



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02181/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 30 October 2018**

**Decision & Reasons Promulgated
On 15 November 2018**

Before

**UPPER TRIBUNAL JUDGE FINCH
UPPER TRIBUNAL JUDGE PLIMMER**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSE [P]

Respondent

Representation:

For the Appellant: Mr. N. Bramble, Home Office Presenting Officer

For the Respondent: Mr. [P] appeared in person

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Chile. He first arrived in the United Kingdom on 7 April 1975, when he was eleven years of age. He returned to Chile in 1978 and remained there until

July 1983, when he returned to join his mother and siblings in the United Kingdom. He was granted indefinite leave to remain in the United Kingdom on 21 November 1984.

2. Meanwhile, in 1983, he had married his British wife, who he had met at school when he was previously in the United Kingdom. They had three children together, the first in 1985, the second in 1987 and the third in 1989. Their second child suffers from severe asthma and also mental health difficulties. Their third child suffers from Graves disease and is on the autistic spectrum.
3. On 12 August 2014 the Respondent was convicted of fraud by abuse of position at Blackfriars Crown Court. The indictment stated that the offence occurred between 31 January 2009 and 1 September 2012. This was when he was working for The World is Yours Ltd. He had left his position by mutual agreement in September 2012 and the discrepancies in the accounts were identified in September 2013. He had pleaded guilty to the offence at the first opportunity and he was sentenced to 16 months imprisonment on 13 April 2015. The sentencing judge accepted that, although he had betrayed the trust placed in him, he was simply a bookkeeper. He was sentenced on the basis that he had not had a position of power, that the amount involved was around £82,000 and that he had pleaded guilty.
4. On 26 January 2016 the Respondent was served with a deportation order and told that he was only entitled to an out-of-country appeal. This decision was subsequently withdrawn and he was served with a second deportation order and a decision to refuse his human rights claim on 16 January 2018. He appealed against this decision and First-tier Tribunal Judge Paul allowed his appeal in a decision, promulgated on 13 August 2018.
5. The Secretary of State for the Home Department appealed against this decision on 17 August 2018 and First-tier Tribunal Judge Hodgkinson granted him permission to appeal to the Upper Tribunal on 30 August 2018. He stated that “whilst the Judge, clearly and understandably, had significant sympathy for the appellant and his wife, it is arguable that he failed to properly apply the relevant undue harshness test, for the reasons set out in the grounds”.

ERROR OF LAW HEARING

6. The Respondent relied on a skeleton argument, dated 26 October 2018, and also a letter to the Upper Tribunal, dated 3 October 2018, with an attachment. These had not been received by the Home Office Presenting Officer and we gave him time to read these documents. The Home Office Presenting Officer addressed us first and submitted that First-tier Tribunal Judge Paul had failed to address the higher threshold for the evidence necessary to establish that the unduly harsh test was met. He noted that all three of the Appellant's children were now adults and that the evidence did not establish that the two younger children were still significantly dependent on the Appellant and his wife, as First-tier Tribunal Judge Paul had found in paragraph 19 of his decision.
7. We asked the Respondent to clarify which documents had been submitted at the First-tier Tribunal hearing and he explained that, although he had brought two large bags of evidence to the hearing, he had only had time to find and submit one document, which was the letter from Maidstone Hospital, typed on 24 May 2016. He also confirmed that he had not previously submitted the letter from a community mental health nurse, dated 14 June 2016, which was attached to the letter to the Upper Tribunal, dated 3 October 2018.
8. We also read out the text of *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC) so that the Appellant was better able to understand the definition of "unduly harsh" which had been adopted by the Upper Tribunal. In response, the Respondent relied on his skeleton argument and stated that he could not expect his older son to support him and that his two younger children could only work on a part-time basis. He also stressed that his wife was not well enough to travel to Chile with him.

ERROR OF LAW DECISION

9. Section 117C of the Nationality, Immigration and Asylum Act 2002 states that:
 - “(1) The deportation of a foreign national is in the public interest.
 - (2) The more serious the crime committed by the 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 of Exception 2 applies.
 - (4) ...
 - (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner...and the effect of C’s deportation on the partner...would be unduly harsh”.
10. The Respondent is a foreign criminal for the purposes of section 117D of the Nationality, Immigration and Asylum Act 2002, as he is not a British citizen, had been convicted of an offence in the United Kingdom and had been sentenced to a period of imprisonment of at least 12 months.
11. The Respondent’s wife is a “qualifying partner” for the purposes of section 117D as she is a British citizen. In addition, the Appellant accepted that the Respondent is in a genuine and subsisting relationship with her. Therefore, the Respondent was clearly able to meet most of the requirements of section 117C(5) but he also had to show that the effect of his deportation would be unduly harsh on his wife.
12. In paragraph 21 of his decision, First-tier Tribunal Judge Paul found that “the effect of the [Respondent’s] deportation would be unduly harsh on his wife, and furthermore that it would be unduly harsh to expect her to relocate to Chile”. But in his grounds of appeal, the Appellant submitted that “the FTTJ has failed to give clear reasons as to how the high threshold of unduly harsh consequences are met in respect of” the Respondent’s wife.
13. In *MK (Sierra Leone)* the Upper Tribunal found that:

“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, denoted 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”.
14. First-tier Tribunal Judge Paul referred to the constituent parts of section 117C but did not refer to *MK (Sierra Leone)* or address the correct meaning of the phrase ‘unduly harsh’. He

reached his decision without the benefit of *KO and Others v Secretary of State for the Home Department* [2018] UKSC 53 but we noted that in paragraph 23 Lord Carnwath addressed the meaning of the phrase and reached a decision similar to that of the Upper Tribunal in *MK (Sierra Leone)*. He found that “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”.

15. In paragraph 19 of his decision, First-tier Tribunal Judge Paul merely took into account the fact that the Appellant had first met his British wife in 1975 and that they had been married since 1983. He also accepted her evidence that she had been utterly dependent upon the Appellant throughout their marriage and that, in turn, their two younger adult children were still significantly dependent upon them. It was on this basis that he concluded in paragraph 21 of his decision that the effect of the Respondent’s deportation on his wife would be unduly harsh.
16. He did so despite the fact that the Respondent’s wife was in employment. Their three adult children were also working; albeit that their daughter and younger son were said to be only able to work on a part-time basis. First-tier Tribunal Judge Paul had found that the two younger children were still significantly dependent upon their parents but the only evidence of this was that they were driven to work and were accompanied to medical appointments. There was no evidence about the nature of their employment and no medical evidence apart from the one letter from Maidstone Hospital, referred to above. This confirmed that, although the Respondent’s younger son suffered from Grave’s disease, he was asymptomatic at that time. There was no evidence that he was on the autistic spectrum and the letter from the hospital indicated that he was able to discuss treatment options with his consultant without assistance.
17. The level of the Respondent’s daughter’s dependence should also have been considered in the context of her letter, which stated that she visited museum and galleries and played around with dogs, want to get a promotion at work and pass her driving test.
18. As a consequence, we also find that First-tier Tribunal Judge Paul reached a decision which was not commensurate with the evidence before him at the hearing. Further, he did not direct

himself to the high threshold necessary to find that the effect on the Respondent's wife would be unduly harsh or adequately reason how that threshold was met in this case.

DECISION

- (1) The appeal is allowed.
- (2) First-tier Tribunal Judge Paul's decision is set aside on the basis that it contained material errors of law.
- (3) We have had regard to paragraph 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision and have decided that it is appropriate to remit the appeal to the First-tier Tribunal to be heard by a First-tier Tribunal Judge other than First-tier Tribunal Judge Paul and First-tier Tribunal Judge Hodgkinson.

Nadine Finch

Signed

Dated: 30 October 2018

Upper Tribunal Judge Finch