Neutral Citation Number: [2019] EWCA Civ 1213

Case No: C5/2018/1419

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Finch
HU/00029/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE HOLROYDE

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Appellant**

- and -

PG (JAMAICA) — **Respondent**

- -
- -

Gwion Lewis (instructed by **Government Legal Department**) for the **Appellant**
William M Rees (instructed by **Chris & Co Solicitors**) for the **Respondent**

Hearing date: 26th June 2019

- -

Approved Judgment

Lord Justice Holroyde:

1. An anonymity direction has been given in respect of the respondent to this appeal. I shall refer to him as "PG", and I shall similarly use initials when referring to other persons connected to him.

2. PG, a citizen of Jamaica now aged 43, came to the United Kingdom on 31st March 2002. On 11th March 2015 the Secretary of State for the Home Department ("the Secretary of State") made a deportation order against him. PG appealed against that decision to the First-tier Tribunal ("FtT"). In a decision promulgated on 11th September 2017 First-tier Tribunal Judge Griffith ("Judge Griffith") allowed his appeal. Judge Griffith's decision was upheld by Upper Tribunal Judge Finch ("Judge Finch") in a decision promulgated on 24th January 2018. The Secretary of State now appeals, by permission of Sir Stephen Silber, against the decisions of Judge Griffith and Judge Finch.

3. At the hearing of the appeal, the Secretary of State was represented by Mr Gwion Lewis and PG was represented by Mr William Rees. I am grateful to them both for their written and oral submissions.

The Facts

4. PG was 26 years old when he came to the United Kingdom. He was then the father of two children, who have remained in Jamaica. He was initially granted leave to enter as a visitor for six months. He was subsequently granted limited leave to remain as a student, that period of leave being extended on a number of occasions, but ultimately expiring on 30th November 2007. In 2007 he was given permission to marry, and did marry, NE.

5. In addition to his two children, now adults, who have remained in Jamaica, PG is the father of six children who have been born in the United Kingdom and are British citizens. With his present partner, SAT, he has three sons, now aged 15, 10 and 3. I shall refer to the oldest as "R". PG also has two sons by his former wife NE, and a daughter by another woman: all three of these children are now aged between 10 and 13. In recent years PG has lived with SAT and their three sons, and he has maintained contact with his other three British-born children.

6. Whilst in this country, PG has committed a number of offences relating to controlled drugs. On 7th November 2007 he was cautioned for possession of cannabis. On 16th May 2008 he was fined by a magistrates' court for possession of cocaine and cannabis. On 10th June he was again fined by a magistrates' court for possession of cannabis. On 20th May 2009 he was given a conditional discharge by a magistrates' court for obstructing a search for drugs. On 22nd July 2009 he was convicted in the Crown Court of four offences of supplying controlled drugs of class A, the charges relating to crack cocaine, cocaine (two offences) and heroin. He was sentenced to a total term of three years, four months' imprisonment. From the limited information available to this court, it appears that the judge who imposed that sentence accepted that PG had been supplying controlled drugs in order to fund his own drug habit.

7. PG has committed further offences since his release from that sentence. On 13th May 2013 he was again cautioned by a magistrates' court for possession of cannabis. On 6th February 2014 he was given a conditional discharge by a magistrates' court for

possession of cannabis. On 9th December 2015 a magistrates' court imposed a fine, and a period of disqualification from driving, for an offence of failing to provide a specimen of breath for analysis.

8. PG's criminal offences led to the making of the deportation order against him.

The Deportation Order

9. A deportation order against PG was first signed on 20th January 2011. However, PG successfully appealed against that order, and it was revoked on 26th September 2011. It is unnecessary to say more about it. PG was then granted discretionary leave to remain, on grounds relating to article 8 of the European Convention on Human Rights ("the Convention"), until 29th March 2012. Shortly before the expiration of that period he applied for further leave to remain, again on article 8 grounds. That application was ultimately refused by the Secretary of State on 11th March 2015.

10. The deportation order with which this court is concerned was signed by the Secretary of State on 11th March 2015. On that same date the Secretary of State sent a detailed decision letter to PG, explaining that his human rights claim had been refused. The letter stated that PG's deportation was required by section 32(5) of UK Borders Act 2007 unless he could demonstrate that he came within one of the statutory exceptions. It summarised his offending history. It indicated that the Secretary of State accepted that PG had a genuine and subsisting parental relationship with his (then) two sons by SAT, albeit that PG was not then living with them or their mother. The Secretary of State did not however accept that there was a genuine and subsisting relationship with SAT. Nor was it accepted that PG had a genuine and subsisting parental relationship with his other three British-born children. The Secretary of State concluded that it would not be unduly harsh for the two sons either to move to Jamaica with their mother SAT and father, or to remain in this country with their mother but without PG. So far as PG himself was concerned, the Secretary of State accepted that there had been some delay in dealing with his case but concluded there were no very compelling circumstances to outweigh the very significant public interest in deporting him. The conclusion in relation to article 8 was that deportation of PG would not breach the UK's obligations under that article, because the public interest in deporting him outweighed his right to private and family life.

11. PG's appeal against the deportation order was first considered by the FtT in a decision promulgated on 24th September 2015. That decision was however subsequently set aside, on grounds of error of law, in a decision of the Upper Tribunal promulgated on 1st May 2017. It is unnecessary to refer to the detail of that decision: it suffices to say that the case was remitted to the FtT, to be heard again by a different judge. So it was that the matter came before Judge Griffith at a hearing on 22nd August 2017.

12. Both PG and SAT gave oral evidence at that hearing. They both gave evidence of the strength of the relationship between themselves, and between PG and their three sons. Both said that deportation of PG would seriously affect the children. PG was not permitted to work, but SAT was working and studying, and both said that she would not be able to cope on her own. PG spoke of a recent incident concerning R, when "a knife had been pulled on him", after which PG had spoken to the parents of the perpetrator. He said that the children needed him to guide and protect them, and said that he did not wish them to become involved with crime. He referred to his offences

in 2013 and 2014 as involving cannabis for personal consumption, and said that since that time he had "addressed his habit and it is no longer a problem for him". SAT said that PG was a changed man in recent years, and "is not involved in drug taking except cannabis". Neither PG nor SAT had initially mentioned his 2015 conviction for an offence of failing to provide a specimen for analysis: when asked about this, both said that they did not think it was a criminal conviction and therefore had not thought it relevant.

The decision of Judge Griffith

13. In her reasons and decision promulgated on 11th September 2017, Judge Griffith summarised PG's immigration history and history of offending. She recorded that the Secretary of State's representative had accepted that PG had a genuine and subsisting relationship with SAT and with their 3 children. Judge Griffith also noted PG's "regular, though infrequent" contact with his other children in this country. Judge Griffith noted that the issue was whether it would be unduly harsh for the children and/or for SAT either to move to Jamaica with PG if he were deported, or to remain in the UK without him. In this regard she considered Immigration Rules paragraph 399, section 117C of the Nationality, Immigration and Asylum Act 2002, and the cases of *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 450 (hereafter, "*MM (Uganda)*") and *Hesham Ali (Iraq) v Secretary of State for the Home Dapartment* [2010] UKSC 60. She said that the first of those cases required her to consider all the circumstances, including PG's immigration and criminal history, and the second stated that only a very strong article 8 claim would outweigh the public interest in deportation.

14. Judge Griffith accepted that it was for the Secretary of State to decide which part of PG's criminal record should be relied on in support of making a deportation order. The decision letter made clear that the Secretary of State had relied on all of PG's offending, and not merely on the most serious conviction of 22nd July 2009. Judge Griffith accepted that both PG and SAT had genuinely misunderstood the 9th December 2015 conviction, and did not draw any adverse inference from their failure to mention it. She said, however, that she could not ignore the fact that PG had been convicted of that offence, in addition to his earlier drug offences. She considered PG's criminal record as part of her assessment of the proportionality of deportation, and summarised it as suggesting that PG had a drug habit beginning in 2007 and continued to smoke cannabis. She listed the countervailing factors which she had considered in assessing proportionality, noting that PG had not been in trouble arising from drugs offences since 2014, that there was no evidence that he presented a risk to the public, that he had not overstayed and that he had made successful applications for further leave to remain. She also had regard to the delay in dealing with the application for further leave to remain which PG made in March 2012, referring in this regard to *EB (Kosovo)* [2008] UKHL 41, [2001] 1AC 1159 (hereafter, "*EB (Kosovo)*") as showing that an article 8 claim could be strengthened by close personal and social ties developed during a period of delay and that delay in taking action to deport can indicate the lack of any pressing public interest in doing so.

15. Judge Griffith accepted that PG was very involved in the day to day lives of SAT and their 3 children and played an important part in their lives. She described R as "going through a difficult time" and felt it likely that the bond between father and son had grown stronger over the years. She accepted the sincerity of PG's expressed wish to be

a father figure who would prevent his sons from falling into crime. She found it unsurprising that PG and SAT had given evidence that she would be unable to cope with the three boys on her own, being "dependent on [PG] for emotional and practical day to day support with the children and the running of the household".

16. The core of Judge Griffith's reasoning is contained in paragraphs 66 and 67 of her decision, which I should quote in full.

> "66. I am satisfied that it is in the best interest of the children (and I include in this assessment [PG's] other children in the UK) for [PG] to remain in the UK to continue in his role as a father to them and to support his partner. [PG's] deportation would cause very serious disruption to and interference with family life with particular reference to [R], given his age and present difficulties. I find the consequences of [PG's] removal for his children would be unduly harsh.
>
> 67. If removed [SAT] would be left alone with three boys to look after and taking into account the present difficulties that [R] is facing, I find the consequence of [PG's] removal would be unduly harsh for her. I accept that she might be able to obtain practical help either through social services or by paying privately, but I am more concerned about the emotional and behavioural "fallout" that she would have to deal with arising from the impact of separation on [R], leaving aside the disruption it would have to her own education and employment prospects. She has no family in Jamaica and has not been there since 2002. I find it would be unduly harsh to expect her to relocate there."

17. Judge Griffith went on to conclude that it would also be unduly harsh for the children to live in Jamaica. She was accordingly satisfied that PG met the requirements of paragraph 399(a) and (b) of the Immigration Rules, and came within Exception 2 of section 117C of the 2002 Act. In those circumstances, the article 8 rights of PG, SAT and the children outweighed the public interest in deporting him.

18. On appeal to the Upper Tribunal, Judge Finch held that Judge Griffith had decided "the overall balancing exercise" in a way which was open to her on the evidence and in the light of current case law, "although it was not one which all First-tier Tribunal judges would have reached". Judge Finch accordingly dismissed the appeal.

<u>The appeal to this court</u>

19. The Secretary of State was granted permission to appeal to this court on two grounds: first, that Judge Griffith failed to accord "great weight" to the public interest in deporting foreign criminals and/or to identify some "very compelling" reason to outweigh that public interest; and secondly, that Judge Griffith failed to undertake a genuinely contextual assessment of whether deporting PG would be "unduly harsh" in the circumstances. The second of those grounds was based on the decision in *MM (Uganda)* and related to the proportionality assessment which Judge Griffith had made. The decision in *MM (Uganda)* was however subsequently overruled by the Supreme Court (in October 2018, and therefore after the decisions of both Judge Griffith and

Judge Finch) in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1WLR 5273 (hereafter, "*KO (Nigeria)*"), and accordingly ground two was not pursued at the hearing of the appeal.

20. Before considering the submissions in relation to the first ground of appeal, it is convenient to set out the legislative framework and to note relevant case law.

The Legislative Framework

21. By section 3(5)(a) of the Immigration Act 1971, a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good.

22. Provision is made for the automatic deportation of foreign criminals by section 32 of UK Borders Act 2007, which so far as is material for present purposes states:

> "**32 Automatic deportation**
>
> (1) In this section *"foreign criminal"* means a person –
>
> (a) who is not a British Citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> …
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

23. Section 32 accordingly requires the deportation of a foreign criminal who has been sentenced to a term of at least 12 months' imprisonment, as PG was, but is subject to the exceptions set out in section 33 of the Act, which so far as material provides:

> "**33 Exceptions**
>
> (1) Section 32(4) and (5) –
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below),
>
> …
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach –
>
> (a) a person's Convention rights, …"

24. In this appeal, it is contended that deportation of PG would result in breach of his rights, and the rights of his partner SAT and their three children, under article 8 of the Convention, which provides:

> "1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

25. With effect from 28th July 2014 part 5A of Nationality, Immigration and Asylum Act 2002 has made specific provision in relation to the consideration of article 8 in circumstances such as the present. Section 117A provides:

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), *"the public interest question"* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

26. Section 117B sets out a number of public interest considerations which are applicable in all cases. It is unnecessary for present purpose to refer to these in further detail. It is however necessary to refer to 117C, which so far as is material provides:

> "**117C Article 8: additional considerations in cases involving foreign criminals**
> (1) The deportation of foreign criminals is in the public interest.

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

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

…

(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."

27. Also with effect from 28th July 2014, the Immigration Rules were amended to make provision for consideration of article 8 claims by persons liable to deportation. So far as is material, the amended Rules provide:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

…

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

…

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) … applies if –

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

(i) the child is a British Citizen; or

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

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

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

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

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

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

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

…

399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave."

28. Thus Part 5A of the 2002 Act, and the amended Rules, together provide a structured approach to the application of article 8 in cases of deportation of a foreign criminal.

Relevant Case Law

29. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, Jackson LJ at [36] summarised the approach which Part 5A of the 2002 Act, and the Rules, require a tribunal or court to take when considering the position of a foreign criminal who has been sentenced to a term of imprisonment of at least 12 months but less than 4 years:

> "… first see whether he falls within Exception 1 or Exception 2. If he does, then the article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the article 8 claim succeeds. If there are not, then the article 8 claim fails. … there is no room for a general article 8 evaluation outside the 2014 Rules, read with sections 117A to 117D of the 2002 Act"

30. In *MM (Uganda)* it was held that in the context of Exception 2 in section 117C(5), the interpretation of the phrase "unduly harsh" required consideration of the public interest in the removal of foreign criminals and the need for a proportionate assessment of any interference with article 8 rights. At paragraph 24 of his judgment, Laws LJ, with whom Vos and Hamblen LJJ agreed, said that section 117C(2) –

> "… steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. … What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history."

31. It was with that decision in mind that Judge Griffith conducted the proportionality exercise which Judge Finch upheld.

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. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [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."

33. At paragraph 32 of his judgment, Lord Carnwath again differed from the approach taken by Laws LJ in *MM (Uganda*).

34. It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him.

The Submissions on Appeal

35. In his submissions on behalf of the Secretary of State, Mr Lewis rightly accepted that in the light of *KO (Nigeria)*, the remaining ground of appeal raises a narrow point: whether the evidence before Judge Griffith was sufficient to enable a judge, properly directing herself or himself, rationally to conclude that the effect of PG's deportation on SAT and/or the children would be unduly harsh. For that reason, Mr Lewis did not develop his written submissions based on case law which preceded *KO (Nigeria)*. He further accepted that it is necessary to have regard to the realities of the case: in this regard, it was common ground between the parties that there would in reality be no prospect of SAT and their 3 sons joining PG in Jamaica, so the focus must be on whether it would be unduly harsh to expect them to remain in this country without PG. Mr Lewis submitted that the matters relied on by Judge Griffith, encapsulated in the evaluative assessments at paragraphs 66 and 67 of her judgment, are nothing more than the commonplace incidents of family life and do not involve, either for SAT or for the children, harshness going beyond that which is normally to be expected whenever a foreign criminal is to be deported. He submitted that the fact that one of the boys was going through a difficult period, and the fact that it had been advantageous to the family for PG to be in a position to intervene in relation to the knife incident of which R was a victim, did not take the case beyond the commonplace. Nor did the "emotional and behavioural 'fallout'" with which SAT would have to deal, that being the probable consequence in any case in which the partner of a person facing deportation would be left with the care of one or more children. Mr Lewis submitted that whether the challenge to Judge Griffith's decision be described as a rationality challenge or as a perversity challenge, the essential point was that the evidence upon which she relied was not sufficient to provide a rational justification for her conclusion. Parliament has decided that a certain level of family disruption is inevitable when a foreign criminal is deported, and tribunals and courts must look for something going beyond that; and in this case, there was nothing going beyond the commonplace. Mr Lewis therefore submitted that on the evidence before Judge Griffith only one conclusion was rationally open to her, and consequently only one rational conclusion was open to Judge Finch on appeal to the Upper Tribunal. In those circumstances, he submitted, this court should not consider remitting the matter for a further hearing: rather, it should allow the appeal and thus reinstate the deportation order. He pointed out that it was always open to PG, if further evidence is now available, to make a fresh article 8 application based on that new evidence.

36. On behalf of PG, Mr Rees emphasised the passage of time since the most serious of PG's offences was committed in 2008. He pointed out that the first deportation order was made as long ago as January 2011, but was revoked following a successful appeal,

and that PG was then given leave to remain until March 2012. He made an in-time application to extend his leave to remain, but the Secretary of State did not make a decision on that application for nearly 3 years. Mr Rees noted that Judge Griffith had specifically referred to the decision in *EB (Kosovo)*, and he relied on that delay both because of Judge Griffith's finding as to the strengthening of family ties with the passage of time (see paragraph 15 above) and because it suggested that lesser weight could properly be given to the public interest in deportation. His principal submission was that Judge Griffith correctly identified evidence showing that it would be unduly harsh for SAT and the children to remain in this country without PG. In addition to the long delay, he particularly pointed to the evidence that R had recently been a victim of knife crime; that SAT faced obvious difficulties in being a lone parent, particularly at a time when she was trying to better herself by studying as well as working; and that PG had not been convicted recently of any offences. The knife incident in particular provided a clear illustration of the disruption in normal family life which would be involved if the parental support of the father were removed by his deportation. He submitted that Judge Griffith was entitled to reach the conclusions which she expressed in paragraphs 66 and 67 of her judgment. He argued that it would be unfair to describe her decision as either perverse or irrational.

37. In reply to Mr Rees's submissions, Mr Lewis argued that the passage of time since the relevant offences could not be a material consideration: the effect of *KO (Nigeria)* is that the seriousness of the offending is not a relevant consideration at this stage, and it must follow that the fact that the relevant offending was some years ago cannot assist the person facing deportation. He acknowledged that it is not a commonplace feature of family life for a child to be the victim of a knife crime, but submitted that it was entirely commonplace for parents to face a variety of difficulties and challenges in the care of their children. Whilst PG's continuing presence would no doubt be helpful in dealing with any difficulties in the future, it could not be said to be essential.

Analysis

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

39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties

between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature.

40. So far as PG's offending history is concerned, I accept Mr Lewis's submission that neither the nature of the offences committed after PG had served his prison sentence, nor the overall passage of time, can assist SAT or the children now that *KO (Nigeria)* has made it clear that the seriousness of the offending is not a relevant consideration when determining pursuant to section 117C(5) of the 2002 Act whether undue harshness would be suffered.

41. I have referred specifically to the three children of PG and SAT. There appears to have been very little evidence before Judge Griffith about the extent of PG's relationship with his other British-born children, and although at paragraph 66 of her judgment she included them in her assessment, she did not make any separate reference to them. Nor did Mr Rees make any separate reference to them, or any discrete point about their positions, in his submissions. The reality of this case, as it seems to me, is that if the effect of deportation is not unduly harsh on the three children of LG and SAT, the same conclusion must be reached in respect of the other children.

42. Further, the reality of this case is that if PG could not succeed in bringing himself within Exception 2 under section 117C(5) of the 2002 Act, nor could he succeed in showing that the public interest in his deportation was outweighed by very compelling factors over and above those described in paragraphs 399 and 399A of the Rules.

43. I conclude that, whether considered individually or collectively, the matters relied upon by Judge Griffith were clearly insufficient to enable a judge properly to conclude that the effect of PG's deportation would be unduly harsh for either his children or SAT. The evidence certainly showed that what might be regarded as the necessary and expected consequences of deportation would be suffered by PG's family, but it cannot be said to have revealed harshness going beyond that level. The points made by Mr Rees were fair points as far as they went, but they were not capable of taking the case beyond the commonplace. The evidence did not provide a basis on which PG could establish Exception 2 under section 117C(5) of the 2002 Act (and there was no suggestion that Exception 1 could apply), and accordingly section 117C(3) required his

deportation. It follows that in my judgment there was no rational foundation for the decision of Judge Griffith, and both it and the decision of Judge Finch must be set aside. I accept Mr Lewis's submission that there is no ground on which it would be appropriate to remit the matter for a further hearing: as I have indicated, I can see only one answer to the issue which must be decided.

Disposal

44. I would accordingly allow this appeal and restore the deportation order.

Lord Justice Hickinbottom:

45. I agree with the analysis and conclusion of Holroyde LJ, and his proposed disposal.

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.

Lord Justice Floyd:

47. I agree with both judgments.