



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04512/2018

THE IMMIGRATION ACTS

Heard at Field House
And via Skype for Business
on 12th May 2021
and in person on 21st July 2021

Decision & Reasons Promulgated
On 11 August 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE KEITH

Between

'GC'
(ANONYMITY DIRECTION CONTINUED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

By virtue of this appeal including consideration of the appellant's minor children, 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. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Ms S Pinder, instructed by Corbin & Hassan Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim. A First-tier Tribunal (Judge Cockrill) had previously refused his protection appeal and that part of the decision remains undisturbed, as confirmed in our error of law decision dated 16th December 2019, and annexed to these reasons.

Background

2. The appellant, a citizen of China, sought leave to remain in the UK based on the right to respect for his family and private life. As recorded in our error of law decision, the respondent refused that application in a decision dated 21st March 2018. The appellant had entered the UK under an assumed identity on 24th August 1996 and applied for asylum; his asylum appeal was refused and his statutory appeal against that decision was treated as abandoned. He remained in the UK unlawfully, and was convicted on 19th June 2006 of the indecent assault of a vulnerable woman, for which he was sentenced to 15 months' imprisonment. The sentencing Judge also recommended his deportation and placed him on the sexual offences register for 10 years. The respondent then served a deportation notice, in response to which the appellant appealed and his appeal was refused by a First-tier Tribunal in a decision promulgated on 3rd January 2007. He was eventually deported on 7th March 2008.
3. The appellant claims to have clandestinely re-entered the UK on 25th February 2012 in breach of the deportation order (he was only encountered on an enforcement visit to a restaurant in the UK in 2015). During the period when he had been returned to China, his wife and children visited him twice. Following his encounter by the UK authorities, he submitted several further representations, including a claim to have been the victim of trafficking. A referral under the National Referral Mechanism was made and his claim was rejected, as were his later protection and human rights claims in the 2018 decision. In that decision, the respondent considered the facts that the appellant's wife was naturalised as a British citizen in 2011 and he had two British citizen children: a daughter born on 5th November 2004 (so now aged 16), whom we refer to as "child A;" and a son born on 6th December 2005 (so now aged 15), "child B". The genuineness of their relationships was accepted but the respondent did not accept that its refusal of the appellant's human rights claim was in breach of his human rights, as a foreign criminal who had re-entered the UK in breach of a deportation order. The family could return as one unit to China, or alternatively, the effect of the appellant's deportation would not be unduly harsh on his wife and children.
4. In a decision promulgated on 30th July 2019, First-tier Tribunal Judge Cockrill (the 'FtT') dismissed the appellant's appeal against the refusal of the appellant's protection claim (there is no appeal against that decision) but allowed his human rights appeal. The respondent appealed against that decision, on the basis (1) of apparently contradictory conclusions in the FtT's analysis, as briefly summarised in our error of law decision; (2) and a failure to explain why the separation of the family would be unduly harsh, which had occurred previously in the period 2008 to 2012.

5. This Tribunal set aside the FtT's decision in respect of the human rights claim, allowing the respondent's appeal. This Tribunal regarded it as appropriate to remake the decision, noting the narrowness of the issues between the parties and potential availability of evidence (a social worker report in respect of the children).

The issues in this appeal

6. While the respondent's decision and the FtT's appeal had referred to paragraph 399D of the Immigration Rules, the issues in remaking the FtT's decision, considering the recent authority of Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 00034 (IAC), are whether the appellant, as a foreign criminal (as defined by section 117D(2) of the Nationality, Immigration and Asylum Act 2002), sentenced to less than four years' imprisonment, meets the requirements of 'Exception 2' as set out in section 117C (5) of the 2002 Act; and whether there are very compelling circumstances for the purposes of section 117C(6).
7. The appellant does not rely on 'Exception 1,' as he has not been lawfully resident in the UK for most of his life (he has never been lawfully resident).
8. The respondent accepts that the effect of the appellant's children having to follow their father and mother to China, when they have lived in the UK all their lives, are British national children and are at a critical stage in their education, would be unduly harsh. The core issue is whether the effect of the separation of the appellant, were he removed to China, from his children in the UK, would be unduly harsh and whether there are very compelling circumstances over and above 'Exception 2'. We had discussed and agreed these issues at the earlier adjourned hearing on 12th May 2021.

Documents and evidence

9. The respondent provided a bundle containing extensive documentation, including the appellant's immigration history and witness statements. The appellant provided a combined bundle, including updated witness statements and an expert report dated 30th January 2020, of an independent social worker, Ms Elizabeth Wanjiru, whose expertise was unchallenged. We also had the benefit of written skeleton arguments of Mr Sowerby, Counsel, initially instructed on behalf of the appellant; and on behalf of the respondent, separate skeleton arguments of Ms Fijiwala and Ms Pettersen, Senior Presenting Officers.
10. We had witness statements and heard evidence from the appellant; his wife; and both of their children. We were conscious that the children were minors and we monitored and checked their understanding of proceedings. The children's spoken English was excellent, and they gave evidence without the need for an interpreter. In contrast, the appellant and his wife required an interpreter in Mandarin to give evidence.
11. We do not recite the evidence in full, much of which was undisputed. Instead, we refer to it where necessary in our findings.

The Law

12. We are reminded by the recent authority of HA (Iraq) v SSHD [2020] EWCA Civ 1176, that what is “unduly harsh” must be considered in the context that the starting point is the public interest in the deportation of foreign criminals. The underlying question is whether the harshness which the deportation will cause for the children is of a sufficiently elevated degree to outweigh that public interest. There is no requirement of exceptionality in the test of ‘unduly harsh’, and such an assessment, bearing in mind the best interests of the children for the purposes of section 55 of the Borders, Citizenship and Immigration Act 2009, is intensely fact specific. In that regard, our assessment needs to be focussed on the loss to child A and to child B in the event of their father’s deportation, and their distinct point of views, rather than consideration of a ‘norm’ in the case of any separation.
13. In relation to the wider issue of very compelling circumstances, we may consider the appellant’s offending, including the nature and date of the offence, any subsequent reoffending and the extent of the appellant’s rehabilitation. We also consider the fact of the deportation order, which, while never revoked, would mandate refusal of entry for a 10-year period, ended in 2017 (the deportation order was made on 20th February 2017). We also consider that the appellant re-entered the UK in breach of the deportation order, which must be a weighty consideration against him (although there is not a higher standard in such cases, as Binaku confirms).

Findings of fact

14. We considered all the evidence presented to us, whether we refer to it specifically in these findings or not.

Child A

15. Child A is 16 years old and has recently sat her GCSE exams. She has yet to receive the results but is predicted to obtain scores at level “six”, equivalent to old grades at the level “B”. She is moving this summer from her current school in London, the name of which it is unnecessary to name, to a sixth form college elsewhere in London where she plans to study vocational qualifications in travel and tourism, with an additional vocational emphasis on aeroplane cabin crew experience. Her expressed aim is to travel, including taking her parents to travel with her. She lives in a close family relationship with her younger brother and her parents. She is aware that her father, the appellant, does not have permission to stay in the UK. She candidly accepts that he is not a very educated person and is therefore not able to help her in terms of the content of her studies, but he has always been a supportive parent. She describes that during the COVID pandemic, when her mother caught COVID symptoms, the appellant ensured that the house was running as normally as it possibly could. When the children’s school began to go “online,” he made sure that everything was comfortable for the children to continue with their education. Without her father, the family would not be complete and child A thought that her mother would be very depressed. Child A also feared about the mental impact on

herself. Correspondence from Child A's school of 8th July 2021 (page [48] of the appellant's bundle ("AB")) states as follows:

"Although this year has been filled with uncertainty, [child A] has managed to hold herself together and remained radiant and bright. As a student she is desperate to excel, she displays all the qualities of a learner that is serious about her academic [sic]. Unfortunately, however, this has not been the case in the last few weeks. [Child A] battled through her GCSE examinations and is expected to receive very good GCSE grades. All of the [sic] was possible because of the support and the encouragement she receives from her father. [Child A] is a bright and intelligent girl this family deserves to stay together. [Child A's] father is committed to support his daughter and members of staff in order to foster a positive working ethos from child A. This commitment is exactly what we encourage from our parents and [the appellant] is the epitome of this. [The appellant's] current plight is causing [child A] added stress and it is impacting on her learning and psychological wellbeing. [Child A] needs her father as they a close family unit [sic] and they all depend on each other. [The appellant] has a desire to support his family financially, physically and emotionally. [The appellant] is the cornerstone of his family and they rely upon his guidance and protection.

I hope you are able to see my concern about the situation [Child A] finds herself in and will understanding [sic] to her needs as a young girl trying to make sense of everything that is going on around her."

16. The correspondence was addressed "to whom it may concern" and was from the head of year at child A's school.
17. The correspondence is consistent with the independent social worker report at pages [50] to [67] AB, produced by Ms Wanjiru, to which we now turn. Her report focusses on the impact of the appellant's removal upon both children. At §21, Ms Wanjiru refers to having liaised with the safeguarding lead of the children's school, who emphasised that both children were doing extremely well academically and are star pupils in the school, with no concerns around their behaviour; always being well-presented; and adhering to school rules and boundaries. The appellant was described as the main point of contact and the contribution in his children's life as "tremendous". The school referred to "good bonding" between the children and their father, and he was a role model to his children. Child A was described as at a crucial point in her education (the report was prepared in January 2020, was when she was in the first year of her GCSEs). The children attended Mandarin classes in London every Sunday as well as being involved in their local church group. At §22, Ms Wanjiru describes an interview with child A, when she asked her about the period when the appellant was not in the UK. Ms Wanjiru described child A recalling this period "with a lot of pain". Child A was worried about who would be there to offer her mother support and the thought of the appellant being away from the family caused her to have "suicidal thoughts". Ms Wanjiru was concerned about child A's presentation when interviewed. Ms Wanjiru referred to general academic work on the traumatic effect for adolescents of the loss of a parent, akin to post-traumatic stress. In Ms Wanjiru's view, child A has already suffered emotional harm because of ongoing exposure to the challenges of the appellant's appeal.
18. At §25, Ms Wanjiru describes her discussions with the appellant's wife, who had also feared for the children experiencing significant disruption, in the event of the

appellant's removal, as they are very well integrated into their school, with settled after-school routines and a "local" way of life. Ms Wanjiru describes at §27 the positive roles models that the children exemplified, in the context of gang violence linked to young children "these days." She contrasted with the effect of the appellant's removal and her opinion was that it would be "shameful" if their lives were interrupted.

19. Ms Wanjiru then describes at §28, the appellant's wife owing a significant amount of money to friends, totalling some £100,000, used to buy the family home; and needing to maintain her employment to pay this back. Ms Wanjiru then discusses the appellant's claimed ill-health, which could be related to stress and could deteriorate, if he were removed.
20. Whilst noting that Ms Wanjiru's qualifications and expertise have not been challenged, in some respects her comments stray beyond an assessment of the effects of deportation to personal opinions (for example, her reference to the "shameful" disruption of the family's life in the event of the appellant's removal). Moreover, it is also clear that in at least one respect, Ms Wanjiru did not have the full picture of the family's circumstances, where she describes the appellant's wife as owing £100,000 to friends, where we now have fuller evidence because of the oral evidence of the appellant and his wife, which we come on to discuss later in these reasons.
21. There is no medical evidence of any diagnosis of any illness that child A suffers from, or any medical treatment received, or any treatment. While Ms Wanjiru referred in her report of January 2020 to concerns about A suffering mental ill-health, there have been no follow-up referrals, for example to children's mental health services. Whilst child A has battled through her GCSEs, she has been able to cope. The worrying predictions outlined by Ms Wanjiru as to possible symptoms consistent with post-traumatic stress disorder do not appear to be borne out by any subsequent assessment or treatment to which we have been referred. We are not satisfied that there has been any impact on child A's educational attainment from the ongoing stress of the resolution of her father's immigration status.
22. We have no doubt that the appellant takes an active role in child A's parenting, for example, in being the prime point of contact with the children's school. We regard elements of his role as on occasion overstated (he claims to have accompanied both children to their school every day, something which child A directly contradicted in her oral evidence) but nevertheless our key finding is that the appellant plays a close and central role, by way of practical and emotional support to both his children, as part of a close-knit family.

Child B

23. Child B is 15 years old and is sitting his GCSE exams next year. He reiterated the closeness of the family unit and that they attended church every Sunday. He describes the appellant as encouraging him and his sister to work hard and achieve good results in their GCSE exams because their lives would only change for the

better in the future. The appellant has stressed to his children the importance of education. Child B confirmed that his mother had been working hard to provide for the family and she comes home from work exhausted and he worries about how she will cope in the appellant's absence. He did not know how the family would cope if the appellant were not present, especially if his mother were seriously ill. He gave examples of her suffering from migraines and an aching body. He was worried that his mother could not continue her work and then look after the family at home as well.

24. The school correspondence in relation to child B, at page 49 [AB], describes an exemplary student with exceptionally high marks in all his mock exams. The same correspondence reiterates the central role played by the appellant in his progress and moulding him to become the "extraordinary man" that child B is. The appellant is described as a very supportive parent over the last four years and having played a vital role in supporting child B in accessing remote learning and being an integral part in child B's mental health. The head of year 10 was very worried about child B's progress being negatively affected, should the status of the appellant and his ability to remain in the UK change. The teacher implored any decision-maker to consider all options to avoid the impact being detrimental on child B's future.
25. As with child A, Ms Wanjiru also expressed a view in her independent social worker report and whilst this is also a view expressed in January 2020, she also discussed concerns around child B when interviewed, at §23, describing him as a "boy of very few words", struggling to show emotions. The potential of him losing his father weighed heavily upon him, as his father was the only source of adult motivation he had. He wished to make his father proud, and Ms Wanjiru records him saying this as he was choking with tears. He mentioned that his father, the appellant, had taught him to manage dark days but he needed a strong role model.
26. Once again, we note Ms Wanjiru's concerns, but also the fact that during the period since the report, child B appears to be prospering, notwithstanding the uncertainty about the appellant's immigration status.
27. It is also important to note in respect of both children that the family, whilst a close-knit one, is not isolated from a wider support network. We consider this in the context of the scenario where the appellant is required to return to China. We find that this is not a case in which, in the event of the appellant's removal, the appellant's wife will be left to cope alone. From a purely financial perspective, Ms Wanjiru's report omits an important part of the family's collective resources. At §10, she refers to the appellant's wife having borrowed £100,000 from a mortgage company and having borrowed £100,000 from friends, to pay for the property valued at over £400,000. The purchase price paid by the appellant's wife on 25th October 2017, recorded on the land registry deed at page [94] AB, was in fact £425,000. At §16, Ms Wanjiru refers to the appellant's family in China with their income reported to be very minimal and only making enough to survive. At §18 there is a description of the appellant's wife's family in China but there is no reference to their resources.

28. In fact, as it transpired during oral evidence, when we discussed with the appellant's wife how she was able to afford a purchase price of £425,000 when she had received the loan from friends of £100,000 and a mortgage of £125,000, how the remainder was therefore paid for. She explained that her family in China had given her (not loaned) the sum of £200,000 in 2017, which she had also used to purchase the property. They are clearly a family of significant financial resources. There was no reference to this gift of £200,000 in Ms Wanjiru's report or the appellant's wife's witness statements.
29. In terms of the loan from friends of around £100,000 in the UK, this was not a single loan or from a small number of friends, but from between 20 and 30 people, some loaning her more than others, but with no minimum agreed repayment terms nor any requirement to pay interest. It is important to note, in that wider context, that the appellant and his wife appear to have extensive family in China. Whilst his family may be of limited financial means, he confirmed that he remained in contact with his siblings, albeit in a different area from where the family originated, and his wife has family in China with sufficient resources to make such a significant financial contribution to support the appellant and his family, as well as a wide network of support in the UK.
30. We regard the part of Ms Wanjiru's report, where she refers to the couple's limited resources in China (§13), which are discussed in the context of the inability of the appellant to return because he still owes money to criminal gangs, to be unreliable. It appears that through no fault of her own, Ms Wanjiru has not been provided with the full details of the family's financial circumstances. We make no criticism of her in this regard but it is clear that at least part of her assessment is based on incomplete information.
31. The support for the appellant and his family goes beyond extensive financial support. Ms Wanjiru herself describes the strong support network for the family in the UK (§14) and at §10, a large progressive Chinese community where the family resides. The children receive tutoring in Mandarin in London and regularly attend church, with the report discussing their involvement in church youth activities and Bible study.
32. In terms of the children's circumstances vis-à-vis their parents, there is no suggestion that they play any caring role for either of their parents. Whilst the appellant's wife has been described as ill and the appellant's wife asserted that she thought she was suffering from the effect of long COVID, she has not been diagnosed by any doctor to this effect and indeed, she continues to work Monday to Friday, 9am until 6pm, making clothing. Whilst there was correspondence in the appellant's bundle from the appellant's GP dated 13th May 2019 (page [86]) suggesting he was unable to work because of severity of migraines and it also discussed his poor sleep, in oral evidence, the appellant confirmed that were he permitted leave to remain, he would immediately start work full time in a restaurant.

33. We do not accept in these circumstances that the children have any caring responsibilities for their parents or would end up on such a role if the appellant is removed to China. Considering the carer role from the other perspective, namely the appellant's wife looking after the children alone, as we have already discussed, there was a discrepancy in the evidence of the extent to which the appellant took his children to school, but we accept the central role he has played in the family. Nevertheless, the appellant does not carry out a caring role in the sense of the children having any special educational needs or medical conditions. He is a continuing presence in their lives, but he admits, and we have noted, were he granted leave to remain, he would immediately start working as a chef in a restaurant full-time. Given their ages, the children are growing in independence and whilst we do not minimise the important stages that they are at in their lives, it is not the case that by virtue of the appellant's wife ending up as the sole or primary carer for them in the appellant's absence, their situation is analogous to that of small children. They take themselves to and from school and there is no reason to suppose that they would not be semi-independent within the home setting, looking after themselves to an extent for some of their practical needs, but also as part of a strong unit with their mother. We emphasise again that the family unit is not the sole source of support for the children, with strong support at school but also with the progressive Chinese community, who were sufficiently supportive to lend the appellant's wife £100,000 towards the family property; and the church group, from whom there is correspondence within the appellant's bundle at pages [84] and [85] AB.
34. Considering the picture as a whole, the family unit has a strong financial footing. There appears to be substantial equity in the family home, the family having been gifted £200,000 by family members in China and loaned an additional £100,000 by immediate friends within the UK, on terms which are not commercial; do not require any minimum repayments; nor any interest. We do not accept that any health conditions mean that the appellant's wife would feel compelled to give up her work and indeed, she continues to work full-time. We are satisfied in terms of any caring arrangements for their children, given their ages, on a practical level the support that they would draw from the wider close-knit community and their church would mean that arrangements for the children could safely continue. In reaching this conclusion, we do not underestimate the impact on the children emotionally. They will, we have no doubt, be upset and that was an upset reflected in the period when they were distressed during the uncertainty over the appellant's immigration status, as reflected in correspondence from the schools and in the independent social worker report. It is, however, testament to both children that they have continued to thrive, albeit with the appellant's presence.
35. We find that in the event of the appellant's removal, both children would be in regular contact via social media with him. They have close connections with the Chinese diaspora community, speak Mandarin and they also have several relatives in China. We have no doubt that just as the children had visited their father on two occasions in the period when he had been removed to China and lived there, that the children would swiftly visit their father in China and so in addition regular, if not

daily, social media contact with him, they would also physically visit him, and that the parental relationship would be maintained.

Discussion and conclusions

36. Based on the above findings, we come on to discuss the question of whether the effect of the appellant's deportation on his wife and children would be unduly harsh, although Ms Pinder has accepted that the effect on the appellant's wife is unlikely to add more to our consideration of the children. We remind ourselves that the consequence of the appellant's offending and his re-entry in breach of the deportation order is not relevant at this stage of the analysis. We take as our starting point that the deportation of foreign criminals is in the public interest. We also remind ourselves as per the authority of HA (Iraq) that there is no "ordinary standard" of harshness and that unduly harsh effects may be commonplace.
37. However, we accept Mr Whitwell's submission that even taking the appellant's case at its highest, the effect of the appellant's deportation on his wife and children would not be unduly harsh. We accept that there will be a substantial degree of upset for both children. We do not underestimate the important stages at which both children are in their lives, even though they are older children. However, and considering the evidence holistically, we also reflect that the children derive support from a financially secure home, within a close-knit UK diaspora community with whom they are involved; their church community; and substantial assistance from both schools. Neither child has any long-lasting medical issues, nor any special educational needs. Even during the period of uncertainty, which has affected child A in particular, both children have thrived. While we accept that the appellant's removal will be distressing in the context of that stable setting, in the children's continuing ability both to see their father by social media means but also, more importantly, to see him on a regular basis in person, as they did before, we are satisfied that the appellant does not meet the test of 'Exception 2' (section 117C(5) of the 2002 Act), in terms of the "stay" scenario, namely the appellant is removed to China, but his family remain in the UK. In respect of the appellant's wife, the effect on her would not be to require her to give up work or be financially compromised so as to put the family home at risk. While the appellant's absence would put additional responsibilities on her as sole parent in the UK, we find that she would receive substantial practical support from her church, her children's school, and the Chinese diaspora community. Considered as a whole, the effect on the appellant's wife would not be unduly harsh. We have analysed the social worker's report above and reference our findings therein. Although Ms Wanjiru was concerned in relation to the children's mental health, we find that they have progressed at school and maintained emotional stability.
38. In respect of whether there are very compelling circumstances, Ms Pinder candidly accepted that in respect of right to respect for the private life, there was little she could usefully add. No appeal against the asylum decision had been pursued and she reflected on the evidence we had heard about the family's financial resources in China. Whilst there had been references and assertions to very significant obstacles

to the appellant's integration into China, we note the significant resources of the appellant's wife's family members in China; his ability to relocate elsewhere than the region in which he was brought up, as his sisters have done; and the continuing strong support from the UK diaspora community, which, we find, is likely to continue in the event of his removal. We do not accept that there is any sense that he would be returning to China as an "outsider", noting the continuing links with family there as recently as 2017, when his wife was given £200,000 by her family members.

39. We then come on to consider the question of very compelling circumstances in the context of family life. It is at this stage that we are permitted to consider the nature of the appellant's offending and his re-entry to the UK in breach of the deportation order. We accept that, as per the authority of Binaku, there is no separate, higher standard for those re-entering in breach of a deportation order. We consider that the ban on re-entry of 10 years which would normally be the consequence of a deportation order has since expired, but we also consider that the appellant was only ever out of the UK for four years. Moreover, as the appellant confirmed in oral evidence to us, the decision to return to the UK in breach was a decision of the couple jointly. The weight of the public interest in the maintenance of immigration control where, as here, somebody has returned in breach of a deportation order, must be very significant.
40. In terms of the offence, we consider the nature of the offence; a sexual assault on a woman using public transport late at night, who was vulnerable through alcohol impairment, as reflected in the remarks of the sentencing Judge, His Honour Judge Lawrence, on 19th June 2006, at pages [E1] to [E3] of the respondent's bundle. We also note the length of sentence (15 months, so towards the lower end of sentences resulting in automatic deportation). We also consider that the appellant has not offended since his conviction for the sexual assault in June 2006; and the correspondence from both the children's school about the positive role played by the appellant; and the church which the family attend, which describes the appellant as having a spiritual conversion to Christianity, and his being rehabilitated.
41. However, in the context where the effect of removal would not be unduly harsh, bearing in mind all of the circumstances, including whether any facts relevant to Exceptions 1 and 2 are nevertheless sufficient to outweigh the public interest in deportation, we attach significant weight to the appellant's re-entry in breach of the deportation order. We also attach particular weight to his ability to see physically his family in the future, just as they did when he had been deported in the past; his ability to integrate into China; and the ability of the family in the UK to prosper, despite his deportation. In our assessment of all of the circumstances, we conclude that there are not very compelling circumstances over and above either Exceptions 1 or 2.
42. As part of the wider Article 8 assessment, by reference to Section 117B, whilst we accept that the appellant and his wife do not appear to be any burden on taxpayers and indeed have significant financial resources, nevertheless, neither appear to be

able to speak English. The appellant has never had leave to enter or remain in the UK. Any private life he has established in the UK was when he was here unlawfully and whilst we accept that different considerations apply in respect of family life, nevertheless, that is a fact we bear in mind in terms of the proportionality assessment. We conclude that whilst the effects of refusal of the appellant's human rights claim and refusal of the revocation of the deportation order will be significant enough to interfere with the appellant's right to respect for his private and family life under Article 8 ECHR to engage with that right, we are satisfied that that interference is wholly proportionate. The interest in immigration control is strong; the appellant does not meet the Immigration Rules; and the effects on the family's private and family life of the appellant's deportation are substantially mitigated by the family's financial resources and extensive support network, both in the UK and China.

43. In summary, the appellant's appeal fails and is dismissed.

Decision

44. The appellant's appeal on human rights grounds is dismissed.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **6th August 2021**

*TO THE RESPONDENT
FEE AWARD*

The appeal has failed and so there can be no fee award.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **6th August 2021**

ANNEX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

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By virtue of this appeal including consideration of the appellant's minor children, 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. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: Mr M Sowerby, instructed by Corbin & Hassan Solicitors

For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The parties are referred to as they were before the First-tier Tribunal.
2. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Cockrill (the 'FtT'), promulgated on 30 July 2019, by which he dismissed the appellant's appeal against the respondent's refusal of his protection claim, but allowed his human rights appeal, in the context of his seeking revocation of the deportation order against him. The respondent reached her decision on 21 March 2018.
3. In essence, the appellant's claims involved the following issues: whether the appellant had a well-founded fear of persecution from criminal gangs to whom he alleged he owed money (so-called "snakehead" gangs) and whom he alleged had forced him to work as a victim of modern slavery in the UK; and whether he should be returned to China, despite having re-entered the UK from China in breach of an existing deportation order, as a result of which he had previously been deported back to China; but noting that his wife and children were now naturalised as British citizens.
4. The core points taken against the appellant by the respondent were that his protection claim was not genuine, let alone well-founded, as his family had sufficient funds to buy a house in the UK, which undermined his claim to owe a debt of a far smaller sum; and his account, given at various times, was internally inconsistent in many respects.
5. In relation to his human rights claim, paragraph 399D of the Immigration Rules applied as he had re-entered the UK in breach of a previous breach of a deportation, having originally entered the UK under an assumed name and having previously been convicted of the indecent assault of a vulnerable woman. There were not very exceptional circumstances justifying why the existing deportation order should not be maintained. While the appellant had a British wife and children, there was no expectation for them to have to return to China with the appellant and they had already been separated from him between 2008 and 2012, following his previous deportation. The family could maintain contact via modern social media and the appellant's wife had previously visited him in China during the period when he had been deported. There would not be very significant obstacles to his integration there.

The FtT's decision

6. The FtT was not impressed by various aspects of the appellant's evidence, dismissing his appeal on protection grounds. The FtT's decision on that issue is not challenged in the Upper Tribunal. The FtT also found that, applying paragraph 399D of the Immigration Rules, he '*did not see*' that there were very exceptional circumstances in this appeal and that the appellant's children would have to adjust to the reality that their father was still the subject of a deportation order. However, the FtT went on to conclude that for the appellant's wife and children to try to maintain a family life in China, they would lose their acquired British citizenship, so that this would swing the balance in favour of the appellant, to be able to meet the very tough test of very exceptional circumstances. He could not enjoy his family life with his wife and

children, who would only be able to visit him; that would cost money and it would be 'unduly harsh' on them, noting their existing face-to-face contact with their father.

7. Having considered the evidence as a whole, the FtT concluded that while the protection claim was dismissed, the appellant's appeal on human rights grounds succeeded.

The grounds of appeal and grant of permission

8. The respondent lodged grounds of appeal which are essentially that the FTT erred in (1) concluding that there were not very exceptional circumstances in the appeal, but then going on to reach the contrary conclusion; and (2) even if the claimed loss of British citizenship of the appellant's spouse and children occurred and was unduly harsh (which was not admitted), the FtT had failed to explain why it would be unduly harsh for the appellant's family to remain in the UK, just as they had done when he was previously deported.
9. First-tier Tribunal Judge Kelly granted permission to appeal to the Upper Tribunal on 1 November 2019, on the basis that it was arguable that the FtT had erred in his application of the 'unduly harsh' criteria and had placed undue weight on family relationships developed when the appellant had returned to the UK in breach of the deportation order against him. The grant of permission was not limited in its scope.

The hearing before us

10. Ms Cunha relied on the grounds of appeal. Mr Sowerby submitted that while the FtT had given a reasoned decision, open to him on the evidence, of why it would be unduly harsh to expect the appellant's wife and children to relocate to China, and while he made no concession, he could see the force in the argument that the FtT had failed to address the issue of why separation of the appellant from his wife and children, such as had occurred previously, would be unduly harsh, let alone amount to very compelling or very exceptional circumstances. He did not seek to justify the FtT's reasoning that the appellant's wife and children would lose their British citizenship if they returned to China with the appellant.

The Law

11. Paragraph 399D of the Immigration Rules states:

"399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances."

12. The Court of Appeal in SSHD v SU [2017] EWCA Civ 1069 gave guidance on the operation of paragraph 399D. The Court confirmed that other provisions in the Immigration Rules relating to deportation, where there was not re-entry in breach of a deportation order, did not apply where paragraph 399D, which related to re-entry in breach of a deportation order, applied. In particular, paragraphs 390A and 391 did not

apply (see [22], [41] and [42] of SU). The test of very exceptional circumstances was higher than the test of 'very compelling circumstances' in 399 and 399A ([44]). The test of 'very compelling circumstances' in turn is higher than the test under 'Exception 2' (see paragraph 398(c) of the Immigration Rules), that is, whether the relevant circumstances would be 'unduly harsh' on the appellant's wife and children.

Discussion and conclusions

13. We conclude that the FtT has erred in law in concluding that the appellant's circumstances are exceptional because he failed to take into account material considerations. He failed to consider, when reaching this conclusion, why the separation of the appellant from his wife and children would amount to very exceptional circumstances, let alone the lower tests of very compelling circumstances; or whether it would be unduly harsh to separate the appellant from his wife and children. By focussing on the family's return to China, he failed to consider whether the impact of the separation of the appellant from his family went beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported (see: SSHD v PG (Jamaica) [2019] EWCA Civ 1213). The gap in that analysis renders the FtT's decision unsafe in respect of the human rights decision and we set aside the FtT's findings and conclusion on that issue.

Decision on error of law

14. We conclude that there are material errors of law in the FtT's decision in relation to the human rights appeal, which we set aside.
15. The FtT's findings and conclusion in relation to the protection claim were not challenged and shall stand.

Disposal

16. With reference to §7.2 of the Practice Direction, given the narrowness of the issues, we regarded this as an appropriate case to be remade by the Upper Tribunal.

Directions for remaking

17. The following directions shall apply on the future conduct of this appeal:
- (a) By 4pm on 24 February 2020, the appellant shall serve on the respondent any social worker report relied on in relation to the appellant's children, to the extent that it is relevant to the appeal. The appellant shall provide a copy of any social worker report to the Upper Tribunal with the written skeleton argument referred to in paragraph 17.2 below.
 - (b) By 4pm on 9 March 2020, the parties shall serve on one another, and the Upper Tribunal written skeleton arguments, to include their submissions on the relevance of the passage of time since the deportation order was originally made.

- (c) The Resumed Hearing shall be listed before Upper Tribunal Judges Rimington and Keith sitting at Field House on the first open date after 16 March 2020, time estimate 3 hours, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.
- (d) The anonymity directions shall continue to remain in force.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law in relation to the human rights appeal and we set it aside.

The decision of the First-tier Tribunal in relation to the protection claim stands.

Signed J Keith

Date: 17 December 2019

Upper Tribunal Judge Keith