Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12786/2016

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 27 February 2018	**On 26 April 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR MING [C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M Cleghorn, instructed by DWFM Beckman Solicitors
For the Respondent: Mr D Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter previously came before me at North Shields on 23 November 2017. For the reasons given in the decision promulgated on 8 December 2017, a copy of which is annexed to this decision, I set aside the decision of the First-tier Tribunal.

2. The purpose of the hearing on 27 February was to hear further evidence from the appellant, his partner, and an additional witness; to hear submissions; and, for me to remake the decision on Article 8 grounds alone. That inevitably includes a consideration of the Immigration Rules relevant to deportation, that is paragraphs

398 and 399. It is not submitted that this is a case to which paragraph 399A applies or that paragraph 399(b) is applicable.

3. The Secretary of State's powers to deport foreign national offenders are set out in Section 32 UKBA 2007. It is not disputed that the claimant is a foreign criminal as defined in that section. By operation of section 32 (5) UKBA, the Secretary of State must make a deportation order in respect of a foreign criminal unless she thinks that an exception in section 33 of the Act applies. That section provides, so far as is relevant, as follows:-

> 33 Exceptions
>
> (1) Section 32(4) and (5)–
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
>
> (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention.
>
> (3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

4. The appellant is a foreign criminal as defined in Section 117D of the 2002 Act. I am therefore bound to consider the matter as set out in Section 117B in addition to 117C which provide as follows:-

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

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

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

5. The starting point in this case is assessing the best interests of the children given that that is a primary concern. That must be assessed at this stage without taking into account any countervailing factors.

6. The children are British citizens and have been since birth. I accept the evidence of the appellant and his wife, which is unchallenged in submissions, that the children do not spontaneously speak in Mandarin although it is clear that they understand it. The older child is now 7½ years of age, the younger only a little over 3 years of age.

7. In assessing their best interests I have had regard to the report of the social worker which was produced to me and again which was not challenged by the respondent. Neither for that matter was the report of the country expert, Dr Christoph Bluth, which sets out in some detail the difficulties that the family would have if they were to relocate to China.

8. An assessment of the children's best interests also involves a consideration of what the alternatives to the continuing of the status quo would be. At present the children have both parents living with them. I accept that because the appellant stays at home he is effectively the primary carer, as is the evidence in the case and as is supported by the social worker. It is the appellant who takes the children to school, to doctor's appointments and spends a greater part of his time with them.

9. I am satisfied that there are a number of obstacles which would make it difficult for the children to go to live in China with their parents. First, as Dr Bluth points out in his report, the appellant's wife is no longer a citizen of the Republic of China as she has voluntarily acquired British citizenship. She therefore lost her Chinese Citizenship by operation of Chinese law. The difficulty is, as he points out in his report at 5.2.2, Miss Lin and the appellant are not formally married and thus she would not be able to obtain entry clearance to China as his dependant. There would also be difficulties in respect of the children in that they would not be able to obtain a household registration certificate (5.2.4) because the partner and children are British citizens and the appellant and Miss Lin are not married.

10. On that basis they would have no access to state funding for education, the health service or other public services. There would also be difficulties in attending school except at a significant cost and because at Chinese schools there would be no concessions made for foreign students and they do not have second language programmes. I accept that there would, in the circumstances, be severe difficulties integrating into the Chinese education system particularly in the case of the older daughter and I accept the conclusion that on the facts of this case they, as Dr Bluth states, they would not be able to move to China and be granted permanent residence (5.2.10).

11. I note also that Dr Bluth considered the possibility of Miss Lin having her Chinese nationality restored and whilst that would be possible, she would first have to renounce her British citizenship. I accept that as Dr Bluth opinion there are several reasons why this may be difficult given that she is not married to her partner and has on the basis of Chinese law no legitimate relationship with him and that there would be difficulties which flow from a deemed violation of previous and current family planning policy given that she would be treated as not married there being no quota for unmarried persons (5.3.5) resulting in social compensation fees which would have to be paid. That in turn would impact negatively on the children.

12. Whilst I accept on the basis of country guidance decisions that this would not be sufficient to amount to a breach of Article 3, nonetheless the children and Miss Lin face very real and significant difficulties in being allowed to live in China at all let

alone be able in the case of the children to be registered and to be permitted to enter the education system as well as entitlement to other social benefits. There would be no access to public services.

13. In light of all of the above, I consider that the children's best interests is to remain in the United Kingdom. It would also be in their best interests for both parents to live with them. I also consider that the effect on them of living in China would be severe, even in the unlikely event that they and their mother could obtain permission to remain there.

14. In considering whether it would be unduly harsh to expect them to go to live in China with both parents, consideration must be given to the substantial negative factors which clearly exist in this case.

15. It is not in dispute that the appellant has a poor immigration history. He entered the United Kingdom unlawfully and has never had the right to be here. He has also committed two criminal offences, the first being an offence of dishonesty for which he served two months, the offence relating to his entry to the United Kingdom using a false document.

16. The second offence is of greater complexity. The appellant was convicted in 2011 of producing cannabis, to which he pleaded guilty. In his sentencing remarks His Honour Judge Mooncey noted the following:-

> "It is accepted by you that you are responsible for helping grow these plants.
>
> The prosecution have accepted your basis of plea, that your involvement was for four days and no more.
>
> You say that you arrived in Derby thinking that you'd be getting proper work rather than this kind of work and you were, in effect, forced to work, although you accept it was not duress. You also make it clear that you knew that the enterprise that was being carried on was illegal.
>
> … As you are no doubt aware, cases of this nature are quite common and the only sentence that is appropriate is one of custody. The Court of Appeal says these deterrent sentences are necessary to prevent people from being attracted to this kind of offending. Yours is not an unusual case. There are many cases that come before the court where people who are described as gardeners have to be punished and the people at the top do not seem to feature. Without these gardeners these enterprises would not work."

17. Whilst the judge was clearly aware of the applicant's doubts over the immigration status he did state that he was ignoring that in the sentencing. He also took into account mitigation put in on behalf of the appellant and his partner and the expected child. Credit was also given to the appellant for an early guilty plea.

18. What differentiates this case is that subsequent to the sentencing, as a result of submissions made in response to a Section 120 One-Stop Warning in which the appellant claimed that he was a potential victim of trafficking, he was interviewed and his case was referred to the competent authority. On 19 April 2016 he was

issued with a positive conclusive trafficking decision. On that basis, the respondent accepted that by virtue of Section 33(6A) of the UK Borders Act 2007 there was in place an exception such that sections 32 (4) and (5) of the 2007 Act do not apply, subject to section 33(7) of that Act which provides:

> 32. The application of an exception –
>
> (a) Does not prevent the making of a deportation order;
>
> (b) Results in it being assumed neither that the deportation of the person concerned is conducive to the public good, nor that it is not conducive to the public good; but section 32(4) applies despite the application of Exception 1 or 4

19. It must, however, be borne in mind that the appellant is still a foreign criminal as defined both in section 32 of the 2007 Act and in section 117D of the 2002 Act. It follows therefore that there is a subset of foreign criminals such as those who are the victims of modern slavery whose deportation is in the public interest but is not deemed to be conducive to the public good. There is, however, a difference in that sections 32 and 33 of the 2007 Act are concerned with the process under which Secretary of State may be compelled to make a deportation decision whereas section 117 is directed to a court's assessment of the public interest once the decision to make a deportation order, be it discretionary or otherwise, has been made.

20. In reaching my decision I bear in mind WZ (China) v SSHD [2017] EWCA Civ 795 and also AJ (Zimbabwe) v SSHD at [13] to [14] and [17], albeit bearing in mind that this is not a case in which the appellant is subject to automatic deportation, nor was he sentenced to a term of more than 4 years.

> 13. This court has on a number of occasions had cause to emphasise that 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. In *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310; [2015] ImmAR 2 the appellant, a citizen of China, had been convicted of two offences of robbery and sentenced to five years' imprisonment. The Secretary of State made a deportation order which was challenged on article 8 grounds. The appellant had two young children who were British citizens and a partner who had indefinite leave to remain in the UK. The FTT held that it would be disproportionate to deport him after taking into account the nature of his offending, the likelihood of his re-offending, the circumstances facing the family if they were all to live in China, and the best interests of the children. The UT held that the FTT had been in error and upheld the order. The Court of Appeal (Moore-Bick, Ryder LJJ and David Richards J) dismissed the appeal. Moore-Bick LJ noted that this was not a case of removing someone who had illegally entered the country – had it been, the decision of the FTT, which placed particular emphasis on the best interests of the children, might well have been sustainable. But here the more important public interest was engaged of deporting a foreign criminal. He observed that:

> "…. neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation"

14. In *Secretary of State for the Hone Department v CT (Vietnam)* [2016] EWCA Civ 488 a foreign criminal with two firearms offences and a variety of other offending was sentenced to seven and a half years' imprisonment, having earlier served a lengthy sentence. The FTT nonetheless found that his deportation would infringe his article 8 rights. The fact that it was in the best interests of the children for their father to remain in the UK weighed particularly heavily with the tribunal. Rafferty LJ, giving a judgment with which Tomlinson LJ agreed, held that it was not a factor capable of constituting exceptional circumstances (paras.36 and 38):

> "The effect on the children was, on the evidence, to leave them unhappy at the prospect of their father being on another continent. I readily accept that description. Experience teaches that most children would so react. I cannot accept the conclusion that, added to a low risk of reoffending, the effect on them tips the balance. These children will not be bereft of both loving parents. Nor was there evidence of a striking condition in either (I ignore the stepchildren by virtue of their age) which his presence in the UK would dispositively resolve. He is said to have "a particular tie" with the Respondent. The son was said to have spoken less confidently when his father was in prison and to have returned to confidence upon his release. That is not exceptional. …
>
> Appellate guidance is clearer now than when the FTT promulgated its decision. As paragraph 24 of *LC (China)* succinctly explains, where the person to be deported has been sentenced to 4 years' imprisonment or more, the weight attached to the public interest in deportation remains very great despite the factors to which paragraph 399 refers. Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in his deportation. Something more is required to weigh in the balance and nothing of substance offered. The approach of both the FTT and the UT failed to give effect to the clearly expressed Parliamentary intention."

...

17. These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children 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. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be

> reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.

21. Allowing for the fact that the Rules have been amended since these decisions, there are a number of factors to be taken into account in assessing undue harshness. Undue harshness is to be interpreted in accordance with the ordinary meaning. In doing so I consider that the factors set out in Section 117B and 117C of the 2002 Act must be taken into account.

22. For the reasons set out above, I am satisfied that removing the children to China would not be in their best interests given that they could not lawfully reside there and would at best be subject to severe restrictions on their ability to be educated, and through lack of accommodation. I find that would not be countered by both parents living with them owing to the severe legal and other obstacles to them and their mother living in China.

23. Several of these factors militate against the appellant. First, although he speaks some English, he and his wife required the services of an interpreter at the hearing. Second, there is no evidence before me as to the exact situation of the children but it is difficult to see how it could be that the family could be financially independent on the basis of the earnings as presently constituted. While I note the consistent evidence that the appellant will be given a job as a chef, there is no firm written job offer, but viewing the evidence as a whole, I am satisfied that the appellant would get a job, thus reducing any financial dependence there may be on the state. That was not a factor pressed on me by Mr Diwnycz.

24. Clearly, if this were a situation where there were no children, the appellant's case would lacking any merit given that he has never had leave to be here and the relationship was formed with his partner when his position was manifestly precarious.

25. The starting point in assessing the public interest is the clear statement of parliament that the deportation of foreign criminals is in the public interest. The offence in this case was serious and involves production of drugs. Whilst the sentence of two years is, in the context of production of drugs, relatively low, equally this reflected a significant reduction of sentence in this case.

26. The exception set out in Section 117C(5), that is exception 2, mirrored in the Immigration Rules referred to above.

27. What sets this case apart is the acceptance by the respondent that the appellant is a victim of modern slavery. Whether and to what extent the sentence and indeed the conviction would be the same now is not a matter for me but is a matter for the appellant should he wish to pursue this through the correct channels. Whilst the exception for victims of trafficking exists in respect of UK Borders Act 2007 that does not apply in the case of parliament's express intentions set out in Section 117C(1) which does not include that exemption. It was parliament's clear intention to stress the public interest in the deportation of foreign criminals to expand to a greater number of people than are covered by the automatic deportation provisions in the Borders Act 2007. On that basis, I do not agree with Miss Pickering's submission that there is no public interest in removal.

28. I accept that it is perhaps less in this case given the trafficking decision and it is of some note that there has been no repetition of the offending behaviour in the subsequent eight years. These must, however, be set against the other negative factors set out above including the precarious nature of the appellant's position and his long period of overstaying. Indeed, he has never had permission to be in the United Kingdom.

29. Turning back then to the analysis of unduly harshness in 399(a)(i), I consider that the impact on the children of having to live in China even with her own parents given the serious difficulties which would effectively mean that their private lives could not exist given the legal disabilities under which they live and their inability to access education and public services is such that requiring them to live in China would, even bearing in mind the large number of negative factors, be unduly harsh.

30. It does not, however, follow that it would be unduly harsh to expect them to be separated from their father. That is, if he were to be deported to China. I note Miss Cleghorn's submissions to that fact but as noted in the cases cited above, this is the effect of deportation. It does separate parents from their children. It is only in the rare cases that the public interest in deporting foreign criminals is outweighed by the harm done to their children.

31. In considering the report by the independent social worker, I note that she was directed to consider if it would be unduly harsh for the partner and children to remain if the applicant were deported (see letter of instructions). That issue is addressed at section 11 of the report where it is opined that father/daughter relationships are important in women becoming higher achievers; that the children are likely to be shaped by their early experiences; that the children have an established relationship with their father; that the best interests of children must be a primary concern; and, that to be cared for by both parents will continuously serve the children's best interests. There is, however, not opinion offered as to what the effect of separation will be. While the theme set out in section 11 is further developed in section 12, this is generalised. The final conclusion is:

> "... to develop their full potential, children need safe and stable housing, adequate and nutritious food, access to medical care, secure relationships with adult caregivers, nurturing and responsive parenting, and high-quality learning opportunities at home, in child care settings and in school…. [The applicant and his partner] are providing and meeting their children's needs as a couple. To continue to do so Mr [C] should be allowed to remain in the UK."

32. With respect, this just does not answer the question of what the effect of removal would be. There is, in consequence, little or no objective evidence of any harm over and above the normal consequences to children of the deportation of a parent.

33. I accept that the removal of the primary care giver on young children will be hard. I am satisfied that both children have a close relationship with their father, and it is important to them. He is closely involved in their upbringing, and in taking the older child to school. His not working allows the mother to work, and he cares for the children when she is not there. It is likely that their mother would have to cease work to look after them, and that the family would, financially, be worse off. Contact with the father would be very limited, and there is little prospect of physical contact through visits. The reality is that the very essence of day to day family life would be negated, communication being possible only by electronic means. This is not a case in which the children have previously been aware of separation from their father while he was in prison, given that the older child was only a baby when he was released. There will thus be a rupture in the family life which has existed for 7 or so years, effectively the whole of the life experience of the older child.

34. This is not, however, a case in which the appellant has been separated from his children already due to serving a prison sentence, at least not since the older child was very young. There is thus a continuous, and (I am satisfied on the evidence before me) particularly close family life, given not least it appears owing to the lack of either the appellant or his wife have extended family networks here; there is just the nuclear family. There would, however, be no removal to an entirely different environment away from the United Kingdom, or to an entirely different educational setup in the case of the older child which would be the case were the family to relocate to China (were that possible).

35. Taking all of these factors into account, I am satisfied that the effect on the children would be harsh, but would it be unduly harsh?

36. Balanced against the harshness to the children is the strong public interest in the removal of foreign criminals. That interest is set out in more detail in OH (Serbia) v SSHD [2008] EWCA Civ 694. Great weight must clearly be given to it, bearing in mind those factors, and the length of the sentence.

37. Some weight must be attached to the appellant's favour that he has not reoffended since the index offence, but equally, as set out above, there are negative factors flowing from section 117B which are not in his favour; neither is his immigration history.

38. There is in this case a nexus between the modern slavery conclusion and the index offence which was committed while the appellant was under the control of those who had subjected him to that. The appellant accepted that this did not amount to duress, but as was noted in MK v R [2018] EWCA Crim 667, the defence provided for in section 45 of the Modern Slavery Act 2015 is wider, albeit that it is not retrospective (see R v Joseph [2017] EWCA Crim 36 at [4]), nor, in consequence are the CPS guidelines. Whether the conviction should be overturned is manifestly not a matter for the Upper Tribunal, but I do not consider that the close nexus between the modern slavery conclusion and the index offence can be discounted in assessing the public interest and whether it is outweighed, even though, as I accept, the modern slavery decision does not assuage the applicant's guilt. On the particular facts of this case, and bearing in mind the factors which make up the public interests as identified in OH (Serbia), I consider that the public interest in deportation, while still strong and entitled to great weight, is lessened. Nonetheless, the public interest in deportation is in this case strengthened to a limited degree owing to the appellant's limited ability to speak English (although it appears good enough for most everyday purposes), and his poor immigration history.

39. This is a case with a number of unusual factors, and is finely balanced. I am, however, satisfied, taking all of the above into account, that the appellant has satisfied me that, the public interest in his deportation is outweighed, and that thus it would be, given the very close nature of the family bond with the children, and the very real difficulty there would be in maintaining any degree of family life, that the effect of deportation on the children would unduly harsh were they to remain in the United Kingdom,

40. Accordingly, I am satisfied that the appellant meets the requirements of paragraph 399(a)(ii) of the Immigration Rules and falls within exception 2 within section 117C of the 2002 Act. For all of these reasons, I satisfied that the deporting the appellant would be disproportionate and thus contrary to his protect rights. I therefore allow the appeal on Human Rights grounds.

Summary of Decision

1 The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2 I remake the decision by allowing the appeal on human rights grounds.
3 No anonymity direction is made.

Signed Date 20 April 2018

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12786/2016

THE IMMIGRATION ACTS

Heard at North Shields
On 23 November 2017

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MING [C]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Miss M Cleghorn, instructed by DWFM Bekman Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge S T Fox promulgated on 18 May 2017 allowing Mr Ming [C]'s appeal against the decision of the Secretary of State to make a deportation order against him and to refuse his human rights and humanitarian protection claims.

2. I refer to Mr [C] as the respondent although the Secretary of State was the respondent below, and is the appellant in this Tribunal.

3. The respondent is a citizen of China who it appears entered the United Kingdom in September 2001 when he was discovered attempting to board a plane to Canada using a forged Japanese passport. He claimed asylum, was granted temporary admission but failed to attend his interview. On 3 April 2002 he was convicted at Uxbridge Magistrates of using a false document and sentenced to four months' imprisonment.

4. The respondent was next encountered by the authorities in November 2010 when he was arrested. On 17 February 2011 he was convicted at Derby Crown Court for production of a class B controlled drug – cannabis and sentenced to two years' imprisonment. There was no appeal against conviction or sentence and, subsequent to this, the respondent was made the subject of a deportation order on 21 May 2012. His appeal against that decision was dismissed by the First-tier Tribunal and subsequently by the Upper Tribunal.

5. On 2 April 2015 the respondent applied for his deportation order to be revoked stating that he had been the victim of modern slavery in the United Kingdom, that is, that he had been forced to assist in the growing of cannabis which had resulted in his conviction. On 19 April 2016 a positive conclusive grounds decision was made where it was found that he had been the victim of modern slavery. Accordingly, the respondent revoked the deportation order on 18 May 2016 but made a further deportation order and refused his human rights and humanitarian protection claim.

6. The respondent is married to a British citizen who is originally from China. They have two children aged 3 and 6 who are also British citizens.

7. The Secretary of State was not satisfied that the respondent had a well-founded fear of persecution in China as a Christian nor that his deportation would be in breach either of the Immigration Rules or contrary to Article 8 of the Human Rights Convention. The judge heard evidence from the respondent and an additional witness; he also had before him a report from a social worker and medical evidence relating to one of the children who has a significant medical condition.

8. The judge dismissed the appeal on refugee grounds but allowed the appeal on the basis that deportation would be disproportionate and thus in breach of the United Kingdom's obligations under Article 8 of the Human Rights Convention.

9. The Secretary of State sought permission to appeal on the grounds that the judge had:-

   (a) Failed to give clear reasons as to why the appeal would be allowed it being unclear whether they had been allowed on Article 8 grounds outside the Immigration Rules and if that were the case had failed to give clear reasons as to why the public interest in deportation is outweighed in such circumstances, the threshold being particularly high in those circumstances;

(b) in apparently relying on delay on the part of the Secretary of State which has in fact been due to the difficulties in obtaining confirmation of the respondent's identity from him and having him documented by the Chinese authorities;

(c) by stating apparently that the public interest was not engaged in this case, contrary to Section 117C(1) of the 2002 Act it being unclear to what the judge was referring; and in referring to it being unreasonable to expect the children to leave the United Kingdom rather than the correct test which is to consider whether it would be unduly harsh;

(d) in failing properly to explain why it would be unduly harsh for the children either to remain in the United Kingdom with their mother alone or to go to China as a family unit, referring at [44] to the decision in **Chikwamba** which was not relevant to deportation; and in failing to explain why it would be unduly harsh for the respondent's wife to return to China with him.

10. Miss Cleghorn supplied a detailed response pursuant to Rule 24 submitting that viewing the decision as a whole it was adequately reasoned that the judge had at several places correctly referred to the issue of being unduly harsh and that proper reasons had been given for finding that it would not be in the children's best interests for them to go to China and that he had given sufficient reasons for finding that this would be unduly harsh and that it would be unduly harsh for them to be separated from their father.

11. She submitted further that the judge had not in reality concluded that the public interest in deportation was not engaged in this case and had made numerous references to undue harshness such that Section 117C(5) was engaged thus there was no public interest in this case in deportation.

12. It is also submitted that the judge had given adequate reasons for saying why the mother could not return to China and had properly dealt with the best interests of the children.

13. The judge's decision is to a significant extent confused. Whilst this is a human rights appeal and the question of whether the decision was or was not in accordance with the Immigration Rules, was not a ground of appeal nonetheless the judge's focus should have been on the Immigration Rules and whether they were met. That is, after all, the basis on which the Secretary of State began consideration of Article 8. Further, whilst to a significant extent the matters raised in paragraph 399A and 398 were produced what is set out in Section 117C of the 2002 Act these are not specifically addressed. Instead, the judge launches into a consideration of Section 117 at Section 19 without having made any findings of fact and confusingly at [21] although accepting the deportation of foreign criminals and public interest concludes that the "public interest ..... was not engaged" plus there are references to obstacles and difficulties and it would be reasonable to expect children to go to live in China, it is unclear in what context the judge was reaching these conclusions. Whilst, as Miss Cleghorn submitted, it is not correct that at paragraphs [31] to [49]

and 61 that the judge refers to unduly harsh consequences, equally in other paragraphs the judge refers to it being unreasonable – see paragraph [23]. It is also correct that the judge improperly refers to the decision in **Chikwamba** and also **Treebhawon and Others (Section 117B(6)) [2015] UKUT 674** in the balancing of the children's rights.

14. Other indicators of significant difficulty in the judge's reasoning process are the conclusions [40] that the respondent does not meet the requirements of the Immigration Rules which begs the question as to why the appeal was allowed if the judge as he appears to have done, thought that Section 117(6) was engaged and was relevant as that reproduces paragraph 399A of the Immigration Rules.

15. There are a number of other paragraphs in this decision which cause concern. At [22] the judge concluded that the respondent's general credibility had not been established yet appears to have accepted his evidence and that of his wife and at [51] found that the respondent had "provided a credible basis for challenging the assertions, analyses and conclusions in the Secretary of State's refusal letter. On the evidence before me today, I am satisfied those different assertions, analyses and conclusions are not valid and tenable and I reach conclusions myself for the reasons recorded above."

16. If that finding were to stand it is not entirely clear why the judge then dismissed the appeal under Article 3 and the Refugee Convention given that those are both issues raised in the refusal letter. Further, the judge expressly directs himself at [59] that this is a matter outside the Rules referring to his observations at paragraphs [19] to [22] as to why these Rules are not met but they simply do not do so. Finally, at paragraph [63] the judge concluded that the interference in the respondent's family life was not in accordance with the law but fails to explain why and at [64] satisfied himself that the interference was necessary yet found that it was not proportionate.

17. For all of these reasons I consider that the decision is so unstructured and frankly incoherent that it is not at all possible to discern that the judge directed himself properly with respect to the law or why he had concluded that the very high threshold in showing that deportation is disproportionate was met if he was not satisfied that the requirements of the Immigration Rules were met.

18. Accordingly, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

Directions

1. The decision of the First-tier Tribunal will be remade in the Upper Tribunal for it to consider whether on the facts as found by the judge the requirements of the Immigration Rules are met and to consider again whether deportation would be proportionate.

2. The Upper Tribunal will not consider whether the applicant's Article 3, humanitarian protection or asylum claim are made out as these were dismissed and there was no

cross appeal on these issues. The Tribunal will therefore consider only the Article 8 issue.

3. As noted during the hearing, the index conviction in this case relates out of circumstances in which the respondent was compelled to work on a cannabis farm. Whilst it is not suggested that this compulsion reached the high threshold to constitute a defence to that criminal law, nonetheless the conclusive finding as to modern slavery is relevant in this context and it would be sensible. The respondent would therefore be advised urgently to seek advice given the decision in the **R v Joseph [2017] EWCA Criminal 36**.

4. To that end, the respondent is directed to inform the Upper Tribunal in writing marked for the attention of Upper Tribunal Judge Rintoul on or before 16 January 2018 as to what steps have been taken in this regard and whether, if appropriate, what advice has been received.

Signed Date: 4 December 2017

Upper Tribunal Judge Rintoul