Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18793/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre **Remotely by Skype for Business** **On 3 December 2020**	**Decision & Reasons Promulgated** **On 23 February 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

DUMITRU TRICOLICI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Sardar instructed by Turpin & Miller LLP (Oxford)
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Moldova who was born on 13 March 1987. The appellant arrived in the United Kingdom on 26 September 2002 as a minor and claimed asylum. That application was refused on 29 October 2002 but the appellant was granted exceptional leave to remain as an unaccompanied minor. That leave was

valid until 12 March 2005. On 28 February 2005, he applied for further leave to remain and on 16 May 2011 he was granted indefinite leave to remain.

2. Between 3 December 2015 and 17 June 2019, he was convicted on six occasions of 24 offences including 14 offences against property, one offence relating to the administration of justice, four drugs offences and four miscellaneous offences. Most recently on 28 May 2019, at the Cardiff Crown Court he was convicted of offering to supply a controlled drug in class B, namely cannabis and possession with intent to supply a controlled drug, in class B, namely cannabis, and breach of previous court orders. On 17 June 2019, he was sentenced to a total of 15 months' imprisonment.

3. On 27 June 2019, the appellant was notified of his liability to be deported. In response, the appellant made submissions under Art 8 of the ECHR.

4. On 30 September 2019, the Secretary of State refused the appellant's claim under Art 8. On 29 September 2019, a deportation order was made against the appellant under s.32(5) of the UK Borders Act 2007 and s.5(1) of the Immigration Act 1971.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Povey on 4 August 2020.

6. The appellant and his partner, "SR" gave oral evidence before the judge. The appellant relied upon Exception 1 in s.117C(4) of the Nationality, Immigration and Asylum Act 2002 (as amended) ("the NIA Act 2002"); Exception 2 in s.117C(5) of the NIA Act 2002 and, in particular, that his deportation would be "unduly harsh" on his partner, SR and their two children born in 2010 and 2015; and, finally, that his deportation was a disproportionate interference with his private and family life because the public interest was outweighed by "very compelling circumstances over and above those described in Exceptions 1 and 2" applying s.117C(6) of the NIA Act 2002.

7. Judge Povey accepted that the appellant had a genuine and subsisting relationship with SR and genuine and subsisting parental relationships with their two children (as well as his step-child). However, although it would be "unduly harsh" for his partner or children to relocate to Moldova, Judge Povey found that it would not be unduly harsh for them to remain in the UK if the appellant were deported. Consequently, the judge found that the appellant did not meet the requirements of Exception 2.

8. Secondly, Judge Povey found that Exception 1 did not apply. It was accepted that the requirements in s.117(4)(a) and (b) were met, namely that the appellant had been lawfully resident in the UK for most of his life and was socially and culturally integrated in the UK. However, Judge Povey found that the requirement in s.117C(4)(c) was not met, namely it had not been established that there were "very significant obstacles " to the appellant's "integration" on return to Moldova.

9. Thirdly, applying s.117C(6) Judge Povey found that the public interest outweighed the appellant's circumstances on the basis that there were not "very compelling circumstances".

The Appeal to the Upper Tribunal

10. The appellant sought permission to appeal to the Upper Tribunal on two grounds. First, the judge had failed properly to apply the "unduly harsh" test in s.117C(5). Secondly, the judge had erred in applying s.117C(6) in that he had failed to make any findings as to the "best interests" of the appellant's children which were a "primary consideration" when assessing whether there were "very compelling circumstances" sufficient to outweigh the public interest.

11. On 3 September 2020, the First-tier Tribunal (Judge Adio) granted the appellant permission to appeal.

12. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 3 December 2020. I was based in court in the Cardiff CJC and Ms Sardar, who represented the appellant, and Mr Howells, who represented the Secretary of State, joined the hearing remotely by Skype for Business.

The Submissions

13. Ms Sardar relies upon the two grounds of appeal.

14. As regards the judge's conclusion that Exception 2 did not apply, Ms Sardar focused upon the decision of the Court of Appeal in HA (Iraq) and another v SSHD [2020] EWCA Civ 1176 decided since the First-tier Tribunal's decision. She submitted that the correct approach to determining whether the impact upon the appellant's partner and children would be "unduly harsh" was set out in [51]–[53] of the judgement of Underhill LJ. She submitted that Underhill LJ had concluded that the underlying test was whether the level of harshness on the appellant's partner and children reached the "elevated" threshold to outweigh the public interest. However, Underhill LJ had concluded that a judge should not seek to determine that issue through the touchstone of whether the degree of harshness went beyond "that which is ordinarily to be expected of the deportation of a parent" or, in relation to a partner, expected by the deportation of a partner. Ms Sardar submitted that the judge had fallen into error because he had applied that touchstone in reaching his finding that the impact, in particular upon the appellant's children, would not be unduly harsh.

15. Ms Sardar drew my attention to the evidence before the judge in particular from an expert social worker (Deborah Orre) dated 11 March 2020, including her conclusion at para 6.19 that the impact upon the children would be devastating as the children might need care outside of the family, i.e. local Social Services involvement. She also placed reliance upon the witness statement of the appellant's partner speaking to the stress caused to her.

16. Ms Sardar submitted that the judge's approach, albeit in accordance with how the law was understood at the time, nevertheless amounted to an error of law as the Court of Appeal's approach in HA (Iraq) represented the law.

17. Secondly, Ms Sardar submitted that in assessing the appellant's claim outside the Rules under Art 8, and in applying s.117(6), in reaching his findings at paras 44 – 46, the judge made no finding in relation to the "best interests" of the appellant's children and, by failing to take those into account, the judge erred in law in reaching his adverse finding under Art 8 outside the Rules.

18. Mr Howells accepted that in HA (Iraq) the Court of Appeal recognised that there was a "elevated" threshold (see [51]–[53] and [56]) but that had not lowered the threshold of the "unduly harsh" test as recognised by the Supreme Court in KO (Nigeria) and others v SSHD [2018] UKSC 58. He submitted that each case must turn upon its own facts and the judge had not misdirected himself by applying the comparator test of whether the degree of harshness went beyond that ordinarily to be expected by the deportation of a parent.

19. Secondly, as regards the judge's decision outside the Rules, Mr Howells accepted that if the judge had erred in his conclusion in relation to Exception 2 then the judge's finding as to whether there were "very compelling circumstances over and above those" described in Exception 2 could not stand. Otherwise, Mr Howells acknowledged that the judge had not specifically referred to s.55 of the Borders, Citizenship and Immigration Act 2009 and the children's "best interests". However, the judge had done so in the context of determining Exception 2 and whether the impact upon the children would be "unduly harsh". Following HA (Iraq) at [55], it was clear that "best interests" of a child was part of that test. Providing the judge's finding in relation to Exception 2 was sustainable, Mr Howells submitted that the judge had considered the children's best interests" at paras 44 and 45 of his determination. The judge had correctly set out the factors in favour of the appellant and in favour of the public interest and then at para 46 carried out a balancing exercise in reaching his fining on proportionality.

20. Mr Howells submitted that the judge had not, therefore, erred in law as set out in Grounds 1 and 2.

Discussion

21. It was common ground that the judge's decision that the appellant could not succeed under Exception 1 in s.117C(4) of the NIA Act 2002 was not challenged in the grounds and so stands.

22. The principal challenge, set out in Ground 1 as developed by Ms Sardar in her submissions, relies upon the Court of Appeal's decision in HA (Iraq) and what was said there about the proper approach to the "unduly harsh" test in Exception 2 in s.117C(5) of the NIA Act 2002. Under Exception 2, so far as relevant to this appeal, the appellant, who was found to have genuine and subsisting parental relationships with the children and a genuine and subsisting relationship with his partner, had to

establish that the impact of his deportation would be "unduly harsh" upon them. It was accepted that, as it is sometimes called, "the go scenario", fell to be decided in his favour, namely that it would be unduly harsh for them to accompany the appellant to Moldova. The judge made that finding at para 19 and it has not been challenged.

23. The issue for the judge was to determine, what is sometimes described as, the "stay scenario", namely whether it would be unduly harsh for the appellant's partner and children to remain in the UK if he were deported. The focus of the submissions before me related to whether it would be "unduly harsh" upon the appellant's children.

24. The leading decision is that of the Supreme Court in KO (Nigeria). The principal issue in that appeal, in respect of s.117C(5), was whether, in applying the "unduly harsh" test, a balancing exercise was required taking into account the public interest. The Supreme Court concluded that was not the correct approach and that the focus should exclusively be upon the child or parent in respect of whom it was said the appellant's deportation would be "unduly harsh". The Supreme Court (in the judgment of Lord Carnwath with whom the other justices agreed) provided guidance on the "unduly harsh" test. Having cited the relevant passages from Lord Carnwath's judgment, in HA (Iraq) Underhill LJ drew together the points made by Lord Carnwath as follows (at [50]–[53]):

> "50. What light do those passages shed on the meaning of "unduly harsh" (beyond the conclusion on the relative seriousness issue)?
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> 51. The essential point is that the criterion of undue harshness sets a bar which is "elevated" and carries a "much stronger emphasis" than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.
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> 52. However, while recognising the "elevated" nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of "very compelling circumstances" to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.

> 53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

25. At [55] – [56], Underhill LJ addressed two further points. The first relates to whether the "unduly harsh" test had embedded within it an assessment of a child's "best interests" and, secondly what Lord Carnwath had said in relation to the degree of harshness required under s.117C(5) going beyond that "ordinarily expected by the deportation of a parent. Underhill LJ said this:

> "55. The first is that what Lord Carnwath says in the relevant parts of his judgment in *KO* makes no reference to the requirements of section 55 of the 2009 Act and is likely to lead tribunals to fail to treat the best interests of any affected child as a primary consideration. As to that, it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55: see para. 15 of his judgment, quoted at para. 41 above. The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test. It was not necessary for Lord Carnwath to spell out that in the application of Exception 2 in any particular case there will need to be "a careful analysis of all relevant factors specific to the child"; but I am happy to confirm that that is so, as Lord Hodge makes clear in his sixth proposition in *Zoumbas*.
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> 56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an "ordinary" level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting

> relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

26. Then, at [57], Underhill LJ concluded:

> "Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of a parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50 – 53 above."

27. Ms Sardar relies upon what Underhill LJ said in [56] about the test not being equated to harshness going beyond that "ordinarily expected by the deportation of a parent".

28. In his concurring judgment, Peter Jackson LJ also identified the importance of determining as a "primary consideration" a child's best interests in applying the "unduly harsh" test or, indeed, the "very compelling circumstances" test (see [152] – [151]. Then, he observed at [156] that there were two ways where a decision maker might inadvertently fail to apply the proper approach. He said this:

> "There are two broad ways in which it seems to me that a decision-maker may inadvertently be deflected from giving primary consideration to the best interests of the child of a foreign criminal. One is by focusing on the position of children generally rather than on the best interests of the individual child. The other is by treating physical harm as intrinsically more significant that emotional harm. I will take these in turn."

29. At [157]-[158], Peter Jackson LJ agreed with Underhill LJ about the dangers of using, what he described as the "any child" approach as a notional comparator. He said this:

> "157. In order to maintain focus on the individual child, it will be helpful for the decision-maker to apply the words of the statutory tests themselves. By their nature, commentaries on the tests may be illuminating, but they are not, as Underhill LJ has shown at [56], a substitute for the statutory wording. For example, Lord Carnwath's reference in paragraph 23 of *KO (Nigeria)* to undue harshness to "any child" cannot have been intended to set up a notional comparator, if only because it is not possible to know what the circumstances of such a child might be. For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent where face to face contact cannot continue may be akin to a bereavement. A decision that gives primary consideration to the best interests of the child will instead focus on the reality of that child's actual situation and the decision-maker will be more assisted by addressing relevant factors of the kind identified by Underhill LJ at the end of [56] than by making generalised comparisons. Likewise, as explained in the footnote to [48], the aphorism "That is what deportation does" is an important truth, but it is not a substitute for a proper consideration of the individual case. The full citation from Sedley LJ in *Lee* makes this clear:
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> > "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what

> deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge."
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> 158. It can be seen that the aphorism frames the question; it does not provide the answer. In that case, the parent was a supplier of Class A drugs who had received a seven year sentence and was facing deportation to Jamaica, and the balance not surprisingly fell in favour of deportation despite the impact on the two young children. In the same way, I agree with Underhill LJ's observations at [34] and [35] that decision-makers should be cautious about transposing statements of principle from one statutory context to another; likewise his consideration at [129] of the limited value of cross-checking outcomes in more or less similar cases. The task of the decision-maker in this respect is to consider the effect of this deportation on this child."

30. Finally, reverting to the issue of a child's "best interests", Peter Jackson LJ cautioned (at [159]) against not treating 'emotional harm' in a similar way to potential 'physical harm'. He said this:

> "My other general observation concerns the treatment of emotional harm. Section 31(9) of the Children Act 1989 defines harm as ill-treatment or the impairment of health or physical, intellectual, emotional, social or behavioural development. Reflecting our contemporary understanding of the importance of emotional development and mental health, there is no hierarchy as between physical and non-physical harm. It must therefore always be recognised that *for the child* the consequences of going with both parents may be experienced as far less harsh than staying with one parent. Despite this, it may be easier for decision-makers to envisage the harm that may be done by expecting a family to experience precarious or even dangerous physical conditions than to factor in at full worth the lifelong emotional harm of terminating the relationship between a child and a close parent during the child's minority and possibly forever. Both situations are grim but for the child neither is intrinsically grimmer than the other."

31. Peter Jackson LJ concluded (at [159]) that, nevertheless, in appropriate circumstances the public interest in deportation could prevail over a child's best interests:

> "Provided the decision-maker faces up to the reality of the child's situation and gives it primary consideration the public interest in deportation may prevail, but it will not do to minimise the emotional impact on the child of severing of ties by reference to the doubtful prospect of maintaining relationships over many years by indirect means only, or bey reciting the fact that this is what deportation does."

32. In my judgment, the Court of Appeal in HA (Iraq) has explained and realigned the "unduly harsh" test. The Court maintained, in accordance with KO (Nigeria), the "elevated" threshold it requires. However, locating that threshold as being above the impact that would "ordinarily" be experienced by a child (or partner) by the deportation of an individual is not an appropriate comparator to determine whether the "elevated" threshold has been reached.

33. Prior to HA (Iraq), the Court of Appeal had in a number of decisions used the "any child" approach, on the face of it, to reflect a level of harshness that would not engage the "unduly harsh" test. For example, in SSHD v PG (Jamaica) [2019] EWCA Civ 1213, the Court said this at [39] in relation to the impact on a child that it did not

> "go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported".

34. Likewise, in SSHD v KF (Nigeria) [2019] EWCA Civ 2051 at [30] the Court recognised that the test of "unduly harsh" required evidence to establish:

> "consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances".

35. Not surprisingly, as this was the (then) approach of the Court of Appeal, Judge Povey in this appeal adopted the same approach. He cited passages from the cases of PG (Jamaica) and KF (Nigeria) in which the "any child" approach to the unduly harsh test was stated (see his paras 34 and 35).

36. The judge did recognise that there would be an impact on the children and, indeed the appellant's partner if he were deported. At paras 31–32, he cited the expert social work report by Ms Orre and said this:

> "31. In respect of the impact upon the children, reliance was placed upon the report of Ms Orre, who met the appellant, [SR] and the children and consulted with the children's primary school and social worker. Ms Orre concluded that:
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> 31.1 The appellant's deportation would *'cause the children significant emotional harm … given the strength of his relationship with [them]'* at (Paragraph 6.11), *which 'may in turn effect their general development and well-being, even with the continued relationship with their mother. If would be likely to cause emotional harm and potentially negatively impact upon all areas of the development ..'* [at Paragraphs 6.15], including their educational progress (at Paragraph 6.17).
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> 31.2 There is an even greater need for the appellant's availability to support and care for his children, because of [SR's] health (at Paragraph 6.19).
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> 32. The largely uncontested evidence in this appeal clearly showed both [SR] and especially the children will suffer great distress if the appellant were no longer in the UK. The impact upon the children was documented by Ms Orr. There will undoubtedly be emotional harm to them if the appellant were deported."

37. Having cited the cases to which I have already referred, the judge then reached his conclusion in para 37 as follows:

> "In my judgment, the facts in this appeal do not lead me to find that the appellant's deportation would cause undue harshness to either the children or [SR]. I do not underestimate the scale of the emotional impact or the distress that would be caused, particularly to the children. But it could not be said that those consequences, as detailed in Ms Orr's report and explained in the witness statement, went over and above what any family would experience."

38. In reaching his finding, the judge clearly applied the "any child" approach which the Court of Appeal in HA (Iraq) disapproved. Reading the judgment as a whole, it is not possible to discern whether the judge thought that the impact, which he related in his determination, reached the "elevated" threshold of the "unduly harsh" test because he assessed whether that test was satisfied simply by asking whether the impact upon the appellant's children would be greater than that on any child

separated from its parents. In applying that test, and in reaching that finding, the judge erred in-law given the subsequent decision of the Court of Appeal in HA (Iraq).

39. I should add, however, that it is a little surprising that the judge saw the evidence in this case as identifying "emotional harm" to the children that was necessarily commonplace. Bearing in mind what Peter Jackson LJ said at [159], the judge may, in any event, have minimised the emotional impact on the children of severing their ties with the appellant.

40. In any event, having misdirected himself in law, albeit understandably in the light of the case law at the time of his decision, I am not persuaded that the evidence before the judge was incapable of meeting the "unduly harsh" test as explained by the Court of Appeal in HA (Iraq). For that reason, therefore, the judge erred in law in finding that Exception 2 did not apply to the appellant.

41. Mr Howells accepted that if the judge's finding in relation to Exception 2 could not be sustained, then the judge's finding, in relation to whether there were "very compelling circumstances" *over and above* those in Exception 2 so as to outweigh the public interest under s.117C(6), also could not be sustained. Despite the judge's careful assessment of the evidence in paras 44 and 45 of his determination, I am driven to accept that conclusion must follow and that the judge's finding in relation to s.117C(6) also is unsustainable. Whether or not Ms Sardar is correct that the judge failed to take into account the children's "best interests", he necessarily erred in law in reaching a finding in relation to the latter.

42. For these reasons, the judge's findings in relation to Exception 2 and in applying s.117C(6) cannot stand and are set aside.

Decision

43. The First-tier Tribunal's decision to dismiss the appellant's appeal under Art 8 involved the making of an error of law and that decision cannot stand. The decision is, accordingly, set aside and must be remade.

44. Both representatives indicated that, if that were my conclusion, the proper disposal of the appeal was to remit it to the First-tier Tribunal in order to remake the decision in relation to Exception 2 and, to the extent necessary, applying s.117C(6).

45. Both representatives agreed that the judge's findings under Exception 1 should be preserved as they were not challenged. In addition, his positive findings in relation to Exception 2 should also be preserved. Those are that the appellant has a genuine and subsisting relationship with his partner SR and genuine and subsisting parental relationships with the children. It is also accepted that the judge's finding that it would be unduly harsh to expect SR or his children to relocate to Moldova is preserved.

46. The outstanding issue under Exception 2 is whether it would be unduly harsh for the appellant's partner and children to remain in the UK (the "stay scenario") if he were deported. Of course, if he cannot succeed under Exception 2, there remains the issue of whether his deportation would be disproportionate applying s.117C(6).

47. With those findings preserved, the appeal is remitted to the First-tier Tribunal to remake the decision to the extent I have indicated by a judge other than Judge Povey.

Signed

Andrew Grubb

Judge of the Upper Tribunal 18 December 2020