Neutral Citation Number: [2019] EWCA Civ 2051

Case No: C5/2017/3257

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Juss
OA/10128/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before :

THE SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE BAKER

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
KF (NIGERIA)	**Respondent**

- -
- -

Jack Anderson (instructed by **Government Legal Department**) for the **Appellant**
Celia Record (instructed by **Direct Access**) for the **Respondent**

Hearing dates : 16 July 2019

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Approved Judgment

LORD JUSTICE BAKER :

1. This is an appeal by the Secretary of State against the decision of the Upper Tribunal by which it dismissed an appeal against the decision of the First-tier Tribunal allowing an appeal against an order for the respondent's deportation. An anonymity direction has been given in respect of the respondent.

2. The respondent, who was born on 15 July 1991, is a citizen of Nigeria. In 2002, he came to the UK with his parents having been granted an entry clearance visa valid from 14 August 2002 until 14 February 2003. On 20 February 2004, his father submitted an application for indefinite leave to remain in this country with the respondent as his dependent. On 10 October 2008, the respondent was granted indefinite leave to remain.

3. On 3 June 2013, the respondent was convicted at Woolwich Crown Court of an offence of burglary and two counts of robbery and was sentenced to 3 years' imprisonment. He was therefore liable to deportation under the statutory automatic deportation regime. On 1 August 2013, he was served with a form notifying him of his liability to deportation and giving him the opportunity to make representations against a deportation order being made. On 4 March 2014, the respondent lodged representations against deportation on the basis that returning him to Nigeria would breach his rights under Article 8 of the ECHR. He stated that he had a family in the UK consisting of his partner, his parents and his son, a British citizen born on 19 June 2013.

4. In a letter dated 16 August 2014, the appellant rejected the respondent's representations, having concluded that his deportation would not breach Article 8. On 7 October 2014, the appellant made a deportation order in respect of the respondent under s.32(5) of the UK Borders Act 2007.

5. In September 2015, the respondent returned voluntarily to Nigeria. On 1 October 2015, he lodged an out of country appeal against the decision to deport him. By a decision dated 4 November 2016, the First-tier Tribunal allowed the respondent's appeal. The appellant was granted permission to appeal but by a decision of the Deputy Upper Tribunal Judge dated 9 August 2017, her appeal was dismissed. On 18 September 2017, the appellant's application for permission to appeal to this Court was refused by the Upper Tribunal.

6. On 30 November 2017, the appellant filed a notice of appeal out of time to this court. On 29 November 2018, Sir Stephen Silber granted permission to appeal, *inter alia* on the grounds that the second appeal test was satisfied because the proposed appeal raised an issue as to whether the approach adopted by the First-tier and Upper Tribunals satisfied the test set out in the decision of the Supreme Court in *KO (Nigeria) v SSHD* [2018] UKSC 53.

7. The appellant's application for an extension of time for filing the notice of appeal was not expressly dealt with on the grant of permission. In his argument before us, Mr Anderson claimed that the delay in filing the notice arose because the appellant did not receive notice of the Upper Tribunal's refusal of the application for permission to appeal until early November 2017. Ms Record objected to the extension of time on the grounds that the case involves the respondent's partner and very young child for

whom any delay is prejudicial. For my part, I am satisfied that, in all circumstances, it is appropriate to grant an extension of time in this case.

8. Under s.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 deemed his deportation to be conducive to the public good."

9. So far as relevant to this appeal, s.32 of the UK Borders Act 2007 provides:

> "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)."

10. These provisions are subject to the exceptions set out in s.32 which include, under subsection (2)(a), "where removal of the foreign criminal in pursuance of the deportation order would breach … a person's Convention rights", that is to say rights under ECHR, including those under Article 8, the right to respect for private and family life.

11. Part 5A of the Nationality, Immigration and Asylum Act 2002, inserted by s.19 of the Immigration Act 2014 and brought into force on 28 July 2014, introduced further provisions governing public interest considerations relating to Article 8. In particular, s.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)."

S.117B sets out public interest considerations applicable in all cases. These include:

"(1) The maintenance of effective immigration controls is in the public interest.

…

(5) Little weight should be given to a private life established by a person when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

S.117C, headed "Article 8: additional considerations in cases involving foreign criminals", provides:

"(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 will 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 consideration 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. "

12. The relevant provisions in the Immigration Rules, as amended with effect from 20 July 2014, are as follows:

"362 Where Article 8 is raised in the conduct of deportation under Part 13 of these rules, the claim under Article 8 will only succeed where the requirements of these rules as at 20 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

…

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

(a) 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.

399A This paragraph applies where paragraph 398(b) or (c) applies if

(a) the person has been lawfully resident in the UK for most of his life and

(b) he is socially and culturally integrated in the UK, and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

13. It has not been suggested before us that this case falls within Exception 1 in s.117C(4) of the 2002 Act. The issue is whether it falls within Exception 2 in s.117C(5) and paragraph 399 of the Rules.

14. The decision and reasons of the First-tier Tribunal and the determination and reasons of the Upper Tribunal contain extensive citation of case law, including reported authorities of this court. As my Lord, the Senior President of Tribunals, observed at the outset of the hearing before us, however, the starting point for any court considering a case involving Part 5A of the 2002 Act is now the decision of the Supreme Court in ***KO (Nigeria)***, supra. In his judgment with which the other members of the court agreed, Lord Carnwath JSC said, at paragraph 15:

> "I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute."

With specific reference to Exception 2 in S.117C(5), Lord Carnwath observed, at paragraph 23:

> "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."

15. The approach to be followed was summarised more recently by this court in ***SSHD v PG (Jamaica)*** [2019] EWCA Civ 1213, decided five days before the hearing of this appeal, in which Holroyde LJ said, at paragraph 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."

At paragraph 38, Holroyde LJ further observed:

> "In the circumstances of this appeal, I do not think it necessary to refer to decisions predating ***KO (Nigeria)***, because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation."

16. In his decision and reasons, the First-Tier Tribunal judge found that the respondent had not shown that there would be "very significant obstacles" to his reintegration into Nigeria. He was therefore unable to meet the requirements of Exception 1 in s.117C and paragraph 399A of the Rules. The case therefore fell to be considered under Exception 2 and paragraph 399.

17. The First-tier Tribunal judge was satisfied that the respondent was in a subsisting relationship with both his partner and his son. He stated (at paragraph 77):

> "When considering whether it would be unduly harsh for the [respondent's] partner and his son to join him in Nigeria or live without him in the UK, I have to undertake a proportionality assessment. However, as set out above my starting point must be that the public interest served by deporting foreign criminals has to be given considerable weight."

The judge proceeded to analyse the respondent's offending. He noted that robbery was a serious offence but that the respondent had been sentenced at the lowest possible level for the offence and had been given credit for his relatively early plea. He considered the OASys Assessment and noted its conclusion that the respondent posed only a medium risk of serious harm to the public and the respondent had expressed a high level of remorse. The First-tier Tribunal judge observed that this was reflected in an observation made by the sentencing judge that the respondent was "obviously not a hopeless case" and that, had he only committed one instead of three offences, a non-custodial sentence might have been appropriate. Having recorded those sentencing remarks, the First-tier Tribunal judge observed:

> "81. In my view this comment is significant. The sentencing judge appears to have accepted that potentially the [respondent's] personal attributes were such that he could have escaped a custodial sentence had he only committed one offence. This could only have been on the basis that the judge was satisfied that he did not pose an ongoing threat [to] the public and he was satisfied that the [respondent] had the potential for rehabilitation.
>
> 82. However, the fact that the [respondent] had committed 3 offences required the judge to impose the higher level of punishment reflected by the custodial sentence the [respondent] ultimately received. Nevertheless, in my view the fact that the [respondent] was sent to prison does not change the underlying conclusions the sentencing judge appears to have reached about [his] character and his potential for rehabilitation."

The First-tier Tribunal judge was satisfied on the evidence that the respondent would have the benefit of a highly supportive family and that the possibility of losing his relationship with his son and partner and his right to remain in the UK would act as a significant deterrent to further offending behaviour.

18. Turning to the impact of the respondent's deportation on his family, the judge said (at paragraph 89):

> "The evidence before me was that if the [respondent's] partner relocated to Nigeria with their young son, she would be moving to a country she has no connection with [the exception of] her relationship with the [respondent]. She would have to abandon her university course and her career plans …. Their son would be deprived of the comparatively high quality healthcare, education and social support that would be available to him as of right as a UK citizen. Effectively, the [respondent's] partner would have to sacrifice her future and prejudice her son's future by depriving him of the advantages of growing up in the UK."

He added (at paragraph 90) that in Nigeria:

> "They would clearly not be destitute but they would be dependent on financial support from their parents and would be likely to have to live a hand to mouth existence with limited prospects of improvement until such time as [the respondent] completed his studies and obtained employment in Nigeria."

The judge acknowledged that the partner and son could avoid these difficulties by remaining in the UK after the respondent was deported, but noted a number of disadvantages:

> "92. For [their son], the adverse consequences remaining in the UK are likely to be that he would be deprived of a proper relationship with his father. I do not accept that maintaining a relationship, while living on different continents, via modern means of communication is in any way a substitute for growing up with a parent. The [respondent's] son is very young. This is the time when he would normally be bonding with his father. I think I am entitled to take judicial notice of the fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child. I take into account that in this case the [respondent's] son has limited knowledge of his father and has the benefit of a supportive extended family. However in my view that is no substitute for the emotional and developmental benefits for a 3 year old child that are associated with being brought up by both parents during its formative years. These benefits have been recognised by the courts on numerous occasions and the consequences of losing them should not be minimised.
>
> 93. In view of the above, looking [at the] evidence as a whole, I find that the best interests of the [respondent's] son would be best served by being brought up in the UK by both his parents. I take this as a first consideration when carrying out the proportionality assessment but it does not in itself outweigh the significant weight I have to give to the public interest inherent in removing foreign criminals from the UK."

19. This led the judge to the following conclusion (paragraph 94):

> "I have kept at the front of my mind and given great weight to the need to protect the public from reoffending, deter crime in general and express societal revulsion for crime in general and serious crime in particular. I have looked at the evidence as a whole and taken into account everything set out above, including what I find to be the [respondent's] low risk of reoffending, his … relative immaturity and the adverse consequences of [his] deportation on his partner and in particular his son. I have found that:
>
> (1) It would be unduly harsh to require [the respondent's] partner and child to live in Nigeria with him. [Were] I dealing with [his] partner in isolation I would not have found that it would be unduly harsh for her to move there on her own. However it is artificial to treat her in isolation. Expecting her to separate from her child in order to live with the [respondent] would also be unduly harsh.

(2) Equally, if I were dealing with the [respondent's] partner in isolation I would not find that it would be unduly harsh to expect her to live in the UK without [him]. She is an adult and in control of her own life. If they are both committed to their relationship they can be expected to maintain it despite their separation. However, I am not dealing with her in isolation. Given the age of her son, the conclusions I reach about him subsume the conclusions I reach about her.

(3) Although it is a finely balanced decision, on the particular facts of this case, I find that it would be unduly harsh for the [respondent's] son to grow up in the UK without him."

20. For those reasons, he concluded that the respondent had met the requirements of Exception 2 in S.117C(5) and paragraph 399(b)(iii) of the Rules, and that the respondent's removal from the UK was a disproportionate interference with the Article 8 rights of the respondent, his partner and son. He therefore allowed the appeal against the deportation order on human rights grounds.

21. In dismissing the appeal, the Upper Tribunal deputy judge described the decision of the First-tier Tribunal as "careful and well-reasoned". He noted that the judge who had granted permission to appeal had expressed concern that the First-tier Tribunal judge had concluded that there would be unduly harsh consequences for the child simply because the family was going to be split, without properly explaining his reasons. The deputy judge expressed the view, however, that the First-tier Tribunal judge had provided adequate reasons for his conclusion and that the evidence for that conclusion was not lacking. He further observed that the relationship between the respondent and his son was one factor amongst others and that it had been incumbent on the First-tier Tribunal judge to consider the wider issues. In that context, he cited the First-tier Tribunal judge's observations about the OASys assessment of the level of risk posed by the respondent, the remorse he had expressed, and the comments of the sentencing judge. The Upper Tribunal deputy judge concluded this observation:

> "It was just unfortunate for the respondent that he had committed three offences, because had he committed one he would have had a non-custodial sentence."

22. On behalf of the Secretary of State, Mr Anderson submitted that the First-tier Tribunal and the Upper Tribunal had failed to apply a lawful approach to the question whether the separation of the respondent and his child would be unduly harsh. It is clear from reported authorities, in particular the decision of the Supreme Court in ***KO (Nigeria)***, that the "unduly harsh" requirement involves some additional feature affecting the nature or quality of the relationship that takes the case out of the ordinary commonplaces of family life. It is submitted that neither the First-tier Tribunal judge nor the Upper Tribunal deputy judge identified any factors that could plausibly take the effect on the respondent's son beyond the inevitable disadvantages resulting from the separation of a parent and his child. It is inevitable that such a separation will have a real and potentially damaging impact on the partner and her child, and that the child will feel unhappiness in those circumstances. Mr Anderson submitted that there was nothing in the First-tier Tribunal's judgment, or the evidence on which it was based, to take this case out of the ordinary. For that reason, he submitted that the First-tier Tribunal and Upper Tribunal judges had erred in law.

23. Mr Anderson further submitted that the approach adopted by the tribunals could not be rescued by reference to other factors. Just as the Supreme Court in ***KO (Nigeria)*** had concluded that the seriousness of offending is not relevant to the question whether the effect of deportation would be unduly harsh for a child, so too the extent of rehabilitation of the parent, and the presence of remorse, cannot be relevant to that question. In this case, both the First-tier Tribunal judge and the Upper Tribunal deputy judge had placed emphasis on the fact that the respondent might have avoided a custodial sentence had he committed only one offence rather than three. Mr Anderson describes this approach as perverse. The reality is that the respondent did commit three offences and was sentenced accordingly. It was submitted that the public interest in deporting the respondent is not just to prevent him offending again but also to mark the seriousness with which offending is treated and to deter other foreign nationals from committing offences in this country.

24. On behalf of the respondent, Ms Record submitted that the Upper Tribunal judge had rightly dismissed the appeal as there was no material error of law. It was her submission that the First-tier Tribunal judge applied the correct legal test as at the date of the hearing. She relied on observations made by Carnwath LJ (as he then was) in ***Mukarkar v SSHD*** [2007] Imm AR 57, cited by Baroness Hale of Richmond and Lord Carnwath JJSC giving the judgment of the Supreme Court in ***R (MM (Lebanon)) v SSHD*** [2017] UKSC 10 at paragraph 107:

> "It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case …. The mere fact that one tribunal has reached what may seem to be an unusually generous view of the facts of a particular case does not mean that it has made an error of law …. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

Lord Carnwath reiterated this observation in ***KO (Nigeria)*** at paragraph 43:

> "If the tribunals applied the correct test, and, if that may have resulted in an arguably generous conclusion, it does not mean that it was erroneous in law."

25. In her skeleton argument and oral submissions, Ms Record set out in some detail the findings made by the First-tier Tribunal on which she relies. They are substantially those recited earlier in this judgment. Ms Record submitted that the First-tier Tribunal judge made a number of findings on which he based his conclusion that the separation of the child from his father would be unduly harsh, that those findings were open to him on the evidence, and that an appellate court should not interfere with that conclusion.

26. Ms Record submitted that, if this court concluded that there was an error of law, the right outcome would be to remit the case to the Upper Tribunal. Mr Anderson contended that there was no reason to remit and urged us to follow the same course as in ***PG (Jamaica)***, where this court concluded that the only answer to the issue was that the matters relied on were clearly insufficient to enable a judge properly to conclude that the effect of the respondent's deportation would be unduly harsh for either his children or his partner.

27. I accept that, where a tribunal has applied the correct legal test, and reached a conclusion that, in the light of subsequent clarification of the law as to the interpretation of the "unduly harsh" requirement, may appear generous, it does not follow that the tribunal has erred in law. The difficulty in this case, however, is that the First-tier Tribunal applied a test which, as the Supreme Court has now confirmed, was wrong in law.

28. As Lord Carnwath noted in ***KO (Nigeria)***, the terms of Exception 2 in s.117C(5) do not require a balancing of the relative levels of severity of the offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. In this case, however, the First-tier Tribunal judge took into account what he concluded to be the respondent's "low risk of reoffending". This conclusion was based on an analysis of the circumstances in which the respondent had committed the offences, the OASys assessment of the risk he posed to the public, and his level of remorse. He attached significant weight to the comments of the sentencing judge to the effect that, had the respondent committed only one offence instead of three, he might have avoided a custodial sentence altogether, and what he inferred to be the sentencing judge's underlying conclusions about the respondent's character and potential for rehabilitation. The importance of this factor in the First-tier Tribunal's decision was underlined by the observations of the Upper Tribunal judge in dismissing first appeal.

29. In my judgment, in taking these matters into consideration, the First-tier Tribunal judge was balancing the relative levels of severity of the offences. It follows that both the First-tier Tribunal and the Upper Tribunal were applying the wrong test and making an error of law. For that reason alone, it follows that the decision cannot stand.

30. Furthermore, and with respect to the First-tier Tribunal judge, I consider that his conclusion on the evidence about the respondent's family that his deportation would be unduly harsh is unsustainable in the light of Lord Carnwath's analysis of the proper interpretation of Exception 2 in s.117C(5), namely that:

> "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."

Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children

deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.

31. For those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what Parliament has decided, and it is important to bear in mind the observations of Hickinbottom LJ in *PG (Jamaica)* at paragraph 46:

> "When a parent is deported, 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 the 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 the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of ECHR. It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

32. I therefore conclude that the First-tier Tribunal was wrong to conclude that it would be unduly harsh for the respondent's son to grow up in the UK without him. Given his conclusion that, if the respondent's partner's case was considered in isolation, he could not find that it would be unduly harsh to expect her to live here without the respondent, and that the conclusions about her were subsumed within those reached about her son, it follows that Exception 2 was not satisfied in this case.

33. In my judgment, there is no need to remit this case. Like the Court of Appeal in *PG (Jamaica)*, I have reached the conclusion that there is really only one possible outcome. There simply was not the evidence on which a tribunal, properly directed as to the law, could conclude that the deportation of KF would lead to his partner and child suffering a degree of harshness beyond what would necessarily be involved for any part of child of a foreign criminal facing deportation. As in that case, the evidence does not provide a basis upon which KF could establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules, and accordingly under s.117C(3) the public interest requires that he be deported.

34. I would therefore allow this appeal and restore the deportation order.

THE SENIOR PRESIDENT OF TRIBUNALS

35. I agree.