Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00003/2015**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Determination Promulgated**
On 14 January 2016	**On 20 January 2016**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms C Johnstone, Senior Home Office Presenting Officer
For the Respondent: Unrepresented

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Introduction

1. This decision refers to the appellant in this case as the SSHD and the respondent as the appellant, as he was before the First-tier Tribunal ('FTT'). I have anonymised the appellant in order to

protect the privacy of his minor child, who is referred to in this decision.

2. The origins of this appeal are traceable to a decision made on behalf of the SSHD, dated 13 February 2015, to deport the appellant, a national of Malawi, from the United Kingdom ('UK').

Appeal Proceedings

3. On 24 June 2015, the appellant's appeal against the SSHD's decision was allowed by the FTT. The FTT concluded that it would be unduly harsh for the appellant's son, P, to live in Malawi with him and to remain in the UK without him. These conclusions are based upon the following relevant factual findings concerning P:

   (i) P resides with his mother (who is no longer in a relationship with the appellant) but spends every Friday night with his father who also often picks him up after school and feeds him [38];

   (ii) The appellant has a genuine and subsisting parental relationship with P [39];

   (iii) P's mother does not wish to live in Malawi and P cannot live in Malawi without her cooperation and as such P's relocation to Malawi would involve separation with his mother [40];

   (iv) In practice P would be unable to visit the appellant in Malawi and contact through modern means of communication would be "*a great deal less*" than P is used to enjoying [41];

   (v) P's best interests lie in remaining in the UK with his mother as his primary carer and seeing his father at weekends and sometimes after school [49];

   (vi) The appellant is a good influence on P [49];

   (vii) Since the appellant was released from prison in 2010 the relationship between him and P has "*considerably strengthened*" [51];

   (viii) The appellant's deportation would lead to the separation of P and the appellant and this is "*very likely to be of indefinite duration*" [51];

   (ix) The mother considers that P would be "*completely devastated*" if the appellant was no longer in the UK [53].

4. The SSHD has appealed to the Upper Tribunal with permission.

Error of law

5. At the hearing I heard from Ms Johnstone and the appellant before announcing my decision that the FtT had erred in law in its application of the factual findings to the applicable 'unduly harsh' test.

6. The FTT was correct to indicate that at the date of the hearing there was no guidance regarding the correct meaning of unduly harsh for the purposes of paragraph 399. The FTT was of the view that it had to consider all the relevant circumstances but did not direct itself to the requisite high threshold that needed to be met i.e. the impact upon the child needed to be more than harsh or difficult. In failing to direct itself to the necessary high threshold that must be met I am satisfied that the FTT erred in law.

7. I do not accept that the FTT's factual findings are infected by a material error of law. The submissions to this effect in the grounds of appeal amount to no more than mere disagreement with those findings.

Re-making the appeal

8. The appellant and Ms Johnstone accepted that the appeal should be re-made by me. Ms Johnstone also accepted that in light of my decision regarding the SSHD's grounds of appeal, the factual findings of the FTT should be preserved.

9. I heard brief evidence from the appellant and P's mother. They indicated that the factual circumstances described by the FTT remained accurate save that if anything the relationship between P and the appellant has increased in strength. Ms Johnstone did not dispute the credibility of the evidence but submitted that it did not come close to meeting the requisite threshold required. Having heard from Ms Johnstone and the appellant I reserved my decision, which I now provide with reasons.

10. In MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC) the Upper Tribunal concluded that in order to determine whether the consequences for a child will be unduly harsh, evidence will need to demonstrate that the consequences for that child will be excessively or inordinately severe or bleak taking into account all the circumstances. This requires a high threshold to be met and involves something more than "*uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging*" consequences.

11. I must therefore decide whether or not the consequences for P will be excessively severe, if his father is deported. The preserved findings of fact from the FTT are clear: the close and established parental relationship between P and the appellant will come to an abrupt and sudden end. This will according to P's mother cause P "*complete devastation*". I should add that the appellant and P's mother are no longer a couple and the appellant's case is predicated entirely upon his relationship with P.

12. For the avoidance of doubt I have decided this appeal having followed the guidance in MAB. Since MAB was promulgated another Tribunal decision addressing the identical issue has been promulgated – KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC). KMO takes the same approach to the high threshold to be applied when considering the meaning of 'unduly harsh' but finds that the word 'unduly' requires consideration of the public interest considerations contained in section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

13. I prefer the approach set out in MAB and apply its reasoning to the instant case. I am satisfied that the MAB approach is more consistent with the ordinary meaning of the wording of the relevant rule. If there is ambiguity then the stricter reading should not be adopted without particularly good reason. Furthermore in my view the MAB approach reflects the proper construction of section 117C. This provides at sub-section (3) that the public interest requires C's deportation unless Exception 2 applies. Exception 2 applies where "...*the effect of C's deportation on the...child would be unduly harsh*". It follows that where Exception 2 applies the public interest does not require C's deportation. The reason for this is that the public interest has already been factored into the parameters of the relevant 'Exceptions' as reflected within the Immigration Rules.

14. Following the MAB approach there is no balancing exercise requiring the public interest to be weighed. My focus is solely upon an evaluation of the consequences and impact upon P. I am satisfied that the application of 399(a)(ii)(a) can only deliver one answer: P cannot live in Malawi without his mother's cooperation and as such P's relocation to Malawi would involve separation with his mother and would be unduly harsh. The appellant and P's mother are no longer in a relationship and it would be unreasonable to expect her to reside in Malawi.

15. I am also satisfied that the application of 399(a)(ii)(b) can only deliver one answer: it would be unduly harsh for P to remain in the UK without his father, given that their close relationship cannot be continued in a meaningful sense. Given P's age, the particular family relationship cannot be maintained by modern means of communication and there will be a complete fracture to the relationship. I also accept the appellant's evidence that through

him P has a number of very close friendships, which will be lost upon his deportation. I accept that P will be completely devastated emotionally and psychologically if his relationship with his father ends. That is not a devastation that can be easily overcome but will continue throughout his life.

16. In case I am wrong about the guidance in MAB I confirm my decision would be the same even applying the KMO approach. The appellant's offending is of concern and involved the use of fraud. In 2009 he was sentenced to 12 months imprisonment and in 2010 to six months imprisonment. He was then convicted of criminal damage in 2013 and given a conditional discharge for 12 months. He has not repeated his offending involving fraud since 2010. I am satisfied that the nature and extent of the appellant's offending is at the less serious end of the spectrum. This may be contrasted with the offending of Mr KMO. Even when the appellant's offending is factored into the exercise of determining whether or not the impact of deportation upon P would be unduly harsh, applying the KMO approach, I am satisfied that that the answers remain the same as those set out in paragraphs 14 and 15 above.

Decision

17. The FTT decision contains a material error of law. I set aside the decision but preserve the FTT's factual findings.

18. I re-make the decision and allow the appellant's appeal.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
18 January 2016