



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal no: HU/08082/2017

**THE IMMIGRATION ACTS**

At Royal Courts of Justice, Belfast  
on 24.07.2018 Signed on 29.07.2018

Decision & Reasons Promulgated  
on 02.08.2018

Before:

Upper Tribunal Judge  
John FREEMAN

Between:

YU Jianbo

appellant

and

Secretary of State for the Home Department

respondent

**Representation:**

For the appellant: *Stuart McTaggart* (counsel instructed by RP Crawford & Co)

For the respondent: Mr A McVeety

**DETERMINATION AND REASONS**

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Moira Hutchinson), sitting at Belfast on 23 November 2017, to allow a deportation appeal by a citizen of China, born 1979.

2. The appellant had arrived in 1998 and claimed asylum: in 2000 he was refused and absconded. Nothing more was heard of him till 2006, when he was arrested for illegally selling DVDs, and claimed asylum once more in another name. That was refused again, but nothing seems to have been done to remove him, and in 2010 a 'legacy' application was made for him. From 2011 to 2013 he absconded again, but in 2014 he was given

*NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.  
(2) persons under 18 are referred to by initials, and must not be further identified.*

discretionary leave to remain till 2 April 2017. On 1 June 2017 the appellant was convicted of possession of a class 'B' drug with intent to supply, and sentenced to imprisonment for 2 years 2 months. On 11 July a deportation order was made against him.

3. The relevant provisions for this appeal are in s. 117C of the Nationality, Immigration and Asylum Act 2002. As a 'foreign criminal', sentenced to between 12 months' and 4 years' imprisonment, the public interest required his deportation, unless he came within one of the two exceptions. Since his lawful residence, while it lasted, had been very recent, he could not benefit from Exception 1, and had to rely on Exception 2. This required a 'genuine and subsisting relationship' with a qualifying partner or child. There are identical provisions in paragraphs 398 – 399 of the Rules, but it is more convenient to use the terms in the statute.
4. This appellant met a Chinese lady in this country in 2004, and they married in 2005. Since then they have had two sons, YH in 2006 and YL in 2008. YH is a British citizen, and both boys have lived here for over seven years, so both are qualifying children; nor is it disputed that he has a 'genuine and subsisting' parental relationship with them.
5. If the appellant were to benefit from Exception 2, then he needed to go further and show that the effect of his deportation on either child would be unduly harsh. This appeal is about the judge's approach to that question. She had to spend a good deal of time dealing with the question of whether it would be unduly harsh to expect either of them to move to China with their family; but each of them has significant mental health problems, which are being dealt with here, and Mr McVeety realistically accepted that her decision on this point could not be challenged. (YH is autistic enough to be given a full-time teaching assistant at school, and YL disturbed enough to refuse to speak at all, as shown in reports before the judge).
6. In the section headlined 'Children Remaining in the UK without the Appellant', the judge referred back at 39 to her 'wider assessment' on Exception 2, and there is no challenge to her assessment of the facts on this possibility. Mr McVeety did criticize the judge for concentrating too much on the interests of the children generally; but it was those that provided the statutory exception to the general rule which the appellant had to establish.
7. As that was the main focus of the hearing before the judge, she dealt with general considerations, including the relevant authorities, in her first section, helpfully headlined 'Relocation of the children to China'. Her decision on the general question comes at paragraphs 32 – 33. She referred to the general public interest in the deportation of offenders, the seriousness of the 'index offence', and warned herself against minimizing the appellant's crime. Mr McVeety criticized the judge for not focussing on the circumstances of his criminality; but she could hardly be blamed for this, when no-one had provided her with the sentencing judge's remarks. The judge did however, and significantly, remind herself about the appellant's abuse of the discretionary leave he had been granted.
8. The judge had already reminded herself at 31 of what was said in *NA (Pakistan)* [2016] EWCA Civ 662 about the desirability of children being with both parents being a

commonplace of family life, but not usually compelling enough to outweigh the high public interest in deporting foreign criminals. This was repeated in *MA* (ETS – TOEIC testing)[2016] UKUT 450 (IAC), as will be seen.

9. The real challenges to the judge's general approach are on
  - (a) the importance she gave, at 35, to the appellant's good conduct and apparent reform while in prison and under supervision since, and
  - (b) the need for exceptional circumstances to justify his not being deported.

On these points, which are very much bound up with each other, Mr McVeety relied on *AJ (Zimbabwe)* [2016] EWCA Civ 1012: the decision in that case was given on 20 October 2016, so could have been put before the judge, though nobody did so. Of course she still had to take account of it, so far as it contained any statements of general principle.

10. These were helpfully set out by Elias LJ (with whom Vos LJ agreed) at paragraph 11: I will go straight to the points on which the judge is criticized, leaving out references to other authorities.

(5) A consequence of the rules constituting a comprehensive code is that when exercising the residual article 8 assessment where exceptional circumstances are relied upon, the tribunal must carry out the assessment "through the lens of the new rules" and that requires a recognition of the very considerable weight to be given to the public interest in deportation. This distinguishes the foreign criminal cases from other article 8 cases, such as where the Secretary of State seeks to remove illegal immigrants in circumstances engaging article 8, where no single factor carries such dominant weight and a more general balancing exercise will be appropriate: ... Here the scales tip heavily in favour of deportation.

(6) When having regard to the public interest in deportation, there are three important facets: the need to deter foreign criminals from committing serious crimes; an expression of society's revulsion at serious crimes and building public confidence in the treatment of foreign criminals who have committed such crimes; and the risk of re-offending. It is an error to assume that the risk of re-offending is the sole, or even the most important, facet where serious crimes are committed: ...

(7) It is not enough for a tribunal in its reasons simply to identify a strong public interest in the deportation of foreign criminals; there must be a full recognition of the very powerful weight to be given to that factor and of the need for compelling factors to outweigh it: ...

11. The principle already referred to by the judge on the basis of *NA* is dealt with in *AJ* at paragraph 13:

... the mere fact that there will be a detrimental effect on the best interests of the children where the parent (almost always the father) is deported in circumstances where the children cannot follow him does not by itself constitute an exceptional circumstance.

12. Going back to the judge's treatment of the undue harshness question generally, she noted at 30, on the basis of *KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC), that the impact on children must be "... inordinately or excessively harsh", and repeated this expression in her own conclusions at 34, and at 39. While 33 is concerned with the appellant's conduct in prison and lack of propensity to re-offend, it was certainly not the only basis on which the judge decided that it would be unduly harsh to expect the

children to stay here without him. Following it were the findings of fact on that point at 35 – 38, which are not criticized.

13. While the judge ended 39 by saying that she need not consider whether there were ‘very compelling circumstances’, this clearly referred to the requirements of s. 117C (6)/paragraph 398 (c) of the Rules, which did not apply here, where there had been a sentence of less than four years’ imprisonment. In my view, the judge did not assume that the risk of re-offending was the sole, or even the most important, facet of this case, but based her decision on consideration of the interests of the public, as well as the children’s.
14. So far as the judge’s general consideration of the undue harshness question is concerned, I have to decide whether her repeated use of the expression ‘inordinately or excessively harsh’ represents an adequate recognition of the principle set out in *AJ* at paragraph 11 (7), taken together with (5). At first sight it might seem not to; but it is worth looking at the authority from which the judge took the expression.
15. This is the judicial head-note of *KMO*, which the judge must have had in mind:

*The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh.*

16. That undoubtedly represents the view of the law later approved by the Court of Appeal in *MM* and *AJ*; and it makes it clear that the judge’s use of ‘inordinately or excessively harsh’ took into account the relevant public interest, as well as those of the children. For those reasons the respondent’s appeal is dismissed; but the appellant should remember that he richly deserves to be deported, and it is only his children who do not deserve to be left here with their mother. If he were ever to commit any further significant offence, then nothing could save him from deportation.

**Appeal dismissed**



(a judge of the Upper Tribunal)