THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any member of their families in connection with these proceedings.

Michaelmas Term
[2018] UKSC 53
On appeals from: [2016] EWCA Civ 617; [2016] EWCA Civ 932; [2016] EWCA Civ 705

JUDGMENT

KO (Nigeria) (Appellant) *v* Secretary of State for the Home Department (Respondent)
IT (Jamaica) (Appellant) *v* Secretary of State for the Home Department (Respondent)
NS (Sri Lanka) and others (Appellants) *v* Secretary of State for the Home Department (Respondent)
Pereira (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Kerr
Lord Wilson
Lord Reed
Lord Carnwath
Lord Briggs

JUDGMENT GIVEN ON

24 October 2018

Heard on 17 and 18 April 2018

Appellant (KO)
Ian Macdonald QC
Sonali Naik QC
Helen Foot
(Instructed by Freemans Solicitors)

Respondent
Lisa Giovannetti QC
Marcus Pilgerstorfer
Andrew Byass
(Instructed by The Government Legal Department)

Appellant (IT)
Richard Drabble QC
Christian J Howells
(Instructed by NLS Solicitors)

Appellant (NS and ors)
Stephen Knafler QC
Charlotte Bayati
(Instructed by Polpitiya & Co)

Appellant (Pereira)
Manjit Singh Gill QC
Anas Khan
Ripon Akther
(Instructed by Thompson & Co Solicitors (SW19))

Intervener
(Equality & Human Rights Commission)
Martin Chamberlain QC
(Instructed by Equality and Human Rights Commission)

LORD CARNWATH: (with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Briggs agree)

Introduction

1. Three of the appeals involve linked issues as to the treatment of "qualifying children" and their parents, under the statutory regime contained in Part 5A of the Nationality, Immigration and Asylum Act 2002. The fourth (*AP (Sri Lanka)*) raises a related issue under the Rules.

2. Part 5A, headed "Article 8 of the ECHR: Public Interest Considerations", was introduced by amendment with effect from 28 July 2014 (section 19 of the Immigration Act 2014). By section 117A it is to apply where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under article 8, and would so be unlawful under section 6 of the Human Rights Act 1998. For these purposes, "the public interest question" is defined as the question whether such an interference is justified under article 8(2). Section 117A(2) provides:

> "(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. Section 117B, applicable in all cases, lists a series of such considerations. They include in summary, the public interest in "the maintenance of effective immigration controls" (subsection (1)); the public interest in those seeking to enter being able to speak English (subsection (2)), and be financially independent (subsection (3)); the little weight to be accorded to private life or relationships established when a person was in the country unlawfully (subsection (4)), or when immigration status was precarious (subsection (5)); and (directly relevant in this case) -

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

A "qualifying child" is defined for this purpose as a person under the age of 18 who is a British citizen, or "(b) has lived in the United Kingdom for a continuous period of seven years or more" (section 117D(1)). The exclusion of persons "liable to deportation" covers non-British citizens whose deportation is deemed "conducive to the public good" and "foreign criminals" as defined by the UK Borders Act 2007 (see Immigration Act 1971 section 3(5); UK Borders Act 2007 section 32(1)-(4)).

4. Section 117C sets out "additional considerations in cases involving foreign criminals". For this purpose a "foreign criminal" is defined by section 117D(2) as a person, who not a British citizen, and who has been convicted of an offence in the United Kingdom, if it attracted a sentence of at least 12 months, or the offence caused "serious harm" or he is a "persistent offender". To show the more intricate structure of this section, it needs to be set out in full:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where -

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

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

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

5. It is unnecessary to refer in detail to the Changes to the Immigration Rules made at the same time (paragraphs 398-399), since it is not argued that any differences are material to the issues before us. It is to be noted however that the question whether "the effect" of C's deportation would be "unduly harsh" (section 117C(5)) is broken down into two parts in paragraph 399, so that it applies where:

"(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."

6. The Appellants' case, in short, is that in determining whether it is "reasonable to expect" a child to leave the UK with a parent (under section 117B(6)), or whether the effect of deportation of the parent on the child would be "unduly harsh" (under section 117C(5)) the tribunal is concerned only with the position of the child, not with the immigration history and conduct of the parents, or any wider public interest factors in favour of removal. By contrast the Secretary of State argues that both provisions require a balancing exercise, weighing any adverse impact on the child against the public interest in proceeding with removal or deportation of the parent.

Paragraph 276ADE(1)(iv)

7. The fourth appeal (*AP (Sri Lanka)*) raises related issues under paragraph 276ADE(1)(iv). That paragraph of the Rules comes under the heading "Requirements to be met by an applicant for leave to remain on the grounds of private life". It reads:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application the applicant: ...
>
> > (iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK."

It will be seen immediately that the substance of this provision, in particular the seven year criterion and the "reasonableness" tests, appears identical to that of section 117B(6), taken with the definition of "qualifying child".

8. However, in this context the so-called "seven year concession" for children has a much longer history. It was reviewed by the Upper Tribunal (McCloskey J, President, sitting with UT Judge Bruce) in *PD (Sri Lanka) v Secretary of State for the Home Department* [2016] UKUT 108 (IAC), [2016] Imm AR 797, paras 8ff. He traced its ancestry back to Deportation Policy 5/96 ("DP5/96"), as revised in February 1999. For present purposes it may be noted that the policy in its original form did not incorporate a "reasonableness" test, but did include in a list of relevant factors any history of criminal behaviour by the parents. Unfortunately, as the Court of Appeal graphically explained in *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, [2009] Imm AR 155, paras 22ff, the application of the policy in practice was plagued by confusion caused by differing or uncertain

Ministerial and Departmental statements over the ensuing years. It was eventually withdrawn in December 2008. The accompanying Ministerial statement indicated that it would be replaced by consideration under the Immigration Rules and article 8, which would "ensure a fairer, more consistent approach to all cases involving children, whether accompanied or unaccompanied, across UKBA" (Hansard (HC Debates), 9 December 2008, Written Ministerial Statements, cols 49-50WS) .

9. Returning to the President's account in *PD*, the new paragraph 276ADE(1)(iv) was first introduced with effect from 9 July 2012, but without a specific reference to "reasonableness". The President (para 12) referred to the accompanying Ministerial "Statement of Intent" including the following:

> "The key test for a non-British citizen child remaining on a permanent basis is the length of residence in the UK of the child - which the Immigration Rules will set as at least the last seven years, subject to countervailing factors. The changes are designed to bring consistency and transparency to decision-making." (Statement of Intent: Family Migration (June 2012), para 56)

Paragraph (iv) was amended (with effect from 13 December 2012) to its present form, including the reasonableness test, apparently without further Ministerial explanation of the change.

10. The President also cited (para 16) relevant guidance contained in an Immigration Directorate Instruction ("IDI") of the Home Office entitled "Family Life (as a partner or parent) and Private Life: Ten Year Routes", published in August 2015, extracts of which were appended to the judgment (Appendix 2). They included a section headed "Would it be unreasonable to expect a non-British citizen child to leave the UK?", under which were set out a number of "relevant considerations", such as risk to the child's health, family ties in the UK and the likelihood of integration into life in another country and:

> "b. Whether the child would be leaving the UK with their parent(s)
>
> It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK."

There was no reference in the list to the criminality or immigration record of the parents as a relevant factor.

11. The most recent version of the IDI (22 February 2018), no doubt taking account of Court of Appeal decisions to which I shall refer below, includes an additional paragraph, which more closely reflects the Secretary of State's submissions in the present case:

> "The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK." (Family Migration: Appendix FM Section 1.0b. Family Life (as a Partner or Parent) and Private Life: Ten-Year Routes, p 76)

Interpretation

General approach

12. This group of sections needs to be looked at in the context of the history of attempts by the Government, with the support of Parliament, to clarify the application of article 8 in immigration cases. In *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 this court had to consider rule changes introduced with similar objectives in July 2012. The background to those changes was explained by Lord Reed (paras 19-21), their avowed purpose being to "promote consistency, predictability and transparency" in decision-making, and "to reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck …" (para 21).

13. In a case heard shortly afterwards, *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, paras 8-10, Lord Reed referred to the previous law as established in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, where it was held that non-compliance with the Rules, not themselves reflecting the assessment of proportionality under article 8, was "the point at which to begin, not end" consideration of article 8. The new Rules, as he said by reference to government policy statements, were designed to change the position comprehensively by

"reflecting an assessment of all the factors relevant to the application of article 8" (para 10).

14. Part 5A of the 2002 Act takes that process a stage further by expressing the intended balance of relevant factors in direct statutory form. It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges. Rather than attempt a detailed analysis of all these impressive but conflicting judgments, I hope I will be forgiven for attempting a simpler and more direct approach.

15. I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute. I also start from the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, para 10 per Lord Hodge).

The specific provisions

16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.

17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI

guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:

> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"

19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:

> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves.

20. Turning to section 117C the structure is not entirely easy to follow. It starts with the general rules (1) that deportation of foreign criminals is in the public interest, and (2) that the more serious the offence the greater that interest. There is however no express indication as to how or at what stage of the process those general rules are to be given effect. Instead, the remainder of the section enacts specific rules for two categories of foreign criminals, defined by reference to whether or not their sentences were of four years or more, and two precisely defined exceptions. For those sentenced to less than four years, the public interest requires deportation unless exception 1 or 2 applies. For those sentenced to four years or more, deportation is required "unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

21. The difficult question is whether the specific rules allow any further room for balancing of the relative seriousness of the offence, beyond the difference between the two categories. The general rule stated in subsection (2) might lead one to expect some such provision, but it could equally be read as no more than a preamble to the more specific rules. Exception 1 seems to leave no room for further balancing. It is precisely defined by reference to three factual issues: lawful residence in the UK for most of C's life, social and cultural integration into the UK, and "very significant obstacles" to integration into the country of proposed deportation. None of these turns on the seriousness of the offence; but, for a sentence of less than four years, they are enough, if they are met, to remove the public interest in deportation. For sentences of four years or more, however, it is not enough to fall within the exception, unless there are in addition "very compelling circumstances".

22. Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C's deportation be "unduly harsh"? Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word "unduly" is intended as a reference back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and like the test of "reasonableness" under section 117B, exception 2 appears self-contained.

23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in

the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.

KO and the cases on section 117C(5)

24. I will start by looking in detail at *KO* because it was the decision of the Upper Tribunal in that case which highlighted the area of disagreement lying at the heart of the main issues in these appeals. There is said to be a difference as to the extent to which account is to be taken of the relative severity of the relevant offences. As will be seen, when it comes to the actual determinations of the cases, the differences seem more apparent than real.

KO - the facts

25. KO entered the UK unlawfully in 1986 and has no leave to enter or remain. He has a wife, a step-daughter, and four children with his wife. The four children were born between 28 August 2005 and 9 August 2013 and are British citizens. The step-daughter who has indefinite leave to remain was born on 23 December 1997 and is now an adult. KO is a "foreign criminal" as defined in section 117D(2) of the 2002 Act, having been convicted in August 2011 of conspiracy to defraud and sentenced to imprisonment for 20 months. On 8 April 2014, the Secretary of State decided to deport him. A determination of the First-tier Tribunal allowing his appeal was set aside by the Upper Tribunal, while preserving certain findings of fact, and directions made for a resumed hearing.

26. In a decision dated 25 September 2015, UT Judge Southern took the view that in applying the "unduly harsh" test it was necessary to take account of the criminality of the parent. In that respect he differed from the view recently taken by the Upper Tribunal in *MAB* (*USA) v Secretary of State for the Home Department* [2015] UKUT 435 16 June 2015 (UT Judge Grubb and Deputy UT Judge Phillips) ("*MAB*"). He determined that it would not be "unduly harsh" for the children to remain in the UK with their mother if KO were deported, but indicated that he would have reached a different view if required to focus solely on the position of the children. On 20 April 2016 the decision in KO was upheld by the Court of Appeal: *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA 617, [2016] Imm AR 954 (Laws, Vos, Hamblen LJJ).

The earlier cases

27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

> "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."

On the facts of that particular case, the Upper Tribunal held that the test was satisfied:

> "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that cruel."

This view was based simply on the wording of the subsection, and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial.

28. The Secretary of State's submission that section 117C(5) required the tribunal to balance, not merely the general interest in deportation of foreign criminals, but the relative severity of the particular offences, seems to have been first considered in detail by the Upper Tribunal in *MAB* noted above, although in the end the point was not determinative. The appellant had been sentenced to three years' imprisonment for a number of sexual offences involving children and was to be deported to USA. The First-tier Tribunal allowed his appeal, holding that it would be unduly harsh for his three children to have to live in the USA or to remain in the UK without him. This decision was reversed by the Upper Tribunal, which held following *MK* that it could not be established that the effect on the children was

"excessive, inordinate or severe", and that the only proper finding was that the effect on them was not "unduly harsh" (para 80). Again this view was reached without any consideration of the relative severity of the particular offences.

29. However, the tribunal in *MAB* had earlier recorded a submission of Mr Richards, the Home Office Presenting Officer:

> "Mr Richards submitted that even though deportation might have very harsh consequences, whether it was 'unduly harsh' could only be determined by looking at the magnitude of the public interest furthered by the individual's deportation. He submitted that the more serious the crime the greater must be the consequences for them to be properly characterised 'unduly' harsh." (para 50)

At this time it seems to have been accepted by the Department that the issue of reasonableness under section 117B focussed only on the position of the child, but it was submitted that section 117C (and the equivalent paragraph 399) represented a change of approach. This submission was rejected:

> "Mr Richards accepted the issue of whether it would be 'reasonable' for a child to live in the deportee's country or remain in the UK without the deportee did not involve an assessment of the 'public interest'. We had also never understood it to require that. We do not consider that the replacement of 'reasonableness' with 'unduly harsh' had changed the approach to the Rules. Now, as then, the focus is on the impact upon the individual child (or partner) …" (para 72)

The tribunal found some support for that approach in the use of the same expression, "unduly harsh", in the context of asylum claims, where the possibility of internal relocation is in play, and where there is "no balancing exercise but rather an 'evaluative' exercise as to whether an individual cannot be expected to move and live within their own country because of the impact upon him or her." (para 73)

30. Given that the decision in *MAB* was a fully reasoned judgment of a two judge Upper Tribunal, it is not clear why the Secretary of State's representative felt it appropriate to argue for a different approach in *KO*, heard only three months later. (I will return to this point at the end of the judgment.) Nor is it clear from the report what if any submission was made about the relationship of sections 117B and 117C.

However in *KO* Upper Tribunal Judge Southern disagreed with the approach of the tribunal in *MAB*. He thought that they had given insufficient weight to the need to give effect to different levels of criminality under section 117C(2). As he explained:

> "One response to this difficulty might be thought to be as follows. As the rules themselves distinguish between levels of criminality by providing a different framework for those who have been sentenced to more than four years' imprisonment, is that sufficient to accommodate the requirements of section 117C(2)? However, an example illustrates how that is not an adequate response. Imagine two persons, A and B, who are foreign criminals facing deportation. A has been sentenced to 12 months imprisonment for, say, making a fraudulent motor insurance claim. B has been sentenced 47 months imprisonment for a serious offence of possession [of] class A drugs with intent to supply, a category of offence that the Secretary of State considers to be particularly serious in the context of immigration control. If the approach advocated in MAB were correct there would be no basis upon which to distinguish between those two foreign criminals, despite the demand of section 117C(2) …" (para 15)

31. The same emphasis on section 117C(2) was at the heart of the key passage of the judgment of Laws LJ in *MM (Uganda)* in holding that *MAB* was wrongly decided:

> "23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in *MAB* ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):
>
> > 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'
>
> 24. This 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. Any other approach in my judgment dislocates the 'unduly harsh' provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term 'unduly' is mistaken for 'excessive' which imports a different idea. 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."

He found no assistance in parallels with the use of the same term in the refugee law, since the asylum context of internal relocation issues was "far removed" from that of the present rules (para 25). He concluded that *MAB* was wrongly decided and that the expression "unduly harsh" in section 117C(5) and in the rules, "requires regard to be had to all the circumstances including the criminal's immigration and criminal history" (para 26).

32. Laws LJ's approach has the advantage of giving full weight to the emphasis on relative seriousness in section 117C(2). However, on closer examination of the language of the two exceptions, and of the relationship of the section with section 117B, as discussed above, I respectfully take a different view. Once one accepts, as the Department did at that stage (rightly in my view), that the issue of "reasonableness" under section 117B(6) is focussed on the position of the child, it would be odd to find a different approach in section 117C(5) at least without a much clearer indication of what is intended than one finds in section 117C(2). It is also difficult to reconcile the approach of Judge Southern or Laws LJ with the purpose of reducing the scope for judicial evaluation (see para 15 above). The examples given by Judge Southern illustrate the point. On his view, the tribunal is asked to decide whether consequences which are deemed unduly harsh for the son of an insurance fraudster may be acceptably harsh for the son of a drug-dealer. Quite apart from the difficulty of reaching a rational judicial conclusion on such a question, it seems to me in direct conflict with the *Zoumbas* principle that the child should not be held responsible for the conduct of the parent.

The decision in KO

33. However, when one comes to the actual decision of Judge Southern in *KO*, it is not clear that his approach was materially different from that of the President in

MK or indeed the tribunal in *MAB.* He adopted with one qualification the guidance in *MAB* as to the meaning of "unduly harsh" test:

> "The consequences for an individual will be 'harsh' if they are 'severe' or 'bleak' and they will be 'unduly' so if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances of the individual' Although I would add, of course, that 'all of the circumstances' includes the criminal history of the person facing deportation." (para 26)

Applying that test he said:

> "43. … There is undoubtedly a close relationship between this father and his children, as one would expect in any family living together as does this one. The preserved finding of fact is that, although it would not be unduly harsh for the four younger children to move to Nigeria, the reality of the situation is that they will remain here and, as the family relationships cannot be maintained by modern means of communication, there will be a complete fracture of these family relationships. The claimant is not authorised to work and so has been unable to provide financial support for his family but his role within the household has meant that his wife has been able to work, which she would find hard or impossible if she had to care on a daily basis for the children without her husband's assistance. Thus it is said that if the claimant is removed, the main household income will be lost and the children would be subject to economic disadvantage. But, again, that is not an experience that can, in my judgment, be categorised as severe or bleak or excessively harsh as, like any other person lawfully settled in the United Kingdom, the claimant's wife and family will have access to welfare benefits should they be needed.
>
> 44. Nor do I have any difficulty in accepting the submission that the children, who have enjoyed a close and loving relationship with their father, will find his absence distressing and difficult to accept. But it is hard to see how that would be any different from any disruption of a genuine and subsisting parental relationship arising from deportation. As was observed by Sedley LJ in *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 248:

> ‘The tragic consequence is that this family, short-lived as it has been, would be broken up for ever, because of the appellant’s bad behaviour. That is what deportation does.’
>
> This family relationship was not, of course, short lived but the point is the same. Nothing out of the ordinary has been identified to demonstrate that in the case of this particular family, *when balanced against the powerful public interest considerations in play*, although the children will find separation from their father to be harsh, it will not be, in all of the circumstances, unduly harsh for them each to remain in the United Kingdom after their father is removed to Nigeria.” (paras 43-44, emphasis added)

34. Judge Southern went on to consider how he would have decided the case applying his understanding of the approach in *MAB.* He described the difference as “stark”:

> “It will be recalled that the MAB approach has been summarised as follows:
>
> > ‘The phrase ‘unduly harsh’ in paragraph 399 of the Rules (and section 117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.’
>
> In this appeal if there is to be no balancing exercise requiring the public interest to be weighed and if the focus is solely upon an evaluation of the consequences and impact upon the claimant’s children, it is clear that the application of paragraph 399(a) can deliver only one answer, that being that it would be unduly harsh for the claimant's children to remain in the United Kingdom without their father, given that there is a close parental relationship which cannot be continued should their father be deported.” (para 45)

35. Miss Giovanetti for the Secretary of State takes issue with that alternative reasoning, which she criticises as applying too low a standard. I agree. The alternative seems to me to treat "unduly harsh" as meaning no more than undesirable. Contrary to the stated intention it does not in fact give effect to the much stronger emphasis of the words "unduly harsh" as approved and applied in both *MK* and *MAB*.

36. Conversely, I find the main reasoning difficult to fault. It is notable that, in that passage, contrary to the thrust of the earlier discussion, no account is taken of the seriousness of the particular offences, or of the particular criminal history of the father. On its face that approach seems no different from that which I have accepted as correct in the earlier discussion. It is also consistent with that in the end adopted by the Upper Tribunal on the facts of *MAB* and by contrast with its response to the much more severe situation considered in *MK*.

37. For these reasons I would dismiss the appeal in *KO*.

The other cases

38. Against that background I can deal more shortly with the other cases.

IT

39. IT is also a "foreign criminal" by reason of his conviction on four counts of supplying class A drugs, for which he was sentenced to imprisonment for 42 months. A deportation order was made against him on 29 October 2009, an appeal against that decision was dismissed and IT was deported to Jamaica on 21 July 2010, where he continues to reside. He has a wife (the sponsor) and child (R, born 30 September 2002) in the UK, who are both British nationals.

40. IT applied to revoke his deportation order on 23 September 2013. That application was refused on 9 May 2014. In a decision given on 5 September 2014, the First-tier Tribunal allowed IT's appeal, holding that the consequences were unduly harsh for the child *R*. It acknowledged the seriousness of the appellant's offences, and that "the more serious the offence … the greater the public interest in deportation" (para 33). However it noted that R had special educational needs and medical problems associated with microcephaly, and that he was about to start secondary school and was on the brink of puberty. The consequences were not unduly harsh for the sponsor, who could relocate to Jamaica. In R's case however the threshold was crossed. It found that the parental relationship between IT and R was subsisting and genuine, adding:

> "It is claimed that [R] cannot join the appellant in Jamaica because [R] has a flying phobia. There is no objective evidence of that. Following *Sanade (British Children— Zambrano— Dereci)* [2012] UKUT 48 (IAC); [2012] Imm AR 597, however, we find that [R] is a British citizen and it is not possible to expect him to relocate outside the European Union" (para 30)

The tribunal concluded:

> "33. … [R] has reached an important stage in his life where his particular needs are likely to increase. The Sponsor cannot reasonably be expected to cope alone.
>
> 34. The consequences of deportation for the appellant are harsh: he is separated from his wife and child and step-children but we find that that is the foreseeable consequence of his serious criminal behaviour.
>
> All other things being equal, those consequences could be mitigated by the Sponsor and [R] joining the appellant in Jamaica and living with him there, alternatively by visits and regular contact by telephone and other means.
>
> It is clear from the decision of the Upper Tribunal in *Sanade* however that as the Sponsor and [R] are British citizens and therefore citizens of the European Union, it is not possible to require them to relocate outside the European Union. Moreover, although the Sponsor has visited the appellant three times in the last four years [R] has not done so because of a phobia of flying. As a result [R] has not seen his father for over four years and has no prospect of doing so for the remainder of his childhood while the deportation order remains in effect.
>
> Given [R]'s condition and special educational needs, we find that the consequences of not revoking the deportation order are unduly harsh and we allow the appeal."

On 12 January 2015 the Upper Tribunal dismissed the Secretary of State's appeal. It confirmed the relevance of the decision in *Sanade* (para 18). It accepted that the tribunal had found no evidence to support the alleged phobia of flying but saw this

as one aspect of the determination, which did not have any material effect on the overall outcome (para 22).

41. The Court of Appeal [2017] 1 WLR 240 took a different view, in a judgment given by Arden LJ. Although this was a case about revocation of a previous deportation, rather than deportation as such, she noted that it was "effectively common ground" that section 117C applied so that the deportation order could only be revoked if its retention is determined to be "unduly harsh"; the dispute was as to "the weight to be given in that determination to the public interest in deporting foreign criminals who have committed serious offences" (para 2). By that time *MM (Uganda)* had been decided. Following the approach in that case, she said: "the public interest must be brought into account. Therefore, the court must know what that public interest is in any particular circumstance in order to give appropriate weight to it" (para 51). She added:

> "54. Moreover, it is clear from section 117C(2) that the nature of the offending is also to be taken into account. The tribunal will have access to the circumstances of the offence and to the length of the sentence and so on.
>
> 55. Subsection (1) and (2) of section 117C together make manifest the strength of the public interest. In order to displace that public interest, the harshness brought about by the continuation of the deportation order must be undue, ie it must be sufficient to outweigh that strong public interest. Inevitably, therefore, there will have to be very compelling reasons …"

She found little evidence that the tribunal had given appropriate weight to the public interest, for example by considering alternative ways in which R's care needs could be met, or whether his phobia about flying ruled out other forms of contact, for example in some other part of Europe which he could access by car or train. She concluded:

> "62. I conclude that the FTT did not demonstrate that they had given appropriate weight to the public interest. … If the FTT indeed considered that the circumstances were very compelling, it was for them to demonstrate this in the reasons they gave ...
>
> 64. The balancing exercise in this case has to be performed again. The FTT did not seek to analyse whether there were very

> compelling reasons why the deportation order should be revoked …"

42. Mr Drabble for IT submits that the court's reasoning is open to the same criticisms as the decision in *MM (Uganda)* on which it relied. In any event he criticises the court's introduction of a "compelling reasons" test which is not found in the relevant sub-section. I agree that for that reason at least the Court of Appeal's reasoning cannot stand. The FTT could not be criticised for not applying a test which was not in the relevant provision. For the reasons I have given, I also think it was wrong to proceed on the basis that section 117C(2) required the "nature of the offending" to be taken into account.

43. It is to be noted that the decisions of both tribunals were made before the guidance given in *MK* and later cases as to the high hurdle set by the "unduly harsh" test. It may be that with the benefit of that guidance they would have assessed the facts in a different way. However, I do not consider that the decisions can be challenged for that reason alone. If the tribunals applied the correct test, and, if that may have resulted in an arguably generous conclusion, it does not mean that it was erroneous in law (see *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771, para 107).

44. The Court of Appeal's suggestion that they should have considered alternatives ways of meeting, perhaps in Europe, does not seem to have been part of the Department's case before the tribunal. However, Miss Giovanetti submits that the tribunal erred in proceeding on the basis that R, as a British citizen, could not be expected to relocate outside the UK. In so far as a concession to that effect was made in *Sanade (British children - Zambrano - Dereci)* [2012] UKUT 48, [2012] Imm AR 597, it was in error, as had since been confirmed by the Court of Appeal (*Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255, para 64). I agree that on this point the First-tier Tribunal erred in law (although there appears to be some uncertainty about the Departments' current practice on this issue). There is also a significant inconsistency in the tribunal's reasoning in the other part of its concluding paragraph. Having earlier accepted that the alleged phobia of flying was unsupported by evidence, it went on to treat it as one of the reasons for allowing the appeal. I cannot agree with the Upper Tribunal that this point was immaterial.

45. For these reasons I would dismiss the appeal and confirm the order of the Court of Appeal for remittal to the Upper Tribunal.

NS

46. NS and AR both entered the UK as students, on 19 February 2004 and 4 February 2003 respectively. NS's wife and elder child entered as dependants of NS in December 2004. NS has a second child, born in the UK in 2008. AR's wife and child entered as his dependants in February 2004. In October 2008, NS and AR made separate applications for leave to remain as Tier 1 (post study worker) migrants. In early 2009 the Secretary of State refused these applications on the basis that both NS and AR were involved in a "scam" by which they (and numerous others) falsely claimed to have successfully completed postgraduate courses at an institution called Cambridge College of Learning ("CCL").

47. NS and AR both appealed against the Secretary of State's decisions. After some procedural delays, their appeals were ultimately joined, and came before UT Judge Perkins. In a determination issued on 5 November 2014, he dismissed the appeals, finding that NS and AR had deliberately submitted false documents to support applications to extend their stays, and by so doing were "acquiescing in a cynical plot to undermine the Rules by issuing meaningless certificates" (para 179).

48. He acknowledged however that "the difficulty is the children" (para 182). It is unnecessary to set out in full the extended passage in which he carefully considered their position against the principles set out in section 117B. He started by referring to section 117B(6), of which he said:

> "I remind myself that this is a NOT a deportation case and so the public interest does not require the person's removal where (a) the person has a genuine and subsisting parental relationship with a qualifying child (as is clearly the case here) and (b) it would not be reasonable to expect the child to leave the United Kingdom (see section 117B(6))." (para 183)

He also referred to section 117B(5) requiring that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious:

> "I am satisfied that their status became precarious [at latest] when their applications for further leave were refused in 2009 so much of the private life relied upon attracts 'little weight'." (para 186)

49. He referred in detail to the evidence of the children's experience of this country and their likelihood of being able to adapt to Sri Lanka. He thought that the parents would "do well for the children in Sri Lanka just as they have in the United Kingdom", but added:

> "Nevertheless the children will lose much. They have no knowledge of life outside the United Kingdom and have done well in the United Kingdom. If they remained they could be expected [to] take full advantage of the education system and removing them will unsettle them. I have no difficulty in concluding that the best interests of the children require that they remain in the United Kingdom with their parents where they are settled. That, from their point of view, would be an ideal result." (paras 193-194)

50. He concluded:

> "I do remind myself that one of the children, particularly, has been in the United Kingdom for more than ten years and that this represents the greater part of a young life by someone who can be expected to be establishing a private and family life outside the home. I remind myself, too, that none of the children here have any experience of life outside the United Kingdom and they are happy and settled and doing well. The fact is their parents have no right to remain unless removal would contravene their human rights.
>
> I remind myself of my findings concerning the need to maintain immigration control by removing the first, second and third appellants. Given their behaviour I would consider it outrageous for them to be permitted to remain in the United Kingdom. They must go and in all the circumstances I find that the other appellants must go with them." (paras 198-199)

51. Mr Knafler supports the other appellants in their challenge to the reasoning of *MM (Uganda).* He says that it is even clearer in the context of section 117B that parental misconduct is to be disregarded. I accept that UTJ Perkins' final conclusion is arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). However, read in its full context I do not think he erred in that respect. He had correctly directed himself as to the wording of the subsection. The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para

18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable.

52. I would dismiss this appeal.

Pereira (AP)

53. AP is now 19 years of age. He first came to the UK on 6 August 2006, with his parents, and as the dependant of his father ("Mr P") who had been granted leave to enter as a student, and obtained further grants of leave, up until 15 August 2012. On 15 August 2012, Mr P applied for a Tier 1 (Entrepreneur) visa. His leave, and that of his family including AP, were extended whilst that application was determined and the refusal unsuccessfully appealed. On 5 November 2013, AP applied for leave to remain in reliance upon paragraph 276ADE(1)(iv) of the Rules, since he had by that time been living continuously in the UK for seven years. The Secretary of State refused this application on 18 March 2014.

54. AP's appeal against this decision initially succeeded before the First-tier Tribunal, but on 19 June 2015 the Upper Tribunal set aside this determination and, re-determined and then dismissed AP's appeal. It held that it was reasonable for AP to accompany his parents to their country of origin at what was a natural break in his education, and that the decision was proportionate. AP's appeal was one of the cases before the Court of Appeal in *MA (Pakistan)* [2016] 1 WLR 5093. The Court of Appeal allowed his appeal on the basis, not of an error under the rule, but that the tribunal judge had erred in his approach to proportionality by failing to identify AP's best interests or recognise them as "a primary consideration" (para 116 per Elias LJ). It ordered that the case should be remitted to the Upper Tribunal for a fresh determination.

55. Mr Gill argues that, applying the correct approach to paragraph 276ADE(1)(iv), AP's appeal should have succeeded under that rule also. The Secretary of State points out that, since AP is now aged 19 and has spent more than half of his life living continuously in the UK, he is in principle qualified for leave to remain under paragraph 276ADE(1)(v) of the Rules.

56. It seems to me unnecessary to say more about this case, which is to be remitted in any event to the tribunal. The issues before the tribunal were not limited

by the order. If it is not disposed of by agreement as suggested by the Secretary of State, it will fall to be considered in accordance with the law as stated in this judgment including the correct approach to para 276ADE(1)(iv). I would therefore simply dismiss the appeal, and confirm the order of the Court of Appeal remitting the case to the tribunal.

Concluding remarks

57. I end with a brief comment on procedure. It has taken almost four years for these cases to reach the Supreme Court. In the meantime there have been significant differences of approach and conflicting decisions at each level. The view of the Department itself, at least of the effect of section 117B(6), seems to have changed over time. I have noted the continuing debate before the Upper Tribunal and the Court of Appeal. Unfortunately these differences are far from surprising given the unhappy drafting of the statutory provisions. But it was clearly desirable that a definitive interpretation could be settled as quickly as possible.

58. At the Upper Tribunal level Judge Southern was not strictly bound by the previous decision in *MAB*, although judicial comity would normally lead to it being treated as persuasive unless there were clear reasons for taking a different view. There is provision under the relevant Practice Directions for "starred decisions" to be treated as authoritative (Para 12.1 of the Practice Directions for the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal); and see Nationality, Immigration, and Asylum Act 2002, section 107(3)) (as inserted by para 22 of Sch 2 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and as substituted by para 28 of Sch 1 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21)) . It may be that the uncertainty at that level could have been resolved at an early stage by selecting a suitable case for such treatment.

59. This of course would not resolve the problem of disagreements at Court of Appeal level. However, I note that there is now provision in suitable cases for "leapfrog" of appeals from the Upper Tribunal to the Supreme Court. This was introduced by section 64 of the Criminal Justice and Courts Act 2015, by way of insertion of new section 14A and B into the Tribunal, Courts and Enforcement Act 2007. The procedure requires a certificate from the Upper Tribunal, one ground being that a point of law is involved of "general public importance" relating wholly or mainly to the construction of a statutory provision, which has been fully argued and considered in the Upper Tribunal (section 14A(4)(a)). It is then for the Supreme Court to decide whether it is "expedient" to grant permission (section 14B(3)).

60. Clearly it is a procedure which should be used with care, since it will normally be more satisfactory for these issues to be resolved at Court of Appeal level, and in any event for the Supreme Court to have the benefit of its views. However, these appeals raised a relatively narrow point of construction of a new set of provisions intended to clarify a contentious area of law applicable to many cases before the Secretary of State and the tribunals. I say no more than that its use could properly be considered in future cases raising comparable issues, and calling for speedy resolution in the public interest.