Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01792/2013

THE IMMIGRATION ACTS

Heard at Field House
On 4 March 2015

Decision & Reasons Promulgated
On 21 April 2015

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

JL
(ANONYMITY DIRECTION IN FORCE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie, Counsel instructed by Birnberg Pierce & Partners, Solicitors (on 28.4.2014)
Mr N Leskin, Solicitor, Birnberg Pierce & Partners (on 4.3.2015)

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer (on 28.4.2014)
Mr C Avery, Senior Home Office Presenting Officer (on 4.3.2015)

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this

© CROWN COPYRIGHT 2015

order can be punished as a contempt of court. I make this order because my reasons for allowing this appeal concern the welfare of a child, CJ, who was born in 2002 and so is now 13 years old. There is no legitimate public interest in identifying him. In order to preserve anonymity I have redacted the full names of people who gave evidence before me or whose names were given in evidence. This order does not restrict publishing details of the appeal other than those prohibited above.

2. This is an appeal against a decision to refuse to revoke a deportation order. It has been determined unsatisfactorily on an earlier occasion by the First-tier Tribunal and I found that the First-tier Tribunal had erred in law. Subject to minor corrections I set out below and incorporate into this determination my “Reasons For Finding Error Of Law And Setting Aside The First-Tier Tribunal’s Determination” which were sent to the parties on 4 November 2014. The reasons also explain the appeal that is before me including the preliminary view I had taken on certain strands of evidence. However it is a matter of record that the law has changed and I have to decide this appeal not in the light of the Rules in existence when the decision complained of was made but in the light of the Rules and Act applicable now.

3. Although I had received written submissions about the effect of paragraph 399A(a) as it was when I first heard the appeal I have not had any argument about the effect of the rule 399A in its present, amended, form. Mr Leskin said that the appellant “does qualify under the rules as they are now”. This is a reference to the appellant having been lawfully resident in the United Kingdom for most of his life (just). He is clearly socially and culturally integrated into the United Kingdom but I do not accept that there are “very significant obstacles to his integration” into Angola. The finding of the First-tier Tribunal at paragraph 41 that the appellant attended a church that had strong links to Angola is factually sound even though I do no accept that it can be described properly as a “tie”. It is part of the appellant’s case that he attends church frequently. The church has links with Angola and these could be used to facilitate his integration into Angola. Paragraph 399A does not apply to this case and so, unless paragraph 399(b) applies, the appellant would have to show very compelling factors before his appeal could be allowed and the evidence before me would not support such a finding.

4. I allow the appeal with reference to paragraph 399(b).

5. I explain my decision for setting aside the decision of the First-tier Tribunal below:

> “1. The appellant is a national of Angola who was born in 1965. He is therefore now 49 years old.
>
> 2. He appealed to the First-tier Tribunal a decision of the Respondent on 19 August 2013 not to revoke a deportation order made against him on 28 July 2010. An earlier appeal against the deportation order was dismissed on 12 October 2010. The First-tier

Tribunal dismissed the present appeal in a determination promulgated on 4 March 2014 and the appellant was given permission to appeal to the Upper Tribunal on 25 March 2014. Essentially the appellant complained that the First-tier Tribunal had not given proper consideration to the appellant's ties with Angola (if any) and had not made the interests of his children a primary consideration.

3. The appellant has lived in the United Kingdom for over 20 years. If the appellant had established that he has "no ties" with Angola then there would be no need for him to show "exceptional circumstances" before the appeal could be allowed on human rights grounds.

4. The Tribunal did not accept that the appellant had no ties with Angola and dismissed the appeal.

5. The Tribunal was unimpressed with oral evidence that the appellant had no ties with Angola. The evidence included evidence from the appellant's children that they had never heard him talk of family members in Angola. The Tribunal discounted that evidence because "they have not lived with the Appellant for over eleven years" (paragraph 28). That reason is perverse. There was unchallenged affidavit evidence that the children lived with the appellant until he went to prison in 2009. Not only is the time period wrong by about 5 years but the value of the children's evidence might reasonably be expected to be greater as they were older than the Tribunal appreciated when they stopped living with their father.

6. I have reminded myself that the Tribunal gave other reasons for its decision but I cannot say that the decision would have been the same if the evidence of the children had been considered properly.

7. It follows that the appeal has to be heard again. I have decided to keep the appeal in the Upper Tribunal. One of my reasons for this decision is that it is likely to lead to the appeal being decided more quickly than would be possible if the case went to the First-tier.

8. I will hear argument at the resumed hearing about what findings, if any, can be preserved. My preliminary views are set out below.

9. The findings at paragraph 26 and 27 about Mr D appear to be sound and should be followed.

10. Paragraphs 29-39 are not tainted by error and should be followed. I do not agree that the appellant's possible future Church connections with Angola amount to a "tie" but they are, potentially, relevant to the balancing exercise.

11. The finding that the appellant has not given up drink depends in part on discounting his children's evidence and so needs to be looked at again.

12. Pastor S's evidence is uncontroversial.

13. If either party wishes to rely on further evidence at the resumed hearing it should be served in accordance with the rules.

> 14. For the avoidance of doubt, I am quite satisfied that the Tribunal at paragraph 43 of its determination simply missed out the word 'not'."

6. There were two findings of the First-tier Tribunal which may well have been perfectly sensible on the evidence before it but which are now agreed to be wrong. The first is that Mr D was not in the United Kingdom in October 2010 and so was unable to attend the hearing. He has produced his Angolan passport with appropriate stamps which has satisfied Mr Avery that he *was* out of the country as claimed. There is also further evidence which establishes that the witness, C D N is not a blood relative of the appellant.

7. These are not points that will necessarily assist me very much but they were wrong findings and the parties are entitled to know that they have not been relied upon.

8. As I am remaking the decision I must apply Part 5A (also called Part VA) of the Nationality, Immigration and Asylum Act 2002 which was inserted by section 19 of the Immigration Act 2014 and is effective from 28 July 2014 and Part 13 of the Immigration Rules but particularly paragraph 399 which puts into the Rules the amended requirements of the Act.

9. The relevant part of the Act is in the following terms:

> s117C. 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- (irrelevant)
>
> (5) Exception 2 applies where C has a … genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the … child would be unduly harsh.

10. The relevant part of the rules is in the following terms:

> 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; … and …
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; or

(b) it would be unduly harsh for the child to remain in the UK without the person who is be deported.

11. The Act also makes clear that although these provisions apply to the instant appeal they do not apply to a case where the person to be deported has been sentenced to at least 4 years imprisonment. In that event the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

12. It is for the appellant to prove his case on the balance of probabilities.

13. The appellant gave evidence before me.

14. He adopted an earlier and unsigned statement in my bundle setting out his personal circumstances. It is not necessary to go into them in any great detail. The essential points are that he came to the United Kingdom in 1990 during the civil war in Angola and was joined by his wife and elder son in 1991. He was given indefinite leave to remain in 2001 although he had not been given asylum. His three youngest children were born in the United Kingdom and are British citizens.

15. He had no family remaining in Angola.

16. He worked in the United Kingdom as a cleaner and later did factory jobs and started working in a printing office. He became unemployed when the business was closed and he drifted into bad company and started to drink excessively. He explained frankly how he had started to drink socially and then too much and then became an alcoholic. He very much regretted the irresponsibility he had shown in that time of his life including his criminal offences.

17. I understand from other evidence that the appellant's oldest son, S, has been to prison and the appellant was anxious that CJ did not follow his example.

18. The appellant has separated from his wife but described himself as close to all of his children who he tried to see as often as possible.

19. He lived with his "sister", M and her family.

20. He explained how he kept in regular contact with all of his children. At the time he made his statement he saw his oldest daughter L "almost every day". Typically he met her on her way from university and they had coffee and a snack together. He met his daughter C two or three times a week and spoke to her most days.

21. Typically his son CJ spent the weekend at the appellant's home with M. Usually he would collect CJ from his mother's home on a Friday. They would spend the weekend together and then attend the same church as CJ's mother on Sunday. CJ would return home with her from church.

22. The appellant said that his relationship with his wife had deteriorated and he saw no hope of reconciliation, but they had come to terms with the breakdown of their marriage and were able to be polite and friendly towards each other for the sake of the children.

23. He expressed the view that his drinking was behind him. He now had a different circle of friends and after making serious attempts to reduce his alcohol consumption he had "stopped altogether since July 2013".

24. In answer to questions from me he said he had last consumed alcohol in September 2014. This was an occasion after he made the statement where he said he had not consumed alcohol at all. He said he had had one glass of wine at a party to celebrate the graduation of his daughter, L.

25. He reiterated that he had not resumed excessive alcohol consumption since being detained.

26. He believed that if he had permission to work he could get a job in a restaurant or as a print finisher.

27. He explained in his evidence-in-chief that he now saw his son every day because he collected him from school.

28. He was cross-examined.

29. Mr Avery asked him, predictably but perfectly fairly, why we should believe his protestations to have stopped drinking when there had been other occasions in his life when drink had got him into trouble and his alleged concern for his family did not stop him attracting a fifteen month prison sentence for the incident in 2009. The appellant had no compelling answer to this question. He said he had changed his friends.

30. He was prompted to collect his son from school every day because a boy had been murdered in the area around the school and the school encouraged parents to accompany their children home.

31. It was pointed out to him that in her statement M had said that he did not have the money to buy alcoholic drink. Mr Avery suggested this might have been a contributory factor in his apparent sobriety. The appellant understood but did not accept that suggestion. He pointed out that his daughter did give him some money and he had not returned to drink.

32. The appellant's wife gave evidence before me adopting her statement she had signed on 6 December 2014. Essentially she supported the appellant's evidence in all material respects, particularly about the circumstances and occasions in which he saw their son CJ. She said that the school would sometimes ask directly to speak to the appellant rather than her and she would certainly involve the appellant if CJ was misbehaving.

33. She was pressed and said that as far as she was aware the appellant no longer drank alcoholic drinks. She made it plain that she knew him well enough to know how he behaved when he was drinking and she had not seen him behave in that way. Rather he was a changed person.

34. She was cross-examined and dealt satisfactorily with the points put to her.

35. The appellant's daughters L and C also gave evidence in accordance with statements which they adopted. They were not cross-examined.

36. It is particularly significant that they supported the appellant's claim not to have consumed alcohol. L said that although she understood her father had drunk alcohol at her graduation party she had not seen him drink on that occasion. He was certainly not drunk.

37. I have considered the documents that were before the First-tier Tribunal. I have read the sentencing remarks of Her Honour Judge W Joseph when she sentenced the appellant to a total of fifteen months' imprisonment for offences involving trying deceitfully to obtain money from a bank. I note Mr Avery's observation that this was not a drink-related offence in the way that his other criminal behaviour might reasonably be seen to be.

38. I particularly note the supporting statement of M which supports the appellant's claim about where he lives and how CJ spends the weekends with him.

39. There is a statement from CJ. My copy is not signed but it is similar to an affidavit that is in the papers.

40. Of much more assistance to me although it is appropriate to have a short statement from the child in his circumstances, is the report of Alison Cantle dated 3 February 2015.

41. I note as well there is a report from Judith Jones described as an independent social worker dated 24 June 2013. That is not hugely different in substance but it predated Ms Cantle's evidence. The more recent report has given me the greatest assistance.

42. Ms Cantle holds a degree of Bachelor or Arts and Master of Psychoanalytic Psychotherapy. She described herself as a Child and Adolescent Psychotherapist with more than twelve years experience. She works in the Child and Adolescent Mental Health Service at the Royal Free Hospital NHS Foundation Trust.

43. She had interviewed the child CJ with his mother and sisters L and C and then interviewed the CJ again as well as interviewing the appellant and seeing the appellant and the child together on another occasion. She also had a telephone interview with the head teacher of CJ's school. She had read the papers in the case.

44. Her conclusion from the background papers is that the appellant's marriage was "functioning reasonably well" until the appellant began to drink heavily. The appellant's wife and children were all affected adversely by the appellant's behaviour.

45. In December 2011 the appellant's wife told CJ that he could no longer see his father and this prompted him to leave the family home by climbing from a window and go to stay at his paternal aunt's home where his father then lived. The conditions there were very cramped but not unwholesome and he was allowed to remain. He was at his father's home for about three months during which time his personal hygiene, conduct and school work declined. CJ returned to live with his mother.

46. Ms Cantle described CJ as having "a rather sweet smile and good manners". She said that she "had the impression of a small, emotionally fragile boy". She said that he was "clearly affected by the conversations about the possible loss of his father".

47. She spoke of how the rest of the family commented on the very close relationship between CJ and his father and CJ's mother and sisters were sure that his bad behaviour at school was due to distraction and anxiety about his father being removed.

48. Ms Cantle's enquiries suggested that L had become a major role model for CJ but she was concerned how she could cope in the event of the appellant being deported.

49. The school confirmed that the appellant was listed as the "second contact" after CJ's mother. The schoolteacher, Mr G attributed CJ's improving behaviour to the school's discipline system but agreed that CJ was better when his father intervenes. CJ's academic progress was described as "on target" in certain subjects but below that level in maths and others.

50. She found that all members of the family believe that CJ had an "especially strong attachment to his father". Ms Cantle's report suggested to me that she thought the family could do more to support CJ and adjust to the possibility of his father being removed.

51. Ms Cantle made some obvious but wholly valid observations about the young adolescent boy needing to distance himself from his mother and follow a wholesome male role model. His brother, S, is not in a suitable position to be a candidate because of his own criminal behaviour. Ms Cantle said: "If [the appellant] is deported CJ will lose his only male role model and will be left, as the baby boy of the family, in an otherwise all female household."

52. She then referred to academic reports supporting the wholly unremarkable conclusion that boys who live without their fathers are more likely to exhibit antisocial behaviour or criminal activity, to be depressed and to

behave badly. She thought it would be extremely harsh for the appellant to be deported.

53. Certain things are reasonably clear from this evidence. Firstly I accept that the appellant has faced up to the highly adverse impact on his life made by his excessive consumption of alcoholic drink and he has responded to that firstly by cutting back his consumption and then by almost completely abstaining from drinking alcohol.

54. I make this finding not just on the appellant’s say so but because the claim is supported by those who know him and see him frequently. The sister with whom he lives, his wife and grown-up children all commented on how his behaviour has improved because he is not drinking.

55. Whilst I do not criticise Mr Avery for making the point that the appellant is short of money and so it must be harder for him to finance drinking spells, I also remind myself that an addiction makes big demands on a person. Indeed one of the reasons that alcoholism is such a dreadful condition is that addicts will find money for drink before they will find money for their basic needs.

56. I was concerned that the appellant still regarded the consumption of intoxicants as an acceptable way of celebrating and therefore that he thought it somehow appropriate to drink alcohol on the occasion of his daughter’s graduation. In some ways his evidence about that was impressive. His daughter’s graduation represented the only academic success of any significance in living memory in the appellant’s family and he was, appropriately, proud of her. I accept that although he did take alcohol on that occasion he limited himself to one drink. Very often a person who has a craving for alcohol cannot content himself with one drink and it may have been that giving into the temptation to drink on that occasion would have led to a drunken episode. The evidence is clear that it did not. Fighting addiction is not easy and many people who are able to give up for a while then relapse with adverse consequences.

57. Further, his wife gave no indication whatsoever of cherishing hopes of rekindling their relationship and I was very much of the view that she has established a polite relationship with the appellant for the sake of CJ. It is desirable that parents who are unable to live together as husband and wife preserve a good relationship. Generally this is in the best interests of the child or children. However I saw nothing in his wife’s evidence to make me think she would do anything to exaggerate or describe falsely the appellant’s abstinence.

58. I recognise that addicts can sometimes produce favourable reports from support organisations to confirm their claims to have given up something that was bad for them. However anyone who breaks an addiction ultimately does so because he or she has decided so do to. I must not disbelieve the appellant’s claim to have given up drink because it is not

confirmed by an alcoholics' support organisation when his claim is supported rather than undermined by other evidence.

59. I can only act on the evidence before me. The evidence is that the appellant has determined to abstain from alcoholic drink and those who know him and live with him confirmed that is precisely what he has done. Whilst they might be predisposed to look favourably upon him I have no basis for assuming they would lie for him.

60. I am satisfied that the appellant has given up taking alcohol and is unlikely to resume taking alcohol in the reasonably foreseeable future, at least as long as he remains in the United Kingdom.

61. I have looked again at the report of Alison Cantle. I remind myself that this was disclosed to the Secretary of State before the hearing and the respondent did not wish the witness to attend to be cross-examined. Having thus accepted Ms Cantle's evidence it was not open to the respondent to challenge it and there is no reason to think that it should be challenged. It appears to be an honest expression of reasoned and informed expert opinion.

62. It is absolutely clear that CJ suffers from a degree of emotional disturbance. The school have identified him as a boy in need of additional support and he has been referred to an educational psychologist. He has friends at school but has had episodes of bad and disruptive behaviour which resulted in frequent detentions and other bother at school but he seemed to have improved. I note that according to Ms Cantle's report the school does not give enthusiastic support to the appellant's relationship with CJ. The appropriate teacher thought the improvement in CJ's behaviour was the result of the school's disciplinary regime but the school noticed "some change" when the appellant is involved. The school confirmed that the appellant is the second contact and that CJ's mother approved that arrangement. I would have preferred it if the report had assured me that the change was a change for the better but that is the inference I draw from it.

63. It is not possible to know with certainty just what events have influenced CJ's behaviour. Commonsense would suggest that the break-up of his parents' marriage and his father leaving the family home would be disturbing for him as would his father's frequent episodes of excess alcohol consumption and involvement with the criminal justice system. It is however quite clear that CJ has responded badly to these influences and that he is very fond of his father. For example it is quite clear that he did on his own initiative leave his mother's care and go to live with his father even though conditions in the father's home were sufficiently unsatisfactory to warrant the attention, but not the intervention, of social services.

64. It is also plain that estrangement from his father was associated with a period of bad behaviour at school and that the re-emergence of his father

in his life has been coincidental with an improvement in behaviour at school.

65. The appellant's daughters and wife commented favourably on the relationship between the appellant and CJ and their comments were echoed by the expert report. Ms Cantle encouraged discussion and unearthed memories of happy times between CJ and his father which gave independent evidence for the conclusion that their relationship is particularly important.

66. I also note the evidence that boys without fathers are more likely to have antisocial behaviour, to steal, to abuse substances and so on than those who enjoy a good relationship. I am aware too that many children from deeply unpromising backgrounds go on to live exemplary lives and that some children from apparently ideal backgrounds can grow up to do bad things. The fact remains that generally a good relationship with a father is an improving influence. I remind myself of Ms Cantle's conclusion. She said:

> "CJ has an extremely strong attachment to his father [the appellant] who has a more effective and positive influence on his behaviour than anyone else in CJ's life. It would be distressing and unhealthy for any child to "lose" their actively involved father. In CJ's case, given his stage of development, his temperament and his family dynamics I think it would be highly detrimental."

67. Although I have examined the evidence critically and reflected on the points made by Mr Avery I have no basis whatsoever for disagreeing with that conclusion. I do not think that Ms Cantle was engaged in advocacy or hyperbole. CJ's attachment to the appellant is "extremely strong" and the appellant's removal would, in her opinion, be "highly detrimental".

68. I remind myself that the appellant is subject to a deportation order because of his own criminal misbehaviour and it is in the public interest to remove him. I see no need to labour this point. I understand it and fully appreciate that the public interest lies in the appellant being removed. Parliament says so and, in any event, the proposition is unremarkable. The United Kingdom does not need foreign criminals. The question for me is whether, when all the other factors are considered, the public interest in his removal is overridden by other circumstances.

69. Although the appellant has been out of trouble for some time, has given up drink and has other children in the United Kingdom I would not expect these things to tip the balance in favour of allowing the appeal. Although his other children are clearly fond of him they are now adult and their relationship with him does not require particular consideration.

70. I do find that the best interests of CJ lie in the appellant remaining in the United Kingdom to preserve a relationship with his son. I do not see that

there can be any sensible argument about that. The evidence was quite plain that the appellant is an important part of CJ's life.

71. I am also satisfied for the purposes of Section 117C(5) of the Immigration Act 2014 that the appellant has a "genuine and subsisting parental relationship with a qualifying child", CJ. He sees CJ most days, usually every day, and he talks to him if he cannot see him. Virtually every weekend is spent at his father's home. His father is involved with the school. Indeed, and I do not mean this as a facetious comment, many busy fathers still living in a nuclear family would have less to do with a 13 year old boy than this appellant has with CJ.

72. For the purposes of paragraph 399(a)(i)(ii)(a) of HC 395 I am satisfied that it would be unduly harsh for CJ to live in Angola. He is a British citizen engaged in the education system in the United Kingdom and supported by his mother and adult sisters there. They are not going to remove to Angola even if that is permissible. It would be silly to suggest that CJ should remove with his father to Angola and the suggestion was not made.

73. I find that Section 117C(5) of the Nationality, Immigration and Asylum Act 2012 operates in favour of allowing this appeal. This states:

> "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."

74. We know from Section 117C(3) that where Exception 2 applies the public interest does not require the appellant's deportation.

75. I must ask myself what is meant by the phrase "unduly harsh".

76. Mr Avery, appropriately, reminded me of the observation of Sedley LJ in **AD Lee v SSHD [2011] EWCA Civ 348** at paragraph 27:

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does."

77. Mr Avery's point was that the implementation of a deportation order may well have serious consequences but Parliament says that in circumstances such as exist here the public interest is in deportation. The words "unduly harsh" imply that some harshness is due. The harm caused to CJ by the appellant being deported is the natural consequence of a deportation order made in the case of a man with a 13 years old son. It must be assumed that it is the kind of harshness that is deemed to be "due".

78. In short Mr Avery submitted the test of "unduly harsh" is a very high one and is not satisfied by the evidence in this case.

79. Mr Leskin submitted, contrarily, that "unduly harsh" should be understood without reference to the appellant's criminality but solely to the effect that

deportation would have on the child concerned. CJ manifestly does not deserve the disruption to his life that would follow with the consequence of his father's deportation and it would therefore be unduly harsh to remove him.

80. Mr Leskin submitted that Home Office guidance suggesting that the degree of criminality is relevant to determining the meaning of "unduly harsh" was wrong.

81. I cannot agree with Mr Leskin that the degree of criminality is an irrelevant consideration but if I did agree with him then I would find that his contention supported Mr Avery's position, namely that, what ever the offence, the public interest requires deportation unless something quite out of the ordinary existed to support a finding that the predictable harsh consequences were in some way "undue". This is clearly not what Mr Leskin suggested.

82. I agree with Mr Leskin that no harshness is due to CJ. It is not his fault that his father is a criminal.

83. It is clear from the rules that "undue harshness" only becomes relevant if the person to be deported has proved that he has a genuine and subsisting parental relationship. Removing a parent in a genuine and subsisting parental relationship is likely to have a disruptive effect. If Mr Leskin is right and the Act permits consideration only of the effect of deportation on a child it is hard to see why there is a need to show undue harshness too. In the huge majority of cases where there is genuine and subsisting parental relationship removing the parent will have harsh consequences.

84. I remind myself that section 117C(2) of the 2002 Act says, in terms, that "the more serious the offence committed by a foreign criminal, the greater the public interest in deportation of the criminal".

85. The Act also makes it plain that something more than undue harshness is needed to avoid deportation in the case of a person sentenced to at least four year in prison.

86. The scheme of the Act shows that although the deportation of foreign criminals is always in the public interest the public interest does not require (in the sense of need, or insist upon) deportation if the effect of deportation on certain people, in this case a child with whom the appellant has a genuine and subsisting parental relationship, would be "unduly harsh".

87. Neither the Act nor the rules give much guidance on the meaning of "unduly harsh". In the absence of such guidance I find that it is something to be determined by the decision maker in the light of all the evidence but illuminated by the public interest, which is variable having regard to the

seriousness of the crime, by the best interests of the child, which statute requires to be considered, and by the criminal's propensity to reoffend.

88. I reject Mr Avery's contention that, because the ordinary consequences of deportation to a family are harsh they must be assumed to be "due" and something more is needed for them to be unduly harsh. Although this submission was cogent, I find it inconsistent with section 117C(6) which provides that, 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. I must not interpret "unduly harsh" as equating with "very compelling". To do so would nullify section 117C(6) and wrongly blur the distinction between criminals who have been sentenced to less than four years imprisonment and those who have not.

89. I have indicated above my findings on the effect of removal on CJ. They are not unusual. The appellant had the advantage of experienced representatives who had prepared the case properly but nothing emerged that could not have been predicted. Generally children benefit from a supportive relationship with both parents and a boy on the cusp of adolescence generally will benefit particularly from the support of his father. It may be that deportation orders are often not appropriate in cases where children will be affected by removal. Where the criminal has been sentenced to less than 4 years imprisonment I find that all of the evidence must be considered to determine if the effects of removal in a particular case are unduly harsh.

90. Although the appellant's criminal conduct merits deportation I think it unlikely that the appellant will get into trouble again. The respondent is uniquely well placed to know if the appellant has committed further offence and I have not been told of any. He has already kept out of trouble for more than 5 years and he appears to have addressed the issues that led to his offending.

91. Neither the Act nor the rules indicate the relevance, if any, of a criminal's propensity to re-offend. Without in any way going behind the statutory declaration that deportation of foreign criminals is in the public interest it seems to me quite clear that although there is always a public interest in deporting foreign criminals the extent of the public interest must depend on any propensity to reoffend as well as on the crime. Whilst recognising that there may well be intense public revulsion towards an offender who has committed one serious offence even if there is little chance of it being repeated very often the need to deport a person is heightened if there is a likelihood of reoffending.

92. The sentencing bracket of twelve months to four years represents the disposal of quite a wide range of criminality. It is entirely possible that some serious sexual offences and drugs offences could be punished with less than four years' imprisonment and it seems to me perfectly sensible,

and consistent with the statute, to say that the public interest in deporting such a person weighs more heavily than in the case of a less serious criminal who nevertheless should be deported in the public interest.

93. Further the appellant's offending behaviour did not include violence, organised crime, sexual misconduct or other activities that particularly outrage the public.

94. I am satisfied on the totality of the evidence that preserving a relationship with his father is extremely desirable for CJ. I accept that he has come to terms with his parents living apart and has regained equilibrium so he behaves acceptably and works reasonably well with the constant support of his father. I think it likely that if that were removed CJ would be seriously unbalanced again and would misbehave. He may well get into criminal trouble. His older sister would have some positive influence on him. His other sister and mother, although well intended, I think would not. The appellant's absence would have a serious detrimental affect on CJ just as it has done before.

95. I remind myself that if the appellant is removed then, absent extraordinary circumstances, he cannot return to the United Kingdom for at least ten years and there is no reason to assume he would be allowed back after that. Any chance of being a meaningful father for CJ during his adolescence would be completely destroyed.

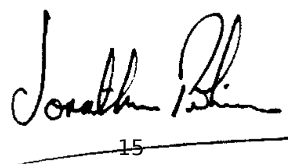
96. His behaviour has put him in a bracket where, although it is in the public interest to deport him, according to Parliament the public interest does not require his removal if he has satisfied me that the consequence would be unduly harsh for his son.

97. It is likely that deporting the appellant would seriously disturb CJ who has already been badly affected by the break up of his parents' marriage. His behaviour is now acceptable. It can be expected to deteriorate again if the appellant leaves. That would be bad in itself but would reflect significant disturbance in CJ's life that would be a harsh consequence of his father's removal.

98. When I remind myself that I do not expect the appellant to get into trouble again, that the offence that led to the decision to deport was committed more than five years ago and was not an offence of a kind that caused public outrage I am persuaded that the likely harsh effects on CJ are more than the facts require. In short they are undue and I allow the appeal.

Notice of Decision

99. I have set aside the decision of the First-tier Tribunal and I allow the appeal. The appellant did not ask for costs and I make no order.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 13 April 2015