Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00815/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18th November 2015	**On 5th January 2016**

Before

UPPER TRIBUNAL JUDGE COKER
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

C S
(Anonymity order made)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms V Easty, counsel, instructed by Duncan Lewis & Co solicitors

DETERMINATION AND REASONS

We make an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of anything that might lead members of the public to identify the parties identified in this decision as CS (Mr S), KMP or E. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. The Secretary of State for the Home Department (SSHD) was granted permission to appeal the decision of the First-tier Tribunal panel which allowed the appeal of Mr S against a decision by the SSHD refusing to revoke the deportation order that was signed on 14th June 2012.

Background

2. Mr S, a citizen of Trinidad and Tobago born on 17th August 1982, arrived in the UK on 17th June 2005 on a two year working holiday visa. He was subsequently granted a five year work permit, his leave to remain expiring in August 2012. On 2 September 2011 he was convicted, after a trial, of assault occasioning actual bodily harm and sentenced to 16 months imprisonment.

3. Mr S was served with the deportation decision dated 14th June 2012 and the deportation order dated 15th June 2012. Although he appealed, his appeal was out of time and, for reasons given in a written decision dated 14th June 2013, time was not extended.

4. On 29th April 2013 Mr S submitted an application for a derivative right to reside in the UK. That application was refused with no right of appeal on 30th January 2014.

5. On 18th October 2013 Mr S applied to revoke the deportation order and for him to be given leave to remain on human rights and compassionate grounds. On 28th March 2014 Mr S sent a letter before action challenging the refusal to grant him a derivative residence card and failing to make a decision on the application to revoke the deportation order. The SSHD took a decision refusing to revoke the deportation order on 17th April 2014, for reasons set out in an accompanying letter.

6. Whilst lawfully in the UK he established a relationship with KMP, a British Citizen, and on 21st February 2009 their child, E, was born. In 2007 KMP had a serious accident and suffers from chronic back pain, fluid retention in her right knee and locking and numbness of her leg.

7. Mr S appealed the decision of 17th April 2014 on general grounds including that if he is deported his British Citizen child would have to leave the UK thus unlawfully and disproportionately depriving him of the benefit of EU citizenship; that paragraphs 399(a) and 399(b) apply; that alternatively there are exceptional circumstances in his case such as outweigh the public interest in deportation and that deportation would be a breach of Article 8 and a breach of his rights under the Charter of Fundamental Rights.

8. The First-tier Tribunal panel found that the deportation of Mr S would not be unduly harsh in its effect on KMP but that the effect on the child would be unduly harsh and thus found that Mr S fell within Exception 2 and allowed the appeal.

Grounds of appeal upon which permission was granted.

9. The SSHD submitted that the First-tier Tribunal had erred in its approach to paragraph 399(a)(i)(a) and (a)(i)(b), had not addressed in particular the public interest factors set out in Part 5A Nationality, Immigration and Asylum Act 2002 and had failed to engage with the pressing public interest in deportation cases and further failed to acknowledge the weight in favour of enforcing a decision to deport.

Relevant law

10. The Immigration Rules relevant to Mr S at the date of the First-tier Tribunal hearing are as follows:

'A398. These rules apply where:

(a) ...

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(a) …

(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; or

(c) …

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) or (c) applies if -

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

(i) the child is a British Citizen; or

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

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

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

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

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

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

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

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.'

11. Part 5A in so far as relevant reads:

'ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

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).

117B Article 8: public interest considerations applicable in all cases

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

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time 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.

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 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 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.

(7) The considerations 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.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who -

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who -

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).'

12. The First-tier tribunal panel, having considered the documentary and oral evidence concluded:

(i) Mr S speaks English fluently and would be less of a burden to tax payers and better able to integrate with such skills;

(ii) Mr S worked when he was able to and, if he is able to find work, will do so in the future;

(iii) His relationship with KMP was formed when he was lawfully in the UK;

(iv) Mr S has not been lawfully in the UK for most of his life;

(v) Mr S has retained ties with Trinidad and Tobago and is in regular contact with his family there;

(vi) Mr S has a genuine and subsisting relationship with KMP, who is a British Citizen;

(vii) He has a genuine and subsisting relationship with their child, E, a British Citizen;

(viii) Mr S has a close relationship with his child and plays a full part in her life;

(ix) During the time Mr S was in prison, KMP struggled to cope with her own life and in caring for their child;

(x) KMP has a number of medical problems: post traumatic stress disorder, depression, chronic back pain, fluid retention of the right knee, urine retention, thoracic scoliosis, "female related" problems, dyslexia,

Vitamin D deficiency. She is engaged in treatment for her 'conditions', attends appointments and takes appropriate medication;

(xi) The medication taken by KMP is available in Trinidad and Tobago and there is support for mental health problems in Trinidad and Tobago;

(xii) KMP said and it was accepted by the First-tier Tribunal that she would not relocate to Trinidad and Tobago;

(xiii) KMP maintained regular contact with Mr S whilst he was in prison, travelling considerable distances to do this;

(xiv) KMP does not have support from her family but she would be able to receive support from Mr S's family in the UK although she would be less willing and able to accept support from them. She would not seek or accept help from her own family. She has close friends nearby who do and would continue to help;

(xv) E is bright, intelligent and settling well at school.

(xvi) KMP is receiving appropriate treatment from healthcare professionals, can access social care to provide her with assistance in daily living, she is sufficiently engaged in her own treatment to ensure she would manage in the absence of Mr S. Although accepted that she would face some deterioration of her condition, particularly her mental health, the difficulties she would face in the event of Mr S's deportation would not be unduly harsh;

(xvii) In the absence of Mr S, KMP would be the primary carer for E and the impact upon E would be unduly harsh if her father were deported: E's anxiety about his absence, separation from a father who has such a practical and important role in her daily life; his presence ensures E's development can proceed so as to ensure her welfare and it is in her best interest that he continues to be present as parent and carer. He has a pivotal role in the child's life;

(xviii) The committed support he provides to his partner to allow her to care for their daughter while managing her health and mental problems result in a finding that his absence would be unduly harsh for the child.

13. Mr S has not sought to appeal the decision of the First-tier Tribunal that it would not be unduly harsh on KMP if he were to be deported.

14. Mr Bramble submitted that although the case law of **MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)** and **KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC)** had not been reported at the date of this decision, the two reported cases informed the interpretation of the Rules and legislation. He relied upon the definition of unduly harsh as set out in **MAB**: *"The consequences for an individual will be "harsh" if they are severe" or "bleak" and they will be "unduly" so if they are 'inordinately' or excessively' harsh taking into account all the circumstances of the individual".*

15. He confirmed that the SSHD's position was that whilst **KMO** adopted the same definition of unduly in so far as it amounted to something over and above harsh, *"…the word "unduly" in the phrase "unduly harsh" requires consideration of*

whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh." Both he and Ms Easty accepted that whether **MAB** or **KMO** was correct, there would be some cases that would fall within both interpretations of "unduly harsh" whereas there would be others that would have succeeded in an appeal under the interpretation of **MAB** but would fail under **KMO**.

16. As a backdrop to his grounds of appeal, Mr Bramble submitted that there was no tension between the wording of s117C (5): *"... the effect of C's deportation on the partner or child would be unduly harsh"* and 399(a)(ii)(a) and (b). He submitted s117C (5) brought the two elements of paragraph 399 together in one phrase – *"effect"*. Ms Easty submitted that this would be to strain the interpretation of the word *"effect"*; the drafting was inadequate and there was a lacuna between the Rules and the Statute. S117C (5) should be read as a requirement to look at the circumstances in terms of the foreign criminal going, not as requiring both aspects namely whether it was unduly harsh for the family either to go with him or stay in the UK without him.

17. Having set out these preliminary matters as the backdrop against which he submitted the First-tier Tribunal decision should be considered, Mr Bramble relied upon three grounds of appeal:

    (i) That the First-tier Tribunal had accepted the refusal of KMP to go to Trinidad and Tobago as a given whereas the panel ought to have considered whether it was unduly harsh for her to leave the UK; there had been no critical analysis of the objective basis for that decision. Without that analysis, he submitted, the decision on the circumstances for the child was flawed. Ms Easty accepted there had been no finding in terms on whether it would be unduly harsh for KMP to leave the UK but submitted that the fact that it was accepted that she would not go did not require further investigation; the First-tier Tribunal was required to consider the position as it was in reality; to consider whether it was unduly harsh for her to relocate to Trinidad and Tobago when she had made clear she would not (and it had been accepted) was to engage in speculation divorced from the reality of the family dynamic. The fact that KMP would not go to Trinidad and Tobago was material and relevant; the reality is that the family were being left in the UK and a reading of the decision as a whole made clear that this would be unduly harsh for the child. She submitted that the whole tenor of the decision when read as a whole – as it should be – made clear that the First-tier Tribunal panel concluded that it would be unduly harsh for KMP and the child to move to Trinidad and Tobago. Ms Easty submitted that the other matters relied upon by the SSHD in this ground were no more than disagreements with the findings of the judge and that the attempt by the SSHD to import the whole of the Article 8 balancing act into the word "unduly" should be rejected.

    (ii) Mr Bramble submitted that the First-tier Tribunal panel had erred in failing to set out the factors within the evidence that resulted in a finding that it would be unduly harsh for the child to remain in the UK without her

father. He drew attention to [51] to [58] of the First-tier Tribunal decision which set out the evidence relied upon by the panel including the report from the Lead Case Worker in Lewisham and the Independent Social Worker and the conclusion reached regarding KMP that she would be able to access social services support in the absence of her partner, that she was housed in appropriate accommodation and was sufficiently engaged with her own medical treatment to ensure she would manage this in the absence of Mr S. The conclusion reached by the panel was that it would not be unduly harsh for KMP to remain in the UK without Mr S. In contrast Mr Bramble submitted that there was no such reasoning employed for the finding that it would be unduly harsh for the child to remain in the UK without her father: there had been no consideration of "unduly", the finding appeared to be based on KMP becoming the primary care for the child, the child was anxious and would be separated from her father who plays such a practical and important role in her life and it was in the child's best interest for her to remain with her father. Mr Bramble submitted that a finding that this amounted to "unduly" harsh was so unreasoned as to be perverse and in any event evinced a lack of adequate reasoning. Ms Easty reiterated that the decision has to be read as a whole and, when taken with the expert reports relied upon, the acceptance that KMP's mental health would deteriorate and that in the absence of Mr S she would have to rely heavily on social services support rendered it unduly harsh. She submitted that "unduly" meant unusual. She compared the facts of **MAB** where the appellant was unsuccessful because the impact on the family was no more than the ordinary impact of a family splitting whereas the facts in this case were that significant levels of social services, publicly paid services would be required to support KMP in looking after the child.

(iii) Finally Mr Bramble submitted that there had been a failure by the First-tier Tribunal panel to take into account the pressing nature of the public interest in the deportation of Mr S, failed to adequately engage with his offending behaviour and failed to consider this through the lens of s117C(1) and (2). The assessment of the public interest must be in all of the findings and this was, he submitted lacking. [45] of the First-tier Tribunal panel decision which states:

> "We note the seriousness of the violent crime that he committed. We take into account his explanation that the assault was motivated by his concern for his partner and daughter as he understood they were being stalked by the victim which is consistent with the witness evidence of his devotion to his family and with the concerns set out by [KMP] and recorded by her medical team."

could not, he submitted be read as including any assessment of the public interest whether under s117C (2) or under paragraph 398(b).

18. Ms Easty submitted that [45] of the decision was sufficient, when read with the decision as a whole, to show that the panel of experienced First-tier Tribunal judges, had taken account of the serious nature of Mr S's criminality and the sentence he received. It was not necessary for them to have added further words to merely set out what is self evident namely that deportation can split families and that the public interest lies in deportation of foreign criminals.

S117C when read consecutively, as it should be, set out the serious weight to be attached to criminality but that the Exceptions provided, irrespective of s117C(2) that if a person met one of those exceptions then deportation was not the proper course of action. The proper interpretation of 'unduly harsh' was as in **MAB** and in the instant case that test was met. In response to a question from us as to whether by including consideration of the criminality in s117C(2), to then consider the level of criminality in the assessment of whether one or other of the Exceptions in s117C was met amounted to 'double counting' the criminality, she said that the assessment of the public interest meant giving sufficient weight to the public interest; that test already applies. The length of the sentence is reflected in the Rules and the statute as indicative of the public interest and it was then a question of considering whether the effect would be unduly harsh. She submitted that the First-tier Tribunal had considered this question and, when viewed in the round and read as a whole, had come to a sustainable conclusion that the effect would be unduly harsh. Thus, in line with s117C(3) the deportation order should be revoked.

19. Ms Easty expressed the view that there was a lacuna between the Rules and the Statute. The Statute does not have the subtlety of the Rules but it was, she submitted a distinction without a difference. The lack of specific reference in the decision to the Immigration Rules did not result in a finding that the First-tier Tribunal had erred in law. The panel had plainly, she submitted, taken account of all the relevant evidence in reaching a decision that the effect on the child of Mr S's deportation would be unduly harsh and thus Exception 2 applied and thus the appeal was allowed.

20. Ms Easty submitted that in any event Mr Bramble was seeking to widen in his submissions the grounds upon which he relied and he should either seek leave to amend his grounds or the appeal should be limited to those in the application.

Findings

21. We do not agree that Mr Bramble was seeking to widen the grounds upon which he had been granted permission to appeal. The grounds clearly relied upon an asserted inadequate assessment by the First-tier Tribunal judge of the meaning of "unduly harsh" and a failure to consider the public interest in deportation. There was no need for Mr Bramble to seek permission to amend his grounds of appeal and in any event Ms Easty was not, so far as we could ascertain, disadvantaged by or taken by surprise by any of the matters relied upon by Mr Bramble in his submissions.

We do not agree with Ms Easty that the use of the word "effect' in s117C(5) refers only to a situation where the foreign criminal is deported and the children/partner remain in the UK. An "effect" is "something that is produced by a cause or agent" (Collins English Dictionary and others).To put it another way the 'effect' is the consequence of a particular action. So far as the parental relationship between the parent and child is concerned there are two possible outcomes: the first is the child travel with the parent to the country of deportation; the second is the child remains in the UK and is, if the parent is removed, separated from the parent. In either case the effect is the effect of deportation upon the child. Not only would the interpretation put forward by Ms

Easty be a restriction on the interpretation of the word “effect”, it would also significantly contradict the Immigration Rules which were amended at the same time as the implementation of Part 5A. It cannot have been the intention that the Rules impose a different requirement to be fulfilled than is in a Statute. The “effect” on a child or partner is plainly an “effect” caused by deportation of the foreign criminal; it cannot possibly import an assumption that such effect is only to be considered in terms of the foreign criminal leaving the UK and the children/partner remaining in the UK. On a plain reading of the words it must include a requirement to consider the effect on the child/partner of travelling with the foreign criminal out of the UK. It is in the public interest to deport foreign criminals. Thus the starting point for consideration of the ‘effect’ is that the foreign criminal is to be deported and it is the consequences, as a whole, of that which are to be considered.

22. The considerations in s117C are a mixture of statements of established jurisprudence and Parliament’s stated intention that particular scenarios would not result in deportation. It is not that some of those sub-sections are of greater importance or that greater weight should be attached to them than others, but that where the tribunal is considering an Article 8 appeal in deportation proceedings these are matters that must be considered. Therefore no matter that a person has been convicted of a serious offence that has resulted in a prison sentence just short of four years, if he meets Exception 2 then the public interest does not require his deportation.

23. Part 5A Nationality, Immigration and Asylum Act 2002 draws attention to the fact that the deportation of foreign criminals is in the public interest and that the more serious offence committed by the foreign criminal, the greater is the public interest in deportation of the criminal. The Immigration Rules, introduced at the same time as Part 5A are the more nuanced framework within which decisions are to be taken. The SSHD is required to take her decisions in accordance with that framework which, it is now well established, are a complete code in so far as deportation is concerned. The Courts and Tribunals will consider the Rules in appeals against the SSHD’s decision but are also specifically required to consider Part 5A. This does not mean that the Rules cease to be a complete code: the Rules are directed at the decision maker and Part 5A is directed to the Tribunal and Courts. The difference in approach, whether addressed first under the Rules or first under Part 5A will not in practice make any difference. The Rules are reflective of Part 5A. It might be asked – What is the purpose of the legislation when the Rules are a complete code and are reflective of the legislation? The answer must surely be that the legislation is Parliament’s view and not merely a statement of policy, albeit passed by way of negative resolution. Although there is a distinction in the wording, the route followed will result in the same outcome.

24. The Rules tread the same ground as Part 5A and can be seen as a more detailed framework and, as is now well established, are a complete code. Provided the decision reached is on the basis of a full and proper assessment of all the circumstances, bearing in mind the fundamental legislative provision that the deportation of foreign criminals is in the public interest and the more serious the offence committed by a foreign criminal the greater the public

interest in deportation, then it matters not whether the outcome is expressed as having been reached through consideration of the Rules first or the Act first.

25. What does this mean in terms of Exception 2 (s117C(5)) or Paragraph 399(a)? First of all s117C(5) is, to all intents and purposes fully reflected in 399(a) albeit the language used is more concise. Secondly, the interpretation of this must have as its backdrop the underlying expressed will of Parliament that the deportation of foreign criminals is in the public interest and the more serious the offence committed by a foreign criminal the greater the public interest in deportation. The general principles as set out in the legislation inform and underpins the decision to be reached on whether an Exception applies. To exclude these general principles in reaching a decision on whether the effect of deportation of the foreign criminal on the child/partner would be unduly harsh is to subvert the expressed will of Parliament. We do not agree that there is a lacuna between the Rules and the Statute.

26. It plainly follows that in assessing whether it is unduly harsh (whether under the Rules or under Part 5A) on the child/partner, there must be included in that assessment consideration of the seriousness of the crime and the public interest in deportation of the foreign criminal – as set out in **KMO**. Without this full assessment the Rules would not be a complete code in deportation cases. A failure to include the extent of the criminality and the public interest when carrying out an assessment of whether it is unduly harsh would result in the expressed will of Parliament being effectively ignored where a foreign criminal had a genuine and subsisting relationship with a child or partner in the UK.

27. Ms Easty's response to our question about 'double counting' did not appear to us to deliver an answer to that question. In our judgment the principle set out in s117C(2) falls to be applied during the assessment.. That means that in respect of a foreign criminal sentenced to more than four years the principle in s117C(2) is applied at the stage of assessment provided by paragraph 398 of the Immigration Rules and s117C(6). In respect of a foreign criminal sentenced to more than 12 months but less than four years it is applied in deciding whether the Exceptions in s117C or paragraph 399 apply. To fail to take account of the criminality in the assessment of "unduly harsh" would result in the level and seriousness of the criminality not being considered at all.

Our decision on the instant appeal

28. The First-tier Tribunal panel erred in law in failing to consider whether it would be unduly harsh for KMP to travel to Trinidad and Tobago. The fact that she has decided not to go does not, of itself, result in the consideration of the effect of deportation on her and the child being limited to the effect on them remaining in the UK without Mr S. It is not, as submitted by Ms Easty, speculative to examine the circumstances of her decision not to go to Trinidad and Tobago. An assessment of the objective well-foundedness of that decision must of itself impact on the consideration of the effect of Mr S's deportation on the child.

29. The First-tier Tribunal panel erred in law in failing to consider whether it would be unduly harsh for the child to go to Trinidad and Tobago, whether with or without her mother.

30. The First-tier Tribunal panel erred in law in failing to identify what, in the separation of the child from her father is of such moment that it is unduly harsh. Separation of a child from a parent is inevitably going to be harsh. The matters relied upon by the panel, expressed in [62] & [63] and taking account of the expert reports are no more than this. Although the departure of Mr S may adversely affect the child and her mother, there is no right to a particular standard of living or quality of life. Of course the welfare of the child is of primary importance but the existence of social services to enable adequate care and protection impacts upon that. That KMP may have to rely more on public and social services than if Mr S were in the UK does not render what is harsh, unduly harsh. As was made clear in **MAB**

> "... whether the consequences of deportation will be unduly harsh for an individual involves more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold. The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all the circumstances of the individual".

31. We accept Ms Easty's submission that there was no requirement upon the FtT to set out what is self-evident ie that deportation can split families. Although it is, or should be self-evident that the public interest lies in deportation we do not accept that the FtT took this into account.

32. The matters relied upon by the First-tier Tribunal do not approach the definition of unduly harsh as set out in **MAB**, never mind if a proper assessment had been undertaken incorporating consideration of the criminality of Mr S and the public interest. Although it was submitted by Ms Easty that the SSHD objections to the findings of the First-tier Tribunal were nothing more than disagreements with the findings this is clearly not so. At no point do the First-tier Tribunal panel address the level of harshness likely to be endured by the child – even assuming that it is unduly harsh for the child to go to Trinidad and Tobago on which no finding was made.

33. Mr Bramble's submission that the decision of the FtT that it would be unduly harsh for the child to be left in the UK without her father was perverse is obviously a very high test. It is important to look at exactly what the judge took into account in reaching the decision that it would be unduly harsh:

- Mr S has a genuine and subsisting relationship with his daughter
- He has a practical and important role in her life
- There would be support for KMP in the UK from family and social services
- The child is bright and intelligent
- His daughter is anxious that he won't be there to collect her at the end of the school day; it is in the child's best interests that her father continues to be present as her parent and carer
- He provides regular support to her and practical and emotional support to her mother ensuring stability in the home.

34. On the basis of the evidence before the First-tier Tribunal, applying **MAB** it cannot conceivably be concluded that a reasonable judge would have reached the decision that the circumstances relied upon by the panel met the threshold of "unduly harsh".

35. In [45] the FtT panel "... notes the seriousness of the violent crime" and take into account Mr S's explanation "... that the assault was motivated by his concern for his partner and daughter as he understood they were being stalked by the victim which is consistent with the witness evidence of his devotion to his family…". The panel, although referring to and setting out in [34] extracts from the sentencing remarks, does not anywhere set out that the nature and seriousness of this assault has been factored into their assessment, rather there is an acknowledgment of his motivation rather than an acknowledgment of the judge's view that his offence "was one of the more serious offences of its kind". Despite Mr S having no previous convictions other than two cautions for assault he was sentenced to 16 months.

36. On the basis of the evidence before the First-tier Tribunal, applying **KMO** it again is inconceivable that any reasonable panel could have reached the conclusion that the threshold of "unduly harsh" was met when the circumstances of the criminality and sentence are factored in.

37. We are satisfied that the finding that it would be unduly harsh for the child to remain in the UK without her father is perverse on the evidence before the First-tier Tribunal panel; furthermore that there is an absence of adequate reasons given.

38. For these reasons we are satisfied the First-tier Tribunal panel erred in law and we set aside the decision to be remade.

Remaking the decision

39. Both parties intimated to us that should we find an error of law in the First-tier Tribunal decision such that it be set aside to be remade, given the extent of the requirement for fresh findings, it was appropriate for it to be remitted to the First-tier Tribunal for a fresh hearing.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision and remit it to the First-tier Tribunal to be remade.

Date 22nd December 2015

Upper Tribunal Judge Coker