Neutral Citation Number: [2021] EWCA Civ 1711
Case No: C5/2020/2067

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
Mr Justice Chamberlain
(Sitting as a Judge of the Upper Tribunal)
Upper Tribunal Judge O'Callaghan
HU/06608/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2021

Before:
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ASPLIN
and
LADY JUSTICE SIMLER

- -

Between:

MI (PAKISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Michael Biggs and Zeeshan Raza (instructed by **Marks and Marks Solicitors**) for the Appellant
Émilie Pottle (instructed by **Government Legal Department**) for the Respondent

Hearing date: 4 November 2021

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Approved Judgment

Lady Justice Simler:

Introduction

1. Muhammad Imran is a national of Pakistan who, because of his conviction of assault causing actual bodily harm and sentence of 18 months' imprisonment, was made subject to a deportation order. The Secretary of State for the Home Department (referred to below as "the SSHD") rejected his claim that deportation would be "unduly harsh" and incompatible with his and his family's rights under article 8 of the European Convention on Human Rights ("the Convention"). Mr Imran appealed successfully against the deportation order to the First-tier Tribunal ("the FTT") but the Upper Tribunal ("the UT") allowed the SSHD's subsequent appeal, finding that the FTT erred in law. The UT remade the decision on the basis of the facts found by the FTT, concluding that deportation would not be "unduly harsh" within the meaning of section 117C of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") having regard to the facts and circumstances of this particular case. This case accordingly raises again the question of how the "unduly harsh" test may properly be fulfilled, revisiting the authoritative decisions in *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 WLR 5273 ("*KO (Nigeria)*") and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 117; [2021] 1 WLR 1327 ("*HA (Iraq)").*

2. Mr Imran's appeal contends (among other things) that the facts found by the FTT in relation to his children were capable of fulfilling the "unduly harsh" test such that there was no identifiable error of law by the FTT and the UT was not entitled to substitute its own decision.

3. The appeal is resisted by the SSHD; and she seeks in the alternative to rely on a respondent's notice that contends (among other things) that *HA (Iraq)* was wrongly decided and the correct test was that set out by Lord Carnwath in *KO (Nigeria).* On her behalf, Ms Pottle invited us to consider as a preliminary matter whether this court regarded itself as bound by *HA (Iraq*). If that was our provisional view, she indicated that she would not seek to persuade us to depart from *HA (Iraq)*, which is in any event awaiting determination of an application for permission to appeal to the Supreme Court. Having considered that question the court indicated that was indeed our view unless persuaded otherwise, and the appeal proceeded on the basis that *HA (Iraq)* is binding on us.

4. Accordingly, the central issue for determination is whether the FTT erred in law (as the UT found) in its application of the "unduly harsh" test to the facts of this case.

The factual background

5. Mr Imran was born in Pakistan on 16 April 1983. He came to the UK on 5 September 2010 with leave to enter valid until 10 November 2012 as the spouse of Ms Naila Ilyas, a British citizen (the couple having married in Pakistan on 24 February 2010). He was granted indefinite leave to remain as Ms Ilyas's spouse on 14 February 2013.

6. The couple now have four children (though their fourth child was born after the UT's decision). The children were born on 4 June 2011, 28 August 2013, 18 November 2014, and 17 April 2020.

7. On 23 September 2018 Mr Imran was convicted of assault occasioning actual bodily harm. He was sentenced on 16 October 2018. According to the judge's sentencing remarks, Mr Imran was the instigator of the assault, which took place against the background of a family dispute. He lured the victim to where he was attacked, threw the first blows, and took the leading role. The victim suffered "a comprehensive beating" and injuries all over his body and head, including significant multiple facial injuries. The judge noted that Mr Imran had pleaded "not guilty," and commented that his claim of self-defence was a lie. Mr Imran was still in denial, and according to his pre-sentence report, there was a clear attempt to continue to lay blame on the victim and "little victim empathy." The judge passed a sentence of 18 months' imprisonment, and a restraining order was imposed.

8. The sentence meant that Mr Imran met the definition of a "foreign criminal" within section 32(1) of the UK Borders Act 2007, triggering the duty pursuant to section 32(4) of that Act to make a deportation order unless the exceptions in section 33 applied, namely that removal would breach a person's Convention rights.

9. By a notice dated 25 October 2018, the SSHD notified Mr Imran of her intention to make a deportation order. It appears that Mr Imran did not respond, or did not do so in time, and on 14 January 2019 a deportation order was signed. Representations dated 21 December 2018 but not received by the SSHD until 31 January 2019 (and not seen by this court) were made on Mr Imran's behalf contending that his deportation would breach his rights under article 8 of the Convention.

10. By a letter dated 28 March 2019, the SSHD refused this claim. The letter provided detailed reasons why the SSHD did not accept that it would be unduly harsh for the couple's children to accompany him to Pakistan or to remain in the UK in his wife's sole care if he was deported. This decision was appealable pursuant to section 82(1)(b) of the 2002 Act.

11. Mr Imran appealed to the FTT. There was a hearing before FTT Judge Talbot on 7 October 2019, at which Mr Imran and his wife gave evidence and were cross-examined. At that time, their children were aged eight, six and four. The judge allowed the appeal by a written decision dated 21 October 2019, holding that his deportation would disproportionately interfere with the rights to family life of Mr Imran and his children.

The legal framework

12. Section 32(4) of the UK Borders Act 2007 provides that the deportation of a "foreign criminal", defined as a non UK citizen sentenced to a period of imprisonment of at least 12 months, "is conducive to the public good" and by section 32(5) the SSHD must make a deportation order in respect of foreign criminals. There are exceptions in section 33 of the UK Borders Act 2007, and in particular, at section 33(2)(a), where "removal of the foreign criminal in pursuance of the deportation order would breach … a person's Convention rights".

13. The Immigration Act 2014 introduced sections 117C-117D as Part 5A of the 2002 Act, "expressing the intended balance of relevant factors in direct statutory form" (see *KO (Nigeria)* at [14]). These provisions list the public interest considerations that must be considered by a court or tribunal required to determine whether a person's right to respect for private and family life under article 8 of the Convention is unjustifiably interfered with by the deportation of a foreign criminal: see section 117A of the 2002 Act.

14. Section 117C is the relevant provision for the purposes of this appeal. It 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.
>
> (4) Exception 1 applies where (a) C has been unlawfully resident in the United Kingdom for most of C's life (b) C is socially and culturally integrated in the United Kingdom, and (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

For these purposes, "qualifying child" means a person who is under the age of 18 and who is a British citizen or lived in the UK continuously for seven years or more: section 117D (1). There is no dispute that Mr Imran's children were all qualifying children.

15. This appeal concerns Exception 2 only; and there is no dispute that Mr Imran has a genuine and subsisting relationship with a qualifying partner (his British wife), and a genuine and subsisting parental relationship with his qualifying children. The only issue was (and remains) whether the effect of his deportation on any of them would be "unduly harsh" within the meaning of section 117C (5).

16. The effect of section 117C is substantially reproduced in paragraphs 398-399 of the Immigration Rules, though in more detail. The governing paragraph, paragraph 398, identifies three categories of foreign criminal – described in *HA (Iraq)* by Underhill LJ as serious offenders, medium offenders and other qualifying offenders (being those

whose offending has caused serious harm or has been persistent). Muhammad Imran is a medium and not a serious offender.

17. Paragraph 399, which contains the equivalent to Exception 2, is described as applying as follows:

> "399 This paragraph … 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 seven 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 …"

In other words, Exception 2 has two elements. There must be a genuine and subsisting parental relationship with a relevant child; and it must be shown that deportation would be unduly harsh both for the child to move with the deportee to live in the country to which the person is to be deported (described in the authorities as the "go scenario"); and to remain in the UK without the person who is to be deported (the "stay scenario").

18. As already indicated, the meaning and application of the "unduly harsh" test in section 117C (5) of the 2002 Act was considered authoritatively by the Supreme Court in *KO (Nigeria)* and by this court in *HA (Iraq).* In *KO (Nigeria)* at [23], Lord Carnwath addressed the "unduly harsh" test in the context of considering whether the seriousness of the parent's offending should be weighed as part of the assessment, as follows:

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction

> drawn by the section itself by reference to length of sentence. Nor … 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."

19. At [27] Lord Carnwath also endorsed guidance given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] INLR 563 as to the meaning of the words "unduly harsh", referring to their description of the "evaluative assessment" required of the tribunal in the following terms:

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

20. The "unduly harsh" test was considered again by this court in *HA (Iraq)*. In relation to the Supreme Court's decision in *KO (Nigeria)* Underhill LJ made a number of important observations with which I respectfully agree.

21. First, he said that Lord Carnwath's reference to "*a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*" could not be read entirely literally since it was difficult to see how one would define the level of harshness that would "*necessarily*" be suffered by "*any*" child: see [44]. I agree. The cohort of children encompassed by this provision will all have a genuine and subsisting relationship with the parent in question but there will inevitably be a spectrum of infinitely differing relationships within that cohort. For example, as Underhill LJ said, the deportee parent might be living separately from the children (while still retaining a genuine and subsisting relationship with them), the child might be on the verge of leaving (or have left) the family home, or there might be a baby who does not know the parent. It simply cannot be assumed that the majority have a close bond with the deportee parent or that there is some objectively identifiable standard of closeness (reflecting an "ordinary degree of closeness") against which comparison might be made. As Peter Jackson LJ put it in his supporting judgment in *HA (Iraq)* at [157]:

> "For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent whose face-to-face contact cannot continue may be akin to a bereavement."

22. Instead, Underhill LJ held at [44], the underlying concept is

> "of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category"

(i.e. those sentenced to a period of imprisonment of more than 12 months but less than four years)

23. 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. The question for the fact-finding tribunal is whether the harshness which deportation will cause for the children is of a sufficiently enhanced degree to outweigh that public interest – the essential point being that "*the criterion of undue harshness sets a bar which is "elevated" and carries a "much stronger emphasis" than mere undesirability*": see [51].

24. Secondly, and plainly in light of the statutory provisions, "*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 …. and the (very high) level applying to serious offenders*": see [52]. Plainly, the threshold for medium offenders is not as stringent as that imposed by the "*very compelling circumstances*" test which applies to serious offenders: see [53].

25. Thirdly, as Underhill LJ explained:

> "There is no reason in principle why cases of "undue" harshness may not occur quite commonly … 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"."

Because it is not possible to identify a baseline of normal or ordinary harm endured by a child in consequence of a parent's deportation against which to assess whether there is an enhanced level of harshness involved in a particular parent's deportation, and because such generalised comparisons may be dangerous, the decision maker should instead focus on the reality of the child's actual situation. By way of example, as Underhill LJ explained, factors that *might* affect the analysis include the child's age, whether the parent lives with the child, the degree of emotional and/or financial dependence, the availability of emotional and financial support from a remaining parent and/or other family members, the practicability of maintaining a relationship with the deported parent, and all the individual characteristics of the child (see [56]). I emphasise the word *might* because it would plainly be wrong to infer that a decision that does not address each of these factors is necessarily deficient. Given the infinitely variable range of circumstances that might apply in any given case, no universally applicable factors can be identified, and the weight of a particular factor in a particular case will be affected by the individual circumstances. In her respondent's notice in this case the SSHD challenges as perverse the FTT's asserted failure to have regard to a number of the factors identified by Underhill LJ. But as he explained at [57], a fact-finding tribunal will make no error of law if a careful evaluation of the likely effect of the parent's deportation on the particular child is conducted and a decision is then made as to whether that effect is not merely harsh but unduly harsh, applying *KO (Nigeria)* in accordance with the guidance in *HA (Iraq).*

26. Fourthly, as Peter Jackson LJ emphasised, in considering harm, "*there is no hierarchy as between physical and non-physical harm*" (see [159]) and there can be no justification for treating emotional harm as intrinsically less significant than physical

or other harm. A failure to appreciate this is likely to result in a failure to focus on the effect of a parent's deportation on the particular child.

27. Finally, referring to a number of earlier decisions of this court that followed *KO (Nigeria)*, including *PG (Jamaica) v SSHD* [2019] EWCA Civ 1213 and *KF (Nigeria)* [2019] EWCA Civ 2051, Underhill LJ found nothing in any of them inconsistent with what he had said in *HA (Iraq)*, in particular as summarised above: see [61].

The FTT decision

28. The FTT carefully summarised the oral and written evidence received from Mr Imran, his wife and sister-in-law at [6] to [19]. The FTT made clear at [27] that there was no challenge to the credibility of the oral evidence, and that reflected the judge's own assessment of their evidence which was honest and straightforward, in particular, as to the nature and quality of their family life in the UK; and the circumstances that would face the family in Pakistan. He analysed the Hampshire Children's Services report commissioned by the SSHD at [28]. This explained in relation to the impact of separation that Mr Imran played the main parental role to the children; that the children were emotionally affected by his absence when in prison to the extent that they needed and received support for their emotional wellbeing; and that their schooling was also affected.

29. The FTT found in light of all the evidence that "*there can be no doubt that the Appellant has a genuine and subsisting parental relationship with his three British children*": [28].

30. At [29] the judge directed himself in accordance with *KO (Nigeria)* stating that it was necessary to look "*for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*".

31. At [30-32] the FTT applied the "unduly harsh" test to this particular case, and drew the following conclusions:

> "30. … There is evidence that this Appellant has had a particularly close relationship with his three young children and that prior to his imprisonment he may have actually had more contact with them than the children's mother. There is clear evidence that there are strong and reciprocal emotional ties between him and the children, perhaps stronger than in many families where the father traditionally has less contact than the children's mother. There is clear evidence that the children suffered emotionally from their father's absence when he was in prison as well as suffering indirectly from the increased stress (financial and emotional) put on their mother and the enforced move to new and smaller accommodation. I accept the evidence from the family that the children have been noticeably happier and more emotionally stable since their father left prison and returned to the family household. On the basis of the evidence before me, I am satisfied that if the Appellant were deported to Pakistan and the children and their mother remain in the UK, the

> consequences for the children would meet the high threshold of the 'unduly harsh' test.
>
> 31. I must also consider the likely consequences if the whole family were to relocate with the Appellant to Pakistan. The following factors are relevant to this assessment. Firstly, all three children were born in the UK and, although still young, have a very established life in the UK, involving not only their school/nursery and their friendships but also their close relationship with a large extended family on their mother's side who live nearby and form an important part of their lives. An enforced move to Pakistan would undoubtedly be deleterious for them on a number of levels. Firstly, there would be disruption to their education (albeit not as critical as for older children) given that their lack of fluency in Urdu or other local languages and the differing standard and nature of the education system in Pakistan. They would suffer also from the financial difficulties that would face their parents, who are likely to have difficulties in finding suitable employment and accommodation and would have very limited support available to them from family members in Pakistan. Finally I accept the very insecure political and security situation that prevails in the Appellant's home area of Azad Kashmir, as confirmed in the background evidence presented to me. Whilst the risks of serious harm do not reach the Article 3 or 'humanitarian protection' threshold, the general insecurity in Kashmir would undoubtedly have some adverse impact on the stability of life for the children. The family could choose to live in another less insecure part of Pakistan, but it appears that the local connections of both parents are with Kashmir and the practical and economic difficulties of establishing a life in another part of the country without any local connections would be considerable.
>
> 32. Taking all these factors into account and bearing in mind the high threshold relevant to my assessment, I am satisfied that it would in fact be unduly harsh for the Appellant's children both in terms of their remaining in the UK without their father and in terms of their relocating with their parents to Pakistan. The paragraph 399(a) criteria are therefore met. So far as 399(b) is concerned, it is clear to me from the evidence that the Appellant has a genuine and subsisting relationship with his wife and I am satisfied that their relationship was formed at a time when the Appellant was in the UK lawfully. It is less clear to me whether the 'unduly harsh' test could be met with regard to the relationship with his wife, particularly with regard to the 'insurmountable obstacles' test that must be overcome in relation to 399(b)(ii)."

Accordingly, the FTT concluded that the SSHD's decision to deport Mr Imran violated his Convention rights and allowed the appeal.

The Upper Tribunal's decision

32. There were four grounds of appeal advanced by the SSHD on appeal to the UT. The first ground contended that the FTT failed to identify how the case met the "unduly harsh" threshold. The SSHD submitted that the matters set out by the FTT at [30] did not go beyond the "inevitable effects" of deportation and so did not provide a proper evidential basis for concluding that the test was met. At [25] the UT paid tribute to the care taken by the FTT in this decision, continuing:

> "25. … The reasons he gave indicate an impressively meticulous approach to the assessment of the documentary materials and the oral evidence before him. The discussion at [29] makes clear that he correctly directed himself that the test to be applied was an exacting one. The reasons at [30] explain why he reached the conclusion that the test was satisfied."

The UT recognised that it would be a rare case in which it would be appropriate to interfere with a decision of the FTT where *"(i) it is clear that the correct test has been applied and (ii) the reasons properly explain the factors which led the tribunal to conclude that it was satisfied*." Nonetheless, rare though such cases might be, the UT stated that where on the facts found by the first instance decision-maker, it was not open to him or her to conclude that the test was satisfied, that would be such a case. *PG (Jamaica)* v *SSHD* (referred to by the UT as "*PG*") was described as such a case.

33. At [27] the UT held:

> "27. The judge did not refer to *PG*. That itself may not be surprising, as the judgment in *PG* was handed down on 11 July 2019 and the decision under challenge here was dated 21 October 2019. There is no indication that *PG* was cited to the judge by either side. We, however, must apply the ratio of that judgment. In order to identify that ratio, we have set out above, in some detail, the facts of the case. In the light of those facts, we consider that *PG* is authority for the proposition that the 'unduly harsh' test will not be satisfied in a case where a child has two parents by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and (therefore) of the emotional harm that would be likely to flow from separation. We emphasise the words 'without more' in the foregoing formulation. It would not be sensible to attempt to set out in advance the kind of factors whose presence would support a conclusion that the test was met. It will remain important to consider carefully the facts of each individual case."

34. In applying the proposition extracted from *PG*, the UT went on to hold that although the factors set out at [30] of the FTT's decision were evidence of "*strong reciprocal ties between [Mr Imran] and the children*", indeed stronger in this case than in many others, this did not serve "*materially to distinguish this case from PG where there was*

also an express finding that the father played an important part in the children's lives": [28].

35. Further, the UT accepted there was a proper basis for concluding that the children would suffer emotionally if Mr Imran were deported, and that the fact that they received emotional support at school while he was away in prison was concrete evidence of the effect of separation on them: see [29]. Moreover, although:

> "29. … there was a firmer evidential basis than in *PG* for the conclusion that emotional harm was likely to be suffered, the harm in question was not in our view qualitatively different from that in *PG*. There was for example, no evidence that it would rise to the level of causing any diagnosable psychiatric injury".

36. Nor in the light of its understanding of *PG (Jamaica)* and *KF (Nigeria),* did the UT consider that the finding that Mr Imran's imprisonment resulted in "*increased stress (financial and emotional) on [the children's] mother*" was capable, even when considered with the likely emotional harm to the children, of supporting a finding that deportation would be "unduly harsh": [30]. Accordingly, and in the light of the approach taken in *PG* and *KF*, the UT concluded that this was one of the rare cases where, despite the careful reasons given by the judge, it was not rationally open to him to conclude that the "unduly harsh" test was met. His decision that it was met was, therefore, a material error of law (see [31]).

37. At [32] the UT explained:

> "32. We have considered whether it is necessary to make further findings of fact. As we have said, we detect no flaw in the findings the judge made. We were referred by Mr Raza to the key parts of the underlying materials and we cannot identify any other relevant finding that the judge could have made in Mr Imran's favour. It is not therefore necessary or appropriate to remit the case to the First-tier Tribunal or to direct a further hearing in this Tribunal. Given the law as declared by the Court of Appeal in *PG* and *KF*, there is only one decision open: the effect of Mr Imran's deportation on his partner and children (assuming that they remain in the UK without him) would not be 'unduly harsh'. Neither of the exceptions in section 117C applies. We shall therefore remake the decision, dismissing the human rights appeal."

38. The UT did not consider it necessary to determine the remaining grounds in light of its conclusion on the first ground of appeal, but indicated that it was doubtful these grounds would have succeeded had the first ground failed.

The appeal

39. On behalf of Mr Imran, Mr Biggs submitted that the specific facts and circumstances of this case amply entitled the FTT to reach the conclusion that the effect of Mr Imran's deportation would be unduly harsh on his children. Therefore, the UT was incorrect to find an error of law and its decision should be set aside. He submitted that the test

formulated by the UT at [27] is wrong and inconsistent with the detailed and authoritative analysis and guidance given by *HA (Iraq).* In the light of that guidance there is no good reason why the two matters identified by the UT at [27] could not in a suitable case justify the conclusion that section 117C (5) of the 2002 Act is satisfied.

40. Mr Biggs submitted that a holistic assessment of the facts of the case was required to determine whether or not undue harshness would follow from Mr Imran's removal. This requirement was first emphasised in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 at [10], *"there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment"*; and was underscored in *HA (Iraq).*

41. He submitted that the FTT had due regard to all relevant factors and conducted a careful evaluative assessment on the basis of its findings of fact that were supported by the evidence. The FTT was best placed to make this assessment having seen and heard the evidence. It is an expert tribunal and its findings of fact should be respected, and the evaluative nature of its task mean that appellate courts should be slow to interfere. As Lord Hoffmann said in *Biogen Inc v Medeva Plc* [1996] UKHL 18, [1997] RPC 1 at [54]:

> "Where the application of a legal standard … involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

By contrast, he submitted that the UT's analysis was wrong and incomplete. At [29] the UT's reasoning appears to go so far as to exclude evidence of emotional impact as immaterial. At [30] the UT considered the FTT's finding that separation from Mr Imran put "increased stress (financial and emotional)… on [the children's] mother" but held that this "increased stress" was not "capable on its own or taken together with the likely emotional harm to the children, of supporting a finding that deportation would be 'unduly harsh'". He submitted that the UT failed to explain why this "increased stress" could not satisfy its "without more" proviso at [27]. In any event, read as a whole and having regard to all the findings made by the FTT, its reasoning plainly went beyond a recognition of mere "increased" emotional and financial "stress" on the children's mother. The UT's reasoning failed to address this and provided no rational basis for concluding that the "unduly harsh" conclusion was not sustained by the FTT's findings and the evidence in this particular case.

42. As to the respondent's notice, he did not accept the contention that in the light of *HA (Iraq)* at [56] the FTT erred by failing to take into account all relevant factors. However, if that is not correct, the implication must be that the UT was not entitled to remake the decision without further, fuller consideration of the facts. This was not a case where only one conclusion was possible on this basis, and the case would have to be remitted.

43. For the SSHD Ms Pottle proceeded, in light of the court's indication, on the basis that *HA (Iraq)* is binding at this level, but reserved her position to argue in the Supreme Court that it was wrongly decided and that the tests set out in *KO (Nigeria)* and *PG (Jamaica)* are correct.

44. In her submission in any event, *PG (Jamaica)* and *KO (Nigeria)* remain good law because *HA (Iraq)* did not find anything inconsistent in its analysis of the phrase "unduly harsh" and those cases, and did not explicitly depart from those cases. Rather, these cases all confirm that a detailed and fact-sensitive enquiry must take place to determine whether the effect of separation on the child would be unduly harsh. She accepted that the FTT gave itself a correct self-direction in law, and that there was some evidence before the FTT of a close relationship between the children and their father. However, and expressly acknowledging that this was a bold submission to make, she submitted that the factual findings made by the FTT could not justify a finding of undue harshness in the event of deportation in this case. In comparison to the level of detail in the examination of the evidence conducted by the FTT in *PG (Jamaica)*, there was scant analysis of the particular circumstances of this family.

45. Ms Pottle submitted that the UT's formulation of the ratio in *PG (Jamaica)* at [27] is correct. While expressly recognising that further explication of the test might have been unwise, she emphasised the importance of the words "without more" as the significant qualifier in this test. It highlights that there are other distinct factors that must be considered in addition to evidence of the particular importance of one parent in the lives of the children and of their emotional dependence on that parent leading to likely emotional harm on separation. Here, the FTT's analysis focussed on the close relationship between the children and their father to the exclusion of other relevant factors including the support available from the wider extended family, the maternal aunt and others.

46. In any event, she submitted that even if this court considers that the UT's distillation of *PG (Jamaica)* at [27] was wrong, it does not follow that the UT erred in its final assessment. The UT is itself a specialist tribunal entitled to respect. The FTT was bound to have regard to the many factors set out in *HA (Iraq)* at [51]. In particular there was evidence that the extended family live nearby and Ms Ilyas can rely on them for support, but this did not feature in the FTT's analysis. The FTT did not consider or address factors such as the impact on the finances of the family, the practicability of maintaining a relationship or the availability of support from the extended family, all of which might bear on the question of how "harsh" the effect of separation would be. Moreover, each child should have been considered individually: his or her age and particular circumstances should have been considered. On either approach therefore, the FTT's decision cannot stand.

Discussion and analysis

47. I agree with Mr Biggs that there was no error of law or perversity in the FTT's application of the "unduly harsh" test to the facts found in this case, and it follows that the UT was not entitled to substitute its own decision for that of the FTT. As is well established and often repeated, absent an error of law in the decision of the FTT, its decision stands and although the concept of error of law is relatively wide, it does not extend to disagreement by the UT with the FTT's conclusions.

48. It seems to me that there are two ways in which the UT's approach at [27] to [30] of its decision can be characterised as in error. First, in my judgment the legal proposition derived by the UT from *PG (Jamaica*) ("*that the 'unduly harsh' test will not be satisfied in a case where a child has two parents by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and*

(ii) evidence of the emotional dependence of the children on that parent and (therefore) of the emotional harm that would be likely to flow from separation") is inconsistent both with the detailed and authoritative analysis in *HA (Iraq)* summarised above, and perhaps more significantly, with the statutory test. It is the statutory test that must be applied in every case, and not a judicial gloss. The test to be applied in section 117C (5) is not hard-edged, but is an evaluative exercise focussed on the reality of the affected child's particular situation. An inevitably important part of the evaluative exercise is to look at the importance of the deportee parent to the child in question, and at the degree of emotional dependence the child has on that parent. In those circumstances, it is hard to see why the two matters identified by the UT at [27] could not in a suitable case justify the conclusion that the statutory test is satisfied. Further, it is wrong and meaningless to assert as a matter of generality that evidence of these factors can never be enough.

49. The UT's approach must rest, at least in part, on the view that a "normal" or "ordinary" level of harm can be identified in respect of *any* child following the deportation of one of that child's parents, and that this threshold must be exceeded before section 117C (5) can be satisfied. It must be on that basis that the UT considered that the matters identified could not "without more" be sufficient. But there is no baseline of ordinariness, as Underhill LJ observed in *HA (Iraq)*. The approach also appears to rest, again in part at least, on an assumption that emotional harm is intrinsically less significant than other forms of harm. It is otherwise hard to understand why the UT considered potentially enormous emotional harm flowing from the rupture of a particularly close parent/child bond with a high degree of emotional dependence to be insufficient. It is noteworthy in this context that the UT compared the emotional harm in this case with that found in *PG (Jamaica)* and expressed the view that it was not qualitatively different, and that there was "*no evidence that it would rise to the level of causing any diagnosable psychiatric injury*". But as Peter Jackson LJ made clear in *HA (Iraq)*, section 31(9) of the Children Act 1989 defines harm as ill-treatment or the impairment of health or physical, intellectual, emotional, social or behavioural development. There is no requirement for such harm to amount to recognised psychiatric injury before it can be considered relevant to meeting the "unduly harsh" test. Neither underlying premise is consistent with *HA (Iraq)* for the reasons summarised above.

50. The second way of describing the UT's error is that the UT took the factual situation in *PG (Jamaica)* together with the holding that that factual situation did not justify the "unduly harsh" conclusion reached, and elevated it to a legal proposition based on the apparent similarity of the facts of *PG (Jamaica)* when compared with this case. That is legally impermissible. It is dangerous to treat any case as a factual precedent as *HA (Iraq)* made clear (at [129]). In the particular context of an evaluative exercise there is a limit to the value to be obtained from considering how the relevant legal test was applied to the facts of a different (albeit similar) case, especially where there may be questions as to the true level of similarity between the two cases given the almost infinitely variable range of circumstances and subsisting parent/child relationships that might be involved (see *HA (Iraq)* at [56]). Ultimately it is the statutory test itself that matters and that must be applied by the first instance tribunal making its own evaluation of the facts in the case with which it is concerned.

51. Moreover as Baroness Hale PSC said in *MM (Lebanon) v Secretary of State for the Home Department* [2017] 1 WLR 771 at [107]:

> "107. It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2007] Imm AR 57, [40] (per Carnwath LJ):
>
> "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 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.""

52. Nor do I accept, as Ms Pottle submitted, that the UT was nonetheless right to conclude that the FTT's decision was unsustainable on the findings it made and was therefore perverse.

53. Like the UT, I consider the reasons given by the FTT are impressive in the care with which the oral and written evidence was assessed. The FTT conducted a particularly focussed analysis of the role played by Mr Imran in the lives of his children and the extent to which they are dependent on him and likely to be harmed by his absence if deportation takes place. The FTT's reasoning at [30] in relation to the "stay scenario" necessarily reflects a summary of the findings made in the earlier part of the decision, findings that are inevitably "*surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation*" (see *Biogen Inc v Medeva Plc* (above) at [54]).

54. The conclusions reached by the FTT must be read in light of those findings and in that context. With his wife in full-time employment as the primary breadwinner of this close knit family, he was the primary care-giver, taking the children to and from school, preparing their lunches, and well-known to the school and involved in making decisions about their schooling, health and quality of life. His absence from the family was "very disruptive and difficult". His children sorely missed him. There was concrete evidence about the physical, financial and emotional effect his absence had on the children when he was in prison, and the improvements that materialised on his return. For example, the family had to move home to a smaller house because Ms Ilyas was forced to take part-time work, and she was herself very depressed during this time and found it difficult to cope and to manage the children; her sister moved in with them to help.

55. The evidence in the report from Hampshire Children's Services provided independent support for the extent of the impact separation from their father had on the children, both emotionally and educationally, when he was in prison. As the assessors commented, "the children are emotionally affected by their father's absence from the

family home. The children are now receiving support for their emotional wellbeing at school …"

56. Considered in context, it seems to me that the FTT drew inferences (as it was plainly entitled to do) from the evidence of what happened in fact when Mr Imran was in prison, about the likely effect his deportation would have on the welfare of his children, in terms of its financial, emotional and other consequences, for them and the children's mother.

57. Likewise the "go scenario" was closely considered and carefully assessed at [31]. No criticism of that part of the FTT's judgment is advanced on behalf of the SSHD.

58. Looking at the FTT's decision as a whole, it seems to me that the factors identified by the FTT were more than capable of supporting the conclusion that the effect on the children of remaining in the UK without their father met the "unduly harsh" test in this case. That was an evaluative judgement for the FTT. The conclusion of undue harshness was amply open to the FTT on the findings made.

59. Finally, I do not see any merit in the alternative argument advanced by Ms Pottle on behalf of the SSHD by way of respondent's notice. To the contrary, for the reasons just given, the FTT made a detailed and careful assessment of the children's situations. The FTT was well aware of their ages and made findings above the extent of the emotional ties between them and their father and the impact on them of separation. The FTT dealt with the financial consequences of separation when Mr Imran was in prison (see for example, [11]), and was well aware of the wider extended family all living nearby and having a close relationship with the children (see for example, [18]). Having done so at that stage, I do not consider it likely that the FTT left those features out of account when making the assessment of undue hardship.

60. In any event, as I have emphasised above, the factors identified by Underhill LJ in *HA (Iraq)* are factors that *might* affect the analysis in a particular case. But the mere fact that a decision does not address each of these factors does not necessarily lead to the conclusion that the decision is deficient. As Underhill LJ explained at [57], a fact-finding tribunal will make no error of law if a careful evaluation of the likely effect of the parent's deportation on the particular child is conducted and a decision is then made as to whether that effect is not merely harsh but unduly harsh, applying *KO (Nigeria)* in accordance with the guidance in *HA (Iraq).* It seems to me that the FTT conducted the necessary evaluation with particular care and having regard to the correct statutory test. The FTT judge reached a decision that was plainly open to him on the evidence and the factual findings he made.

61. For all these reasons I would allow the appeal, set aside the UT's decision, and restore the decision of the FTT that the consequences of Mr Imran's deportation would be unduly harsh on his children (because it would be unduly harsh for Mr Imran's children to remain in the UK without him and to relocate to Pakistan with their parents) and the public interest in his deportation is accordingly outweighed by the effect on the family life rights of those children.

Lady Justice Asplin

62. I agree.

Lord Justice Underhill

63. I also agree.