vicissitudes his appeal was heard on 17 November 2017. By a decision promulgated on 30 November FTT Judge E.M.M. Smith allowed his appeal. The Secretary of State appealed to the Upper Tribunal (Immigration and Asylum Chamber) ("the UT"). By a decision promulgated on 9 May 2019 UT Judge Rintoul found an error of law in the decision of the FTT and remitted the case to the FTT for a fresh determination.

7. The fresh hearing took place on 25 June 2019 before FTT Judge Parkes. By a decision promulgated on 11 July he dismissed the Appellant's appeal. The Appellant again appealed to the UT. By a decision promulgated on 21 April 2020 UT Judge Mandalia dismissed his appeal.

8. The Appellant appeals against the decision of the UT with the permission of Elisabeth Laing LJ. He has been represented before us by Mr Stephen Vokes and Mr Olumide Sobowa of counsel (who did not appear in the FTT or the UT). The Secretary of State has been represented by Ms Émilie Pottle of counsel.

THE BACKGROUND LAW

9. The correct approach to the deportation of foreign criminals is prescribed by Part 5A of the Nationality Asylum and Immigration Act 2002, which was introduced by the Immigration Act 2014, and more particularly by section 117C. The statutory provisions are reflected in Part 13 of the Immigration Rules. The effect of section 117C and the equivalent Rules has now been authoritatively expounded by this Court in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207, and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 WLR 1327, and the summary that follows is based on what appears there.

10. In this case we are concerned with a potential deportee who has been sentenced to less than four years' imprisonment (described in the jargon as a "medium offender") and who contends that his deportation would involve a breach of article 8 of the European Convention on Human Rights because he or she has a genuine and subsisting parental relationship with a "qualifying child" in the UK. (S was a qualifying child because he was a British citizen, and at least the elder of the other two children also was because he had lived in the UK for more than seven years.) In such a case the decision whether the foreign criminal should be deported involves (potentially) two stages, which I consider in turn.

The "Undue Harshness" Assessment: section 117C (5)

11. The first stage is to decide whether the effect of the parent's deportation on the child (either because he or she will leave the country with the deportee or because they will remain behind without them) would be "unduly harsh": see section 117C (5) of the Act, providing for what is described as "Exception 2", and paragraph 399 (a) of the Rules. If it would, that is the end of the enquiry, and the public interest does not require deportation: in that sense, section 117C (5) affords applicants a shortcut which avoids the need for a full proportionality assessment. The focus is entirely on the impact on the child: nothing else is relevant.

12. The meaning of "unduly harsh" in the context of this first stage has been the subject of a good deal of recent authority, which I reviewed at paras. 39-58 of my judgment in *HA (Iraq)*. For present purposes the following summary is sufficient.

13. In *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), the Upper Tribunal directed itself as follows (at para. 46):

> "… '[U]nduly 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."

That self-direction was followed in the later case of *MAB* (*USA) v Secretary of State for the Home Department* [2015] UKUT 435 and was quoted with approval by Lord Carnwath in his judgment in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273. However, it must be read subject to two passages from my judgment in *HA (Iraq)*.

14. First, at paras. 51-52, I said:

> "51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. 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.
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> 52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context ... The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders."

15. Second, at para. 55 I cautioned against treating *KO (Nigeria)* as having established a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". That phrase derived from a reference in the decision of UTJ Southern in that case to the degree of harshness that would be

experienced by the appellant's children being "nothing out of the ordinary". As to that, I said:

> "As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold 'acceptable' level. It is not necessarily wrong to describe that as an 'ordinary' level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, 'ordinary' is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of 'undue' harshness may not occur quite commonly. Secondly, 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 them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

To similar effect, I also deprecated over-ready reliance on the dictum of Sedley LJ in *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 that the breaking up of families is "what deportation does": see n. 5. At paras. 157-158 of his concurring judgment Peter Jackson LJ made powerful observations in support of this part of my judgment.

The Proportionality Assessment: section 117C (6)

16. If the undue harshness shortcut is not available, it is necessary to proceed to the second stage which requires an assessment of the proportionality of the proposed deportation in accordance with article 8 of the European Convention on Human Rights. That must be performed on the basis that the strong public interest in the deportation of foreign criminals can only be outweighed by "very compelling circumstances": see section 117C (6) of the 2002 Act, and paragraph 399 (b) of the Immigration Rules.

17. The nature of the proportionality assessment, including the way in which it should take account of the best interests of any children, is fully discussed at paras. 28-34 of the judgment of the Court (delivered by Jackson LJ) in *NA (Pakistan),* and in *HA (Iraq)* I added some points specific to the case of medium offenders (see paras. 32-35). Given the particular issues in this appeal, I need not quote from either judgment. The only

point that I need make is that the proportionality assessment is holistic in character and that all relevant considerations need to be brought into the balance.

18. I also made the point in *HA (Iraq)* (see paras. 36-38 of my judgment) that the approach to the proportionality assessment required since the 2014 Act is not substantially different from that which applied previously and which is the subject of the decision of the Supreme Court in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799. Again, I need not summarise Lord Reed's important guidance in that case, but I should note, because the point was referred to by the FTT in this case, that in Lord Thomas's short concurring judgment he said, at para. 82, that Judges in the FTT should in conducting the proportionality assessment:

> "… set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed".

He went on at paras. 83-84 to observe that this could helpfully be done by adopting what he called a "balance sheet approach", by which the judge would, after finding the facts,

> "… set out each of the 'pros' and 'cons' … and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders".

THE "FIRST-ROUND DECISIONS"

19. In this appeal we are concerned only with the Appellant's second round of appeals to the FTT and the UT. I need accordingly say very little about the first-round decisions.

20. In bare summary, in the first FTT decision Judge Smith found that it would be unduly harsh for the children to move with the Appellant to Zimbabwe. As regards their remaining in the UK without him, he found that the family was now "united, happy and functioning", that S had "a positive and loving relationship" with the Appellant, despite his earlier conduct, and that the impact of his deportation on the family would be disproportionate.

21. It is unnecessary to explain the basis on which the UT found that decision to be vitiated by an error of law. I should, however, note that in remitting the case it directed that the finding that it would be unduly harsh for the children to move with the Appellant to Zimbabwe should be preserved.

THE DECISION OF THE FTT

22. After an introductory paragraph the Judge began his determination, at paras. 2-12, by setting out the legal framework. As regards the meaning of the term "unduly harsh", he directed himself in accordance with *MAB (USA)*, which, as we have seen, reproduces the UT's self-direction in *MK (Sierra Leone)*. As regards the "very compelling circumstances" requirement, he quoted two observations by Lord Reed in *Hesham Ali* – first, that "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors"; and, second, that, "in general only a

claim which is very strong indeed – very compelling … – will succeed". He also noted Lord Thomas's encouragement of a "balance sheet approach".

23. Paras. 13-16 of the determination set out the procedural background, as a result of which the Judge directed himself (at para. 16) that the focus of the appeal was:

> "… whether it would be unduly harsh for the children to remain in the UK without the appellant. If that test is not met the question is whether there are very compelling circumstances over and above those in paragraph 399."

24. At paras. 17-18 the Judge identifies the evidence which was before the Tribunal. Both the Appellant and his wife gave oral evidence. The Judge does not summarise their evidence, saying that it is "set out in the Record of Proceedings" (i.e. in his contemporary note, which is retained on the file): we do not have this. He says that he will refer to their evidence "where relevant below", but I can detect no such references in the reasoning which follows. He records that he had both the bundle of documents provided to the FTT first time round and a further bundle prepared for the hearing before him. We have not been supplied with either bundle, and he does not identify their contents beyond saying that they contain school reports and four reports/letters from social workers: three of these dated back to 2015/2016, but one, a report from an independent social worker (referred to be the Judge as "the ISWR"), was from June 2019, i.e. shortly before the hearing.

25. At para. 19 the Judge summarises the effects of the earlier social workers' reports as being that following the Appellant's release from prison "the children wished [him] to return and that [he] had taken steps to address what had happened"; but he noted that "we are now some years on", and he understandably regarded the crucial evidence as being the ISWR, which he shortly summarises at paras. 20-23. I need not set out those paragraphs in full. As summarised by him, the report refers to the Appellant cooking for the children, "collecting them" (presumably from school), and being involved in their football. It says that they see him as their protector, and the author expresses the view that "the appellant is so heavily involved with the children and they are so attached to him that separation would result in serious loss and disruption of their attachment and irreparable loss"; also that his deportation would "impact negatively on the children's participation and integration into the community and at worst result in anti-social behaviour". The author apparently referred to research "on the negative effect of reduced father-child contact and the effect on other relationships". The Judge summarises the report's conclusion as being that:

> "… [t]he current circumstances of the family were … stable, ... the appellant is playing an important role in the care of the children at the critical stage of their lives when they are young and vulnerable and … should be permitted to remain as it is in their best interests".

26. At paras. 24-28 the Judge considers the effect of that evidence. I should quote paras. 24-27 in full. They read:

> "24. The possible consequences for the future welfare of children arising from their separation from their father is a feature in all deportations where there is an existing family in the UK. The research

> cited in the ISWR at pages 6 and 7 applies equally to all children who find themselves in the position of the Appellant's children and stepson. Whilst the research shows that some children do suffer from the absence of a father, for whatever reason, not all do so and it is speculative to state that the Appellant's deportation would inevitably have dire consequences for any or all of the children affected.
>
> 25. Equally children can be characterised as vulnerable and at a critical stage of development at most points of growing up and that too forms the backdrop against which many deportations take place. Clearly the Appellant's wife will find it difficult without the Appellant's support and contribution to family life with a growing family and that will have an effect on what she is able to do for the children and may curtail their involvement in outside activities such as football which formed a large part of the Appellant's oral evidence. This too is a feature in a great many deportation cases.
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> 26. The points made above may make life in the UK without the Appellant unpleasant and difficult for the children involved. Can that be said to be harsh and if so will it be unduly so? I bear in mind the guidance in *MAB* and that to be harsh life in the UK without the Appellant would have to be severe or bleak and to be unduly so would have to be inordinately or excessively.
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> 27. The principal evidence as to how the family coped when the Appellant was in prison is at page 8 of the ISWR in the 2nd paragraph. Whilst I accept that it was a very difficult period for the children the report does not highlight any issues that could be said to be unexpected or out of the ordinary. The family did not involve social services as has first happened when the Appellant was arrested and there is no suggestion that any issues that the children may have had were not coped with. There is no evidence from their school to suggest any conduct or issues that could be said to be remarkable or which required extra intervention on their part."

Para. 28 makes a particular point in relation to para. 27 which I need not reproduce.

27. At paras. 29-30 the Judge stated his conclusions as follows:

> "29. Having regard to the report of the ISW and the other evidence discussed above, bearing in mind the preference of the children that the Appellant should remain and that as is ordinarily the case it would be in their best interest that he should remain an active part of their lives I cannot find that it would be unduly harsh for the children to remain in the UK in the absence of the Appellant. I accept that the family life would be difficult and very challenging but the evidence does not show that it would be bleak or severe, let alone unduly so.
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> 30. There is nothing in the evidence to show that there are circumstances that would take the Appellant's circumstances and those

> of his family could be said to be very compelling and there is no justification for allowing the appeal under article 8 outside the rules."

28. It will be seen that para. 29 represents the Judge's conclusion on the issue of undue harshness and thus on the qualifying child shortcut and that para. 30 represents his conclusion on the proportionality assessment. (Something has gone wrong with the drafting in para. 30: the verb "take" is left hanging, but the overall sense is clear. The reference to "outside the Rules" is also technically wrong, since the proportionality assessment falls within the framework of paragraph 399 of the Rules; but nothing turns on that.)

THE APPEAL TO THE UT

29. The Appellant sought permission to appeal to the UT on two grounds, headed (1) "Failure to consider very compelling circumstances properly or at all" and (2) "Failure to take into account material factors on the 'unduly harsh' test". As regards ground (1), his grounds, pleaded by Mr James Fraczyk of counsel, made the general point that para. 30 of the determination was purely conclusory and made no attempt to assess the particular elements that are said to have been relevant to the proportionality assessment: various elements are referred to in particular, including what is described as "a unique feature of this appeal", namely

> "that the ***sole*** criminal offence arose from the Appellant's poor parenting, and that the appellant has been rehabilitated to the extent that he is now in a genuine, subsisting and caring parental relationship with the very victim of his crime".

It was pleaded that "this was not a 'run of the mill' deport" and that the circumstances were described as "nuanced and worthy of proper consideration". As regards ground 2, Mr Fraczyk focused on the Judge's dismissive approach to the children's ages: see the beginning of para. 25 of the determination.

30. UT Judge Grubb gave permission to appeal on both grounds. As regards ground 1, he observed that para. 30 of the determination was "arguably an inadequate assessment of the evidence".

31. The ultimate question for us is whether the decision of the FTT is sustainable in law. That being so, I need not set out the reasoning of the UT in the same detail, but I should identify briefly the Judge's reasoning on the two issues.

32. As regards the qualifying child shortcut, the Judge refers at paras. 15-17 to para. 23 of the judgment of Lord Carnwath in *KO (Nigeria)* and also to the judgment of Holroyde LJ in *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213. At para. 18 he holds that the FTT Judge had applied the correct test and reached a decision that was open to him. At para. 23 he addresses the pleaded criticism of his approach to the argument that the children were at a vulnerable age. He repeats the Judge's own observation at para. 25 of the determination and goes on to say, at para, 24:

> "Looking at the evidence before the First-tier Tribunal, it is difficult to identify anything which distinguishes this case from other cases where

> a parent who is subject to deportation as a foreign criminal is separated from a child. All children deprived of a parent's company during their formative years will be at risk of suffering harm. It is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances."

33. As regards the proportionality assessment, the UT Judge does not identify any passage in the Judge's determination where the necessary proportionality balance was considered. Rather, his approach is to identify the facts as found, in so far as they relate to the impact of the Appellant's deportation on his family, and to express the view that on those facts "it was in the end open to the judge to conclude that there are no features in this case that come close to reaching the very high threshold of 'very compelling circumstances'" (see para. 25).

THE APPEAL

34. The Grounds of Appeal attached to the Appellant's Notice were settled by Mr Vokes. They are not in proper form. They are discursive, running to three single-spaced pages and containing among other things lengthy quotations from the case-law. They contain no single succinct formulation of the errors of law in the decision of the FTT (uncorrected by the UT) of which the Appellant complains, which is the sole function of grounds of appeal (see, for example, *Idu v East Suffolk & North Essex NHS Foundation Trust* [2019] EWCA Civ 1649, [2020] ICR 683, at para. 34, and *Municipio De Mariana v BHP Group plc* [2021] EWCA Civ 1156, at paras. 113-114). However, the essential point made in them, and in Mr Vokes' skeleton argument, is that the FTT failed to attach any weight to the very particular circumstance that the Appellant is now in a genuine, subsisting and caring parental relationship with the victim of his crime. That point, which is characterised as a form of "rehabilitation", was of course the principal argument under Mr Fraczyk's original ground 1; but it is said by Mr Vokes to be relevant to the FTT's decision on undue harshness as much as to its proportionality assessment.

35. Elisabeth Laing LJ granted permission to appeal. She said:

> "I do not consider it arguable that the FTT ignored A's rehabilitation in considering the test of undue harshness. The FTT took that into account because it was part of the then current family relationships (see paragraphs 19, 20 and 23 of the determination). I consider it arguable that the FTT did not consider this aspect in its cursory, one-sentence assessment of compelling circumstances (determination, paragraph 30), and that, in the unusual circumstances of this case, it was a potentially relevant consideration."

DISCUSSION AND CONCLUSION

36. On the face of it the point which is the basis of the successive grants of permission by UT Judge Grubb and by Elisabeth Laing LJ would appear to be well-founded. Para. 30 of the FTT's determination is purely conclusory. Despite the Judge's own reference to Lord Thomas's encouragement of a "balance sheet approach", he makes no attempt to identify, and assess the weight of, the circumstances which the Appellant contended were sufficiently compelling to outweigh the strong public interest in deportation – or

indeed to assess just how strong that public interest was in the particular circumstances of the case.

37. Ms Pottle in her succinct and cogent submissions for the Secretary of State sought to answer that point in two ways, which I take in turn.

38. First, she submitted that the matters on which the Appellant relied had all been sufficiently assessed in the context of the assessment of undue harshness and that the Judge's conclusion on the issue of proportionality must be taken to have incorporated that assessment. I accept, of course, that a Judge's conclusions about the impact of the deportation of a foreign criminal on his or her family will be an important part of the proportionality assessment and may in a particular case be in practice dispositive of it. But the proportionality assessment inherently involves a wider range of factors than the impact on the potential deportee's family. The factor principally relied on in the present case is the Appellant's rehabilitation. There is authority to the effect that the mere fact that a foreign criminal is unlikely to offend again (what I might call "plain rehabilitation") may not carry great weight by itself – see, for example, para. 141 of my judgment in *HA (Iraq)*; but even so it requires to be put into the balance. And in the present case the "rehabilitation" relied on was of a very particular type – namely that the Appellant had been fully reconciled to, and had become an important figure in the life of, the victim of his crime. The point is well encapsulated in ground 1 of the grounds of appeal to the UT – see para. 29 above – and was at the forefront of Mr Vokes' submissions before us. It is simply not addressed by the FTT at all. Ms Pottle submitted that it formed part of the Judge's "unduly harsh" assessment, but I cannot agree: it is a separate, and unusual, feature of the case. Subject to Ms Pottle's second argument, the omission to take it into account vitiates the FTT's decision overall.

39. Second, Ms Pottle submitted that even if FTT's reasoning was inadequate for those reasons, the error was not material. She summarised various features of the case which she submitted meant that the only possible conclusion was that the Appellant's deportation was proportionate. These partly related to the impact on the family – which, as she pointed out, had been found by the FTT not to be unduly harsh – but she also described the Appellant's offence as "particularly serious" and noted that his immigration history was poor because most of his residence in the UK had been unlawful. As regards the seriousness of the offence, I would refer to what I said at para. 94 of my judgment in *HA (Iraq)*: in all ordinary cases, the correct approach to the seriousness of an offence is that the best measure is the length of the sentence – the Appellant should be treated when striking the proportionality balance as having committed an offence of sufficient seriousness to attract a sentence of two years, no more and no less. As regards the remainder of Ms Pottle's points, they have force, but I am not persuaded that they are sufficient to render the outcome of the appeal a foregone conclusion. This case had the unusual feature relied on by Mr Vokes, and by Mr Fraczyk before him, and a tribunal properly directing itself might reasonably have concluded that the Appellant's deportation would in the particular circumstances of the case be disproportionate notwithstanding the strong public interest in his deportation as a foreign criminal. For the avoidance of doubt, I am not to be taken as saying that that should necessarily be the result: that must be a matter for the tribunal itself to decide.

40. It follows that in my view this appeal should be allowed, and that if the Secretary of State wishes to proceed with the Appellant's deportation the case will have to be remitted to the FTT for a re-hearing. It is regrettable, but fortunately also very rare, for

an appeal to have to be remitted for a second time, but in this case it cannot fairly be avoided.

41. Although the appeal to this Court concerned only the proportionality assessment, it will not be possible for the FTT to decide that issue on remittal without revisiting the question of the impact that the Appellant's deportation would have on his family. That means that the question whether it would have an unduly harsh impact on his (qualifying) children will also have to be remitted: I understood Ms Pottle to accept that that was so when the question was raised with counsel in the course of the hearing. The Appellant will need to ensure that the tribunal is provided with up-to-date evidence on all matters on which he proposes to rely at the remitted hearing. Notwithstanding the passage of time, it seems very unlikely that the Secretary of State will wish to argue that it would not be unduly harsh for S (or indeed any other member of the family) to accompany the Appellant to Zimbabwe and, accordingly, subject to any submission to the contrary, I would direct that the finding of the first FTT on that issue remain preserved.

42. I should, finally, mention that, although the point was not before us (and so was not argued), I do have a concern that the reasoning of the FTT on the "unduly harsh" issue may fall foul of the points which I make at para. 55 of my judgment in *HA (Iraq)* (see para. 15 above): see in particular paras. 24 ("a feature in a great many deportation cases") and 25 ("[nothing] unexpected or out of the ordinary"). The decision of this Court in *HA (Iraq)* was not referred to in the grounds of appeal: if it had been, it is possible that permission might have been granted. That being so, on remittal the FTT should beware of being influenced by the fact that Judge Parkes had found for the Secretary of State on this issue.

Elisabeth Laing LJ:

43. I agree.

Baker LJ:

44. I also agree.