



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/23719/2018 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 16 April 2021

On 27 April 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TR

(ANONYMITY ORDER MADE)

Claimant

DECISION AND REASONS (V)

For the appellant: Mr A McVeety, Senior Presenting Officer

For the Claimant: Mr A Osman, instructed by Turpin & Miller LLP

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I indicated that I found an error of law but reserved my full reasons to be given in writing, which I now address. The order made is described at the end of these reasons.

1. To avoid confusion, for the purposes of this decision I shall refer below to the parties as they were at the First-tier Tribunal appeal hearing.
2. The appellant is a national of Zimbabwe, with date of birth given as 22.3.90, who first arrived in the UK in 2007. Following a conviction and sentence for serious drug-dealing offences, he was imprisoned for three and a half years on 10.3.17 and subsequently made the subject of a deportation order.
3. The Secretary of State has appealed with permission against the decision of the First-tier Tribunal promulgated 16.4.20, allowing on human rights grounds the appellant's appeal against the decision of the Secretary of State, dated 8.11.18, to make a deportation order and to refuse his human rights claim. At that appeal hearing, the appellant's representative confirmed that the challenge was made only on article 8 ECHR grounds outside the Immigration Rules.
4. The appeal was primarily allowed by the First-tier Tribunal on the basis that pursuant to paragraph 399(b) it would be unduly harsh on the appellant's 3-year-old daughter for him to be removed. The grounds argue that the findings were inadequately reasoned, particularly when the appellant does not live with his daughter and her mother is her primary carer. Reference is made to various case authorities defining and clarifying the term "unduly harsh" as something going beyond what would necessarily be involved for any child faced with the deportation of a parent.
5. The grounds also challenge the finding of very significant obstacles in relation to private life, pointing out that because he had not lived in the UK for the majority of his life, the appellant could not meet 399A and therefore he cannot satisfy the very significant obstacles test but would need to meet the very compelling circumstances over and above the very significant obstacles and unduly harsh tests in 399 and 399A.
6. The grounds go on to complain that in relying on the expert report, the judge failed to justify strong and cogent grounds for departing from the Country Guidance of CM (EM country guidance; disclosure) Zimbabwe Country Guidance [2013] UKUT 59 (IAC). Finally, the grounds submit that the judge failed to take into account family support, which would be relevant to article 3 considerations.
7. Permission to appeal was granted by the First-tier Tribunal on 13.5.20, the judge considering there to be arguable merit in the ground that the judge failed to explain how the obstacles to return to Zimbabwe were such as to amount to very

compelling circumstances “over and above” the Immigration Rules. The judge granting permission was not impressed by the very significant obstacles argument, considering that necessarily part and parcel of the very compelling circumstances test.

8. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. In particular, I have read and taken account of the appellant’s lengthy response, dated 21.8.20.
9. For the reasons summarised below, I am satisfied that the Secretary of State’s complaint does identify at least one material error of law, and in fact more than one, sufficient to require the decision to be set aside and remade, with no findings of fact preserved.
10. Whilst Mr Osman did his best to piece together from various parts of the impugned decision findings which could have justified the conclusion that the unduly harsh test was met, the fact is that this finding at [78] of the decision is inadequately reasoned. The only reason given is that the judge considers it would be unduly harsh for the child to lose the direct personal contact with her father she currently enjoys if she had to remain in the UK without him, and given her age it would be unreasonable to expect them to continue family life through modern means of communication. The judge fails to point to any other factors to justify the unduly harsh finding.
11. In relation to unduly harsh, the grounds cite the reference to ‘bleak’ and ‘severe’ in *MK (Sierra Leone) v Secretary of State* [2015] UKUT 223 (IAC), and the more recent Supreme Court decision of *KO (Nigeria) & Ors v Secretary of State* [2018] UKSC 53, where it is explained that unduly harsh is intended to introduce a higher hurdle than that of reasonableness and that “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.” In *Secretary of State v PG (Jamaica)* [2019] EWCA Civ 1213, the Court of Appeal held that the distressing consequences and difficulties to be expected from separation are not unduly harsh as they do not elevate the case above the commonplace. Mr Osman referred me to the Court of Appeal’s decision in *HA (Iraq) v Secretary of State* [2020] EWCA Civ 1176, where the Court found no reason in principle why cases of “undue” harshness may not occur quite commonly under section 117C(5), which addresses article 8 and additional considerations in cases involving foreign criminals. The court clarified the effect of *KO (Nigeria) v Secretary of State*. According to the Court of Appeal, there is no reason why undue harshness should be a rarity in deportation cases.
12. At [51] Lord Justice Underhill stated,

“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.

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).”

13. Although that decision post-dates the decision of the First-tier Tribunal, it highlights that an elevated degree of harshness is necessary to meet the test. Nothing in the impugned decision begins to justify the unduly harsh conclusion and that failure amounts to an error of law vitiating the decision. Neither the reference to ‘unduly harsh’ at [78] nor the reference to s117C(5) at [98] help the reader understand the reasoning for reaching that conclusion.
14. In passing, I note that at [81] and [98] the judge makes the confused findings that there is little or no public interest in the appellant’s deportation. Elsewhere, the judge correctly refers to the test of the public interest being outweighed but it is not clear overall that the judge has correctly understood what the public interest means. For example, at [99] the judge refers to the “respondent’s important public duties” being outweighed.
15. At [91] the judge concludes that the cumulative effect of the difficulties to be encountered on return to Zimbabwe amount to very significant obstacles, even though at [90] the judge noted the respondent’s argument that the appellant could not meet 399A because of the limited length of residence in the UK and that his offending history meant that he was not socially and culturally integrated in the UK. The judge appears to deliberately overlook that very compelling circumstances are required if the appellant cannot meet the requirements of the Rules. Reading the decision carefully, it is not clear what the judge’s conclusion on 399A is. The correct approach would have been to reach a conclusion on the Rules before making a consideration outside the Rules. This is a material error of law.
16. In relation to article 3, the judge cites extensively from the expert report but fails entirely to identify strong and cogent grounds to justify departing from the applicable Country Guidance case of CM, cited above. That according to what is set out at [87] that the respondent’s representative did not challenge the

credentials of the expert or the report's conclusions is insufficient. This is a clear error of law.

17. Finally, also in relation to article 3, the judge failed to take account of the financial and family support the appellant might reasonably expect on return to Zimbabwe. In response, Mr Osman referred me to [29] of his response and the reference to *Secretary of State v Kamara* [2016] EWCA Civ 813, where Lord Justice Sales considers the concept of integration. I do not agree with Mr Osman's reading that integration at its core requires the ability to find a job. As put at [30] of Mr Osman's response, "First-tier Tribunal Judge Flynn finds that the respondent cannot find a job in Zimbabwe and therefore the only conclusion open to her is that the respondent cannot integrate within Zimbabwe." That is a misconstrued interpretation of the point being made by Sales LJ that integration is a broad concept and "not confined to the ability to find a job or sustain life while living in the other country." What was required was "a broad evaluative judgement as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life." In any event, the appellant could not meet the other requirements of Exception 1 under s117C(4) of the 2002 Act. In the premises, unless the appellant could meet Exception 2, the unduly harsh test, the public interest required his deportation. For the reasons set out above, the unduly harsh consideration is flawed and in error of law. Given those difficulties, the conclusion at [99] that the interference with the article 8 rights of the appellant and his daughter outweigh the "respondent's important public duties" cannot be sustained.
18. Taken and read as a whole, I am satisfied that the decision is lacking in adequate reasoning for the findings made, such as to render the decision in error of law. In consequence, none of the findings can be preserved. In the premises, the appropriate course is to remit the matter to the First-tier Tribunal to be made de novo.
19. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the Secretary of State to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade afresh.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 16 April 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 16 April 2021