IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09280/2018 (P)

THE IMMIGRATION ACTS

Decision Pursuant to Rule 34	**Decision & Reasons Promulgated**
On 01 June 2020	**On 05 June 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

JHON [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

The Appellant is a citizen of Colombia. His date of birth is 11 April 1977.

The Appellant came here in 1999 having been granted a student visa. He overstayed. As a result of the Appellant's criminal activity the Respondent made a deportation order against the Appellant dated 9 January 2018.

The Appellant made an application to revoke that order on the basis that deportation would breach his rights under Article 8 of the ECHR. He has a family life here with his wife, [JB] and their son [JV] (born here on 9 March 2007) and daughter DV (born here on 12 June 2008). He came to the United Kingdom in 1999 as a student and has overstayed.

In a decision of 29 March 2018, the Respondent refused to revoke the order. The Appellant appealed against that decision. His appeal was

dismissed by First-tier Tribunal Judge Feeney in a decision that was promulgated on 21 November 2019 following a hearing at Taylor House on 9 October 2019. On 13 February 2020, the Appellant was granted permission to appeal the decision of the First-tier Tribunal by Upper Tribunal Judge Owens.

Rule 34

This matter was originally listed to be heard on 1 April 2020 at Field House. However, it was adjourned because of the COVID-19 pandemic. COVID-19 directions were issued to the parties on 27 April 2020. There was a response received from the Appellant on 11 May 2020. The Secretary of State has not responded to the directions however, there is on the file a Rule 24 response dated 26 February 2020.

The Appellant does not consent to the matter being determined on the papers. He seeks a remote hearing. In support of this those representing him rely on a letter from the Immigration Law Practitioners Association (ILPA) to the President of the Upper Tribunal. In addition, the Appellant reminds the Tribunal of the long history of oral hearings in English common law judicial procedure. The Appellant cites a Court of Appeal case, R (Siddiqui) v Lord Chancellor & Ors [2019] EWCA Civ 1040 at [8], in which it was said that it is an "undeniable fact that the oral hearing procedure lies at the heart of English civil procedure". The case of Dr Sengupta & Anor v Holmes & Ors [2002] EWCA Civ 1103 is relied upon and cited at length. It is submitted that an oral hearing allows the advocates to focus on the arguments and affords the opportunity to reflexively engage with the judge. Oral argument is the best means available to effectively communicate with a Tribunal. It is asserted that in this case oral argument would be beneficial and should take place unless there are sufficient countervailing reasons against it. There is little reason against using technology to provide for a remote hearing. While the current emergency requires compromises, these must be proportionate and fair. The parties should not be unduly impacted by the misfortune of having their case listed during the COVID pandemic.

The case of R (Refugee Legal Centre) v SSHD [2005] 1 WLR 2219 is relied upon as follows: "No Tribunal is entitled to 'sacrifice fairness on the altar of speed and convenience, much less of expedience'."

I have also had full regard to the Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and Upper Tribunal, Presidential Guidance Note No 1 2020 and I conclude that this appeal decision should be made without a hearing. The appeal can be fairly and justly determined without the need for a hearing. The Appellant in submissions relies on a letter from the Immigration Law Practitioners Association (ILPA) to the President of the Upper Tribunal. There is no reference to the President's response to this letter. The Appellant relies on two cases which concern applications for permission in the context of a judicial review. The case of Dr Sengupta & Anor v Holmes & Ors [2002] EWCA Civ

1104 is relied on. This case concerned an application to recuse a judge and the paragraph cited is an attempt by the Court of Appeal to explain how the power of legal argument can change a judge's mind in the context of granting permission. In this case permission has already been granted on the papers by Upper Tribunal Judge Owens. It is not a matter of a party persuading a judge to change his or her mind. It is not a matter of a party persuading me to grant or refuse permission. The Appellant has been afforded a full opportunity to participate in these proceedings and to comment on the Respondent's Rule 24 response. The Appellant's representatives have not identified any reason why in this case determination of this appeal on the papers would give rise to unfairness. They have been given the opportunity to participate fully in the proceedings.

The law (statutory framework)

Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") reads as follows:-

"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."

Application of the law

In KO (Nigeria) v SSHD [2018] UKSC 23, the Supreme Court considered the interpretation of unduly harsh in the context of s117C of the 2002 Act. The following guidance was given:

> "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 (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

More recently the Court of Appeal in PG (Jamaica) [2019] EWCA Civ 1213 considered unduly harsh in the context of section 117C (5):-

> "38. The decision in *KO (Nigeria)* requires this court to adopt an approach which differs from that taken by Judge Griffith and Judge Finch. In the circumstances of this appeal, I do not think it necessary to refer to decisions predating *KO (Nigeria)*, because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation.

39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through 'a difficult period' for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the 'emotional and behavioural fallout' with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature."

The Court of Appeal in NA (Pakistan) v SSHD [2016] EWCA Civ 662 considered very compelling circumstances in the context of section 117C (6).

"32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that 'there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions

1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

> 'Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.'"

The Appellant's criminality

The Appellant pleaded guilty to two offences of transferring criminal property, three offences involving an identity document with improper intention and twelve offences which involved the possession of identity documents without a reasonable excuse (identity cards, UK driving licences and passports). The judge's sentencing remarks included the following:-

> "… The facts fall within a very small compass and they are these; on Friday, 5 February 2013 police officers conducted and executed a search warrant at Arch 139 Farrell Court, Elephant and Castle. The arch itself was leased by a company Lovider (?) Locker Limited which was controlled by your uncle and your father.
>
> Within that arch you and others ran a money transmitting bureau called Universal Remitters. The bureau operated and dealt, rather, as other money bureaus within the jurisdiction but targeted mainly or worked mainly with the South American market.
>
> When you opened the safe to those premises barring (?) sums of cash and other items were discovered including some of the offending items that are subject matter of this indictment.

> Your home was also searched and there the officers found a similar number of items, again those form part of the indictment insofar as they relate to the criminal matters.
>
> You were obviously arrested as a consequence and you were interviewed. You gave a prepared statement. You also, following your plea tendered a basis of plea and although the Crown is of variance in part of it in the main the view has rightly been taken, in my judgment, that it does not impact dramatically upon sentence in this case. I, therefore proceed on that basis. You are now 39 years of age. You came to the United Kingdom in 1999. You are a married man with two children now aged 8 and 9. You have a large, loyal, extended family within the United Kingdom and I accept what Mr Shapi has said so eloquently advanced on your behalf, that really it is your family and in particular your children who are going to bear the brunt of any sentence which this court ultimately has to pass."

The sentencing judge continued:-

> "… The sentencing guidelines direct, and I so find, that your offending falls within category (a) as far as culpability, is concerned.
>
> I regard it as high culpability because in my judgment you played a leading role in this business. You are, in fact, running it, you are the protagonist of it, you operated the business and it is quite plain that the safe was in your custody.
>
> So in my judgment there cannot be any dispute that you have a leading role. Secondly, your offending represents an abuse of your position of trust as a banker and as remittance operator. We are essentially, as I have already observed, a commercial community and business property must be a factor which is enforced by these courts. Thirdly, it is plain that there must have been a substantial amount of planning that went into this operation not least particularly because it operated for a substantial period of time.
>
> Fourthly, your offending falls within category 5 by virtue of the amounts involved. The starting point is three years' custody and the range is eighteen months to four years."

The decision of the First–tier Tribunal

The Appellant's case was advanced on the basis that his deportation breached his rights under Article 8 because he met exception 2 (s117C (5)) in respect of his wife and children. In the alternative that there are very compelling circumstances that would outweigh the public interest in deportation (s117C (6)).

The Appellant gave evidence, as did his wife and other family members. A number of witnesses attended the hearing to give evidence. The evidence included a report by Peter Horrocks, an independent social worker, relating to the Appellant's children. He was instructed by the Appellant's solicitors and asked to comment on a number of issues including the effect of separation of the children from their father. In respect of the Appellant's son, [JV], Mr Horrocks said:

"4.7 [[JV]] has the same physical, emotional and educational needs of any child of his age. *In terms of his physical needs, [[JV]] has always been a very slight child, however following his father's absence from the family home, he started losing weight to the point that he was considered to be on the verge of malnutrition. He has had consultations with the nutritionist at the hospital, who confirmed that his diet was appropriate and has given advice on helping him to regain some of the weight loss. He has a further appointment with the nutritionist in February 2019. [[JV]] needs to avoid situations which could lead to further stress and the risk of weight loss (*my emphasis*).*

4.8 In terms of his additional emotional needs [[JV]] has been significantly impacted by his father's absence from the family and how this has influenced family life. The loss of his father has led to a hole both in his personal life but also in the family unit. He is a vulnerable child in any case, who has suffered from ongoing bullying at school because he has different interests to the other children. He and his sister have also been impacted by their exposure to their mother's mental health difficulties, for which she has not accessed any form of treatment. [[JV]] needs stability, security and continuity in terms of his family life and he needs to be able to enjoy the presence of both of his parents in his life, uncomplicated by visits to prison or the threat of removal to a strange country and the upheaval that would bring to all aspects of his life. He worries about the future of his family and what will happen to them all and [[JV]] needs to be allowed to be a child and to have age-appropriate responsibilities rather than to have to worry worries and concerns (sic) almost of an adult nature. *There are clearly close links between his emotional needs and his weight loss (*my emphasis*).*

4.9 In terms of his educational development [[JV]] is a very capable student and has the potential to achieve above the age-expected levels and has to be considered a gifted and talented child. His teacher from primary school advised that he was capable of progressing straight into year 8 when he moved to secondary school. He also managed his father's absence from the home without any deterioration in his academic functioning, which under the circumstances could have been expected. [[JV]] needs, in terms of his educational development, are for stability, security and continuity of his educational environment, in order to help him achieve and progress to his full potential. High-achieving and gifted and talented children are children with special educational needs …

4.17 … His father was a major part of [[JV]] life until he was sent to prison and was both a primary carer and a secure attachment figure for both children. He was also the parent who undertook a range of different activities with them outside of the family home. [[JV]] is a very sensitive child and was the most impacted

by his father's absence. *Following his father's imprisonment, he lost a significant amount of weight and was described as being on the verge of malnutrition. He was referred to a nutritionist, whom has identified no problems with his diet, which would indicate some emotional cause for his weight loss and he has a further appointment in February (*my emphasis*).*

4.24 In the event that [the Appellant] was removed to Colombia and his family was to remain in the UK, that would involve a further major emotional trauma for these children and they would suffer great distress and unhappiness. They would suffer from harm to their emotional development at what would effectively be the permanent separation from a primary carer and secure attachment figure, but this time there would be no hope that they would ever be reunited as a family. *A permanent separation would in all likelihood lead to further weight problems for [[JV]] and the risk of permanent harm to his physical development. There are the associated risks of the development of eating disorders and other mental health problems (my emphasis)*. [DV] would not be immune from such difficulties, just because she demonstrated no outward signs of suffering harm previously … Under the circumstances the compounding nature of the harm they will experience, poses a high risk that their educational development will also be impacted because of the distractions caused to their home life and stability and their worries about both of their parents."

At 4.19 of the report the author states that the Appellant's partner suffered from anxiety and depression during her husband's incarceration and she became very emotional and had sleeping difficulties. However, for cultural reasons she did not seek help. He comments on the exposure of the children of their mother's mental health problems.

The judge set out the legal framework at paragraphs 8 to 12 and her findings at paragraphs 13 to 39. The judge was in no doubt that there was a cohesive family unit. She set parts of the evidence of the social worker within her findings at paragraphs 13 and 14. She reached conclusions in respect of the children's best interests at paragraph 15 which read as follows:-

> "My view is that the children presently enjoy a stable home, school and social life. I attach weight to the fact that this will be the second lengthy separation they have had from their father. I attach weight to the fact that having now become accustomed to his presence, they will potentially have to readjust again to life without him. This does have implications in terms of their emotional stability. As British citizens they are able to take advantage of the benefits that flow from their citizenship. Conversely, they have never lived in Colombia and although they can speak a little Spanish, they have limited familiarity with society. For these reasons it is in the children's best interests to remain in the UK together with their parents as a family unit. These

> best interests are a primary consideration, but they are not the primary consideration and they can be outweighed by other factors."

The judge went on to consider the Appellant's private life. The Appellant had not lived in the UK lawfully for most of his life. He had not committed any further offences. She found that he was socially and culturally integrated in the UK. The Appellant had been away from Colombia since he was aged 22. The judge found that the Appellant is of working age and had completed courses. There was no suggestion that he had skills that were not transferable. He had previously worked in Colombia, where he has family including a brother and an aunt and two cousins. In addition, his parents-in-law live there. The judge found that the Appellant would be able to rely on his brother. There was no evidence that the Appellant's family would not be able to accommodate him until he settles and finds employment.

The judge when considering the Appellant's family relationships directed herself (see paragraph 22) in respect of KO (Nigeria) v SSHD [2018] UKSC 23. In relation to the Appellant's family the judge said:-

> "23. I had the opportunity of hearing evidence from the family and his friends who spoke on his behalf. The damaging and disastrous effect of the Appellant's offending behaviour is painfully clear. I am prepared to accept that [[JV]] suffered from health problems with eating which led to malnutrition for which he received treatment. I have not seen any medical evidence regarding this, and this is a concern raised by Mr Wightman during the hearing. However, the family were open and honest when giving their evidence to me, they did not seek to embellish their difficulties and I am prepared to accept what they say about the problems [[JV]] experienced."

The judge considered the Appellant's wife's position at paragraphs 23 to 26. She appreciated that the Appellant's criminality has led to her experiencing some mental health issues for which she did not seek treatment. The judge concluded for the reasons articulated at paragraph 25 that the impact of deportation on her would not be unduly harsh.

The judge went on to consider the Appellant's children and said as follows:-

> "27. Although the Respondent submits that the family could relocate to Colombia, I do not consider that to be reasonable or feasible in the circumstances. The children are entitled to remain in the country of their nationality and avail themselves of the benefits that flow from their citizenship. In addition, they are settled in school and any move will be disruptive, and they are unlikely to be able to pick up their education in Colombia where they left off in the UK. They had never lived in Colombia.
>
> 28. The family's limited finances mean that it is unlikely they will be able to visit the Appellant as often as they would like as the role the Appellant would play in their life would be limited. He will

however be able to contact his family using digital communication but I accept that this is not a substitute for face-to-face contact.

29. [DV] is in good health and is doing well at school. *The same cannot be said for [[JV]] who suffered bullying at school and who has difficulties with eating. He faced malnutrition while his father was in prison. I do not know the extent of the condition or what treatment he received as there is limited medical evidence. I have taken into account the findings of the independent social worker who asserts that there is a risk that the condition will deteriorate if the Appellant is removed. This may well be the case, without further medical evidence however it is difficult to make an assessment about the risks of any eating disorder. It does however seem that he is being treated for his condition by specialists and it does not seem to have affected his academic performance as he is described as being an exceptionally intelligent child (*my emphasis*).*

30. I also bear in mind that the children will be able to rely on their mother and their grandparents for emotional support. They are particularly close to their grandmother as she lived with the family for a number of years when she came to the UK.

31. I also appreciate that the Appellant's absence will cause financial difficulties, but the family are now in council accommodation and they can rely on financial support from the state if eligible.

32. Having regard to my findings, I conclude that it would not be unduly harsh for the Appellant's children to remain in the UK without the Appellant because they have the support of their mother and an extended family and friends. They are able to rely on financial support from the state and medical support which is freely available to them."

The judge went on to consider whether there were very compelling circumstances. She directed herself on the law at paragraphs 34 and 35. She said that the skeleton arguments and the submissions made did not raise any further factors over and above those which she had already considered. She said as follows:-

"36. … I have reconsidered the social worker report as well as the fact that the Appellant was released from custody some time ago and was able to re-establish a crimefree life for himself. I accept he is classed as low risk and wants nothing more than to live a law-abiding life."

The judge then took a balance sheet approach. The "cons" she identified were the public interest, the Appellant having committed a serious offence and that the Immigration Rules had not been met. The "pros" she identified were her findings in relation to the children's best interests and the "detrimental effect on their emotional wellbeing" which will be brought about by his deportation. She found that deportation would disrupt family life. She considered that the Appellant had established a life for himself in the UK and had been here for some time. She considered the Appellant's work history, that he was working, his age and good health. She

considered that he has skills and would be able to work in the UK. She also found that he is remorseful and had accepted responsibility for his actions and that there was little prospect that he will reoffend. She made the following conclusions at paragraph 39:

> "When weighing these factors, I conclude there are no very compelling circumstances over and above those described in the exceptions. Even taking account of the factors that weigh in the Appellant's favour, the public interest in this case carries great weight and tips the balance in the Respondent's favour. I find that the Appellant's removal in pursuance of the deportation order would not be a disproportionate interference with his right to respect for his family and private life."

The grounds of appeal

The first ground is that in concluding that the possible reoccurrence of [JV]'s eating disorder following the Appellant's deportation could not be characterised as being a consequence that was unduly harsh is a material misdirection in law. It is a degree of harshness going beyond what would necessarily be involved for any "… child of a foreign criminal facing deportation" as per paragraph 23 KO. It is a consequence that could be properly characterised as being "severe, or bleak" as per paragraph 46 MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223.

Ground 2 asserts that the judge materially erred in failing to take proper account or attach sufficient weight to the fact that the Appellant had been assessed as posing an exceptionally low risk of reoffending and causing serious harm with reference to the percentage risk of reoffending. Reference is made to the OASys Report at paragraphs 62 and 67 of the Appellant's bundle, which indicates that the Appellant had been assessed as posing a 2% risk of reoffending after one year and a 4% risk of reoffending after two with a low risk of causing serious harm. It is asserted that it is the exceptionality of the low risk that the judge failed to take account of when assessing very compelling circumstances. The Appellant relies on the case of Danso v Secretary of State for the Home Department [2015] EWCA Civ 596.

Conclusions

There is no challenge to the decision in respect of the Appellant's partner. There is no challenge to the private life findings (section 117C (4) exception 1). There is no challenge to section 117C (5) in as far as the Appellant's wife and DV are concerned. The challenge in ground one is to the weight attached to the evidence concerning JVP and that the judge did not apply the correct test. There is however no challenge to the judge's self-direction on the law.

The Appellant and his partner gave evidence before the judge. She was satisfied that they had told her the truth. Their witness statements do not refer to [JV]'s weight loss. There was before the judge no medical

evidence. The Appellant's partner's witness statement at paragraph 10 reads as follows:

> "Our children have surprised us greatly. We thought that they would struggle at school but actually it has been the opposite. They are working very hard to make us feel proud of them so they are doing very good at school. My children have been my 'rock', they are stronger than me. They are always saying to me that this situation is not going to be forever. They always ask me to think that very soon Daddy will be back and that we will be together again and forever. I do not know how I am going to tell them if Jhon is finally deported that he is going but that we are staying. I hope I would never need to make this decision in the first place, never mind to communicate it to the children."

There is no reference to the child's weight loss in the skeleton argument before the First-tier Tribunal. There was no medical evidence about malnutrition during the Appellant's incarceration or future prognosis. In any event, the judge accepted the oral evidence that he had received treatment and was being seen by specialists. However, in the absence of medical evidence, she was entitled to conclude, at paragraph 29, that she did not know the extent of the condition or what treatment he received. The judge took into account the findings of the independent social worker, in whose opinion there is a risk of a reoccurrence of the condition should the Appellant be deported. What weight to attach to this was a matter for the judge. The judge rationally concluded in the light of the evidence before her that without medical evidence it was difficult to make an assessment about the risk of an eating disorder or further deterioration of the child's condition should his father be deported. However, the judge rationally attached weight to the child having the support of his mother and grandparents in the absence of the Appellant.

The grounds are misconceived because the judge did not conclude that a return of an eating disorder causing near malnutrition was not sufficient to establish that deportation would be unduly harsh (although considering what the Court of Appeal said in PG this would not necessarily involve a misapplication of the KO). There was insufficient evidence before the judge to establish a causal link between the Appellant's deportation and [JV]'s eating problems or that there would be a relapse should the Appellant be deported. The judge did not apply the wrong test. She properly applied the law and reached a decision that was open to her on the evidence. It was open to the Appellant to produce medical evidence concerning his son's condition. There is no substance in ground 1.

Ground 2 is a disagreement with the findings of the judge. This concerns the weight the judge attached to the Appellant's rehabilitation. The test of very compelling circumstances is an extremely demanding test. The list of factors to be considered are not closed, but the seriousness of the offence is material (s117C (2)). In this case the Appellant was sentenced to 45 months for serious offences of dishonesty. He was described by the

sentencing judge as the protagonist having a leading role and high culpability. Moreover, he had abused his position. Rehabilitation is a material factor to consider. It is wholly unarguable that the judge did not consider the assessment of risk as outlined in the OASys Report. The judge at paragraph 36 stated that he was classed as low risk. There was no need for her to engage specifically with the percentages. However, in this case, she clearly understood that risk was indeed very low because at paragraph 38(e) she said that there was little prospect that he will reoffend. This was a matter that the judge characterised as a pro-Appellant factor that she put into the mix following the balance sheet approach in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. The judge properly took into account rehabilitation. She was entitled on the evidence to conclude that the balance tips in favour of deportation. There is no error of law in the decision of the First-tier Tribunal.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal to dismiss the Appellant's appeal is maintained.

No anonymity direction is made.

Signed Joanna McWilliam

Upper Tribunal Judge McWilliam
Date 1 June 2020