Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05110/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 15 August 2019	**on 22 August 2019**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZI [W]

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr A Caskie, Advocate, instructed by Latta & Co, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. The appellant is a citizen of China, born on 10 January 1974. He appealed to the FtT against the SSHD's decision, made on 17 January 2018, to deport him to China.

3. Judge Lea heard the appeal on 15 May 2019. In her determination promulgated on 20 May 2019, she recorded at [23] that the SSHD accepted that it would be unduly harsh to expect the appellant's two

children to go to China. It is common ground that she correctly identified the decisive issue as "whether it would be unduly harsh for the children to remain in the UK with their mother without their father".

4. At [24] the Judge found that there was a low risk of re-offending, and that the appellant seemed "genuinely chastened". She noted the opinion of a psychologist that it was in the best interests of the children to be with both parents in the UK, and accepted that the appellant had been "very involved … in childcare" given that his wife was working.

5. At [25] the Judge found that "although … very finely balanced … it would be unduly harsh on the appellant's two UK children for him to be deported to China and separated from them, with them having very little chance of even being able to visit him given the distances involved and the financial situation of the appellant's wife". She therefore allowed the appeal.

6. The SSHD's grounds of appeal cite *RA (Iraq)* [2019] UKUT 123 and *MK (Sierra Leone)* [2015] UKUT 223, and contend that the Judge did not identify anything meeting the high standard required to show undue harshness.

7. In *MK* the UT (McCloskey J, President, and UT Judge Perkins) said at [46]:

> "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."

8. In *KO* [2018] UKSC 53 the Supreme Court at [27] described that as authoritative guidance. The Court went on to reject the view that the exercise involved any consideration of the criminality of the parent. At [35], the Court said that "unduly harsh" meant more than "undesirable", and that effect was to be given to "the much stronger emphasis of the words" approved and applied in *MK* and in *MAB* [2015] UKUT 435.

9. Mr Govan referred to *RA* [2019] UKUT 123 (Lane J, President, and UT Judges Gill & Coker) for the proposition that rehabilitation will not ordinarily bear material weight in favour of a foreign criminal.

10. He cited also *PF (Nigeria)* [2019] EWCA Civ 1139 at [97 iii]:

> "… the separation of children from a deported parent is an unfortunate but usual consequence of a deportation order. The degree of upset that is contemplated for the children here is unfortunate but clearly not extraordinary; and, in my view, comes nowhere near meeting the unduly harsh test even on the exclusively child-centred approach required by *KO*, let alone the more stringent "very compelling circumstances" test in section 117C(6) of the 2002 Act."

11. At [23] the judge said that it was clear from the social work report that there was a low risk of re-offending, which she repeated when weighing up at [24]. Mr Govan pointed out that the criminal justice social work report at page O6 of the SSHD's FtT bundle says under the heading of "risk assessment":

> 'Likelihood
>
> Assessed as low risk of reoffending. No responsibility taken for the current offence which may indicate a risk of reoffending.'

12. And at page O7:

> 'Conclusion
>
> …
>
> The risk assessment is scored as medium.'

13. Mr Govan said that the FtT was "not entirely correct" about the risk assessment, but, more significantly, was wrong to think that a low risk of re-offending weighed on the appellant's side.

14. The appellant had produced a report by Dr Alia Ul-Hassan, clinical psychologist, on the impact on the children of their father's deportation. At [24] the judge noted the psychologist's opinion that it was "in the best interests of the children in terms of their psychological wellbeing, development and education to be with both their parents in the UK". Mr Govan said that the report showed there would be a significant impact, but no more than is inherent in any such case.

15. Mr Govan submitted finally that the FtT did not identify the threshold which the appellant had to meet, or specify anything which met that threshold; and that, applying *KO*, its decision should be set aside and reversed.

16. Mr Caskie made two "preliminary observations"; (i) the SSHD was trying to have "a second bite at the cherry", could have cited the cases now relied upon to the FtT, but did not do so; and (ii) the SSHD has been anxious for many years to ensure that responsibility for non-deportation of any "foreign criminal" is passed to someone else.

17. The principal submissions for the appellant were based on the psychological report and on *JG (Jamaica)* [2019] EWCA Civ 982.

18. The report shows that the appellant has played a full and active role in his children's lives. The older child, JJ, is vulnerable to anxiety, and the risk of mental health problems would be greater if faced with "significant life stressors", of which his father's removal would be a clear example. The younger, JW, "does not possess particularly well developed coping strategies", which, with a tendency towards anxiety, suggests that he is

"also prone to developing problems with his mental health, particularly if forced to undergo a significant and traumatic separation from his father". "From psychological theory, it is well established that loss of secure attachments can be extremely detrimental and traumatic to a child". The report also opines on the impact of separation from the appellant on the children's mother, and expresses concern over her "ability to cope with such extreme levels of stress", which in turn may result in her having "more difficulty supporting the healthy development of the children".

19. The further points which I noted from the submissions for the appellant were these:

(i) As in *JG,* the SSHD was in reality alleging perversity.

(ii) It was enough that there was evidence capable of reaching the necessary threshold. The UT could interfere only if there had been no evidence capable of supporting the decision of the FtT.

(iii) Removal of the appellant would effectively separate the children from their father for at least a decade, beyond the remainder of their childhood years.

(iv) The family relationships here were strong and stable, not the fractured and imperfect ones often seen in such cases.

(v) The submissions in the FtT (where Mr Caskie also appeared) were based on the psychological report. With a report in such clear and strong terms, there had been little more to say. That remained the foundation of the case in the UT.

(vi) There is no duty to quote case law.

(vii) It was not to be assumed that an experienced judge used the legal term of art "unduly harsh" without knowing what it meant.

(viii) The judge referred to the seriousness of the appellant's offending, so it could not be said that she did not recognise the weight to be given to the public interest.

(ix) The judge made a slip about the social work report on the risk of reoffending, but that made no difference.

(x) At [23] the judge alluded to the appellants' refusal to accept responsibility at the time of sentencing probably being one of the factors resulting in his situation. It was likely that she had in mind that if he had pleaded guilty, there would have been a discount in his sentence taking him out of automatic deportation. She was entitled to have regard to that.

(xi) At [24] the judge did exactly what she was required to do.

(xii) At [25], the judge was right to find the case "very finely balanced". Other judges might have come down on the other side, but it was not an error to strike the balance where she did.

(xiii) The decision was not "so far off beam" that it could be said the judge must have applied the wrong test.

20. I reserved my decision.

21. Absence of recital of case law is no error. However, it must be clear that the decisive issue was posed and resolved in accordance with authority.

22. The decision under challenge in *JG* stood partly because it was "replete with correct self-directions in law", and because the judge repeatedly mentioned the very high hurdle (in that case, "very compelling circumstances").

23. The question here is whether the judge, although not setting out the exegesis of the test in the case law, applied it in substance. It is agreed that she stated the question correctly at [23], but how did she go about answering it?

24. The judge's slip about the level of risk of re-offending is, in itself, inconsequential. The case did not turn on whether that risk was low, medium or high. However, the judge took this in the appellant's favour, along with his remorse, although those matters were irrelevant.

25. At [24] the judge said she had "to weigh up the clear adverse effect which removal of the appellant will have on his wife and children with the public interest and the impact of illegal drugs having a negative effect on public protection issues". She did not. All she had to decide was whether the effect on the children would be not merely harsh, as was to be expected, but unduly harsh, having regard to the effect on them, and to nothing else.

26. This case was at the lowest end of the scale of criminality to trigger deportation. It is highly likely that a guilty plea would have brought the appellant below the threshold. The case is at the higher end of the scale of family relationships. In a free-ranging proportionality exercise, it might be finely balanced. The judge thought that she was engaged in such an exercise.

27. The SSHD categorises this case with *PF*, where the UT reached a conclusion which could not properly be made, as the evidence did not come close to anything unduly harsh. Mr Caskie for the appellant has done his best to categorise it with *JG*, where there was such evidence, and the FtT might have decided either way.

28. In my view, the decision of the FtT cannot be read as applying the legal test correctly, and is not analogous to *JG*. Having posed the question in its barest form at [23], the judge went the wrong way about answering it. She took account of matters which would have been relevant in a free-ranging proportionality exercise but were irrelevant in the tightly structured scheme of deportation. She identified consequences which are sad and unfortunate and did not appreciate that there had to be something beyond that, taking the case out of the ordinary.

29. This is not a case where the SSHD has to establish perversity. The judge has failed to apply the relevant test in accordance with clear authority.

30. The decision of the FtT is set aside because it adopted a legally incorrect approach.

31. At [35] of *RA* the UT said that exceptions from the rule that rehabilitation is irrelevant could not entirely be excluded, although departure from the norm would have to be "fully reasoned". It was, rightly, not argued that the decision of the FtT fell within that exception, because the matter was not discussed. In remaking it, there is nothing to initiate a search for an exception to the rule; and the risk is medium, not low.

32. On the evidence before the FtT, the children would be subject to a degree of upset which is real and damaging, but no more than is inherent in any deportation which severs a genuine and subsisting parental relationship; which means that it would be harsh, but not unduly harsh.

33. The appeal, as originally brought to the FtT, is dismissed.

34. No anonymity direction has been requested or made.

19 August 2019
UT Judge Macleman