Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03395/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 6 September 2019	**On 31 December 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NT
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Presenting Officer
For the Respondent: Mr S Winter, instructed by Peter G Farrell Solicitors

DECISION AND REASONS

Introduction

1. I make an order for the anonymity of the parties in this appeal by the Secretary of State pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as children are involved. Any breach of this order may lead to contempt proceedings.

2. In my earlier decision dated 31 May 2019 (a copy of which is annexed) I set aside the decision of First-tier Tribunal Judge Handley who had allowed the appeal by NT

against the Secretary of State's decision dated 25 January 2018 refusing her human rights claim which had been made in anticipation of a deportation order made on 24 January 2018 pursuant to section 32(5) of the UK Borders Act 2007. This was the consequence of her conviction on 30 January 2017 in Bristol Crown Court of conspiring to produce a Class B controlled drug cannabis, for which she was sentenced to four years' imprisonment.

3. NT is a national of Vietnam where she was born in 1978. She was granted indefinite leave to remain in the United Kingdom in January 2014 based on her marriage to a British national NM in November 2008. She had arrived as a fiancée under the Immigration Rules in August 2008 with a daughter (MT) from a previous relationship in Vietnam, who was born in June 1999. The couple have a child CM who was born in the United Kingdom in January 2009. NT was released from prison on 24 March 2008 on licence and after, a period of immigration detention, was released on bail. She lives with her family in Glasgow where her husband is employed by a bank. At the time of the offence the family were living in Bristol, where the family had moved to from Scotland in the light of NM's work commitments.

4. The First-tier Tribunal Judge had materially erred based on a misunderstanding of the length of sentence imposed and the misapplication of the law when assessing the claim on Article 8 grounds in his decision dated 5 December 2018, in particular section 117C of the Nationality, Immigration and Asylum Act 2002 to which he had made no reference in his reasons for allowing the appeal on Article 8 grounds.

The Law

5. As I reminded the parties at the outset of the hearing, the Court of Appeal have recently given guidance on the approach to be taken following the decision of the Supreme Court in *KO (Nigeria) v SSHD* [2018] UKSC 53 in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 (where the sentence was less than four years) and in *SSHD v PF (Nigeria)* [2019] EWCA Civ 1139 where, as in this appeal, the sentence was for more than four years. As explained by Hickinbottom LJ at [23] in the latter decision, the starting point for consideration of an Article 8 claim is section 32 of the 2007 Act which:

> "Introduced the statutory presumption that the deportation of an offender who has been sentenced to at least twelve months' imprisonment for any crime is conducive to the public good for the purposes of section 3(5)(a) of the 1971 Act. That presumption could only be rebutted and automatic deportation constrained, where one of the statutory exceptions applies including where deportation would be a breach of human rights."

6. After a survey of the relevant Immigration Rules, Hickinbottom LJ set out the provisions at Part 5A of the 2002 Act as follows:

> "30. In considering the public interest question, section 117A(2) requires the court or tribunal to have regard to the considerations set out in section

117B; and, importantly for this appeal, in cases concerning the deportation of a foreign criminal, also to those set out in section 117C, namely:

"(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. Hickinbottom LJ continued with an explanation of the impact of the length of sentence at [31] as follows:

> "31. Given that section 117C(2) provides that there is a direct correlation between the seriousness of offences and the public interest in the deportation of a criminal who commits them, and there is a general correlation between the seriousness of offence and the sentence imposed upon those who commit them, it is unsurprising that the statutory provisions continue to provide for an approach to article 8 claims which is dependent upon the length of sentence that has been imposed upon the potential deportee, with criteria applying to those who are sentenced to at least four years' imprisonment different from those applying to foreign offenders who are sentenced to less."

8. As to offenders who were sentenced for at least four years, he further explained at [33]:

> "33. Turning to section 117C(6), for offenders who are sentenced to at least four years, or who fall outside the exceptions, the new statutory provisions reflect MF (Nigeria), by adopting the wording "very compelling circumstances" instead of the previous "exceptional circumstances". That is clearly a more stringent test than the "unduly harsh" test of section 117C(5). At [22] in KO, Lord Carnwath referred to section 117C(6) requiring, "in addition" to the section 117C(5) criteria, "very compelling circumstances". In Secretary of State for the Home Department v JG (Jamaica) [2019] EWCA Civ 982 at [16], having reviewed the relevant authorities, Underhill LJ referred to the need to show that the effect on the relevant child or partner would be "*extra* unduly harsh" (emphasis in the original). However, as Mr Dunlop submitted, that formulation risks masking a difference in approach required by section 117C(5) and (6) respectively: whilst KO held that the former requires an exclusive focus on the effects of deportation on the relevant child or partner, section 117C(6) requires those effects to be balanced against the section 117C(1) public interest in deporting foreign nationals. Under section 117C(6), the public interest is back in play."

9. But explained further at [34]:

> "34. That does not mean that consideration of "undue harshness" may not be helpful even where section 117C(6) applies. As to the approach to section 117C(6), in NA (Pakistan) at [37], Jackson LJ said this:
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> > "… [I]t will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within the Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

10. Relevant to the issues in this appeal, there is no material difference between the provisions in the Immigration Rules and those in section 117C(6). These were explained by Hickinbottom LJ at [36]:

> "36. The statutory provisions in sections 117A-117D are, unlike the Immigration Rules (see Ali at [17]), law rather than mere policy. However, both section 117C and the relevant Immigration Rules set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8(2) where there is a public interest in deporting a foreign criminal but countervailing article 8 factors. The force of the assessment in section 117C is, of course, the greater because it directly reflects the will of Parliament. The statutory provisions thus provide a "particularly strong statement of public policy" (NA (Pakistan) at [22]), such that "great weight" should generally be given to it and cases in

> which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, "are likely to be a very small minority (particular in non-settled cases)" (Ali at [38]), i.e. will be rare (NA (Pakistan) at [33]).”

11. Hickinbottom LJ continued between [37] and [39] to give guidance on the approach that should be taken:

> “37. But the required, heavily structured analysis does not eradicate all judgment on the part of the decision-maker and, in its turn, the court or tribunal on any challenge to that decision-maker's decision. It is self-evident that relative human rights (such as the right to respect for family and private life under article 8) can only ultimately be considered on the facts of the particular case. The structured approach towards the article 8(2) proportionality balancing exercise required by the 2002 Act and the Immigration Rules does not in itself determine the outcome of the assessment required to be made in an individual case.
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> 38. Therefore, whether an exception in paragraph 399 or 399A applies is dependent upon questions that require case-specific evaluation, such as whether in all of the circumstances it would not be reasonable for a child to leave the United Kingdom or whether in all of the circumstances there are insurmountable obstacles to family life outside the United Kingdom.
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> 39. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, by section 117C(6) and paragraph 398 of the Rules, the decision-maker, court or tribunal entrusted with the task must still consider and make an assessment of whether there are "very compelling circumstances" that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not – indeed, cannot – be taken into account in any general assessment.”

12. Although Mr Winter argued (with respect to the court) that the approach by the Court of Appeal was too “generalist”, it is clear to me that paragraph [37] of the judgment emphasises that a case specific evaluation is also needed as well as a structured approach. Furthermore, Hickinbottom LJ highlighted in [39] cited above not only the need for a general assessment (being Mr Winter’s “generalist” point) but also an assessment of the facts and circumstances of the *particular* case “which are not – indeed, cannot – be taken into account in any general assessment”.

13. In summary, Mr Clarke contended that NT did not come with Exception 1 in section 117C on the basis that her criminal behaviour demonstrated that she had not become socially and culturally integrated in the United Kingdom and furthermore he contended that there would not be very significant obstacles to her reintegration into Vietnam. He also argued that Exception 2 was not met and that the effect of deportation on MT and CM would not be unduly harsh.

14. Those submissions were based on the approach in *NA (Pakistan)* where the Court of Appeal considered it sensible to conduct an analysis as if an appellant were a 'medium offender' before considering whether there were 'very compelling circumstances' over and above those described in the Exceptions.

15. In *KO (Nigeria)* Lord Carnwath explained at [23] as to the assessment of "unduly harsh":

> "32. However, in *KO (Nigeria)* the Supreme Court took a different view as to the interpretation in this context of the phrase "unduly harsh". At paragraph 22, Lord Carnwath (with whom the other Justices agreed) said that on its face, Exception 2 in section 117C of the 2002 Act raises a factual issue seen from the point of view of the partner or child. At paragraph 23 he went on to say:
>
> > "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. he 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* [2017] 1 WLR 240, paras 55 and 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"."

16. In *PG (Jamaica),* Holroyde LJ carried out an analysis of the way in which parental separation can impact on children. PG was the father of six children who had been born in the United Kingdom and were British citizens. By his partner at the time of the appeal he had three sons aged between 3 and 15 as well as two sons by his former wife and a daughter by another woman, with all three being aged between 10 and 13. He lived with his partner and their three sons and maintained contact with the other children. In his analysis of the impact of deportation on the children affected, Holroyde LJ recognised the human realities of the situation and explained that he was in no doubt that PG's partner and the three children would "… suffer great distress if PG were deported". He was in no doubt that their lives would in a number of ways be made more difficult but nevertheless accepted the submission on behalf of the Secretary of State that the effect would not go beyond the degree of harshness. Those were his conclusions on the particular facts of that case. I must make my own assessment but nevertheless the observations made are instructive on

the scope of whether circumstances are unduly harsh or not and those features which reflect the commonplace nature of the impact of deportation.

17. Before leaving *PG (Jamaica)* it is helpful also to refer to the short judgment of Hickinbottom LJ who observed at [46]:

> "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 their 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 the ECHR. It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion: that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness."

Submissions

18. I have already referred in part to the submissions of the parties above. As to the Secretary of State's case, Mr Clarke explained that it remained unchanged from the refusal decision. In rejecting the case that there were very significant obstacles to integration, the Secretary of State contended that whilst it was accepted NT may face some practical difficulties in re-starting her life and that she may have genuine concerns about the uncertainties involved, even if it were accepted she had no ties to Vietnam, there was no evidence to suggest that she was estranged from life there, having regard to the network of family support available and in the alternative the ability of NT to support herself.

19. The Secretary of State did not consider family life with MT as she was now an adult. With regard to CM's best interests, no evidence had been submitted to demonstrate that her developmental needs or care would be hindered by NT's absence. Specifically:

> "It is considered that she is primarily dependent upon her father, for her accommodation, financial and subsistence needs, as well as her day-to-day care and wellbeing. In light of the fact that her father is settled in the UK, it is considered unlikely that he would seek to relocate himself and the child to Vietnam. It is considered to be in the best interests of your daughter to remain in the care of her father. Alternatively, it would be open to you to decide to take [CM] with you on your return to Vietnam."

20. It was considered by the Secretary of State that with time CM would be able to overcome any negative emotions as she would be supported (in the United Kingdom) by her immediate and extended family members.

21. As to NT's partner it was accepted the couple have a subsisting relationship but it was not accepted it would be unduly harsh for him to live in Vietnam should he choose to do so. It had not been demonstrated it would be unduly harsh for him to join NT in Vietnam. In addition, it was accepted that her deportation may result in a permanent separation but contact could be maintained via "modern methods of communication".

22. The Secretary of State observed that although NM had explained in his letter submitted prior to the decision that removal of NT would have a devastating on the children's lives, whilst in prison, he had been able to support himself and the children. This demonstrated that he did not rely on NT for his day-to-day welfare and well-being.

23. Mr Clarke supplemented these reasons with reference to NT's remaining connections with Vietnam where she had been for the first 30 years of her life, the subsequent visits where she stayed with her parents and her resourcefulness in helping her elder daughter in her business in the UK. He remained of the view that the devastation identified by NM would not amount to undue harshness in the light of the high test. Furthermore, it had not been demonstrated that there was something of a compelling kind over and above the Exceptions.

24. Mr Winter was content for Mr Clarke to make his submissions first and it had not been his intention to call NT or NM, however they gave evidence in the light of aspects on which I considered a clarification desirable. CM was present but not called, Mr Clarke having no questions for her. I encouraged her to remain outside with her father in the course of the hearing although her parents had not considered her presence objectionable. NT gave her evidence in English after Mr Winter and his instructing solicitor indicated they were satisfied she would be able to competently do so. I am satisfied from her responses that she fully understood the questions put to her and she gave her evidence in an articulate way, indicating a complete comprehension of what she was being asked.

25. Mr Winter's skeleton argument focuses on Part 5A of the 2002 Act in which he identifies the positive aspects of section 117B that NT meets. It is contended that there would be very significant obstacles to her integration in Vietnam and that the effect of her deportation would be unduly harsh on her partner and child. A number of factors are relied on as very compelling circumstances over and above the Exceptions, being in summary:-

    (i) A child with a dual ethnic background.

    (ii) NT's guilty plea.

    (iii) Assessment at a low risk of re-offending and her move away from where the offence took place as well as no longer associating with the persons involved.

    (iv) The first OASys was written whilst NT was in detention and the second was not supported by evidence from Dr Stark based on various misunderstandings and misapprehension.

(v) NM's employment in the United Kingdom, the family having accommodation and CM being in education here.

(vi) NT being a settled migrant and not having re-offended nor having had a bad immigration history.

(vii) Family ties would effectively be raptured as in reality the family are not going to go to Vietnam where NM and CM have no ties with their family in Scotland as well as it would be unreasonable for them to make that move together with the psychological issues they would face were they to do so.

26. Mr Winter supplemented this skeleton argument with the points including his observations on the reach of *PG (Jamaica)*. Having regard to the range of evidence and the reports before the tribunal he considered the material combined got over the threshold.

The evidence

27. This comprises statements by NT and NM which they adopted at the hearing and by MT and CM, neither of whom was called. At this point I observe that no submissions were made on behalf of MT who moved out of the family unit following NT's conviction but has moved in again.

28. Key points from NT's statement are that:-

(i) She had run her own business in Vietnam which she had sold before coming to the United Kingdom. She had started another business in Edinburgh which was unsuccessful. By the time the family moved to Bristol, NM was between jobs. NT helped run a restaurant there but that too was unsuccessful and the family moved back to Scotland where the focus of NM's work and it was after MT had finished High School.

(ii) It was whilst in Bristol NT explains that she became involved in the criminal network.

29. Under cross-examination NT confirmed that she had discussed with NM whether he would go with her to Vietnam and she did not believe he would do so. Her child CM would not go with her were she to be deported although she did not know whether she would remain in the care of her father were that so. NT has two sisters and two brothers in Vietnam. Both sisters are married, one of whom lives in the south and one in the middle of the country. One of her brothers live some seven miles from her parents' house which is also in the middle of the country; as with his sisters, he has two children. The second son has mental health difficulties and stays with his parents who care for him. Her father was born in 1952 and her mother in 1950. Her father had visited her in the United Kingdom. He is in poor health with heart difficulties.

30. NM's written evidence comprises a handwritten statement dated 23 July 2018 and a letter addressed to NT's solicitors dated 2 August 2017 which is the letter referred to by the Secretary of State in the decision letter.

31. NM's more recent statement explains that NT has been the main carer for the children and describes the difficulties that CM encountered whilst her mother was in prison. He considered that her physical health had also been impacted since he was not much of a cook and they survived on supermarket packaged food. His parents who are nearing 70 are retired teachers. He felt it an imposition to ask them for help whilst NT was in prison but they were okay for a "limited amount of time".

32. In cross-examination NM explained that he worked as a senior applications developer for a clearing bank. He had obtained a business degree from university but did not have any qualifications as an English teacher. He has been with the bank on and off for twenty years with breaks as an independent consultant to two other financial institutions. His parents live 100 miles away from Glasgow in south-west Scotland and he explained how he would take CM there for a week at a time, the arrangement being that he and his parents would meet halfway for the handover. He can work at home in his current post for two days a week. With the support of a childminder, he had cared for CM who had stayed with his parents during the school holidays. He did not know what to do were NT to be deported, referring to his daughter being settled here and his work.

33. CM's written statement refers to her happiness now that her mother has returned.

34. The OASys report dated 9 April 2018 predicts the probability of proven re-offending as low and likewise the risk in the community for children, known adults and prisoners, but medium for the public.

35. As to responsibility for the offence the report explains:

> "[NT] has stated that she was recommended by the solicitor to plead guilty as she would otherwise receive a lengthy prison sentence and be returned to Vietnam. [NT] is adamant that she was unaware of any drug activity. [NT] maintains that she used to be a regular user of a Vietnamese coffee shop and was asked to translate phone calls. She maintains that the phone calls that she translated involved arranging for the persons to meet at specific places, coffee shops or shopping centres. There was no suggestion of drug activity during the phone calls. The police investigation reports that [NT] was the leader of the group. She was controlling the movement of the trafficked males via telephone and had a network of associates whom she was instructing to co-ordinate the rental of properties used for the cultivations. The police operation has also witnessed [NT's] involvement with the loading of bags in and out of vehicles and analysis of her telephone calls has proved extremely significant."

36. The sentencing remarks by HHJ Picton explained in respect of NT:

> "[NT], you are 39 years of age, married to a UK citizen and a mother of young children. You pleaded guilty on the day of trial. It is suggested that you[r] plea was prompted by sight of the surveillance footage that shows you behaving in what, in my assessment, was a confident, professional and practiced way. Your property at 9 Admiral Close was effectively the control centre for the cannabis production this count concerns. You set up a tenancy at 1 Whittingham Drive, but the activities at Admiral Close encompassed other properties as well. You had a coordinating role, and in the context of this count have to be assessed as

> being at the top of the range of relative criminal culpability. You accept that your position in the Vietnamese community was one of the factors that made you valuable to this conspiracy, along with your capacity to speak English, something you co-accused, Khai Ta, lacked. Your position certainly encompasses all of the factors identified under the heading 'significant role'. Arguably, there are some features that fall within 'leading role', but it seems to me the better course is to asses those factors as having an impact by moving the sentence up the category range, as opposed to regarding them as triggering a starting point based upon leading role culpability.
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> As to the timing of your plea of guilty, there was no good reason why you should have left it to the day of trial to accept your guilt; you knew all along what you had done and the police surveillance footage did not show you anything of which you were unaware, all it did was demonstrate to you that your prospects of lying your way out of your predicament were nonexistent. You are not entitled to any more than 10 percent credit.
>
> In terms of identifying the sentence merited at the end of a trial, I have to balance the aggravating and mitigating features in the context of a starting point of 4 years and a category range of 2 years 6 months to 5 years. As I have already identified, those features that might have justified a conclusion that you performed a leading role have to impact where in the category range, your case falls prior to factoring in such mitigation for which you can contend. There is mitigation in your circumstances; in your letter to me you expressed the pain of being parted from your children and the loss of your marriage. All of that has stemmed from your choice of getting involved in serious and organised crime, a choice you made for financial gain. There was evidence that gain you did; hence for example, the trip to the diamond merchant in London, by which route you were no doubt spiriting money out of the jurisdiction.
>
> I do take account of your previous good character, and having balanced the aggravating and mitigating features, I identify 4 years 6 months as being the sentence I would have imposed, but for your plea of guilty. Application of the 10 percent credit for plea that I have already identified produces, giving you the benefit of some rounding down, a sentence of 4 years, of which you will serve up to half in custody, before then being on licence for the balance."

37. A social worker Ruth Stark has provided two reports. The first dated 24 September 2018 explains that she had been instructed to comment on the risk of re-offending. Her conclusion is that the risk of re-offending by NT was "… extremely low given her attitude to her offence, the remorse for the victims of her offending, the impact on her family and the determination she has to make amends to her family".

38. The second report dated 18 November 2018 comments on the OASys assessment which she describes as have "… some variance from the information available in the conviction and sentencing remarks previously available".

39. Ms Stark refers to the OASys assessment that were NT released into the community there would be a high risk of her absconding and she would be at risk of linking again with her former co-defendants. Neither prediction had occurred. She concludes:

> "In all other respects the conclusions reached in the substantive report in assessing the risk of re-offending, that [NT] is at a very low risk of re-offending, remain."

40. Ms Angeline Seymour who is also a social worker has provided two reports dated 21 March and 18 November 2018. The earlier report refers to the regularity with which the two children of the family see their grandparents, with CM explaining that she had stayed there with them during the school holidays and enjoyed outings and cooking with her grandparents. She referred to NM's account of CM's bedwetting as an indication that this had been an issue from a young age but that had increased during NT's incarceration. The report in part is based on a meeting in March 2018 whilst NT was still in prison and it refers to MT having "… moved out of the family home to fend for herself"; as well as reference by NT to her concern that she was staying out late which had worried her given her age.

41. Ms Seymour refers to the apprehended difficulties of the family relocating to Vietnam and in the summary of her report explains:

> "With regards to [CM] relocating to Vietnam with her mother, [CM] made it very clear that she did not want to go to Vietnam as she would not fit in there. With regards to CM being separated from her mother in the long-term, we have heard how the short-term separation is impacting on the current family life of [CM] and [NM's] inability to manage the new family dynamic. I have advised NM to seek professional help for [CM's] bed-wetting as in my experience should a physical cause be ruled out, [CM's] bed-wetting may well be related to a traumatic event, in this case separation from her mother. In addition, [CM] has become isolative and upset. She is struggling at school and not able to mix freely with her peers. All events that have occurred since [NT's] absence."

42. In her second report dated 20 July 2018, Ms Seymour refers to an interview with the family the same month for one hour on face time. She refers to CM's happiness that she no longer needs to rise so early and the positive aspects of spending more time with her mother. NM explained CM's confidence having improved. As to the effect and impact of NT's removal, Ms Seymour makes the following points:

    (i) This will severely impact on CM's physical and emotional well-being.

    (ii) It may well fall on CM to support her father, a process known as "parentification".

    (iii) If the family situation is not resolved in the long term this may well have a significant impact on the later life of CM and MT.

    (iv) CM's opinion on not wanting to go to Vietnam had not changed.

43. Dr Natalie Bordon, a Chartered Clinical Psychologist has also provided a report dated 31 August 2018 following interviews with the family members over a two hour period. The following key points emerged:

    (i) There appeared to be a strong secure attachment between CM and her mother and while she appeared to have a positive attachment to her father she was able to differentiate between the roles each parent provided.

(ii) MT was heavily reliant on her mother's practical input in order to attend to the various matters involved in owning her business.

(iii) The prospect of the family as a whole moving from Scotland to Vietnam did not appear to be a viable option. Neither NM nor CM can converse in Vietnamese which would undoubtedly make integration into the culture very difficult. CM's ability to speak the language have been significantly reduced due to NT not being within the family home for some time.

(iv) CM very much identifies herself as Scottish and was somewhat resistant to her mother's attempts to reinforce her Vietnamese heritage.

44. By way of summary, Dr Bordon explains that any separation between NT and her daughters was likely to have a negative impact on their mental health and well-being. Specifically in respect of CM, given her age, this " … in all probability may result in significant long term emotional and behavioural distress".

45. Dr Tran who holds a PhD in International Law from the University of Leeds and had worked as a senior official to the Vietnamese government between 1997 and 2013 has provided a report analysing the risks and obstacles that NT and her family would face if required to settle in Vietnam. In his skeleton argument Mr Winter specifically relied on passages relating to employment issues that NM would face, educational issues that CM would encounter and the difficulties over Vietnam's internal registration system (*Ho Khau*) which is necessary in order to participate in daily life. Reliance was also placed on the impact on NT obtaining employment in Vietnam due to her UK criminal record, accommodation difficulties and the psychological impact of NT returning alone.

Analysis

46. My starting point is a consideration of the best interests of CM. These are undoubtedly for her to continue to develop and grow with both parents present. This is reinforced by the impact of the absence of her mother for two years and whilst she was able to cope with the support of her father and grandparents, the negative effects indicate that this was not ideal. Of less force, CM's best interests lie in remaining in Scotland which is implicit in the Secretary of State's decision. This is understandable because she identifies as a Scot, she has limited competence in Vietnamese and Scotland is the only country she has known all her life, apart from a visit to Vietnam some time ago. She is unambiguous in her statement that she does not wish to go there.

47. The evidence points to it being unlikely that NM and CM will accompany NT were she to be deported. That being so deportation would result in a prolonged separation although the opportunity exists for regular visits and continuing communication by social media. Dr Tran considered that such visits could only be made once every three years. In the absence of evidence that NM would be unable to afford the cost of a trip or that he did not have time to do so, this prediction is misplaced. I consider that it will be open to the parties to visit at least twice a year

and to for CM to stay for an extended period should a trip be made in the school holidays.

48. Following the approach considered sensible in *NA (Pakistan)*, I consider NT's case first in the context of the three limbs to Exception 1. She has been here lawfully but it cannot be said for most of her life. Mr Clarke argued that by virtue of her criminal activity NT had not demonstrated that she was socially and culturally integrated in the United Kingdom. On balance I consider that she has despite that criminal activity in the light of her marriage, family and business activities here, despite having broken the law.

49. The third requirement is whether there would be very significant obstacles to her reintegration. Dr Tran explained the complexities of the domestic registration system in Vietnam which NT would need to cope with. Permanent registration is the standard needed to enjoy all benefits of living in Vietnamese society. There is no suggestion that NT did not have such registration in the past and Dr Tran does not explain other than a reference to the law on residence of Vietnam how it is her previous registration had been removed or deleted due to her settlement in the UK. I accept that NT is likely to have to go through the process of re-establishing permanent residence which will involve temporary residence for at least twelve months. This will undoubtedly be a difficulty but nevertheless Dr Tran does not state that permanent residence after time would not be achievable. During the regime of temporary residence, there will be restrictions on the ability of NT to function and obtain employment. She has family in Vietnam whom she can turn to, there being no suggestion of estrangement. Whilst she may be unable to obtain permanent employment in the short term, as urged by Mr Clarke in his submissions, NT is resourceful, demonstrated by her business activities in the United Kingdom and the current support she provides for her elder daughter. Whilst NT's own UK ventures have not been successful, there is no indication that the previous business venture by NT in Vietnam itself was not successful. Whilst there will be obstacles to NT's reintegration, in time and with application, it would be reasonably open to NT to overcome them. The difficulties identified by Dr Tran related also to the financial implications on NT of having only temporary registration for a period, but there is no evidence that her husband would be unable to provide financial support during any interregnum. Exception 1 is not made out on the hypothetical basis of NT having been sentenced to less than 4 years.

50. I turn now to Exception 2. NT is in a genuine and subsisting relationship with her British National husband (a qualifying partner) and she is such a relationship with CM (a qualifying child). The question is whether the effect of NT's deportation on her husband and child would be unduly harsh. Para 399 of the rules breaks the enquiry down for those who have been sentenced to less than four years into whether, for a child, it would be unduly harsh to live in the country to which there will be deportation or to remain without the parent being deported. As to the partner, the enquiry is whether it would be unduly harsh to live in the country of deportation because of compelling circumstances over and above those described in paragraph EX.2. (very significant difficulties which could not be overcome or would

entail very serious hardship for either party) or unduly harsh for that partner to remain without the deportee.

51. In the light of the evidence and submissions the reality is that NT would return to Vietnam alone. Nevertheless, for the sake of completeness, I do not consider it would be unduly harsh for her husband and CM to accompany her. The family will face challenges but these are to be found with any family migrating to another country where a different language is spoken and where the culture differs but NT's familiarity with the country and her connections there will smooth the path. Language can be learned. People can adapt to local conditions. NM has a university degree and long experience in the banking sector. Dr Tran explains that NM would face significant obstacles in finding a job due to the work permit system and language barrier. She acknowledges that some foreign banks operate in Vietnam but that he would nevertheless need to apply for a work permit despite having a spouse visa. Dr Tran does not explain why it was very clear to her that NM would only have a very limited chance to be able to obtain a job. She speculates that he would be unlikely to get a job as a teacher in Vietnam due to the absence of a teaching qualification. She nevertheless acknowledges that such a qualification could be obtained in the United Kingdom. Again, although Dr Tran paints a negative picture, the difficulties identified are those that can be overcome.

52. Turning to CM, clearly there would be difficulties with her lack of competence in Vietnamese but as acknowledged by Dr Tran Hanoi and Ho Chi Min City have international high schools as well as a few primary schools that use English as an official language. The identified barrier of expense and limited spaces does not in my judgment indicate that these could not be overcome. I am not persuaded that the evidence establishes that it would be unduly harsh for the family to relocate to Vietnam in order to preserve family unity. Such an outcome would largely serve CM's best interests if not all.

53. The next enquiry is therefore whether it would be unduly harsh on CM and NM to remain without NT, there being no case advanced with any conviction in respect of MT. The absence of NT in prison clearly caused difficulties and distress to CM and her father. But the fact is they were able to cope. NM kept his job and arrangements were put in place for CM's care supplemented by support by her grandparents. There is no evidence that such a regime could not continue. Again, taking account of the best interests, while such arrangements may fall well short of the ideal, nevertheless it cannot be said on the evidence before me that it would be unduly harsh. The long-term effect on CM is addressed in the expert evidence and I readily accept that CM's life will not be as rich and that her education may not develop as well without her mother. These though are the inevitable consequences of the split up of this family. CM has a devoted father and his parents are able to help. The absence of immediate maternal influence will be distressing for CM but regular contact by social media will be possible together with visits which I considered above. She will have the company of her older adult stepsister and will be able to see her grandmother on a regular basis. Dr Borden indicates the possibility of significant long term emotional and behavioural distress for CM however her apprehension is

based on the inevitable effect of separation on a child who is close to her mother apart from the issue of bedwetting which she acknowledges can be managed with the help of services. I am not satisfied that Exception 2 is made out on the evidence.

54. The next step is to consider whether there are very compelling circumstances over and above those captured in Exceptions 1 and 2 which requires consideration of all factors including those analysed in the Exceptions assessment.

55. I am satisfied the OASys report accurately reflects the risk of re-offending by NT in the light of the way that she sought to distance herself from the criminal activity which did not persuade the sentencing judge. An aspect of Ms Stark's second report which was not discussed at the hearing relates to the observation that by October 2015 the difficult family situation had reached a point where NT and NM were potentially heading for a divorce. This appears to have been brought about by his work pattern which took him away from home. Ms Stark is correct that the OASys assessment refers to NT having lived in Germany for a short time which appears to have been an error. Having regard to the OASys report as a whole I do not consider this material; it only emerges at 6.10 where NT's immigration history is summarised.

56. Ms Stark refers to NT in her first report as being at extremely low risk of re-offending and in her second report as at a very low risk of re-offending. I have had careful regard to her reasoning for this but remain of the view that the OASys assessment identifies without a good reasoning why the risk is low. This means that whilst there is a risk it is of low probability. There is nothing in NT's offending and her subsequent behaviour that points to a very compelling reason why the public interest in her deportation should not prevail.

57. As to the other factors relied on to resist deportation, I do not see in the circumstances disclosed by the evidence taken as a whole that there are very compelling reasons why NT should not be deported. I have considered again all the factors relied on in relation the 'medium offending' criteria and assessed these against the offending. The case does not meet the demanding criteria to overcome the strong public interest in deportation. Such deportation will cause further upset and distress in the lives of those innocently affected by NT's offending. They may feel that with NT having served her sentence and expressed remorse, the conviction should be put behind them and family life continue. This is not however an approach that is available in the light of the legislative framework I am required to apply. In my judgment the public interest in NT's deportation outweighs the factors relied on by the family members.

58. By way of summary the decision of First-tier Tribunal Handley is set aside. I re-make the decision and dismiss NT's appeal.

Signed

Date 15 October 2019

UTJ Dawson
Upper Tribunal Judge Dawson