Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08310/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 8 August 2019	**On 30 August 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

CD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S McTaggart, instructed by Suzanne Moran Solicitors
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting disclosure of any matter that may lead to the identification of the appellant and other parties to these proceedings. Any breach may lead to contempt proceedings.

2. This is an appeal by a citizen of Malawi (born in 1981) against the decision of First-tier Tribunal Judge Grimes who for reasons given in her decision dated 29 October 2018 dismissed the appellant's appeal against the Secretary of State's decision dated

10 August 2017 refusing the appellant's protection and human rights claims that had been made after a decision by the Secretary of State to make a deportation order pursuant to section 32 of the UK Borders Act 2007.

3. The appellant had arrived in the United Kingdom in 2004 and unsuccessfully applied for asylum. His appeal was dismissed and he was recorded as an absconder in 2005.

4. The judge noted the background circumstances as follows in her decision:

> "10. The appellant's immigration history is set out in the Reasons for Refusal Letter and in the respondent's bundle. His background is set out in the witness statements and other documents. In summary the immigration history and background are as follows:
>
> - On 25 March 2004 the appellant made an application at the port of entry for leave to enter the UK as a visitor. He was travelling on a Malawian passport. That application was refused. He lodged an application for asylum that day. The application for asylum was refused on 5 May 2004 and his appeal against that was dismissed on 3 September 2004. His application for permission to appeal was refused and his appeal rights were exhausted on 9 December 2004. On 28 January 2005 the appellant was listed as an absconder.
> - In his witness statement the appellant claims that he lived on the streets from November 2004 until September 2005. He obtained a fraudulent British passport. He registered with a Doctor and was diagnosed with Sarcoidosis, a long term health condition and was hospitalised. After his discharge from hospital he obtained employment and accommodation. He worked as a gym instructor. He met his partner, who is from Northern Ireland, in August 2011 at a football match in Manchester. They were in a relationship for around one and a half years and he visited her in Northern Ireland during that time. He moved to Northern Ireland when his partner became pregnant. They moved in together and his son was born on 12 November 2012. The appellant set up his own business. The relationship broke down and there was acrimony over access to the child.
> - The appellant was stopped by police in connection with a car insurance issue and, on 3 June 2014 the appellant was arrested by police and remanded in custody, he was subsequently granted temporary release. On 3 June 2014 he applied for stateless leave consideration.
> - On 4 May 2016 the appellant was convicted of Possession of a false identity document to improperly allow another to obtain personal information. He received a 12 month sentence comprised of 6 months in prison followed by 6 months on licence. He was also sentenced to 6 months concurrent sentence for fraud by false representation and a further count of False identity document to improperly allow another to obtain personal information. He was fined £250 on conviction of Estreat bail. The convictions related to

possession of a false UK passport and a false UK driving licence and their use in obtaining motor insurance policies.

- On 26 May 2016 the appellant was notified that he was liable to deportation action. Representations were submitted by his solicitors. These raised a number of issues including the appellant's claim that he is a national of Zimbabwe rather than Malawi; the appellant's health conditions; and his relationship with his child.
- Since his release from custody the appellant has been living in rented accommodation, the rent has been paid for by friends. The appellant has obtained access to his son through Court."

5. It was accepted on behalf of the appellant that the earlier decision in relation to the protection claim could not be challenged nor could the high threshold to meet Article 3 in relation to medical issues be met. Furthermore, it was accepted that the appellant could not meet the private life requirements of Exception 1 as set out in section 117C(4) and paragraph 399A of the Immigration Rules. As a consequence the appellant's case was to be considered under paragraph A398(b) and section 117C(3) in the light of the twelve months' sentence.

6. The judge accepted that the child had a passport and that his mother "appeared to be someone born in Northern Ireland". She accepted that it was likely the appellant's child is a British citizen who was born in 2012. Regard was had to a report by a Dr Zack regarding the relationship between the appellant and his son and also an interim contact order dated 19 September 2018. The judge concluded that it was in the child's best interests "to continue and expand contact with his father for his (p)resent and future overall development". The judge observed that the child has not visited the appellant in prison who now sees the child twice a week although there are significant restrictions in that there is no overnight stay nor does the child go to his accommodation. The judge accepted that the appellant "has some limited involvement in decisions relating to the child based on his oral evidence which included attending parent teacher meetings and being at the hospital during a tonsil operation.

7. The judge's focus then turned to whether it would be unduly harsh for the child to live in the country to which the appellant is to be deported being either Malawi or Zimbabwe and she concluded that the child lives with his mother and that it was not likely that the child would be able to relocate abroad.

8. As to whether it would be unduly harsh for the child to remain in the United Kingdom without his father, the judge directed herself in accordance with *MM (Uganda) v SSHD* [2016] EWCA Civ 616 and *AJ (Zimbabwe) v SSHD* [2016] EWCA Civ 1021. These authorities led the judge to consider the appellant's criminal immigration and history in the context of the unduly harsh consideration. She concluded that based on all the evidence and her findings and in the light of the case law it had not been established that if would be unduly harsh for the child to remain without the appellant.

9. As to whether there were very compelling circumstances over and above those captured by section 117C and the Rules the judge set out her reasons at [40]:

> "40. I consider the other issues which go to determining whether there are very compelling circumstances in this case such as to outweigh the public interest in deporting the appellant. These factors also go to the issue of proportionality. I take into account all of the factors set out above. The appellant has been convicted of offences connected with using false documents committed over a lengthy period. He absconded from Home Office supervision and remained in the UK unlawfully for around 9 years. During this time he developed a relationship and had a child. He now has limited contact with his child. Although he and the child have a genuine attachment there are significant limitations on their ongoing contact and his role in relation to the child. As is clear from the case law this is not enough to amount to very compelling circumstances over and above those set out in Exception 2. I have taken account of his medical conditions and find nothing there to show very compelling circumstances to outweigh the public interest."

10. The grounds of appeal argue the judge had misapplied s. 117C(6) of the Nationality, Immigration and Asylum Act 2002 (ground one) and had irrationally excluded factors in considering paragraph 399 as to whether it would be unduly harsh for the child to remain in the United Kingdom without the appellant (ground two) . She had also misapplied section 117B of the 2002 Act (ground three).

11. In granting permission to appeal, First-tier Tribunal Judge Nightingale considered the grounds to have some merit and that the judge had arguably fell into error by balancing the appellant's criminality and immigration history against whether it was unduly harsh for the child to remain without the appellant. Such an approach was not in accordance with the judgment in *KO (Nigeria) v SSHD* [2018] UKSC 53.

12. Mr McTaggart relied on a detailed skeleton argument and he began his submissions with the indication that he did not intend to pursue grounds one and three relating to the application of sections 117B and 117C of the 2002 Act. He characterised the remaining grounds in his skeleton (which incorporated the points raised in the grant of permission) which I paraphrase in part and otherwise quote as follows:

    (i) Misapplying (or due to the sequencing of the decision – not applying (KO) – with the balancing of the appellant's criminality and immigration history against whether it was unduly harsh for the appellant's child to remain in the UK without the appellant; and

    (ii) Excluding materially relevant factors under paragraph 399 as to whether it was unduly harsh for the child to remain in the UK without the appellant. He considered the former granted by motion of First-tier Tribunal Judge Nightingale and there was no objection to this by Mr Diwnycz. In the light of the positive factual findings by Judge Grimes as to the relationship, the nationality of the appellant's son and the relationship between them. In addition, the judge had found that as the child lived with his mother he would not be moving to Malawi or Zimbabwe, and following the report of Dr Zack,

there is a secure attachment and positive link between father and son and that it is in the child's best interests to continue and expand contact with his father for present and future development. There were also positive findings regarding the regular contact and contact orders. These findings resulted in the sole issue whether it would be unduly harsh for the child to remain in the United Kingdom without his father and how this assessment is to be approached. In her assessment of this issue the judge had regard to the offences and he submitted that significant weight had been given to that offending resulting in material error.

13. It is contended in the skeleton that the judge had materially failed to take proper account of fraught relationship between the appellant and his son's mother relating to the second limb of the recharacterized grounds. It was accepted that there was no direct evidence about how the mother would react were the appellant to be deported, nevertheless all the evidence indicated that this would on the balance of probabilities mean the end of all contact. The judge had failed to have regard to aspects of the appellant's statement regarding the history of contact orders and the strict conditions required by the child's mother. Material factors included in addition the report of Dr Zack indicating that the appellant had been the recipient of false allegations from the mother. Were the appellant unable to demonstrate that it would be unduly harsh the remaining task, in reliance on *RA (s.117C: "unduly harsh"; offence: seriousness (Iraq)* [2019] UKUT 00123 (IAC), the offences which the Tribunal would need to have regard to, but against that it is contended the very compelling circumstances comprised:

(a) Length of time in the UK (since 2004).

(b) The presence of a son.

(c) Assessed as low risk of reoffending.

(d) The fact of the appellant's contribution to the community.

14. In the development of his submissions at the hearing, Mr McTaggart acknowledged that the judge had noted the restrictions in the contact order but argued that contact had been a "long hard road". The restriction in particular relating to the appellant's son's hair gave an indication how bad the relationship was and it was more likely that contact might not be facilitated and deportation would effectively end contact. He argued that the judge had not taken all these aspects into account which included an indication that the appellant's former partner would not allow telephone contact, the order requiring contact by text only. Mr McTaggart nevertheless accepted that there was no specific evidence before the judge of the false allegations other than the reference by Dr Zack in her report.

15. By way of response Mr Diwnycz accepted the judge had not followed *KO* which had been published in the time between the hearing and the judge's promulgation of her decision. At the outset of the hearing I had invited both parties to consider the most recent decision of the Court of Appeal as to how *KO* was to be applied in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213. Mr Diwnycz reiterated in terms the observation by

Holroyde LJ as to the sad consequences that occur when families are split up but that this is the unfortunate consequence of deportation. He did not accept it would be a case of no contact; the appellant and his son would be able to speak and could seek a variation of the contact order to achieve this. Mr Diwnycz clarified that he did not consider the judge's error material despite not having followed *KO*. Both parties were content that, in the event, I set aside the decision I could re-make the decision based on what had been said in the course of argument and the new evidence that had been lodged.

16. In his judgment in *PG (Jamaica*, Holroyde LJ set out the legislative framework and thereafter the relevant caselaw to a case where the appellant had been sentenced to a term of imprisonment of between one and four years. In particular, he made observations on the effect of *KO* and explained how it is to be applied. The legal framework (which is also applicable to the appeal before me) is set out [21] to [28] of his decision:

> **"The Legislative Framework**
>
> 21. By section 3(5)(a) of the Immigration Act 1971, a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good.
>
> 22. Provision is made for the automatic deportation of foreign criminals by section 32 of UK Borders Act 2007, which so far as is material for present purposes states:
>
> "**32 Automatic deportation**
>
> (1) In this section "*foreign criminal*" means a person –
>
> (a) who is not a British Citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> …
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."
>
> 23. Section 32 accordingly requires the deportation of a foreign criminal who has been sentenced to a term of at least 12 months' imprisonment, as PG was, but is subject to the exceptions set out in section 33 of the Act, which so far as material provides:
>
> "**33 Exceptions**
>
> (1) Section 32(4) and (5) –
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below),
>
> …

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach –

(a) a person's Convention rights, …"

24. In this appeal, it is contended that deportation of PG would result in breach of his rights, and the rights of his partner SAT and their three children, under article 8 of the Convention, which provides:

"1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

25. With effect from 28th July 2014 part 5A of Nationality, Immigration and Asylum Act 2002 has made specific provision in relation to the consideration of article 8 in circumstances such as the present. Section 117A provides:

"**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

26. Section 117B sets out a number of public interest considerations which are applicable in all cases. It is unnecessary for present purpose to refer to these in further detail. It is however necessary to refer to 117C, which so far as is material provides:

"**117C Article 8: additional considerations in cases involving foreign criminals**

(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.

…

(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."

27. Also with effect from 28th July 2014, the Immigration Rules were amended to make provision for consideration of article 8 claims by persons liable to deportation. So far as is material, the amended Rules provide:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

…

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

…

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) … applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(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; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling

circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

…

399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave."

28. Thus Part 5A of the 2002 Act, and the amended Rules, together provide a structured approach to the application of article 8 in cases of deportation of a foreign criminal."

17. Thereafter between [29] and [34], Holroyde LJ set out the relevant caselaw as follows:

"Relevant Case Law

29. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, Jackson LJ at [36] summarised the approach which Part 5A of the 2002 Act, and the Rules, require a tribunal or court to take when considering the position of a foreign criminal who has been sentenced to a term of imprisonment of at least 12 months but less than 4 years:

> "… first see whether he falls within Exception 1 or Exception 2. If he does, then the article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the article 8 claim succeeds. If there are not, then the article 8 claim fails. … there is no room for a general article 8 evaluation outside the 2014 Rules, read with sections 117A to 117D of the 2002 Act"

30. In *MM (Uganda)* it was held that in the context of Exception 2 in section 117C(5), the interpretation of the phrase "unduly harsh" required consideration of the public interest in the removal of foreign criminals and the need for a proportionate assessment of any interference with article 8 rights. At paragraph 24 of his judgment, Laws LJ, with whom Vos and Hamblen LJJ agreed, said that section 117C(2) –

> "… steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. … What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history."

31. It was with that decision in mind that Judge Griffith conducted the proportionality exercise which Judge Finch upheld.

32. However, in *KO (Nigeria)* the Supreme Court took a different view as to the interpretation in this context of the phrase "unduly harsh". At paragraph 22, Lord Carnwath (with whom the other Justices agreed) said that on its face, Exception 2 in section 117C of the 2002 Act raises a factual issue seen from the point of view of the partner or child. At paragraph 23 he went on to say:

"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."

33. At paragraph 32 of his judgment, Lord Carnwath again differed from the approach taken by Laws LJ in *MM (Uganda*).

34. It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

18. It is unarguable that Judge Grimes made an error of law in factoring in the appellant's criminal offending in addressing the issue of whether it would be unduly harsh for the child to remain in the United Kingdom without the appellant. After satisfying herself as to the appellant's nationality and the likelihood of the child being British, she turned her attention to the evidence of the relationship which included a survey of the evidence of Dr Zack and the court orders which included the particular restriction relating to the child's hair before concluding at [21]:

"21. The conditions are significant and would indicate that the appellant does not have a real role in making decisions about the child. It is clear that the

> nature of the contact and ongoing relationship is subject to agreement with the child's mother and the supervision of the Family Court. Accordingly the parental relationship is limited. However I accept based on the level of contact that he has a genuine and subsisting parental relationship with the child."

And thereafter concluded as to the child's best interests at [22]:

> "22. I consider the best interests of the child. I accept on the basis of Dr Zack's report that the appellant and the child have a genuine and positive link (page 14 paragraph 4.1). I take account of the conclusion reached by Dr Zack (page 14 paragraph 4.2) that, as he and his father have a secure attachment, it is in the child's best interests to continue and expand contact with his father, for his present and future overall development."

19. The judge then explained in [23] why the child would be unable to live abroad before turning her attention to whether it would be unduly harsh for the child to remain in the United Kingdom without his father. This led her to consider the authorities of the Court of Appeal in *MM (Uganda) v SSHD* [2016] EWCA Civ 617 and *AJ (Zimbabwe) v SSHD* [2016] EWCA Civ 1021. She directed herself at [26] specifically in relation to the appellant's criminal offending:

> "26. I also take account of the guidance given by Elias LJ (with whom Vos LJ agreed) in **AJ (Zimbabwe) v The Secretary of State for the Home Department [2016] EWCA Civ 1021** at paragraph 17:
>
> > "These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be

> largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary."

20. This was followed by a review of the negative factors weighing against the appellant in the undue harshness assessment before turning to the factors weighing "against the public interest" between [33] and [37] as follows:

> "33. In weighing the factors against the public interest I take account of the appellant's relationship with his son. The child will be 6 years old in November. I accept that Dr Zack found that there is a secure attachment and a genuine and positive link between the appellant and his son. I take into account Dr Zack's assessment that it is in the child's best interests to continue and expand contact with his father for his resent [sic] and future overall development (page 536). I take account of Dr Zack's opinion as to the appellant's removal from the UK as follows:
>
> > "Based on the secure attachment and the warm and affectionate bond between father and child, I believe that the deportation of [the appellant] is likely to have a negative impact. While this impact may not be observable immediately, research has reported both negative short-term and long-term outcomes for children who do not enjoy the involvement of their fathers. In this particular case, it is my opinion that [the appellant's] and [the child's] relationship is strong and that [the child] loves his father. Due to [the appellant's] idea of a father and his own resiliency, [the child] would not only miss out on their emotional bond but also the ability to learn about himself and acquire skills, eg of resiliency, through is father."
>
> 34. I take account of the court documents outlining regular contact between the appellant and his son. I note that there are contact orders dating from 2014. The child did not visit his father in prison. In oral evidence the appellant said that he has been seeing the child regularly since he was released from custody in December 2016. However I note the limited nature of this contact, the appellant sees the child twice a week and there are significant restrictions on this contact in that the child does not currently stay with his father overnight and does not go to his accommodation. In oral evidence the appellant said that he makes decisions regarding his son's life and that he has been to parent-teacher meetings and that he had been with his son when he had his tonsils removed in hospital. The appellant therefore has some limited involvement in decisions relating to the child.
>
> 35. In his submissions Mr Wright argued that the appellant and his son could continue their relationship after the appellant leaves the UK through modern means of communication and visits. Mr McTaggart submitted that if the appellant is not able to remain in the UK and maintain contact with his son then he will be lost to his son. He submitted that in circumstances where the appellant's ex-partner will not facilitate contact without recourse to the courts and the child is too young to stay in contact himself then

contact will be lost. In these circumstances, in his submission, it would be unduly harsh for the child to remain in the UK without his father.

36. Although it was submitted that the child's mother would not facilitate ongoing contact with the child should the appellant be deported this is somewhat speculative and there is no direct evidence to support this submission. It is possible that an arrangement for contact could be made with the child's mother, there is no evidence that any such proposals have been made or rejected. In any event, considering the case law as set out above, I do not find that this issue is determinative of the appeal.

37. I accept that the deportation of the appellant would have an adverse impact on the appellant's child. However, based on all of the evidence and my findings and, in light of the case law set out above, I find that it has not been established that it would be unduly harsh for the child to remain in the UK without the appellant."

21. This was followed by an application of section 117C(6) on which there is no remaining challenge.

22. Although the judge was wrong to include the appellant's offending in her assessment of the undue harshness, the question remains whether, in the light of the matters set out between [33] to [37], the error was material. Put another way, in the light of the evidence, is there only one answer in this case. Before considering that question, I turn to the second limb to the remaining challenge relates to the judge's treatment of the evidence, in particular, the argument by Mr McTaggart that had pointed to there being no contact after deportation. As will be seen his submission on this point is recorded at [35]. In my judgment the judge took account of all the relevant evidence and this aspect of the challenge is no more than a disagreement with findings that were properly open to her, including the conclusion on the issue of contact at [36]. Uncertainty over whether the parties will be able to maintain contact after deportation is likely to be a factor in many deportation cases that involve the split up of families. It is one of its inevitable consequences. The evidence before the judge was thin regarding the nature of the conflict between the appellant and the child's mother and in my view the judge was correct to observe that there was no evidence of such proposals having been made or rejected for contact to endure after removal.

23. In my judgment even when the factors "weighing against the public interest" as set out by the judge are fully discounted, in the light of the evidential findings, there is not on the facts of this case a degree of harshness going beyond what would necessarily be involved for any child of a foreign criminal facing deportation. It is inevitable that the child will be distressed by the absence of the appellant. The twice weekly contact will cease and this will cause the child a real sense of loss in the light of the strength of the bond as observed by Dr Zack. There is doubt over how effective contact will be made after deportation as this will be a matter of negotiation between the parents which may well result in further court proceedings. However as observed by Hickinbottom LJ in this short judgment in *PG* at [46], "…one can only have great sympathy for the entirely innocent children involved. Even in

circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8.

24. In my judgment, had the judge directed herself correctly as to the approach to be taken, the only answer she could have come to on the evidence was that it would not be unduly harsh for the child to remain without his father. There is no challenge to the next level of enquiry undertaken by the judge as to whether there were "very compelling circumstances" over and above those described in Exceptions 1 and 2 by reference to the rules. Although I am satisfied the judge erred in law, I do not consider the error material.

25. This appeal is dismissed.

Signed Date 20 August 2019

UTJ Dawson

Upper Tribunal Judge Dawson