



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08000/2017

**THE IMMIGRATION ACTS**

Heard at The Royal Courts of Justice, Belfast  
On 17 May 2018

Decision & Reasons Promulgated  
On 7 June 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

JG  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr McTaggart, instructed by RP Crawford & Co Solicitors  
For the Respondent: Mrs O'Brien, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, JG, was born in 1978 and is a male citizen of the People's Republic of China. On 11 July 2017, a deportation order was made against the appellant as a foreign criminal under the UK Borders Act 2007. On 7 July 2016, the appellant had been convicted for possession of a class B drug with the intent to supply and been given a three year period of imprisonment. The appellant is married with two children aged 11 years and 2 years respectively. The appellant appealed against the decision to deport him to the First-tier Tribunal (Judge Gillespie) which, in a decision promulgated on 24 November 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Mr McTaggart, who appeared both before the First-tier Tribunal and the Upper Tribunal, offered his apology to the Tribunal for having unwittingly provided Judge Gillespie with an out of date legal authority. When considering whether or not the removal of the appellant from the United Kingdom would have “unduly harsh” consequences for the children, Mr McTaggart had submitted to Judge Gillespie that he should follow *MAB (paragraph 399; “unduly harsh”) USA* [2015] UKUT 00435. Prior to the hearing in the First-tier Tribunal, *MAB* had been overruled by the Court of Appeal in *MM (Uganda)* [2016] EWCA Civ 617. That fact had, unfortunately, not been brought to the attention of Judge Gillespie. It appears that Judge Grant, who granted permission in the First-tier Tribunal, did so primarily on account of the judge having relied upon the incorrect jurisprudence.
3. Mr McTaggart submitted that the appellant was particularly close to his son (B). B is a British citizen, as is his younger sister. The Secretary of State accepted that it would be unduly harsh for B to leave the United Kingdom to live in China but considered that it would not be unduly harsh to expect B to remain in the United Kingdom after the deportation of the appellant. This was the most significant aspect of the case with which Judge Gillespie had to deal.
4. Evidence had been obtained from a Dr Bratten, an educational psychologist. The contents of Dr Bratten’s report are summarised by the judge at [30]. Dr Bratten saw the appellant as his primary attachment figure. The judge had noted that B had visited his father in prison and had become upset. The judge did not consider that to be “surprising”. Mr McTaggart submitted that the parents of B had been in a dilemma; if they did not take B to visit the appellant in prison then the accusation may be made that the relationship between B and the appellant was not particularly close. On the other hand, by taking him for visits, B had become upset. Mr McTaggart argued that the judge had failed to take account of that dilemma.
5. Furthermore, the degree of attachment to the family life enjoyed by the appellant and B in the United Kingdom could not easily be substituted by contact by Skype or by occasional holidays.
6. Mr McTaggart told me that the appellant had been released from prison in December 2017 and was now living at home with the family on licence.
7. I reserved my decision.
8. The parties agree that the proper approach is now that set out by the Court of Appeal in *MM* in particular at [22-25]

I turn to the interpretation of the phrase “unduly harsh”. Plainly it means the same in section 117C(5) as in Rule 399. “Unduly harsh” is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a proposition but is anyway provided, for example by *VIA Rail Canada* [2000] 193 DLR (4th) 357 at paragraphs 35 to 37.

The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in *MAB* ignores this combination of factors. The first of them, the public

interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):

"The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."

This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.

The issue is not advanced with respect either by the terms of the Secretary of State's guidance in the immigration directorate instructions or the learning on the use of the term "unduly harsh" in the context of internal relocation issues arising in refugee law. The IDIs are not a source of law and the asylum context of internal relocation issues is far removed from that of Rules 398 to 399. In fact authority in the asylum field emphasises the importance of context (see Januzi [2006] 2 AC 426 per Lord Bingham at paragraph 21).

9. In essence, the approach to the interpretation of "unduly harsh" set out by the Court of Appeal differs from that previously adopted by the Tribunal in *MAB* by widening or, as Mrs O'Brien for the Secretary of State described it, "contextualising" the assessment of "undue harshness" by reference to all relevant facts, including the appellant's offending and immigration history. A wholly child-focused test has been replaced by one with a wider scope.
10. The difficulty for the appellant in this appeal is that the judge has applied a test (that set out in *MAB*) which is more likely to have led him to allow the appeal than to dismiss it. In other words, after applying a test which is more favourable to the appellant than the test which replaced it, Judge Gillespie has still decided to dismiss the appeal. I find that, although the judge has erred in law by applying the wrong test, the appellant has failed to show that this error has affected the outcome of the appeal.
11. I find that the other grounds lack merit. First, I have no reason to believe that Judge Gillespie ignored any part of Dr Bratten's report when determining what he himself declared [39] to be "a difficult case to decide." I am satisfied that the judge was aware of Dr Bratten's description of the appellant as the primary attachment figure of B and that he made his findings in the light of that evidence. Secondly, whilst the judge does not refer to paragraph 398(c) of HC 395 in terms, the appellant has not shown that there exist factors outside those arising under paragraphs 339 and 339A which might have led the judge to a different conclusion. The judge was well aware that, in addition to being separated from his children by deportation, the appellant would be separated from his wife. Thirdly, I find that nothing turns on the judge's comments at [38] regarding B visiting the appellant in prison. In so far as the judge considers that the visits to the prison may have harmed B, his criticisms appear to be directed at B's

mother rather than the appellant. Fourthly, the judge's reference to Section 117B of the 2002 Act (as amended) is, admittedly, brief at [39] but again, the appellant has failed to show that a more thorough analysis of Section 117 would have been likely to lead the judge to a different conclusion. Fifthly, the contact arrangements in the future which the judge sets out at [35] are not advanced as a substitution for the family life which currently exists in the United Kingdom. As Mrs O'Brien submitted, the judge's decision is predicated on the understanding that the family will be separated, probably permanently, as a consequence of the deportation.

12. I find that the judge has adopted a careful approach to this appeal, acknowledging that it was "a difficult case to decide." The outcome which he reached was not, on the facts before the Tribunal, unavailable to him. His application of the "wrong" test of *MAB* did not materially affect the outcome. In the circumstances, I do not consider it necessary for the Upper Tribunal to interfere with the judge's findings or his conclusion.

### **Notice of Decision**

13. This appeal is dismissed.

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

14. 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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  
Upper Tribunal Judge Lane

Date 1 JUNE 2018

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 1 JUNE 2018

Upper Tribunal Judge Lane