Upper Tribunal
(Immigration and Asylum Chamber)

Patel (British citizen child – deportation) [2020] UKUT 00045 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 October 2019	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE RIMINGTON
DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

HIRENKUMAR BHIKHABHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, Counsel, instructed by Montecristo LLP
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

(1) In its application to a "qualifying child" within the meaning of section 117D of the Nationality, Immigration and Asylum Act 2002, section 117C(5) imposes the same two requirements as are specified in paragraph 399(a)(ii) of the Immigration Rules; namely, that it would be unduly harsh for the child to leave the United Kingdom and for the child to remain.

(2) In both section 117C(5) and paragraph 399(a)(ii), what judicial decision-makers are being required to assess is a hypothetical question – whether going or staying 'would' be unduly harsh.

They are not being asked to undertake a predictive factual analysis as to whether such a child would in fact go or stay.

(3) Nationality (in the form of British citizenship) is a relevant factor when assessing whether the 'unduly harsh' requirements of section 117C(5) are met. However, it is not necessarily a weighty factor; all depends on the facts.

(4) The possession of British citizenship by a child with whom a person (P) has a genuine and subsisting parental relationship does not mean that P is exempted from the 'unduly harsh' requirements. Even though the child may be British, it has to be unduly harsh both for him or her to leave with P or to stay without P; not just harsh. Thus, some substantial interference with the rights and expectations that come with being British is possible, without the position becoming one of undue harshness to the child.

DECISION AND REASONS

1. This is a decision to whose writing each member of the panel has contributed.

2. A citizen of India aged 37, the appellant has permission to challenge the decision of Judge Welsh of the First-tier Tribunal sent on 30 April 2019 dismissing his appeal against the decisions made by the respondent on 4 December 2018 to make a deportation order and on 6 December 2018 to refuse his human rights claim.

3. The appellant came to the UK in 2008 with entry clearance as a spouse. In November 2013 he was granted indefinite leave to remain. He is a foreign criminal by virtue of the fact that on 26 January 2016 he was convicted of three counts of conspiring to conceal/disguise/convert/transfer/remove criminal property and one count of proceeds of crime money laundering – failure to disclose in regulated sector. On 20 February 2017 he was sentenced to three years and six months' imprisonment. In his sentencing remarks, the judge noted that: "[m]oney laundering is integral to the serious criminality: in this case drug dealing." The appellant's wife, who also originates from India, came to the UK in 2006 as a student. She and the appellant have a son born in April 2013. On 6 January 2016 she and her son were naturalised as British citizens. As an infant the child suffered from macrocephaly and thoracolumbar scoliosis.

4. The judge found the appellant and his wife to be credible and reliable witnesses.

5. The judge noted the legal requirements applicable to the appellant's case as being those set out in section 117C of the Nationality, Immigration and Asylum Act 2002 and the broadly corresponding provisions of the Immigration Rules at paragraphs 398, 399 and 399A.

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

> "(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there 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."

7. The relevant immigration rules are paragraphs 398, 399 and 399A.

8. Paragraph 398 is as follows:

"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) 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 at least 4 years;

(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 deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, 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."

9. Paragraph 399 of the Rules applies where paragraph 398 (b) or (c) is engaged, 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."

10. Paragraph 399A provides:

"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. With reference to section 117C(3)-(5), the judge noted that, as the appellant had not lawfully been in the UK for most of his life, he could not meet Exception 1. The judge then turned to Exception 2, noting that the appellant's representative before her (Mr Malik) had conceded that if the requirements of Exception 2 are not met, the appeal must fail because on the facts of the case there were not "very compelling circumstances". In relation to Exception 2, the judge concluded that it would not be unduly harsh for the appellant's wife either to relocate to India or (if she chose) to remain in the UK with her son if the appellant were deported. As regards the appellant's child, the judge found that even though it is in his best interests to be with both parents in the UK, it would not be unduly harsh for the child to relocate to India nor unduly harsh for him to remain in the UK.

12. The appellant's grounds have two main components, it being submitted (1) that the judge applied an unduly stringent approach to the public interest, as evidenced by his reference in paragraph 48 to there being "a strong public interest in the Appellant's removal"; and (2) that the judge's treatment of the best interests of the child failed to take into account in assessing the 'unduly harsh' requirements that the son was a British citizen. In relation to ground (1), it was submitted that the Supreme Court in *Hesham Ali* [2016] UKSC 60 had made clear, that whilst great weight ought to be applied to the public interest in deportation, that weight was not a fixity. In relation to ground (2), it was highlighted that the judge accepted that: the appellant

and his wife would not be able to afford a private education for their son on return to India, which would mean he would be taught in Gujarati, which he does not speak; that the son suffers from infantile scoliosis and requires yearly checkups; and that the child's school and friendship networks are "sources of happiness and stability" for the child that would be fractured by the move. It was argued that at no point in this assessment did the judge treat "the British child's best interests as a primary consideration".

13. Both parties produced skeleton arguments, but it is convenient to refer to these by reference to the oral submissions.

14. At the hearing, Ms Akinbolu reiterated the point made in her skeleton argument as regards ground (1) that the public interest was not a fixity and that factors such as the risk of reoffending, the length of the sentence and the conduct since the offence committed were also relevant to that assessment. She said that the judge made no reference to the low risk of reoffending presented by the appellant.

15. As regards ground (2), Ms Akinbolu submitted that the judge had failed to take into account that for the child to relocate to India would entail the loss of his rights as a British citizen, including his right to a British education and to grow up knowing what it means to be British and to establish social connections with other British citizen children in his formative years. Ms Akinbolu accepted that the judge had said at paragraph 33 that she had taken the fact that the child was a British citizen into account, but in fact she had compartmentalised her consideration so as to ignore it. Although it was not foreshadowed in the grounds upon which permission to appeal had been granted, Ms Akinbolu asserted that it was also relevant, drawing on the *Zambrano* (*Zambrano* (*Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265) line of cases, in particular *CS* (*Case C-304/14,Secretary of State for the Home Department v CS*), that the loss of a child's rights were not justifiable by reference to something done by the father. The "compelled to leave" criterion set out in *Zambrano* was relevant when looking at the second limb relating to whether it was unduly harsh on the child to stay without his father. The CJEU in cases such as *CS* had emphasised the need for there to be "genuine enjoyment of the substance of the rights and benefits attaching to Union citizenship". Indeed what it said was stronger than that.

16. Ms Akinbolu's skeleton argument outlined that the judge's finding that it would not be unduly harsh for the child to relocate to India paid no attention to his British citizenship. Given his mother's unequivocal statement that she would have to go with her husband should he be deported, a statement supported by the medical evidence of her ongoing depression, that finding was material.

17. Ms Akinbolu was asked by the bench what significance, if any, should be attached to the child's possession of Indian nationality or at least his Indian heritage. Ms Akinbolu submitted that the child would always have access to India but in this case the cost of facilitating this would be that his father was deported. Given his youth, the child can only access enjoyment of the substance of the rights attaching to British citizenship via his parents. The child was actually enjoying the rights and benefits of

his British nationality and to compel him to leave with his father and mother would be to visit on him the sins of his father, contrary to *ZH(Tanzania*) [2011] 2 AC 166 and *Zoumbas* [2013] UKSC 34. It would be unduly harsh.

18. Ms Akinbolu accepted that it could be harsher to compel a child to leave if in the country of destination the child had no citizenship rights, but that did not mean compulsion was not unduly harsh in this case. Exception 2 did not require a consideration of compulsion. There was also a difference between the two limbs of the 'unduly harsh' test. When looking at the effect on the child were he or she not to stay, one has to consider the loss of the rights of British citizenship and Union citizenship that that entails. In reply to a question from the bench as to whether in her view it made any difference when considering the 'unduly harsh' issue that a British child was (at one end of the spectrum) very young or (at the other end of the spectrum), nearly 18, she agreed that the age of the child and how long he or she had lived in the UK required fact-sensitive treatment. The lack of opportunity for a very young child to continue to be able to enjoy the rights and benefits of British citizenship could be very material.

19. Mr Lindsay submitted that the appellant's ground (1) was unmeritorious because the fact that the public interest in deportation is strong is uncontentious. It includes a concept of deterrence as well as public confidence in the system.

20. As regards ground (2), Mr Lindsay recalled that the respondent's rule 24 response acknowledged that there was an error of form on the part of the judge in not explicitly considering the relevance of the child's British nationality in the section of the determination dealing with the question of whether it would be unduly harsh for the child to relocate to India, but this error was not material to the outcome of the decision and the appellant's appeal should be rejected accordingly. Read as a whole, the judge's findings were sustainable. There is a sound finding that the child can stay in the UK without his father and thus the issue of going to India is not relevant. There was a proper consideration of the child's best interests and also of whether the appellant's deportation would cause undue hardship. It is a safe inference that the judge had in mind the relevance of the child being British throughout her assessment. The respondent's skeleton argument had stated that "the unduly harsh assessment is in substance a best interests assessment" and that the respondent's position as set out in the refusal decision was that the child's status as a British citizen will not be altered in the event of relocation to India.

21. In response to the question the bench had asked Ms Akinbolu about whether it made any difference when considering the 'unduly harsh' issue that the British child was very young or nearly 18, Mr Lindsay agreed it was fact-sensitive but it could not be right to equate mere opportunity to grow up as British with rights accrued by, say, living in the UK for seventeen years. In the appellant's case, it was obvious what were the relevant rights and benefits being enjoyed on the one hand and on the other hand those standing to be enjoyed potentially. "Potential cannot be stronger than the actual enjoyment of a right". There was no requirement for the judge to set out what the rights and benefits were comparatively.

22. Mr Lindsay said that the fact that the child in question has a dual heritage was relevant because it cannot be assumed that life abroad is inferior to life here. There was no evidence before the Tribunal that dual nationality was not permitted and hence there was nothing for the judge to consider under this rubric.

23. Mr Lindsay emphasised the point that there was an unchallenged finding that it would not be unduly harsh for the child to remain in the UK. Hence any error on the part of the judge in relation to this issue was not material because the requirements set out in paragraph 399(ii) (a)-(b) are conjunctive.

24. By reference to the *Zambrano* line of cases, including *Dereci* (*Dereci v Bundesministerium für Inneres* (Case C-256/11) [2012] All ER (EC) 373 and *CS*, Mr Lindsay submitted that 'compelled to leave' was clearly a high threshold. As was clear *from Secretary of State for the Home Department v VM (Jamaica*) [2017] EWCA Civ 255 at [57] and [64] in particular, a case could not succeed unless there was a compulsion to leave the jurisdiction. In the appellant's case, indications of compulsion were clearly lacking. The judge considered the medical evidence relating to both the child and the mother and was entitled to conclude that there would be no shortfall in the child's care should the family be split. There was no "entire dependency" on the relevant parent – the appellant.

25. Ms Akinbolu submitted that *VM* should be distinguished because the starting point in that case was that the exceptions did not apply. So the only issue was whether there were exceptional circumstances outside the Rules. She queried whether Mr Lindsay's contention that actual enjoyment always outweighed potential enjoyment of the rights and benefits of nationality could be right. It was clear from the British naturalisation criteria that the Secretary of State accepts that British citizenship is more than mere birth in the country (in the case of a child born here) but comprises a set of values. Applicants have to prove knowledge and understanding of these values.

Recent case law

26. We refer to a number of key decisions below. Since we heard this case, there have been further cases of relevance, in particular: (on the 'unduly harsh' issues in the context of deportation) *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 2051 (22 November 2019) and *CI(Nigeria*) [2019] EWCA Civ 2027, 22 November 2019; (on the public interest issue) *Akinyemi v The Secretary of State for the Home Department* [2019] EWCA Civ 2098 (04 December 2019); and (on the *Zambrano* issues) *Patel (Appellant) v Secretary of State for the Home Department (Respondent) Secretary of State for the Home Department (Respondent) v Shah (Appellant)* [2019] UKSC 59. We did not consider it necessary to ask the parties to provide further submissions as to the significance of any of these cases because each reached conclusions broadly in line with pre-existing authority.

OUR ASSESSMENT

General

27. Before proceeding to assessment of the appellant's particular case, it will assist to address the underlying issue which led to this case being made the subject of a Presidential panel, namely the (British) citizenship of the child. Unlike another case heard by the same panel on this issue, this case is an in-country case.

28. Because this case concerns a person liable to deportation, section 117B(6) of the 2002 Act (which contains a provision relating to a parent of British citizen child) is inapplicable. However, the British citizenship of the child of a person liable to deportation is still relevant in the section 117C(5) context because what it concerns is the issue of whether the effect of such a person's deportation on a 'qualifying child' would be unduly harsh. Section 117D(1) provides that:

> "'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".

29. Parliament has thus chosen to make a British citizen child a "qualifying child" for the purposes of Part 5A, irrespective of his or her length of residence in the UK. Both section 117B(6), which applies to a parent who is not liable to deportation, and section 117C(5), which applies to a parent who is liable to deportation, reflect this. In both instances, the relevant provision cannot benefit parents of a child who is neither a British citizen nor has a continuous period of seven years' residence. However, the test of "unduly harsh" in section117C(5) is a stricter one than the test of reasonableness in section 117B(6): see *KO (Nigeria*) at [23].

30. Also involved are the somewhat differently formulated provisions of paragraph 399 (ii)) which has two express limbs, one ((a)) concerned with whether it would be unduly harsh for the child to "live in the country to which the person is to be deported"; the other ((b)) concerned with whether "it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

31. In its application to a "qualifying child" within the meaning of section 117D of the Nationality, Immigration and Asylum Act 2002, section 117C(5) imposes the same two requirements as are specified in paragraph 399(a)(ii) of the Immigration Rules; namely, that it would be unduly harsh for the child to leave the United Kingdom and for the child to remain. To read section 117C(5) as being concerned only with one requirement - *either* whether it would be unduly harsh for the child to leave *o*r whether it would be unduly harsh for the child to remain – would be to contemplate unduly harsh effects arising even when there was a viable alternative available that was not unduly harsh – going or staying whichever was the case. We are not aware of this particular aspect of the 'unduly harsh' requirements having been expressly addressed in previous analyses essayed by the higher courts or Upper Tribunal, but what has been said strongly implies that the two provisions apply the same requirements. In *KO (Nigeria*) [2018] UKSC 53, Lord Carnwath stated at [5] that:

"[i]t is unnecessary to refer in detail to the Changes to the Immigration Rules made at the same time (paragraphs 398-399), since it is not argued that any differences are material to the issues before us. It is to be noted however that the question whether "the effect" of C's deportation would be "unduly harsh" (section 117C(5)) is broken down into two parts in paragraph 399". In [20]-[21] of *CI (Nigeria*) [2019] EWCA Civ 2027, 22 November 2019, Leggatt LJ states at [20]: "Paragraphs 398-399A … are in very similar terms to section 117C(3)-(6) of the 2002 Act."

32. We also consider salient that in both section 117C(5) and paragraph 399(a)(ii), what judicial decision-makers are being required to assess is a hypothetical question – whether going or staying 'would' be unduly harsh. They are not being asked to undertake a predictive factual analysis as to whether such a child would in fact go or stay.

Nationality

33. In *SSHD v Al-Jedda* [2013] UKSC 62 at [12], Lord Wilson endorsed the well-known aphorism of Warren CJ in *Perez v Brownell*, 356 US 44, 64 (1958) that the right to nationality was "nothing less than the right to have rights". In international law, nationality is defined as the legal relationship or 'legal bond' between the national and his or her state. It is 'the juridical expression of the fact that an individual upon whom it is conferred…is in fact more closely connected with the population of the State conferring nationality than with that of any other State'. (*Nottebohm Case (Liechtenstein v Guatemala*): Second Phase, ICJ, 6 April 1955, ICJ Reports, p.4,23; General List, No.18). It gives rise to rights and duties on the part of both sides of this relationship.

34. As regards the substantive contents of these rights and duties, there is no definitive statement, although there is broad agreement (we draw here on the summary given by Alice Edwards in *Nationality and Statelessness under International Law*, C.U.P 2014 (eds Alice Edwards and Laura van Waas)) that from the perspective of the national, possessing the nationality of a particular state is generally associated with being granted entitlements to a range of rights, in particular, rights to (re-) admission and to take up residence, consular assistance when abroad, to run for elections, participate in public life and to vote, and the right to economic, social and cultural advancement. Correspondingly, from the perspective of the state, it is generally seen to owe certain duties to its nationals, in particular the right of diplomatic protection and the duty of (re)admission and residence. Nationals may be required to perform specific civic duties, including the obligation to defend the state against enemies (military service) and to pay taxes and can be liable for certain criminal offences, wherever committed.

35. The absence of any agreed content to substantive rights and duties attaching to nationality undoubtedly reflects the strong recognition that it is largely for states to determine the precise contents of the rights and benefits they afford to their nationals. The UNHCR Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons (Geneva, 2014), which was

referred to by the Supreme Court in *Pham (Appellant) v SSHD (Respondent*) [2015] UKSC 19 at [24], notes at paragraph 53:

> "Where States grant a legal status to certain groups of people over whom they consider to have jurisdiction on the basis of a nationality link rather than a form of residence, then a person belonging to this category will be a "national" for the purposes of the 1954 Convention. Generally, at a minimum, such status will be associated with the right of entry, re-entry and residence in the State's territory but there may be situations where, for historical reasons, entry is only permitted to a non-metropolitan territory belonging to a State. The fact that different categories of nationality within a State have different rights associated with them does not prevent their holders from being treated as a "national" for the purposes of Article 1(1). Nor does the fact that in some countries the rights associated with nationality are fewer than those enjoyed by nationals of other States or indeed fall short of those required in terms of international human rights obligations. Although the issue of diminished rights may raise issues regarding the effectiveness of the nationality and violations of international human rights obligations, this is not pertinent to the application of the stateless person definition in the 1954 Convention."

36. The footnote to this passage observes that: "[h]istorically, there does not appear to have been any requirement under international law for nationality to have a specific content in terms of rights of individuals, as opposed to it creating certain inter-State obligations."

37. Consonant with this learning, we know from case law on the 'nationality' element of the definition of 'refugee' in Article 1A(2) of the 1951 Refugee Convention that just because a state denies basic rights and benefits to its nationals – and for example fails in the process to protect them against persecution - does not mean they cease to be its nationals; that underlines how contingent are the actual contents of such rights and duties on what is the situation in the particular state at the relevant time.

38. To summarise the general position in international law, the rights that nationals possess are not rights to a particular quality of enjoyment of those rights. As noted by Edwards (ibid), "[e]ven though the above-mentioned substantive rights are usually associated with the holding of nationality, the lack of access to or enjoyment of these rights does not change the nationality status of the individual under international law, nor ordinarily under municipal law." Edwards notes further that:

> "The only possible exception may be the case where a state denies an individual of the right to re-enter and reside in its territory (considered as the essence of nationality as a matter of public international law), which could be interpreted as a state effectively denying that the individual is its national. However, this could only be determined on the individual case at hand and considering all the relevant facts."

Children and nationality

39. At the same time it is also clear that, by virtue of their minority, children are not in a position to exercise some of the rights and benefits ordinarily associated with nationality for so long as they are children. This is a feature highlighted by a leading

expert on children and nationality, Jacqueline Bhaba[1], in her article on "The importance of nationality for children", Institute on Statelessness and Exclusion, 2017:

> "Many of these rights and obligations are not applicable to nationals under 18 years of age: children cannot vote, they cannot stand for public office, they cannot serve on juries, and, as a matter of international law, they cannot be compelled to participate in active combat."

40. However, she goes on to emphasise that "these exclusions do not negate the importance of nationality for children." She then notes the following examples:

> "First, even a very young child, like an adult, will need proof of nationality to qualify for safe and legal border crossing. Second, more age specifically, though primary education is supposed to be free and universally available to all children irrespective of nationality, comparable international mandates do not apply to other, equally critical, educational opportunities, a deficit with consequential implications. Compared to their non-national peers, children who are citizens generally have privileged access to early childhood development and preschool opportunities, as well as to post primary education, college scholarships and other educational facilities. The same enhanced access for citizen children also applies to health care, to social welfare protections and to other critical economic and social rights facilities."

We will have cause to qualify how such examples apply in the UK context: see below paragraph 44.

British citizenship and British citizen children

41. In this case we are concerned throughout with British nationality in the form of British citizenship only, not with any other type of British nationality.[2] The rights and benefits of British citizenship are in large measure a matter of statute. Whether or not a constitutional right (a point on which Lord Hoffman (at [43]) and Lord Mance [at [151] differed in *R (Bancoult) v Foreign Secretary (No 2*)), the right of abode is clearly one of the most important components of British citizenship. However, as Lord Hope observed in *ZH (Tanzania*) at [41], "there is much more to British citizenship than the status it gives to the children in immigration law … [i]t carries with it a host of other benefits and advantages … [which] ought never to be left out of account." In the same case, Lady Hale emphasised at [32] that "the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond."

42. In *R (on the application of Johnson) (Appellant) v SSHD (Respondent*) [2016] UKSC 56, Lady Hale observed at [2] that "[t]here are many benefits to being a British citizen,

[1] Lady Hale's quotation in *ZH (Tanzania*) at [32] from another of Ms Bhabha's publications is noted below at paragraph 52.

[2] Under the British Nationality Act 1981 as amended, there are five other types of British nationals: British Overseas Territories Citizens, British Overseas Citizens, British Subjects, British Nationals (Overseas) and British Protected Persons.

among them the right to vote, the right to live and to work here without needing permission to do so, and everything that comes along with those rights".

43. Insofar as the position of British citizen children is concerned, the Home Office publication of July 2019, *MN1 Registration as a British citizen– A guide about the registration of children under 18*, states at p.5 that:

> "Becoming a British citizen is a significant life event. Apart from allowing a child to apply for a British citizen passport, British citizenship gives them the opportunity to participate more fully in the life of their local community as they grow up."

44. This is not to say, however, that access to a significant number of rights and benefits in the UK are confined to British citizens. For example, foreign nationals who are settled or have limited leave in the UK also enjoy privileged access to educational opportunities (in this respect, Jacqueline Bhaba's summary quoted at paragraph 40 above does not fit well with the UK context). Nevertheless, whilst UK law also accords a significant number of rights and benefits to persons who have lawful status, they are lesser than those enjoyed by British citizens, As noted by Jay, J in *The Project for the Registration of Children As British Citizens & Ors, R (On the Application Of) v Secretary of State for the Home Departmen*t [2019] EWHC 3536 (Admin) at [16]:

> "The advantages of British citizenship cannot be considered in abstract. The position of British citizens falls to be contrasted with those who have limited or indefinite leave to remain (there are also important practical differences between these species of leave), into which categories the majority but not all of the children entitled to be registered will no doubt fall. A person with leave to remain as opposed to the right of abode cannot enter and/or remain in the UK without let or hindrance: by definition, she requires leave, and this permission may require examination by immigration officers at a port of entry or at Lunar House. The status may lapse; it may be cancelled; and individuals holding such leave are liable to be deported on conducive grounds under s.3(5)(a) of the Immigration Act 1971."

45. Although, at time of writing, we are aware that matters look set to change, *presently* possession of British citizenship also carries with it possession of citizenship of the Union under EU law. We say no more about this here, given the conclusions we set out below in paragraphs 79-80.

The relevance of the British citizenship of children in the context of Article 8

46. It is necessary to consider the relevance of the British citizenship of children in the context of Article 8. In *ZH (Tanzania*) Lady Hale, in analysing the relevance of the best interests of the child as a primary consideration, observed at paras 30 and 32 that:

> "30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying

their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

"(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608, 614);

(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;

(c) the loss of educational opportunities available to the children in Australia; and

(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

…

32. *Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults*. [Emphasis added] As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

> 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'"

47. In *Zoumbas*, Lord Hodge, having identified as one of seven legal principles to govern best interests of the child assessment in immigration cases that:

> "(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; …"

went on to state that:

> "12. Mr Lindsay [a different Mr Lindsay] for Mr Zoumbas also founded on a statement in the judgment of Lord Kerr of Tonaghmore in *ZH (Tanzania)* at para 46 in support of the proposition that what is determined to be in a child's best interests should customarily dictate the outcome of cases and that it will require considerations of substantial moment to permit a different result. In our view, it is important to note that Lord Kerr's formulation spoke of dictating the outcome of cases "such as the present" and that in *ZH (Tanzania)* the court was dealing with children who were British citizens. *In that case the children by virtue of their nationality had significant benefits, including a right of abode and rights to future education and healthcare in this country, which the children in this case, as citizens of the Republic of Congo, do not. The benefits of British*

citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Moreover in *H(H)* Lord Kerr explained (at para 145) that what he was seeking to say was that no factor should be given greater weight than the interests of a child. See the third principle above." [Emphasis added]

48. In the context of cases involving deportation of foreign criminals, the relevance of British citizenship when considering the best interests of the child was briefly discussed in *NA(Pakistan)* [2016] EWCA Civ 66, Jackson LK observing at [34], with reference to *CT (Vietnam*) [2016] EWCA Civ 488, that:

> "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."
>
> "

49. Turning to consider Article 8 jurisprudence generally, it is clear that nationality (in the form of British citizenship) is a relevant consideration both in the deportation/removal and the immigration context. Thus, in *ZH (Tanzania*) Lady Hale at [17] made reference to the identification by the Strasbourg Court of relevant factors to be taken into consideration in cases concerned with the expulsion of long-settled non-nationals who had committed criminal offences. She noted that the relevant factors which had first been enunciated in *Boultif v Switzerland* (2001) 33 EHRR 50 (numbers inserted) were:

> "[i] the nature and seriousness of the offence committed by the applicant;
>
> [ii] the length of the applicant's stay in the country from which he or she is to be expelled;
>
> [iii] the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> [iv*] the nationalities of the various persons concerned*;
>
> [v] the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> [vi] whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> [vii] whether there are children of the marriage, and if so, their age; and

[viii] the seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled." [Emphasis added]

50. She further noted that this list of factors was approved and expanded upon in *Uner v The Netherlands* (2007) 45 EHRR 421.

51. At [180] Lady Hale noted that "[f]actors (i), (iii), and (vi) identified in *Boultif* and *Uner* are not relevant when it comes to ordinary immigration cases, although the equivalent of (vi) for a spouse is whether family life was established knowing of the precariousness of the immigration situation."

52. Taking stock of the relevant Strasbourg jurisprudence on Article 8, we derive that (i) Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory; (ii) a relevant factor that must be taken into account is the nationalities of the various persons concerned; and (iii) in order to establish the scope of the State's obligations, the facts of the case must be considered**.** In relation to (ii), we cannot find any support in this jurisprudence for extending this to include a principle that having a British citizen child furnishes powerful reasons for finding that the effect of the deportation of a parent on the child would be unduly harsh. What weight is to be given appears to citizenship be left as a matter for each Contracting State's "margin of appreciation". As regards (iii), we would observe that in this regard the Strasbourg jurisprudence reflects our own initial observations on the significance of nationality at the level of abstract principle, in particular that the rights and benefits that attach to nationality will depend heavily on the particular circumstances.

53. Applying the above analysis to the specific context of the unduly harsh requirements, the principal conclusions we draw from our foregoing analysis are twofold.

54. First, because the unduly harsh requirements are derivable from Article 8 jurisprudence, nationality (in the form of British citizenship) is a relevant factor when assessing whether the 'unduly harsh' requirements of section 117C(5) are met. However, it is not necessarily a weighty factor; all depends on the facts.

55. Second, in respect of the issue of whether it would be unduly harsh for a British citizen child to remain in the UK without one of his parents, it seems to us integral to the framework set out in section 117C of the Act and paragraph 399(a)(ii) of the Rules that the possession of British citizenship by a child with whom a person (P) has a genuine and subsisting parental relationship does not mean that P is exempted from the unduly harsh requirements. Even though the child may be British, it has to be unduly harsh both for him or her to leave with P or to stay without P; not just harsh. Thus, some substantial interference with the rights and expectations that come with being British is possible, without the position becoming one of <u>undue</u> harshness to the child.

The judge's treatment of the appellant's case

56. Like the respondent, the judge concluded that the appellant did not meet the requirements of paragraph 399A. Whilst it is not entirely clear that the appellant agreed in substance that he did not meet the requirements of subparagraphs (b) and (c) of paragraph 399A, it is incontrovertible that he could not show, as required by sub-paragraph (a), that he had been lawfully resident in the UK for most of his life.

57. The appellant concedes that he is not able to show that there are very compelling circumstances over and above those set out in paragraphs 399A and 399.

58. Accordingly, the appellant's case hinges entirely on whether he can show that the judge materially erred in law in concluding that he did not meet the requirements of paragraph 399(a)(ii) (a)-(b) of the Immigration Rules and section 117C(5) of the 2002 Act.

The public interest issues

59. It is the appellant's contention in ground (1) that the judge's assessment of the unduly harsh requirements of paragraph 399 was vitiated by applying more stringent consideration of the public interest than the statute specifies or requires. This contention focuses on the judge's final paragraph under the subheading "Decision":

> "48. In my view there is a strong public interest in the Appellant's removal and the effect of his deportation will not be unduly harsh on either his child or his wife, nor do the particulars of his private and family life amount to very compelling circumstances. I therefore conclude that the Respondent's decision being maintained is a proportionate interference with the right to respect for his family and private life and lawful under section 6 of the Human Rights Act 1998."

60. It is submitted that the reference to "strong public interest" implies that the judge has erroneously balanced the question of whether or not the appellant's deportation is unduly harsh against a 'strong public interest' for his deportation. Reference is made to the dictum of Lord Carnwath in *KO (Nigeria*) [2016] UKSC 53 at [23] that: "[w]hat section 117C(5) does not require in my view … 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." The judge, the grounds assert, "appear to have admitted the actual length of the sentence (as opposed to the placement of the sentence in the section 117C thresholds) in her consideration of the public interest". As thus formulated, ground (1) appear to subdivide into two parts, it being argued that the judge (i) wrongly allowed public interest considerations to intrude into her unduly harsh assessment; and (ii) overstated the strength of the public interest.

61. We do not accept that the judge's use of the term 'strong public interest' somehow intruded into her unduly harsh assessment. In the first place, the judge specifically reminded herself in paragraph 19 that in *KO (Nigeria*) (in her words) "[t]he court stated that the assessment does not involve consideration of the wider public interest

factors; it is solely an evaluation of the consequences and impact of deportation on the child or the partner." Second, in her ensuing assessment of the unduly harsh issues, there is no reference whatsoever to any public interest factors. Third, in paragraph 48 the judge's formulation makes clear that the issue of whether deportation would be unduly harsh and the public interest issue are distinct.

62. Nor do we accept the contention that the judge overstated the public interest. At paragraphs 15 – 17, she correctly set out that the relevant provisions of the Rules and the Act providing that deportation of foreign criminals is in the public interest and that the public interest requires the deportation of the appellant unless either Exceptions 1 or 2 of section 117C((4)-(5) apply. We consider that in referring at the end of her summary to 'strong public interest' the judge was doing no more than highlighting that she had given due weight to the strength of the public interest in the deportation of foreign criminals. That is entirely consistent with the approach of the Tribunal and higher courts: see e.g. *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11 at [57] and Lord Reed in *Hesham Ali* when he stated at [164] that "I do not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals."

63. Ms Akinbolu has sought to bolster her submissions on ground (1), by emphasising that the public interest is not a fixity. She has correctly sourced this proposition to what was said by Lord Kerr in *Hesham Ali* at [64]. Since we heard this case the Senior President of Tribunals has noted this proposition in *Akinyemi v The Secretary of State for the Home Department* [2019] EWCA Civ 2098 (04 December 2019 at [49] -[50]:

> "49. Although Lord Kerr JSC differs from the majority in some of his reasoning, he comes to the same conclusion in his judgment, a conclusion which is not doubted by anyone else. At [164] he says:
>
> > "The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation. I do not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals but a claim that this has a fixed quality, in the sense that its importance is unchanging whatever the circumstances, seems to me to be plainly wrong in principle, and contrary to ECtHR jurisprudence."'

He continues at [165]:

> "It is important for the decision-maker to scrutinise the elements of public interest in deportation relied upon in an individual case, and the extent to which these factors are rationally connected to the legitimate aim of preventing crime and disorder. That exercise should be undertaken before the decision-maker weighs the public interest in deportation against the countervailing factors relating to the individual's private or family life, and reaching a conclusion on whether the interference is proportionate."

64. However, the guidance given in *Hesham Ali* (as reconfirmed in *Akinyemi*) cannot avail the appellant since it was expressly accepted by Miss Akinbolu that he could not succeed on the basis of "very compelling circumstances' over and above those set out in paragraphs 399 and 399A: see above paragraph 57. The analysis conducted of the public interest in *Hesham Ali* was in the context of cases where it was argued that there were very compelling circumstances: see [36]-[38]. In any event, the asserted low risk of re-offending, cited by Ms Akinbolu (see paragraph 14 above) cannot on the facts of this case rationally cause the strength of the public interest to be reduced to any material extent.

The unduly harsh issues

65. As Ms Akinbolu candidly observed, she was in some difficulty in advancing the second ground in as much as the original written grounds were confined to the public interest issue and the renewed grounds were concerned principally with the issue of whether it was unduly harsh for the child to move to India. On the other hand, there are paragraphs that clearly identify a challenge to the judge's other finding (that it would not be unduly harsh for the child to remain in the UK without his father: e.g. the final sentence of paragraph 16) and on a fair reading we consider that the appellant's challenge was clearly intended to cover both scenarios. We therefore read the alleged "failing to adequately consider the British child's rights in line with section 55 of the Borders, Citizenship and Immigration Act 2009 and in light of the findings of fact made" to apply to both limbs of the "unduly harsh" requirements. We read likewise the submission at paragraph 17 that "[t]he judge was required to consider the appellant's British child's best interests as a primary consideration, when assessing if it would, or would not, be unduly harsh to deport his father." In addition, we note that the appellant in his human rights application had identified as significant the reference in his representations of 8 May 2017 to the fact that his son was a British citizen. Further, the respondent's refusal decision of September 2018 on the human rights claim had stated that whilst it was accepted that the son was a British citizen, it was not accepted that this had any significance because "[a]lthough he is a British citizen his nationality will not change as a result of him moving to India as he will be able to return to the UK at his own leisure" (p. 3) and that it would not be unduly harsh for him to remain in the UK even though the appellant was deported because he would be able to continue attending school and accessing NHS treatment for his illness (p. 4) and that his mother, was "a British citizen and as such would be accustomed to the British way of life and the benefits it has to offer her" (p. 5).

66. Accordingly we are satisfied that the appellant's grounds constitute in relation to the child a challenge in effect to both limbs of the 'unduly harsh' requirements.

The 'unduly harsh' requirements of the Rules as applied to a 'qualifying child'

67. It is necessary to consider the 'unduly harsh' requirements in two parts, dealing firstly with the 399(a)(ii)(a) limb, which focuses on whether "it would be unduly

harsh for the child to live in the country to which the person is to be deported". As explained earlier we consider s. 117C(5) to impose the same requirements.

Unduly harsh for the child to live in [India]

68. The respondent accepted in her rule 24 response that the judge's treatment of the 'unduly harsh' requirements is flawed by virtue of the fact that in the paragraphs addressing the issue of the child's relocation to India at paragraphs 34 – 43, "there is no explicit reference to the child's British nationality nor any recognition that this may be a relevant consideration". However, it was submitted that this error was not material. Mr Lindsay reiterated the same position.

69. Like the respondent, we do not consider fatal the mere lack of mention by the judge of the child's British nationality in the context of assessing whether it would be unduly harsh for the child to live in India, since at paragraph 33 she had identified this as a relevant factor in the context of her best interests of the child assessment which she stated was her "starting point". The judge had referred to the British citizenship of the child as one of four factors that led her to conclude that it was "in [the child's] best interests to be with both parents and to remain in the UK". At paragraph 33 she wrote:

> "My starting point is that I find that it is in his best interests to be with both parents and to remain in the UK. I reach this conclusion based on the following evidence:
>
> (1) the psychological assessment, prepared by Mr O'Doherty, dated 5 March 2019. He concluded this is where the best interests of the child lie, having reviewed the child's school reports and interviewed and observed the family together;
>
> (2) I have reviewed the school reports within the Appellant's bundle, which demonstrate that the child is doing well at school and is happy;
>
> (3) it was clear from the witness statements of the Appellant and Mrs Patel, as well as from their oral evidence, that their main concern is for the well-being of their son and that they put their own interests second to his;
>
> (4) the child is a British citizen and so entitled to the rights and privileges that come with that status."

70. That terminology indicated that she saw her starting point as something to be fed into the remainder of her assessment.

71. Further, although the judge did not refer to the child's British citizenship when assessing the issue of whether it would be unduly harsh to expect him to leave the UK, she was clearly cognisant of the relative advantages and disadvantages that flowed from that status and clearly understood that if the child departed he would not enjoy the rights and benefits he does presently. She did not, as the respondent did, seek to rely on the somewhat formalistic point that "his nationality will not change as a result of him moving to India as he will be able to return to the UK at his own leisure". She considered the child's circumstances substantively. She specifically

addressed the issue of education at paragraphs 38 to 41, taking into account, inter alia, that the appellant and his wife would not be able to afford a private education for their son on return to India, which would mean he would be taught in Gujarati, which he does not speak. She also addressed the issue of medical treatment at paragraphs 42 and 43, taking into account that that the son suffers from infantile scoliosis and requires yearly check-ups. She also took into account that the child's school and friendship networks are "sources of happiness and stability" for the child that would be fractured by the move. It was within the range of reasonable responses for her to conclude that the disadvantages and hardships involved were not unduly harsh. We remind ourselves that the higher courts have confirmed many times that the threshold denoted by the 'unduly harsh' criterion is a high one: see *KO (Nigeria*) at [23] ("One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation a parent").

72. The grounds raise no challenge to the judge's finding that the wife could relocate without it being unduly harsh nor to the judge's finding that it would not be unduly harsh for her to remain in the UK without her partner. Hence paragraph 399(b) (ii) and (iii) are not engaged.

73. We turn to consider the second limb of paragraph 399((a)(ii), namely whether "it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

Unduly harsh for child to remain in the UK without the [father]

74. The judge's treatment of the second limb of the 'unduly harsh' test was considerably shorter and was effectively confined to the issue of whether the appellant's wife, notwithstanding the adverse effect of the appellant's absence on her mental health, would remain in the UK and be able to care for the child. Whilst there is no reference in this context to the significance of the child's British citizenship, it is clearly part of the background accepted by the judge that in the UK the child is actually enjoying the rights and benefits of British nationality and that these would not be threatened or diminished by his father's departure. We do not understand Ms Akinbolu to suggest otherwise; see above paragraph 13.

75. Further, as we observed at paragraph 55 above, in respect of the issue of whether it would be unduly harsh for a British citizen child to remain in the UK without one of his parents, it seems to us integral to the framework set out in section 117C of the Act and paragraph 399(a)(ii) of the Rules that just because a child has British citizenship does not mean that P is exempted from the "unduly harsh" requirements. Even though the child may be British, it has to be unduly harsh for him or her to leave with P or stay without P; not just harsh. To reiterate, some substantial interference with the rights and expectations that come with being British is possible, without the position becoming one of undue harshness to the child.

76. As already noted, the grounds raise no challenge to the judge's findings that it would not be unduly harsh for the appellant's wife to remain in the UK. Nor do the grounds raise any challenge to the judge's assessment of the ability of the appellant's wife to

care for the child in the UK. In the context of the child remaining in the UK with his mother, it is plain that the child is in the UK enjoying in substance the rights and benefits of British citizenship. Hence any failure to address the child's British nationality in this limb of the 'unduly harsh' test could not amount to a legal error since it is a premise of any such assessment that the child is enjoying such rights and benefits.

77. Given that the requirements of para 399(a)(ii) (a) and (b) are conjunctive, even if we were to have identified an error of law on the part of the judge in relation to para 399(a)(ii)(a), that error would not have been material.

78. In arriving at the above conclusion we have taken into account the post-*KO(Nigeria*) decisions of the Court of Appeal in *Secretary of State for the Home Department v PG (Jamaica*) [2019] EWCA Civ 1213 (11 July 2019) and *Secretary of State for the Home Department v KF (Nigeria*) [2019] EWCA Civ 2051 (22 November 2019. In the former there were 6 British citizen children involved (see [5]). In the latter, there was one British citizen child (see [3]). In the latter, Baker, LJ (with the Senior President of Tribunals in agreement) endorsed the position taken in *PG (Jamaica)* and stated at [30]-[31] that:

> "Furthermore, and with respect to the First-tier Tribunal judge [who had allowed the appeal], I consider that his conclusion on the evidence about the respondent's family that his deportation would be unduly harsh is unsustainable in the light of Lord Carnwath's analysis of the proper interpretation of Exception 2 in s.117C(5), namely that:
>
> > "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."
>
> Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances."

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

> "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with the other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of ECHR. It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

79. We appreciate that in these cases their lordships were not asked to consider the specific issue of the significance of a relevant child possessing British citizenship (and this remains one of the reasons why we have seen fit to address this issue discretely). However, especially given the reference made in *KF (Nigeria*) to *PG (Jamaica* (which in turn refers to *NA (Pakistan*), we are confident that their lordships were mindful, in reaching their conclusions, of the fact that the children involved possessed British citizenship and what significance was to be attached to that.

The Zambrano issue

80. In concluding that the appellant's grounds fail to identify any legal error in the judge's finding that it would not be unduly harsh for the child to remain in the UK without the appellant, we have recorded Ms Akinbolu's attempt to raise a *Zambrano* point. We consider it is not a point we need address because it was not raised in any shape or form in the grounds.

81. In any event, we record our agreement with Mr Lindsay that the relevant facts in the appellant's case are on all fours with *VM (Jamaica*). We do not understand the recent Supreme Court decision in *Patel (Appellant) v Secretary of State for the Home Department (Respondent) Secretary of State for the Home Department (Respondent) v Shah (Appellant)* [2019] UKSC 59 to take a significantly different view of the need for a high threshold even in *Zambrano* cases concerning children: see in particular [30] of *Patel*.

82. For the above reasons, we conclude that the judge did not materially err in law and her decision to dismiss the appeal should stand.

No anonymity direction is made.

Signed Date:28 January 2020

H H Storey

Dr H H Storey
Judge of the Upper Tribunal