Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02074/2017

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
on 20 February 2018	**on 26 February 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MING [Y]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hussain instructed by Kingswell Watts Solicitors
For the Respondent: Mr Harrison Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals, with permission, against a decision of First-tier Tribunal Judge Lloyd-Smith promulgated on 29 June 2017 in which the Judge dismissed the appellant's appeal on protection and human rights grounds; relied upon by the appellant as an exception to the order for his deportation from the United Kingdom under UK Borders Act 2007.

Background

2. The appellant, a national of China, born on [ ] 1981 has two convictions for drug-related activity being a conviction on 4 June 2008 for being concerned in the production of a Class C controlled drug by a jury at Chester Crown Court for which the appellant was sentenced on 8 April 2016 to 18 months imprisonment, and on 19 September 2016 a conviction and sentencing at Glasgow Sheriff Court of twelve months imprisonment for the offence of supplying a controlled drug.

3. The Judge sets out more detail of the appellant's immigration/criminal history at [5 – 15] of the decision under challenge.

4. The appellant is in a relationship with a British national who he met in 2006. They began their relationship and commenced cohabitation in April 2006. The appellant and his partner have four children; K born on [ ] 2008, S born on [ ] 2010, C born on [ ] 2012, and D born on [ ] 2016.

5. The Judge records that since the appellant was imprisoned his partners mental health suffered and that she struggled in caring for the children as a result of which the children were placed on a Child Protection plan under "emotional abuse" category and considered to be "looked after children".

6. Having considered the evidence with the required degree of anxious scrutiny the Judge did not find the appellant was able to satisfy the requirements of the Immigration Rules or outside the rules such as to entitle him to succeed with his appeal.

7. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal. The application was renewed to the Upper Tribunal where permission was granted on 20 September 2017 in the following terms:

    1. it is arguable for the reasons outlined in the grounds that there has been a failure to take into account a material consideration.

    2. There has been an arguable failure to address whether it would be unduly harsh for the children to remain in the UK without the appellant (399 (a) (i)/(ii) (b)) in light of the apparently cogent evidence demonstrating that the children may become 'looked after' by social services if their father is deported.

    3. It is arguable that the First-tier Tribunal has failed to consider the impact of China's population policy upon the children when considering together with their mother's mental health, the medical condition of The and their wishes and feelings, a set against the strong reasons in favour of deportation. These were arguably relevant matters to take into account when addressing 399 (a) (i)/(ii) (a).

Error of law

8. During the course of the hearing Mr Harrison confirmed that this is a family splitting case in that the appellant's wife and children, as British citizens, will not be forced to leave the United Kingdom and will not have to leave as a consequence of any decision made. It was, as Mr Harrison submitted, a matter for the appellant's wife. Accordingly, Grounds 2, 3 and 4 which refer to China's One Child Policy, availability of safe blood transfusions in China, and the British citizenship of the children, fall away and were not pursued by Mr Hussain.

9. The remaining ground of challenge asserts the Judge failed to take into account material evidence and provide reasons in relation to the children.

10. It is not disputed that the children are 'qualifying children' and that as they will remain in the United Kingdom the question was whether it would be unduly harsh for them to do so without the appellant's presence.

11. In *MM (Uganda) [2016] EWCA Civ 450* it was held that the phrase 'unduly harsh' plainly meant the same in section 117C(5) of the 2002 Act as it did in paragraph 399 of the Immigration Rules. It was an ordinary English expression coloured by its context. The context invited emphasis on two factors: first, the public interest in the removal of foreign criminals and, secondly, the need for a proportionate assessment of any interference with Article 8 rights. The public interest factor was expressly vouched by Parliament in section 117C(1). Section 117C(2) provided that the more serious the offence committed, the greater the public interest in deportation. That steered 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 would be to show that the effect on his child or partner would be unduly harsh. Any other approach would dislocate the 'unduly harsh' provisions from their context such that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation. In such a case 'unduly' would be mistaken for 'excessive', which imported a different idea. What was due or undue depended on all the circumstances, not merely the impact on the child or partner in the given case. The expression 'unduly harsh' in section 117C(5) and paragraph 399(a) and (b) required consideration of all the circumstances, including the criminal's immigration and criminal history. MAB was wrongly decided (paras 22 – 26).

12. It was submitted on the appellant's behalf that there was evidence before the Judge, as noted at [19] that since the appellant had been imprisoned in 2016 his partners mental health has suffered and she has struggled in caring for the children. It is argued the Judge failed to take into account the letter from the Social Worker Peter Hanlon, dated 2

May 2017, in which he confirms the appellant can offer significant support to his partner and children, that the children have received consideration for Edge of Care Support and that the children were Looked After children for a time but have been rehabilitated home and that there is concern that they could be Looked After Children once again without the support of the appellant for his family. It is argued the Judge does not factor into the findings the fact this might occur again and the children become Looked After children as a result of emotional abuse.

13. Mr Hussain asserts the Judge failed to take into account such evidence and that the assessment cannot be considered to have been in compliance with the principles set out by the Supreme Court in the case of *Zoumbas v Secretary State the Home Department [2013] UKSC 74* when that Court set out a number of matters when considering the best interests of a child. It is asserted principles 5 and 6 are relevant to this appeal. The Grounds refer only to (1), (2), (5) and (6) whereas the relevant paragraph of the judgment in full reads:

> 10. In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely *ZH (Tanzania)* (above), *H v Lord Advocate* 2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:
>
> (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

14. The best interests of children are therefore not the determinative factor but a factor of great importance as part of the proportionality balancing exercise.

15. The letter from the social worker, dated 2 May 2017 was clearly taken into account by the Judge as the same forms an exhibit to the appellants bundle. The letter, written by Peter Hanlon a Child Protection Social Worker with Manchester City Council, addressed "to whom it may concern" states:

> "The situation is that Children were placed upon Child Protection plans on 19 July 2016. The Child Protection concerns are about Mother's mental health, physical health, issues re ability/capacity to care for children (including guidance and boundaries).
>
> Father can offer significant support to his partner and children. Children have received consideration for Age of care support. They were Looked After Children for a time but have been rehabilitated home. There is concerned that they could be Looked After Children, once again, without the support of Ming for his family.
>
> There are for children aged from eleven months to 9 years of age. They continue upon child protection plans due to Mother's mental health which is affected by the uncertain immigration.
>
> There is support for Ming to stay in the UK as he could offer the oversight for the children which would stabilise the situation."

16. A further letter dated 21 June 2017 written following risk assessments and multiagency meetings confirms the appellant continues to live with his wife and children and thereafter states:

> "I am writing as the above children are on the child protection plans due to Mother's mental health, issues relating to ability to care for children (including guidance and boundaries) and isolation from any supporting extended family.
>
> It is positive that Ming is meeting the children's needs and appears to be ensuring they are kept safe. Mother's well-being in her presentation regarding this has improved since father has been released from prison into the community. However his immigration status continues to remain an issue and needs to be stabilised the sake of children and family. Ming has attended all meetings asked of him.
>
> Should father be deported from UK mother is likely to struggle to manage this and this may have a detrimental impact on her well-being and her ability to be consistently available to the children to meet their needs and not expose them to harm in the future.
>
> Probation have completed risk assessments of father and have rated him as a low risk to parents and the children, they have also assessed that there is a low risk from the community to the family.

> Children's wishes and feelings can be evidenced in drawings and comments to Social Worker that they have missed their father, and they are now much happier and settled."

17. At the outset of the hearing before the Upper Tribunal Mr Hussain was asked to assist by clarifying the period for which the children had been taken into care as 'Looked after Children' as suggested in the evidence available to the Judge. Having spoken to the appellant and his wife Mr Hussain confirmed that he had been advised that the children were never taken into care and had always remained in the family.

18. If the children have remained with the family throughout this would have included a period during which the appellant was in prison. The local authority must have therefore been satisfied that the children could be adequately cared for within the family home. If the children had been placed outside the family but subsequent returned to the appellant's wife the details of the same have not been provided and nor has it been made clear what packages were made available to assist the appellant's wife. The fact the children were in the family home clearly shows that it was not considered necessary for them to be taken into care.

19. The reference to Edge of Care is interesting. The evidence suggests this was being considered by social services but there is no evidence that such support was deemed necessary. Edge of Care is devised to strengthening families and improving relationships to enable children to remain living within the family home safely and sustainably. Such plans are structured evidence-based intervention that is normally undertaken to enable families to develop problem-solving skills, build resilience, and achieve positive sustainable behavioural changes. Properly trained and experienced staff are required, including those able to deal with a crisis situation, and to overcome difficulties in families at risk of breakdown. The reference by the Judge to support being available from Social Services in the event of the appellants deportation is clearly a reference to the statutory support that must be provided, if required.

20. It is not known whether prior to social services intervention the authorities were aware of the appellant's wife's mental health issues. They are now clearly aware and it has not been made out that appropriate assistance or treatment would not be available in the United Kingdom to assist in managing the same in the event the appellant was removed or to provide a comprehensive Edge of Care plan to assist the children within the home environment, if required.

21. It is accepted that in most situations the preferred option would be for the children to be brought up in a loving and caring environment with both parents and they seem to be doing well in the home environment since their father has been released from custody. But, as stated, the best interests of the children are not the determinative factor and although the appellant's removal will, on the face of it, be a distressing

time for all, it was not made out before the Judge that requisite intervention will not be available.

22. As confirmed in the case law all competing aspects have to be taken into account to assess whether the decision, although harsh, is unduly harsh. In this respect Mr Harrison referred to the nature of the appellant's criminal offending relating to two counts of drug dealing. It is known that drugs have a devastating effect upon society generally as well as an extremely destructive effect upon the individuals who become addicted to the same.

23. The Judge set against the considerations weighing in favour of deportation prejudice to family and private life including the effect on the appellant's family and the family life of his partner and children in relation to which the Judge stated she was most concerned. The Judge noted the appellant's wife's situation of anxiety and depression and receipt of medication at [48]. At [49] the Judge writes:

> 49. In conclusion, deportation in this case is conducive to the public good. There is a small risk of reoffending, given his past. The importance of deterrence cannot be ignored. The Judge made it clear that the essential offence which triggered deportation was serious. Set against that, private life is prejudiced but not unduly so. The appellant can develop as private life at home in China and his family life does not have to be severed. Bearing in mind the factors weighing in favour of deportation to which I have referred given my comments on the actual nature of the family life and other issues I have referred to above, I have concluded that the decision to deport was and is proportionate.

24. As stated above, it was conceded before the Upper Tribunal that this is a family splitting case, but the conclusion by the Judge in relation to the proportionality of the decision appears to be within the range of findings reasonably open to the Judge on the evidence. At [39] the Judge states she needed to look at whether it would be unduly harsh for the children to go to China with the appellant or to remain in the UK without him. The Judge also referred to the decision of the Supreme Court in *Makhlouf [2016] UKSC 59* and the fact that where a decision was taken about deportation of a foreign criminal who had children residing in the United Kingdom consideration of their best interests was required especially if they did not converge with those of the parent to be deported. The Judge also refers to *MA (Pakistan) [2014] EWCA Civ 163* and *AJ (Zimbabwe) [2016] EWCA Civ 1012* in which it is said that court held that it would be rare for the best interests of the child to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent was required, even though such separation was detrimental to the child's best interests. It would undermine the specific exceptions in the rules if the interests of the child in maintaining a close and immediate relationship with the deported parent were as a matter of course to "trump" the strong public interest in deportation. Paragraph 399 (a) of the Rules identified a

particular circumstance where it was accepted that the interests of the child would outweigh the public interest in deportation. The conditions were onerous and would only rarely arise. No doubt there will be some emotional damage to the children, but that was not unusual whenever a parent was deported and the child was unable to live with that parent outside the UK. Separating parent and child could not, without more, be a good reason to outweigh the very powerful public interest in deportation.

25. The language of the letter from social services is also of importance as it says that things "could" or "may" occur if the appellant is removed rather than being written in absolute terms. It is accepted the author could not write a letter in such terms especially in light of the fact there are packages available to enable the best interests of the children to be protected within the home.

26. The best interests of the children were clearly considered and factored into the decision-making process. There was no evidence before the Judge to indicate the conclusion in relation to proportionality is arguably perverse or irrational or contrary to the material. This is a sad case in which the appellant's wife and children may undergo a further period of upset, distress, and readjustment, all of which flows from the appellant's offending behaviour.

Decision

27. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

28. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed…….
Judge of the Upper Tribunal Hanson

Dated the 20 February 2018