



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-003799

First-tier Tribunal No: HU/52164/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

21<sup>st</sup> December 2023

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**  
**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**DK**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr J Dhanji, Counsel.

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer.

**Heard at Field House on 15 November 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

**Introduction**

1. The Appellant appeals against the decision of First-tier Tribunal Judge C. Clarke (“the Judge”) dated 13 July 2023 following a hearing at Hatton Cross Tribunal Centre on 11 May 2023.

### **Factual Background**

2. The Appellant is a citizen of Poland. On 7 September 2023 he was granted permission to appeal by First-tier Tribunal Judge Grimes on EU Settlement Scheme grounds and on human rights grounds.
3. The Appellant’s immigration history is extensive. The Appellant claims to have initially entered the United Kingdom in 2013. On 12 May 2018 the Appellant was extradited to Poland and refused admission to the United Kingdom on 21 August 2020 due to his criminal history. The Judge noted that the Appellant then entered the United Kingdom via the Common Travel Area through the Republic of Ireland deliberately circumventing immigration control in the full knowledge that he did not have permission to enter the United Kingdom.
4. On 23 February 2022 the Respondent informed the Appellant that, because of his criminal convictions, he intended to make a deportation order against him pursuant to section 5(1) of the Immigration Act 1971. The Respondent was of the view that the Appellant’s deportation was in the public good. On 25 February 2022 the Appellant made representations setting out why he should not be deported. On 16 March 2022 the Respondent refused the Appellant’s representations and also his application under the EU Settlement Scheme (EUSS).
5. The Appellant has a number of very serious offences recorded against him in Poland. The Judge noted that these included sentences of imprisonment, including many for 4 years or more, for offences including rape, blackmail, extortion and offences involving drugs. The Judge recorded at paragraph 19 of her decision that, *“As the Appellant has received a conviction of over 4 years, deportation can only be avoided if he meets the test of “very compelling circumstances.”*

### **The Hearing and Submissions Before Us**

6. Mr Dhanji had relied on his skeleton argument. In that he had said that having considered the Respondent’s Rule 24 Response, the Appellant no longer relied on the EUSS ground.
7. The remaining human rights ground of appeal continued to be relied upon. Namely that the Judge had materially erred in law because she had misapplied the law when deciding whether it would be unduly harsh for the Appellant’s children to remain in the United Kingdom without the Appellant or join the Appellant in Poland if was to be deported.
8. In his oral submissions before us, Mr Dhanji amplified this ground of appeal. He said that the Judge had materially erred in law in the application of the ‘unduly harsh test’ in section 117C(5) NIAA 2002, relating to the Appellant’s children, in two ways.
9. Firstly, by linking the unduly harsh question to issues surrounding the Appellant’s past criminality, which was an impermissible approach when considering paragraphs 22-23 of the Supreme Court’s decision in **KO (Nigeria)**

**and others v Secretary of State for the Home Department** [2018] 1 W.L.R. 5271, [2018] UKSC 53.

10. The Judge's decision at paragraph 90 ended with the Judge saying, *"To put it bluntly, this is their father's fault."* Then at paragraph 92, the Judge explicitly considered the unduly harsh question with reference to the fact that the Appellant's children are in this position due to the Appellant's criminal behaviour, stating, *"...The fact is that it is the Appellant's poor choices and criminal behaviour that may lead to the children living in the United Kingdom without their father. While separation from their father will be difficult for them and they will miss him, separation is a consequence of a parent's criminal behaviour..."*
11. Mr Dhanji said that these considerations were irrelevant to the unduly harsh test, and it was impermissible for the Judge to take account of them when reaching her decision. Mr Dhanji said that this amounted to the Judge blaming the children for what the Father had done.
12. Secondly it was submitted that the Judge misapplied the law when considering the 'go' scenario in respect of the child exception by failing to consider that scenario with reference to the "real world" facts, as required by paragraph 19 of **KO (Nigeria) v SSHD**. At paragraph 99 the Judge failed to identify that for the purpose of determining the 'go' scenario in respect of the child exception, the question was whether it was unduly harsh for the Appellant's children to leave the United Kingdom to join the Appellant in circumstances where their mother, who is settled, is not required to leave the UK. Rather, the Judge erroneously considered the 'go' scenario in circumstances where the children's mother would also leave the United Kingdom to return to Poland.
13. In his submissions on behalf of the Respondent, Mr Wain relied on the Rule 24 Response and a skeleton argument drafted by Mr Tan. In summary it was submitted that the Judge was entitled to come to the decision that she did and that she had correctly applied the unduly harsh test. Paragraph 83 of the Judge's decision showed consideration of the 'family life exception' pursuant to section 117C(5) of the NIAA 2002. It was also submitted that the 'go' and 'stay' scenarios are relevant to the unduly harsh test. Whilst the Judge had not mentioned section 117C(5) or **KO (Nigeria) v SSHD**, she had applied them.
14. Mr Wain said further that there was a supporting letter from the Appellant's wife dated 27 March 2023 before the Judge. Within that the Appellant's wife had said that *"Please do not separate our family because we cannot return to Poland because we have nothing to do, and I will not let our children live there in poverty because in Poland we are not able to create conditions for a dignified life so please do not forbid my husband to live with us because this is our home."*
15. Mr Wain said that the Judge was aware that the Appellant's appeal could only succeed on very compelling circumstances and had said so at paragraphs 65 and 67 of her decision. Mr Wain said that paragraphs 90 and 92 of the Judge's decision were consistent with **KO (Nigeria) v SSHD**. When read as a whole, those paragraphs referred to the impact of the criminal offending. It was simply a comment on the Appellant's bad behaviour. It was consistent with what was said at paragraph 33 in **KO (Nigeria) v SSHD** and approval of para 44 of MAB with the tragic consequences of an Appellant's bad behaviour and the Judge has used that approach.

16. The FTT Judge had not gone into the details of the criminality. The Judge had considered the impact of children's time in UK. It was a 'real world' context.
17. There was no challenge to the assessment of the impact on the Appellant's wife at paragraphs 69 to 78 of the Judge's decision.
18. Mr Wain said that the second part of ground of appeal related to real world factors. Namely the children having to move to Poland rather than to remain with their mother in the UK. The letter written by the Appellant's wife to the Judge showed that it was never suggested in the evidence that in the hypothetical 'go' scenario that children would be separated to go and live with the father in Poland. Paragraphs 84 to 88 of the Judge's decision dealt with this as did paragraphs 88 and 94.
19. Mr Wain submitted that even if the case of **KO (Nigeria) v SSHD** is assessed properly then it does not follow that the unduly harsh test has been improperly applied to the scenario in this case.
20. In reply Mr Dhanji said that in this case the Appellant's wife had settled status and therefore the Judge had not asked the correct question at paragraph 88 of her decision in respect of whether it was unduly harsh to go to Poland. The question was whether it would be unduly harsh if the Appellant is deported when the other parent has settled status and does not have leave. There was nothing in the decision where the children's mother said that she will go if the Appellant was deported. Even when looking at very compelling circumstances, were the exceptions met? The Appellant's wife's letter needed to be read as a whole. The Judge had materially erred in law because she had failed to correctly set the scales.
21. We had reserved our decision.

### **Decision and Analysis**

22. Having considered the rival submissions, we conclude that there is no material error of law in the Judge's decision. We come to this conclusion for the following reasons.
23. The Supreme Court in **KO (Nigeria) v Secretary of State for the Home Department** mandates the approach to be taken. Lord Carnwath, with whom the rest of the Supreme Court agreed, provided the only reasoned judgment of the Court. The Supreme Court made clear that in respect of deportation cases involving imprisonment, *"For sentences of four years or more, however, it is not enough to fall within the exception, unless there are in addition "very compelling circumstances"*.
24. At paragraph 19 Lord Carnwath approved Lewison LJ's judgment in **EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874** *"In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"*

25. At paragraph 22 Lord Carnwath explained, *“On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C’s deportation be “unduly harsh”? Although the language is perhaps less precise than that of Exception 1, there is nothing to suggest that the word “unduly” is intended as a reference back to the issue of relative seriousness introduced by subsection (2)”*
26. Then at paragraph 23 his Lordship, when referring to undue harshness said, *“What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent’s offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence.”*
27. Lord Carnwath also made clear at paragraph 32 that, *“Quite apart from the difficulty of reaching a rational judicial conclusion on such a question, it seems to me in direct conflict with the [Zoumbas principle \[2013\] 1 WLR 3690](#) , para 10 that the child should not be held responsible for the conduct of the parent.*
28. It is also important to note what Lord Carnwath then said at paragraph 33,
- “33. However, when one comes to the actual decision of Judge Southern in KO, it is not clear that his approach was materially different from that of the President in Page 15 MK or indeed the tribunal in MAB. He adopted with one qualification the guidance in MAB as to the meaning of “unduly harsh” test:*
- “The consequences for an individual will be ‘harsh’ if they are ‘severe’ or ‘bleak’ and they will be ‘unduly’ so if they are ‘inordinately’ or ‘excessively’ harsh taking into account all of the circumstances of the individual’ Although I would add, of course, that ‘all of the circumstances’ includes the criminal history of the person facing deportation.” (para 26)”*
29. We note that the Judge in her decision at paragraphs 79 to 102 considered the family life exception. She did so on a very detailed basis. That includes the correct legal test being cited and applied at various places, including at paragraph 83 where she correctly stated that she must consider whether it would be unduly harsh for the Appellant’s two children to live in Poland or to remain in the UK without the Appellant. The Judge stated at paragraphs 84 to 88 that she was in no doubt that the time that the Appellant was in prison was difficult for the Appellant’s wife and his children. Importantly though the Judge said that there has been no sufficient evidence from the Appellant of the ‘unduly harsh’ test being met. The burden of proof being on the Appellant.
30. Parts of paragraphs 90 and 92 of the Judge’s decision are specifically relied upon by Mr Dhanji to contend that there was a material error of law. We consider those submissions with **KO (Nigeria) v SSHD** firmly in mind, but we must also consider the Judge’s decision as a whole. Whilst the Judge did not refer specifically to the well-known case of **KO (Nigeria)** it can be seen from paragraph 19 of her decision that Judge referred to the correct test from the outset and then she applied it throughout. The Judge said on numerous occasions that, *“...deportation can only be avoided if [the Appellant] meets the test of ‘very compelling circumstances’”*
31. The Judge referred extensively to the Appellant’s two children, including initially at paragraph 28 of her decision with specific reference to section 55 of the Borders, Citizenship and Immigration Act 2009.

32. Mr Dhajni contends that the Judge erred when she stated that the children would miss their father if he was deported but that they had experienced that when their father was in prison previously and that, *“To put it bluntly, this is their father’s fault.”* The Judge also said that *“...The fact is that it is the Appellant’s poor choices and criminal behaviour that may lead to the children living in the United Kingdom without their father. While separation from their father will be difficult for them and they will miss him, separation is a consequence of a parent’s criminal behaviour...”*
33. We note the Judge had specifically referred to the adverse effect that prison had already had on the Appellant’s two children and on his wife. The Judge noted the lack of evidence from the Appellant to show that the unduly harsh test was met. We discern no material error of law in the Judge when reaching such a conclusion. There was no challenge against the Judge’s finding that there was a lack of evidence from the Appellant relating to the effect of deportation in an unduly harsh sense.
34. Mr Wain referred us to the letter written by the Appellant’s wife and which was before the Judge and which we have referred to in part at paragraph 14 above in respect of whether the Appellant’s wife and children would leave the UK. We also note the findings of the Judge in respect of the effect on the Appellant’s wife of the deportation which the Judge set out extensively throughout her decision and then summarised at paragraphs 93 to 100 of the decision. This includes the Appellant’s wife seeking to enhance her studies by undertaking a degree in Health and Social Care at the Open University. The Judge concluded she did not believe the Appellant’s evidence that his wife struggled with English because otherwise she could not undertake a degree course.
35. The Judge also clearly had firmly in mind the Appellant’s wife’s EUSS status and thereby her right to remain in the UK because she referred to it paragraph 30 of her decision and then again at paragraph 97 when assessing the ‘go’ scenario.
36. The Judge also correctly cited **HA (Iraq) v Secretary of State for the Home Department** [2022] UKSC 22 whereby because the Appellant had received custodial sentences of over 4 years then *“...the Appellant can only avoid deportation if he can show “very compelling circumstances over and above family life and private life exceptions set out in the Immigration Rules. This is a high and elevated threshold...”* Then at paragraphs 65 to 68 the Judge stressed the test and she referred to s117A-A117D of the NIAA 2002.
37. We conclude that when read as a whole the Judge set out in extensive detail the correct legal tests. The Judge also applied those correct legal tests throughout her decision. It is important to consider the judgment of Lord Carnwath at paragraph 33 in **KO (Nigeria) v SSHD** which we set out at paragraph 28 above and which refers to “all the circumstances” can mean taking into account the criminality of the Appellant. The Judge did no more than that after setting out other extensive detail and making other extensive findings. We therefore conclude that there is no error of law in the Judge’s decision. The Judge also correctly applied a balance sheet approach.
38. Therefore having considered the short extracts of those parts of the sentences and paragraphs which were taken in isolation and relied upon by Mr Dhanji, we conclude that when read as a whole, they show no material error of law.

39. Even if we are wrong and there is an error of law in the Judge's decision, we conclude that any error of law would not be material. We come to this view because there was no sufficient evidence provided by the Appellant to show that the 'stay or go' scenarios would lead to unduly harsh circumstances for the Appellant's wife or children. The failure to provide that evidence is fatal to the Appellant's appeal, even if the Judge had erred in law in referring to the Appellant's criminality when assessing the unduly harsh test relating to the children or in respect of the 'stay or go' scenarios. The Judge had set out in some detail that she was satisfied that the effect of deportation on the Appellant's wife and children would be 'difficult'. We can also see that it will be 'difficult' for the Appellant's wife and children, but 'difficult' is not the correct legal test. We are unable to see how a decision other than one dismissing the Appellant's human rights appeal could have succeeded.

40. Whilst Mr Dhanji was persuasive in his submissions, we are unable to agree with him. We therefore dismiss the Appellant's appeal.

### **Notice of Decision**

**The Upper Tribunal dismisses the Appellant's appeal.**

**The decision of the First-tier Tribunal does not contain a material error of law.**

**The decision of the First-tier Tribunal dismissing the Appellant's appeal on EU and Human Rights Grounds stands.**

**An anonymity order is made.**

Abid Mahmood  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**24 November 2023**