Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03722/2019

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 1 July 2020, *via Skype for Business*	**On 29 July 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

CRAIG [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J. Victor-Mazeli, Counsel, instructed by Bridges Solicitors
For the Respondent: Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and no-one requested the same; I issued directions which stated that my provisional view was that the matter was suitable for a remote hearing, and no objections were received. I reached a final decision to direct that a remote hearing would be necessary and appropriate having considered the overriding objective, the need to avoid delay (insofar as compatible with the proper consideration of the issues), in particular the need for the parties to have this matter resolved, in light of my familiarity with the matter following the face-to-face error of law hearing on 19 March 2020. The documents that I was referred to are outlined in the body of the decision, the contents of which I have recorded. The order made is described at the end of these reasons. At the conclusion of the hearing, all parties were content that the hearing had been conducted fairly and, in particular, that no procedural or other unfairness arose by virtue of the hearing having been conducted remotely.

1. The appellant, Craig [M], is a citizen of Zimbabwe, born on 14 May 1990. He appeals against a decision of the Secretary of State dated 20 February 2019 to refuse to revoke a deportation order dated 15 May 2013 made under the automatic deportation regime established by the UK Borders Act 2007 ("the 2007 Act"). The automatic deportation order was triggered by the appellant's conviction, following his plea of guilty, to attempted burglary of a dwelling, for which he was sentenced to two years' imprisonment on 2 December 2011. At the same time, he was sentenced to an additional total of two months' imprisonment, arising from two previous failures to comply with the community requirements of suspended sentence orders. Thus, the appellant was sentenced to a total of two years', two months' imprisonment.

Procedural history

2. The appellant claimed asylum on 1 November 2012. His claim was refused by the Secretary of State, and the appellant appealed to the First-tier Tribunal. On 20 November 2013, the First-tier Tribunal (Judge Morgan) dismissed his appeal against the refusal of his asylum claim and dismissed his appeal against the deportation order on human rights grounds. The appellant exhausted all available avenues of appeal in relation to that decision on 19 December 2013. On 31 August 2018 and 28 January 2019, the appellant made a further human rights claim to the Secretary of State, in the form of an application for the deportation order to be revoked. That application was refused, and it is that refusal decision which the appellant appeals against in these proceedings.

3. The appellant originally appealed against the refusal to revoke the deportation order and the corresponding refusal of his human rights claim to First-tier Tribunal Judge Widdup who, in a decision promulgated on 10 December 2019, allowed the appeal. The Secretary of State appealed to this Tribunal. Sitting with Upper Tribunal Judge Jackson on 19 March 2020, I held in an *extempore* decision that the decision of Judge Widdup involved the making of an error of law and set it aside in its entirety (see the **Annex** to this decision). I directed that the matter be reheard in this tribunal, and invited the appellant to provide further evidence going to the issue of whether his deportation would be unduly harsh on either his partner, or their son, and reminded the parties of the need to provide updated evidence in further directions, issued on 5 June 2020.

4. I issued directions stating that it was my provisional view that the matter would be suitable for a remote rehearing, inviting representations in response. Neither party objected to the hearing taking place remotely. Accordingly, having satisfied myself that proceeding in that way was consistent with the overriding objective, the resumed hearing took place, via Skype for business, on 1 July 2020. Although Ms Victor-Mazeli experienced some connectivity difficulties during the hearing, they were overcome, and the hearing was able to resume without further difficulty. At the conclusion of the hearing, during which both the appellant and his partner had given evidence over the Skype link, both parties agreed that the hearing had been conducted fairly, and that there had been no issues arising from the hearing being conducted remotely which had affected the fairness of the proceedings.

Cases for the appellant and the Secretary of State

5. In summary, the appellant contends that it would be "unduly harsh" for his partner, Ms M, a British citizen of Hungarian origin, and their one year old son, N, for him to be deported; either for them to remain here without him, or for them to accompany him to Zimbabwe. He has no links with Zimbabwe, having moved here aged 11. All his family are here. He is now 30 years old. His life, and theirs, is firmly rooted in the United Kingdom, and Europe. Ms M has worked hard to establish herself in her adopted country of nationality and has no desire to leave. Her work as an audiologist could not continue in Zimbabwe, or anywhere else in Africa. She experiences mental health conditions, including anxiety and depression. She has attempted to commit suicide in the past and would likely do so again in his absence. The offences took place a long time ago. The appellant has learned his lesson. He has paid his punishment.

6. The Secretary of State resists the appeal on the basis that the threshold for something to be regarded as "unduly harsh" has not been met. The appellant has not lost all links to Zimbabwe, and would be able to establish himself there, either with Ms M and N, which would not be unduly harsh, or they could choose to stay here. That would be difficult for them, but not unduly harsh. In summary, his deportation would be proportionate.

Documentary evidence

7. The appellant relied on the bundle originally prepared for the First-tier Tribunal hearing in December 2019, plus two additional medical documents: a letter from Ms M's GP, Dr IM, dated 10 June 2020, and a report from Tamara Licht, a clinical and counselling psychologist, dated 26 June 2020.

Legal framework

8. Section 32 of the 2007 Act defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as a "foreign criminal". Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of exceptions contained in section 33, of which the only relevant exception is "Exception 1", namely that "removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's [ECHR] rights…" (see section 33(2)(a)).

9. The essential issue for my consideration is, therefore, whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be deported to Zimbabwe. This issue is to be addressed primarily through the lens of public interest considerations contained in Part 5A of the Nationality, Immigration and Asylum Act 2002, in particular section 117C (additional considerations in cases involving foreign criminals): see section 117A(2). The Immigration Rules also set out the Secretary of State's views as to where the public interest balance lies in relation to matters relating to Article 8.

10. It is settled law that the best interests of the children are a primary consideration.

11. It is for the appellant to establish his case to the balance of probabilities standard. It is for the Secretary of State to demonstrate that any interference with the Article 8 rights of the appellant or his family would be justified.

12. Although Ms M is a dual Hungarian/British citizen, at no stage has the appellant sought to argue that he enjoys any rights under the Immigration (European Economic Area) Regulations 2016 or the EU Treaties. He is not married to Ms M and he has not been recognised as a durable partner. For that reason, this decision will not consider whether the appellant enjoys the higher levels of protection under the EU regime.

The hearing

13. The appellant and Ms M gave evidence and adopted their statements. The appellant provided a single statement, dated 25 November 2019. Ms M provided two statements, dated 25 November 2019, and 2 December 2019. Each witness was cross-examined. I will summarise the salient parts of their evidence under my findings, below.

14. The appellant's sister, AM, provided a statement. She was available to give evidence, but Mr Jarvis indicated that he had no questions for her. I have taken the contents of her statement into account.

Discussion

15. Turning to the substantive issues for my consideration, I reached my decision in this case having considered the entirety of the evidence, in the round.

16. I find that the appellant's private and family life plainly engage Article 8 of the ECHR. He has lived in this country for more than half of his life, and many of his formative years have been spent here, given he arrived age 10. He was only a child when he left Zimbabwe. He has been in a relationship with Ms M since around 2010, and they have a child together. His deportation will engage his Article 8 rights, and those of his family, to such an extent as to amount to an interference with those rights. That would be an interference that would be in accordance with the law, in the sense it would be pursuant to an established legal framework, accompanied by a right of appeal to this tribunal. The operative question for my consideration is whether it would be proportionate, for the purposes of Article 8(2) of the convention for the appellant to be deported.

17. The Immigration Rules make provision for a person subject to a deportation order to apply to the Secretary of State for its revocation: see paragraph 390. Paragraph 390A incorporates the criteria that feature in paragraphs 398, 399 and 399A of the rules, concerning the making of deportation orders. Those rules largely replicate the statutory regime established by section 117C of the 2002 Act. As the Court of Appeal noted in CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ

2027 at [20], because of the statutory regime "there is no room for any further assessment of proportionality under Article 8(2) [through an application of the Immigration Rules in a deportation case] because these statutory provisions determine the way in which the assessment is to be carried out in accordance with UK law." Therefore:

> "it is generally unnecessary for a tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis…"

Accordingly, I will conduct my analysis by reference to the structured regime contained in section 117C. Those are considerations to which I must, "in particular", have regard: see section 117A(2)(b).

The offence

18. It is for the Secretary of State to justify the interference in the Article 8 rights of the appellant and his family that deportation will necessarily entail. Since the appellant's deportation was triggered by his offending, and since section 117C looks to the seriousness of that offending in order to determine the extent of the corresponding public interest in the appellant's deportation, I will begin my analysis by examining the offence for which the Secretary of State pursues the appellant's deportation ("the index offence").

19. The appellant was convicted of a serious offence. He attempted to burgle the home of a young mother present with her baby. He only failed because he was thwarted by a contractor. The sentencing judge, sitting in the Crown Court at Luton, said:

> "Domestic burglary – dwelling house burglary – is not just an offence against property; it is an offence against the person, as has been said times before. It causes devastating effects to householders to know that their house has been burgled. In this case, although only an attempt, the householder – a young mother with a child, a baby – has, in her victim impact statement, explained vividly how, now, she feels unsafe for her safety. To be the victim of a burglary – dwelling house burglary – must be a horrible experience… Regrettably, you must serve a custodial sentence of some length to reflect that."

20. This was not, as the sentencing judge noted, the appellant's first attempt. He had two convictions for dwelling house burglaries in October 2009. For those two offences, the appellant had been made subject to suspended sentence orders. The index offence was committed during the suspension period for those offences. The judge noted that it was a "merciful view" for the magistrates who sentenced him on the earlier occasions only to have imposed suspended sentences and that, "despite that" the appellant had gone on to reoffend. The judge noted that the appellant needed to "get out of the grips of drug addiction, and of the circle of people you mix with…"

21. The appellant was in effect a third time domestic burglar. This was a very serious offence, in respect of which – as the sentencing judge noted – the appellant received

credit for his plea of guilty, meaning that the sentence would have been higher but for that reduction.

22. Viewed through the lens of section 117C(1) of the 2002 Act, "the deportation of foreign criminals is in the public interest." Pursuant to subsection (2), "the more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal." This was an offence which was not at the bottom of the spectrum of severity. Although, as is regrettably the case, it is possible to envisage more serious offending, the appellant is not one who is caught by the automatic deportation provisions "on the cusp". He is over the threshold for being categorised as a "foreign criminal", which merely requires a sentence of at least 12 months, by a margin. As the appellant has been sentenced to a period of imprisonment of over 12 months, but less than four years, "the public interest requires [his] deportation unless Exception 1 or Exception 2 applies."

23. I turn, therefore, to the exceptions. The statute terms the person in the appellant's position as "C" throughout.

Exception 1

24. Section 117C(4) provides:

> "(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."

25. The appellant has not been lawfully resident for most of his life, although he cannot be held responsible for his unlawful status as a child (a factor which goes to whether there are "very compelling circumstances over and above" the statutory exceptions). He was granted discretionary leave in November 2009, when he would have been approximately 19 and a half, for what appears to be a period of three years. The grant of discretionary leave was not renewed, and the appellant remains here unlawfully. Although he has lived here for more than half of his life, he was not lawfully resident for that time.

26. I accept that the appellant is socially and culturally integrated, and Mr Jarvis made no attempt to contend otherwise. Although he has committed a series of offences, the most recent of which was in March 2018, possession of heroin, for which he was fined £50, the picture that emerged before me was of an individual who is committed to his family, and prior to the pandemic, engaged in a range of community activities with his baby son. Ms M was an impressive witness who spoke with great clarity about the extent and depth of the family ties she enjoys with the appellant, and the importance of family to them.

27. A central tenet of the appellant's case is that he would not be able to resume life in Zimbabwe, a country he does not know. His evidence was that he has no family in

Zimbabwe anymore; his family are all here, and his experience of life, both as a teenager growing up, and as an adult, is confined to this country. I accept that the appellant no longer has any family in Zimbabwe; in November 2013, in unchallenged findings of fact, the First-tier Tribunal accepted that he no longer has any family in Zimbabwe: see [18] of the decision of Judge Morgan. However, Judge Morgan also found that the appellant had not lost all ties to Zimbabwe. It was the country of his birth, and he would be able culturally to associate himself with the country. I accept that almost 7 years have passed since Judge Morgan's findings were made. However, the reasons given by the appellant for his claimed inability to integrate into Zimbabwe do not demonstrate that anything significant has changed, other than the passage of time, since Judge Morgan's decision. I do not accept that the appellant would experience "very significant obstacles" to his integration. The mere claimed inability to be able to find work, or unfamiliarity with the language (bearing in mind that English is one of the official languages of Zimbabwe), or feared destitution cannot amount to "very significant obstacles". It is a high threshold. The question of whether there will be such obstacles calls for a broad evaluative judgement, of whether, given sufficient time, the appellant will be able to establish himself as enough of an insider as to be able to enjoy a reasonable prospect of establishing a private life there. I find that he will be able to establish a private life in Zimbabwe, within a reasonable period of time, on the basis of the preserved links found by Judge Morgan to continue to exist, and the family he has here to support him.

28. A central plank of the appellant's case is that he has a supportive family around him in this country. He is financially supported by Ms M and, to an extent, by his mother. I accept the evidence of Ms M, outlined in her statements, that the family finances are very tight, and that they have been plunged into debt, principally as a result of the appellant's conviction and immigration status, which has had the dual impact of preventing him from being able to work, and the family taking on debt to meet legal fees and other expenses. However, other than the assertion of the appellant, there is no evidence that the wider family would not be able to remit at least some financial support, at least initially. At [9] of her statement, AM writes that, "we have all been there for Craig and until this day we continue to support him because that is the many values of being a family." Under cross-examination, the appellant said that his family support his brother at university, and that his mother helps with household expenses. I do not accept that the clear evidence of the warmth of family relationship that is evident between the appellant and his wider family, and the support that they provide to him at the moment, would simply draw to a halt in the event of his deportation. The reality is that his family support him now and are more likely than not to continue to do so in the future, at least initially.

29. Ms M said that a significant expense she and the appellant have had to meet has been the cost of these legal proceedings. I do not underestimate the expense that that will have put them to. However, upon his return, those expenses will, by definition, come to an end. There is no evidence, other than the bare assertions which I do not accept for the reasons given, that the appellant would be left high and dry by his loving and caring family here.

30. Ms Victor-Mazeli did not contest Mr Jarvis's submission that some funding may be available from the Secretary of State, to assist with the appellant's initial arrival in Zimbabwe. I find that some support would be available to him from the respondent.

31. I accept that the appellant will encounter a range of difficulties upon his return. However, the obstacles which the appellant will inevitably face, cannot be so significant as to amount to "very significant obstacles". He has not demonstrated that the ties Judge Morgan found he continued to enjoy to Zimbabwe in November 2013 (see also [12] of that decision) have been lost altogether. Judge Morgan's decision forms the starting point for my analysis, and there has been no additional evidence, other than the passage of time, demonstrating that those findings should be displaced. The appellant will be able to use those retained ties, support and encouragement from his family, and his own Zimbabwean roots to put down the foundations of a private life which, within a reasonable period of time, will enable him to become integrated. There are obstacles to his integration, but none of them is "very significant".

32. It follows, therefore, that the appellant is not able to resist deportation on the basis that Exception 1 is met.

Exception 2

33. Section 117C(5) provides:

> "(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."

34. It is common ground that the appellant enjoys a genuine and subsisting relationship with Ms M and N. Both are British citizens, with the effect that they are a qualifying partner and child respectively: see section 117D(1). Mr Jarvis did not suggest that the relationships within the family unit are anything but genuine and subsisting.

35. The essential question is whether it would be "unduly harsh" on either Ms M or N for the appellant to be deported.

36. I begin with the medical evidence which has been adduced in relation to Ms M. She experiences anxiety and depression. In an extract from her GP records, she is noted as having a "significant past" in the form of anxiety with depression, in September 2015. In a single paragraph letter of four lines dated 28 November 2019, Dr IM writes that Ms M:

> "… has a history of depression. If [the appellant] were to be deported this may have a severe impact on [Ms M's] mental health. Equally separation from his father would have an impact on their child."

Unfortunately, other than confirming that Ms M's medical history includes depression, this letter does not provide any detail as to the nature of her depression, its suspected causes, nor what the "significant history" recorded by her medical

records entailed. Some assistance is provided by a further letter from Dr IM, dated 10 June 2020, which states:

> "[Ms M] has a history of anxiety and depression, and a history of an impulsive overdose of over-the-counter sleeping tablets and pain medication in response to social stress which required an assessment in hospital.
>
> She has already been through a lot of stress due to the ongoing immigration court case, which I understand has been going on for several years. If [the appellant] were to be deported this would likely have a serious impact on [Ms M's] mental health especially given her previous history. As a result she would likely struggle to look after their son."
>
> I also believe their son, although only 13 months old, would suffer, possibly psychologically if separated from his father. This would further compound issues for [Ms M]."

37. Although this letter provides a degree of additional detail, I have included its operative contents in full to highlight its brief nature, and the absence of detail concerning the "social stress" and the "assessment in hospital" which that entailed. In her own evidence, Ms M said that the appellant's unexpected continued detention following the expiry of the custodial element of his criminal sentence, had triggered this incident. The letter does not assist with any specificity at all in relation to the likely "serious impact" upon Ms M's mental health, in the event of the appellant's deportation.

38. Some further detail is provided in the report of Ms Licht, but the report features significant limitations, as set out below. It was drafted following a video consultation with Ms M which lasted an hour and 15 minutes. At [3.03], Ms Licht writes that she had not received any documentation from the appellant or those representing him (or, indeed, Ms M herself, although I make no criticism of her for this), which means that she must have drafted the report without having even seen the very brief medical summary included in the bundle for these proceedings, still less the broader range of materials that must have been generated by the hospital admission and the other medical attention Ms M had at the time and since. Ms Licht concludes that Ms M meets the criteria for "major depressive disorder" single episode, without psychotic features, with anxious distress: see [4]. In the same paragraph, Ms Licht writes that the ongoing uncertainty from the legal proceedings involving the appellant have had a significant impact on Ms M's mental health.

39. In the fourth unnumbered paragraph on page 8, Ms Licht writes, with emphasis added:

> "It's my professional opinion that a major risk to [Ms M's] health if she were to lose her husband [sic], is that *current suicidal thoughts* may increase and get more intense; thus, the risk of committing suicide remains high in this scenario. Literature suggests that the possibility of suicidal behaviour exists at all times during major depressive episode… Furthermore, literature indicates that it should be remembered that most contemplated suicides are not preceded by unsuccessful attempts…"

40. The suggestion that Ms M experiences "current suicidal thoughts" is not one that finds support in any of the other medical documents or evidence in the case, including that of Ms M herself. At [21] of her first statement, Ms M writes about how she is able to manage her anxiety of depression. At [58], she writes that he has a history of the conditions, explaining at [59] what her fears are in the event "these problems return". In her oral evidence, Ms M was keen to emphasise that she had only attempted suicide once, and that was some time ago – 2015. Neither of the letters from Dr IM, her GP, suggest contemporary suicidal ideation.

41. It is not clear, therefore, why or how Ms Licht – who, of course, had not been asked to view any supporting medical documents ahead of writing her report – refers to Ms M as experiencing "current suicidal thoughts". There appears to be no support for the introduction of those concerns in the report. That is a concerning feature of the report.

42. At page 10, Ms Licht writes, in the present tense:

> "…it is my professional opinion that [Ms M] will need a long and constant psychological process *before being fit to function again in society*." (Emphasis added)

The suggestion that Ms M requires such extensive psychological treatment before being "fit to function again in society" is at odds with the GP's letters, and the remaining evidence in the case. Dr IM's most recent letter states that Ms M has a *history* of anxiety and depression but makes no mention of it being a contemporary condition, not does the GP state that any conditions which are experienced by Ms M impair her fitness to "function again in society". The evidence Ms M herself does not support that proposition. She writes vividly in her statements, and spoke with equal enthusiasm in her evidence before me, of the training that she has undertaken to qualify as an audiologist. She works for a private audiology company, which operates within the NHS system, and is about to be offered a senior audiologist role. In her December 2019 statement, she wrote at [7] that she looks after:

> "hundreds if not thousands of patients who are in dire need of hearing care… Our line of work not only helps patients hear better but helps preserve their mental health and brain health keep people away from isolation… It is crucial for these patients that I continue my job."

She adds that [9] that:

> "it is extremely difficult to find anybody for my position. My work is very demanding in time and energy as well. My diary is back to back and I have four clinic days a week. The job requires a great amount of admin, which must be done on a separate day, on the fifth day of the week."

At [11] she writes:

> "I also have patients whom I look after for years. They know me personally and they tend to request their appointment with me only. It is extremely important for me that I provide the highest and best possible care for patients with continuity and reliability. [12] I enjoy my work and I do it with great passion."

43. The picture of a suicidal, extremely depressed individual, who is "unable to function in society", and who would not be able to function unless these proceedings are resolved in favour of the appellant, that emerges from the report of Ms Licht, is at odds with the evidence of Ms M herself, and the remaining medical evidence. These weaknesses lead me to diminish the weight that would otherwise be attached to the report.

44. Drawing this analysis together, I accept that Ms M does experience anxiety and depression, and that the stress of high pressure situations where there is unpredictable and impacting change has the potential to bring about further anxiety and depression. However, given the weaknesses in Ms Licht's report identified above, I am unable to accept its conclusions concerning the impact of the appellant's deportation on the mental health of Ms M. His deportation would inevitably have an impact, but it is not likely to be as acute or extensive as – and I regret to put it in these terms – Ms Licht has speculated. Similarly, the lack of detail in Dr IM's letters means it is difficult to ascribe much weight to the assertions in either letter, other than to accept that, in broad terms, the mental health of Ms M will suffer upon the appellant's deportation.

N: best interests

45. Against that background, I turn to the best interests of N. I have no hesitation in concluding that N's best interests are to remain in this country, with Ms M and the appellant, and for the family to continue as a family unit. N is a British citizen, as is his mother. The appellant's devotion to his son was evident from the description he gave of their daily life together, which summarised in warm and loving terms the strength and depth of the relationship between father and son. Although N is a very young child at the moment, his best interests are to avoid the disruption and uncertainty that would flow from the deportation of the appellant. If he were to remain in this country without the appellant, he would be deprived of his father, and the family unit would be separated. In turn, while that would not have the devastating impact on Ms M's mental health that Ms Licht speculated it would, it would nevertheless have an impact on Ms M, and inevitably upon the wellbeing of N.

46. Ms M may have to stop work in order to look after her son, or would have to source childcare from elsewhere. Either way, that would place the remaining family unit in this country, Ms M and N, under immense emotional and financial stress, which they would have to face alone. See the letter from the appellant's son's NHS keyworker at page 39 of the bundle. There will be an impact upon Ms M's mental health, although in the absence of any detail from either medical expert, it is not clear what that impact would be, nor its extent. There is a lack of depth in Dr IM's assertion that N "would suffer, possibly psychologically"; it lacks the detail and precision to necessary to attract weight: see the 10 June 2020 letter. The commitment that Ms M clearly has to her work, and the sense of fulfilment she has from it, could be lost if she has to stop work for childcare reasons, and that would have a corresponding

impact on the atmosphere of the family home. None of this would be in the best interests of N.

47. It would plainly not be in the best interests of N for him to accompany the appellant, with Ms M, to Zimbabwe. While I have found that the appellant, if returned in isolation, would – within a reasonable period of time – be able to integrate, and establish a private life consistent with his own nationality, ethnicity and the cultural origins of his early childhood, I have no basis to read those findings across to reach a similar conclusion in relation to the return of Ms M and N with the appellant. It is one thing to expect the appellant to cope on his own. It is another to expect the entire family to be able to accompany him and cope alongside him. For the purposes of this assessment of N's best interests, I find that it is not in his best interests to accompany his father to Zimbabwe with Ms M. It would be an alien environment for his mother, who would likely take some time to find work in her current field, or retrain, in the already-fragile post-pandemic Zimbabwean economy. In turn, that would have a corresponding and detrimental impact on the child. It is not in the best interests of any child to be required to live in the country where his father will experience difficulties (albeit not very significant obstacles) to integrating, and where the mother, being of a completely different ethnic and cultural background, would be likely to struggle immensely with bringing up a young child, against the background of severe financial problems the family would be likely to encounter, and a past history of mental health conditions.

48. Drawing this analysis together, therefore, the best interests of N, are to remain in this country, with both parents.

Unduly harsh

49. A certain amount of harshness is "due", or to be expected, when a person is deported from the United Kingdom. The level of "due" harshness is that set out in section 117C(1), arising from the public interest in the deportation of foreign criminals. The level of "due" harshness does not correspond to the seriousness of the offending, otherwise that would result in some children being "due" greater levels of harshness depending on what their parent(s) had done. That would offend the settled principle that children are not to be held responsible for the acts or omissions of their parents. But when considering the threshold, "*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…*": see KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [23].

50. I find that the difficulties the family would encounter if they sought to relocate to Zimbabwe would be "unduly harsh" for N, in light of my assessments of his best interests. The harshness of requiring a young British child to relocate to Zimbabwe, with its well-documented economic difficulties, compounded by the difficulties his father and mother would face, would go beyond what is "due". The family unit would be exposed to a poverty unlikely to be faced by the appellant if he were to return alone, for finding funds to maintain a family of three will be a greater

challenge than the appellant will face when seeking to sustain himself, or rely on remittances from family here. Accommodation that would be sufficient (and affordable) for a single 30 year old man would be very unlikely to be suitable for a young family with a toddler; common sense dictates that suitable accommodation for the entire family would be more expensive, and harder to secure. The risk of destitution for the family unit would be significant. Ms M's past anxiety and depression would be at risk of returning, and placing considerable barriers before what minimal prospects the family would have of being able to establish themselves there. I find that it would be unduly harsh to expect either Ms M or N to accompany the appellant to Zimbabwe. I reach this conclusion taking full account of the level of harshness that is "due", calibrated by the public interest in the deportation of foreign criminals, as set out in section 117C(1) of the 2002 Act. Exposing a family, including a young British child, to the real possibility of living an impoverished life in a country which has experienced significant instability and extreme economic pressure, goes beyond the harshness that is due.

51. The same cannot be said, however, in relation to Ms M and N remaining here, in the absence of the appellant.

52. In Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213, Hickinbottom LJ summarised the position in relation to the impact on family life, commencing with the position of the children involved, in this way, at [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."

53. "Unduly harsh" is an elevated threshold, as the Supreme Court observed in KO, endorsing this tribunal's approach in MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563 (see [27] of KO). It is clear that the passage of time, and any element of delay, in the Secretary of State's consideration of the appellant's deportation is not a relevant consideration for the purposes of determining whether deportation would be "unduly harsh": see PG (Jamaica) at [40]. That means that, contrary to the submissions of Ms Victor-Mazeli, the "delay" and the passage of time since the appellant's 2011 convictions is not a factor which goes to the issue of whether the appellant's deportation would be "unduly harsh" on Ms M or N. The reference point for what is "due" is that which the Supreme Court emphasised in KO is contained in section 117C(1), namely the fixed public interest in the deportation of foreign criminals. For the purpose of this exception, the issue of

delay is not a relevant consideration; what is "due" cannot be tempered by the passage of time.

54. I set out above how the appellant's supplementary evidence in chief described the care and affection which characterises his relationship with N, and their daily routine together. I accept that the appellant is the primary carer for N, given the extensive work responsibilities of Ms M. The family income is not significant, and although Ms M is a qualified audiologist, she does not currently earn enough to pay for full-time childcare. The family are able to cope at the moment because the appellant is the primary carer. However, the loss of childcare is a normal consequence of deportation which is not capable of amounting to being "unduly harsh" in isolation.

55. The most significant aspect of the impact of the appellant's removal upon Ms M is her mental health. I accept that she has experienced anxiety and depression in the past and attempted suicide on a single occasion in 2015. I also accept that the catalyst for the suicide attempt was likely to have been the stress arising from the uncertainty of the appellant's continued detention.

56. I accept that the absence of the appellant is likely to augment Ms M's mental health conditions, with the potential to lead to her anxiety and depression returning. However, the evidence does not demonstrate that the mental health consequences of the appellant's deportation upon Ms M, and therefore by proxy upon N, go beyond the expected and sadly tragic likely consequences of most deportations of a parent. The medical evidence submitted on behalf of Ms M is vague and imprecise. It does not specify, with the required clinical precision, what the impact of the appellant's removal would be. As I have set out above, the report of Ms Licht was drafted without the sight of any of Ms M's medical records, and proceeded on the erroneous assumption that she experiences suicidal ideation and was unable properly to "function in society". That, of course, was plainly incorrect. The medical evidence does not demonstrate a suicide risk or the risk of severe deterioration of Ms M's health.

57. I accept that the deportation of the appellant would deprive N of his father and would be contrary to his best interests. Against those concerns, is the fact that the appellant's family, his mother, brother and sister, live in this country. They assisted with childcare during the hearing. I accept the appellant's evidence that his mother provides extensive practical and financial assistance towards the cost of bringing up N. I find that Ms M would not be left without any support from her wider family by marriage. She has demonstrated resolution and determination in the pursuit of her career here, and has demonstrated that she is able to function highly in a broad range of contexts, from national security to audiology. She is relied upon by a large number of her patients in the area she lives, and is on the cusp of being promoted to a more senior position, underlining her broad skill set. I find that, although her mental health will be impacted, there is no evidence demonstrating a causal and likely link to a further suicide attempt or a significant and unduly harsh deterioration.

58. As tragic as the appellant's deportation is, and despite the great sympathy, to adopt the terminology of Hickinbottom LJ in PG (Jamaica), I have for N, and the inevitable distress which the appellant's deportation will cause for Ms M, on the facts of this case, those are the sad consequences which can be expected ordinarily to flow from the deportation of foreign criminals.

59. Exception 2 is not, therefore, met.

Very compelling circumstances over and above

60. The remaining question is whether there are "very compelling circumstances" over and above the exceptions. Pursuant to NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, those in the position of this appellant are to enjoy the ability to contend that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2", for the purposes of section 117C(6). This is an analysis which must take place by reference to the extent to which Exceptions 1 and two were met, in addition to considering any additional factors.

61. Ms Victor-Mazeli contends that the passage of time since the appellant committed the index offence means that the public interest in his deportation has diminished. I reject this submission. The difficulty with the appellant's delay argument, is that this is not a case where the respondent's approach may properly be characterised as one of inactivity or acquiescence in long-term unlawful residence. The appellant was placed in immigration detention for a considerable period of time, in order to facilitate the appellant's removal. There is no suggestion that that detention has been found to be unlawful on the basis that there was no realistic prospect of the appellant's removal; while he was released on bail, Ms Victor-Mazeli has not contended that the Secretary of State's detention of him was unlawful or otherwise unaccompanied by efforts to secure his removal.

62. Mr Jarvis put to the appellant that the respondent has attempted, unsuccessfully, to arrange meetings between him and the Zimbabwean authorities, in order to secure a travel document. In cross-examination, the appellant gave the rather unimpressive reply that he has been reporting to the respondent on a regular basis, and that those attendances could have been used to secure his cooperation for a travel document interview. It seems that the appellant's attitude is that, rather than complying with the specific requests to arrange an interview at a time of mutual convenience with the Zimbabwean authorities, he expects the respondent simply to have secured the attendance of the relevant Zimbabwean officials, in order to coincide with one of his regular reporting attendances at the respondent's premises. Taken with the remainder of the appellant's evidence, in which he accepted that he had no intention of returning to Zimbabwe unless physically placed on a plane as part of an enforced removal, I find this to be an unconvincing explanation.

63. This is not one of those cases where the respondent's delay has contributed significantly to the longevity of the appellant's continued residence. The respondent detained the appellant with a view to his removal for a considerable period and has attempted to secure his cooperation for a travel document interview. The appellant

was, at all times, under an obligation to leave, and he chose not to. He has never approached the Zimbabwean authorities himself to secure an extension to his passport, which, he said under cross-examination, expired in 2006. Any delay is not the fault of the respondent. The appellant has done absolutely nothing to progress his own removal, despite being under an obligation to leave the country.

64. I will adopt a balance sheet approach to analyse the remaining issues which are relevant to the "very compelling circumstances" test. Factors mitigating against the appellant's deportation include:

    a. The best interests of N are for the appellant to remain here. The appellant's deportation would deprive N of his father. The appellant plays a significant role in N's life, which would come to an end in its current form in the event of his deportation.

    b. The appellant arrived aged 11, and has grown up in the United Kingdom, and considers this country to be his home.

    c. Although the appellant was here unlawfully for most of his childhood residence, that cannot be held against him, for it was entirely out of his hands. It is an established principle that when considering the best interests of a child, as the appellant was at the times under consideration, that children are not to be held responsible for the misdeeds of others. Accordingly, I treat the appellant as though he was lawfully resident until at all material times when he was under 18.

    d. The appellant has not always resided here unlawfully; he was granted limited discretionary leave in November 2009.

    e. As Ms Victor-Mazeli highlighted, the European Court of Human Rights has ascribed significance to longevity of residence for the purposes of assessing Article 8: see Maslov v Austria (1638/03) [2009] INLR 47.

    f. The length of the appellant's residence here, and the passage of time since his offending, are weighty factors.

    g. Save for a single offence for the possession of heroin in March 2018, and a caution for the possession of cannabis in April 2015, the appellant has not reoffended since the commission of the index offence.

    h. Ms M provides a valuable service to a number of patients, operating within the NHS context. Her work as an audiologist may be called into question, at least in the short to medium term, in the event of the appellant's deportation. The appellant's deportation would have an impact that would be felt in the local community, not because of any contribution he makes, but because of that made by Ms M.

    i. The appellant speaks English and is financially independent.

65. Factors militating in favour of the appellant's deportation include:

    a. The public interest in the deportation of foreign criminals.

b. The appellant committed a serious offence, for which, pursuant to section 117C(2), attracts a correspondingly greater public interest in deportation (note this factor does not apply in relation to the amount of harshness that is "due", the reference point for which is fixed by section 117C(1), by reference to the general public interest in the deportation of foreign criminals).

c. The appellant meets none of the statutory exceptions to deportation. He would not face very significant obstacles to his integration in Zimbabwe, and his deportation would not be unduly harsh on Ms M or N.

d. To the extent that the appellant contends that there has been significant delay by the Secretary of State in pursuing his removal, pursuant to EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, there is no merit to this argument. As set out above, any delay cannot properly be attributed to the respondent. The appellant was quite clear in his evidence that he has never had any intention of leaving the country. Nor can it be said that he has lived an entirely blameless life since the index offence, having received a caution and a conviction for the possession of cannabis and heroin in 2015 and 2018 respectively.

e. Although the appellant has lived here for a considerable period, he did spend his early years in Zimbabwe, and still retains some links (albeit not familial) to the country. This is not a case where, for example, the appellant was five or six when he arrived (for example, the applicant in Maslov was six years old upon his arrival in Austria).

f. Speaking English, and being financially independent, are neutral factors.

66. Ms Victor-Mazeli highlighted [46] of Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. There, Lord Reed spoke of the need for an appellate tribunal to reach its own decision on the proportionality of the deportation of a foreign criminal. Lord Reid added that, "where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, [appellate tribunal] should attach considerable weight to that assessment…" In reaching my own view of the proportionality of the appellant's removal I do, of course, take into account the general policy of the Secretary of State. That is nothing to the point, however, as the legislative framework applicable to these proceedings, Part 5A of the 2002 Act, sets out not only the Secretary of State's views of the public interest in the deportation of foreign criminals, but Parliament's view, in the form of statutory considerations to which I must, in particular, have regard. What is clear from Ali at [46] is that the public interest in the deportation of foreign criminals "can generally be outweighed only by countervailing factors which are very compelling…"

67. In light of the above analysis, I do not consider that there are very compelling circumstances, over and above the exceptions, mitigating against the public interest being in favour of the appellant's deportation. The cumulative force of the factors that have been advanced on his behalf are not capable of outweighing the force of the

public interest in the deportation of foreign criminals. In light of the statutory considerations prescribed by Parliament, I consider that the appellant's deportation is a proportionate response to the index offence. The consequences which will no doubt be very significant for Ms M and N bearing in mind the expected harshness which is "due" when crimes are committed by foreign criminals. The pain which the family will have to endure has been augmented by the appellant's defiance of the deportation order which has been in force against him, in relation to which exhausted all available avenues of appeal in December 2013, rather than leaving the country. It is not disproportionate to expect a person in the position of this appellant to be deported to Zimbabwe in these circumstances. While the best interests of N are not consistent with this conclusion, the cumulative force of the reasons in favour of the appellant's deportation, the public interest in the maintenance of effective immigration controls and the deportation of foreign criminals, the appellant's inability to satisfy the requirements of either of the statutory exceptions, in the absence of "very compelling circumstances over and above" the exceptions, are capable of outweighing his best interests.

68. It follows that the public interest in the deportation of foreign criminals pursuant to Part 5A of the 2002 Act has not been overcome by the appellant. That is dispositive of an application of the Immigration Rules to revoke the deportation order made against him. The operative requirement of paragraph 390A of the rules concerning the revocation of deportation is to consider whether the exceptions in paragraphs 399 or 399A of the rules are met. Paragraph 399 corresponds to Exception 2 in section 117C, and paragraph 399A corresponds to Exception 1. Pursuant to my earlier analysis, the appellant is unable to meet either exception, and there are no very compelling circumstances over and above the exceptions. Having regard to the considerations in Part 5A, the appellant's deportation is in the public interest, and the appellant cannot defeat the application of the automatic deportation provisions on that basis. The exception to automatic deportation contained in section 33(2)(a) (deportation would breach a person's Convention rights) is not made out.

69. This appeal is dismissed.

Notice of Decision

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Fee Award

I make no fee award.

Signed *Stephen H Smith* Date 16 July 2020

Upper Tribunal Judge Stephen Smith

Annex – Error of Law decision

IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03722/2019

THE IMMIGRATION ACTS

Heard at Field House
On 19 March 2020
Extempore decision

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE JACKSON
and
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

CRAIG [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr O Agho, Bridges Solicitors

DECISION AND REASONS

1. This is an appeal of the Secretary of State. For convenience we will refers to the parties as they were before the First-tier Tribunal where appropriate.

2. The appellant, Craig [M], is a citizen of Zimbabwe. The Secretary of State appeals against a decision of First-tier Tribunal Judge Widdup promulgated on 10 December 2019 allowing the appellant's appeal against a decision of the Secretary of State dated 20 February 2019 refusing his application to revoke a deportation order and refusing his associated human rights claim.

3. The appellant had been made subject to a deportation order on account of offences he committed between 2009 and 2011. He was convicted of burglary and sentenced to two years and two months' imprisonment. He was also convicted for attempted burglary and for failing to comply with the requirements of a community sentence. The appellant thereafter claimed asylum, but that claim was refused on 15 May 2013 and a deportation order was made against the appellant under the provisions of the UK Borders Act 2007. The appellant appealed against the refusal of his asylum claim to the First-tier Tribunal in November 2013. The appeal was dismissed and there was no successful onward appeal from that decision.

4. The First-tier Tribunal Judge on this occasion accepted the submissions made on behalf of the appellant that it would be unduly harsh for his Hungarian-British partner and his son for him, the appellant, to be deported to Zimbabwe. The Secretary of State contends that the reasons given by the judge for reaching that finding were insufficient. She also submits that there was no proper self-direction in the relevant legal principles which the judge was bound to apply when finding that the appellant's deportation would be unduly harsh either on his partner or on his son.

5. On behalf of the appellant, Mr Agho submits that the judge's decision was sufficiently reasoned and featured the correct self-directions in law. He took us through the materials that were before the judge and submitted that they supported a finding that it would be unduly harsh on the partner and son if deportation were to proceed. The evidence featured a report from the appellant's British son's key worker with the East Sussex Healthcare NHS Trust, medical materials and records concerning the appellant's partner and other evidence concerning the impact of deportation upon the family unit. The judge found that the deportation of the appellant would be disproportionate.

6. Permission to appeal was granted by First-tier Tribunal Judge Chohan on the basis that the judge failed to give sufficient reasons for his findings.

Discussion

7. At the outset of our analysis, it is necessary to recall the legal framework pursuant to which the judge was considering the appellant's deportation. The judge correctly directed himself concerning the Immigration Rules' approach to the revocation of deportation orders and the rules in connection with the making of a substantive deportation order, which are relevant to the question of revocation. He did not set out, in terms, the legislative framework contained in Part 5A of the Nationality, Immigration and Asylum Act 2002, in particular section 117C. This is the statutory framework which not only underpins the deportation provisions of the Immigration Rules but also supersedes, and it is by reference to the primary legislation that a deportation assessment should take place: see CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027 at [20].

8. Section 117C(5) sets out one of the exceptions to the principle that the deportation of certain foreign criminals, including this appellant is in the public interest. It states as follows:

> "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."

The judge did not address that legislative provision as such but did purport to consider whether the appellant's deportation would be "unduly harsh".

9. The judge considered the best interests of the appellant's son. He was born on 14 May 2019 and lives with the appellant and his partner as a family unit. It was common ground in the hearing before us that the best interests of the appellant's son would be for the appellant to remain with the family unit for the family unit to remain living in this country. So much is clear from even brief consideration of the authorities concerning the best interests of the child. Despite the appellant's offending, there are no safeguarding concerns that have been drawn to our attention.

10. Mr Agho submitted that the entirety of the evidence in the case, when considered in the round, was sufficient to justify the conclusions the judge reached. For the reasons we set out below, we disagree.

11. In order to consider whether deportation would be unduly harsh, it was necessary for the judge to consider the concept by reference to the relevant legal principles. In the Supreme Court case of KO (Nigeria) v the Secretary of State for the Home Department [2018] UK Supreme Court 53 at [27] Lord Carnwath endorsed the guidance given by this Tribunal in MK (Sierra Leone) v the Secretary of State for the Home Department [2015] UKUT 223 at [46]. The endorsed guidance of the Upper Tribunal was in these terms:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

12. We remind ourselves that our task is to determine whether the decision of the First-tier Tribunal involved the making of an error of law. We are not charged with deciding whether we agree with the judge's decision or would have decided it in the same way. Our jurisdiction is limited to determining whether the decision involved the making of an error of law.

13. We consider that difficulties with the judge's decision arise because he conflated the best interests of the child assessment at [108] with his subsequent discussion at [109] and following of whether it would be unduly harsh to expect the appellant's partner and son to live in Zimbabwe with him. The judge sets out brief reasons at [109] why it would be unduly harsh for the appellant's partner and son to follow him to

Zimbabwe. In doing so, the judge did not follow the approach of the Supreme Court in applying the "elevated threshold" of what amounts to unduly harsh.

14. The factors outlined by the judge in that paragraph, namely the fact that the appellant's partner is a trained audiologist whose services are in great demand in the part of the country where they live, and that she would not be able to continue her work in Zimbabwe, are not in our view factors which could properly be categorised as enabling the appellant's deportation to be viewed as having an "unduly harsh" impact on his family.

15. One of the other factors relied upon by the judge was the impact on the appellant's partner's mental health of his possible deportation. In our view, there was insufficient medical evidence to merit a finding that deportation would be unduly harsh. It is true that the partner's medical notes recorded a history of past depression, although that was listed as being in 2015. There was an update from the appellant's partner's GP dated 28 November 2019, in these terms:

> "With reference to your letter dated 27 November requesting a report from the doctor regarding this patient Ms [] and Mr M have a 6 month old son. Ms [] has a history of depression. If Mr M were to be deported this may have a severe impact on Ms []'s mental health. Equally, separation from his father would have an impact on their child."

16. There was no analysis in the GP's very brief letter of the factors which caused Ms [] to suffer a history of depression previously, nor the likely triggers for it to reoccur. The details of the doctor's concern that the "severe impact" of the appellant's deportation on his partner would follow are simply not set out.

17. The judge did not consider the elevated threshold to which the unduly harsh assessment is subject. As we have noted, he did refer to the adverse impact that deportation would have on the family, but appears to have done so by reference to his assessment of the best interests of the child at [108], which is a different matter. Deportation of a parent is rarely in the best interests of any child, but that does not mean that the elevated threshold is met. In [108], the judge outlined how the removal of the appellant would entail a risk that the appellant's partner would suffer and that that would be to the detriment of their son. He also referred to the key worker's letter which stated that the appellant's partner would need to find alternative childcare because she had no support and would have to cease to work.

18. The judge appeared to ascribe significance to those two factors and the medical evidence, elevating them to the level of being unduly harsh. We do not consider those factors to get remotely close to the threshold that must be met to merit an "unduly harsh" finding.

19. The judge took the difficulties which are likely to attach to the deportation of any adult family member from a family unit involving a child, and did not consider whether those difficulties, and the impact of deportation, would entail more than mere discomfort, inconvenience, undesirable consequences or something that merely

difficult. We stress that we do not underestimate the severe impact that the deportation of the appellant would have on his family, in particular his partner and his son. We consider that if he were to be removed, it would be a matter of significant impact on the entire family unit. That, however, is not the test.

20. In light of these findings, we consider that the overall assessment conducted by the judge was flawed. The factors the judge went on to outline at [111] were against the background of that earlier flawed assessment. The judge set out the factors mitigating against the deportation of the appellant. On their own, the factors the judge set out were entirely reasonable. Similarly, at [112] the factors the judge there set out were also entirely reasonable. However, the overall analysis conducted by the judge was flawed. It is not possible for the judge's reasoning to be saved by his balance sheet analysis, given his flawed application of the unduly harsh test, and his reliance on evidence which was not capable of meeting the statutory test in purported fulfilment of it.

21. It follows, therefore, that we set aside the decision of Judge Widdup in its entirety with no findings preserved.

22. It is appropriate for the matter to be retained in this Tribunal for a further hearing based upon up-to-date evidence concerning the impact of the appellant's deportation on his partner and on their son.

Notice of Decision

The decision of Judge Widdup involved the making of an error of law and is set aside with no findings preserved.

The matter will be relisted for reconsideration before the Upper Tribunal.

No anonymity direction is made.

Signed *Stephen H Smith* Date 17 April 2020

Upper Tribunal Judge Stephen Smith