**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/19702/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 14 March 2019** | **On 21 March 2019** |

**Before**

**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**JIANHUANG [X]**

**Appellant**

**-and-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation**

For the Appellant: Mr. T. Jones of counsel, instructed by Haq Hamilton

For the Respondent: Ms A. Everett, Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Appellant is a national of China. He entered the United Kingdom and applied for asylum on 8 April 2003. This application was refused on 23 May 2003. He appealed but his appeal was dismissed on 23 September 2003. He was granted permission to appeal to the Asylum

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and Immigration Tribunal, but his appeal was dismissed and he became appeal rights exhausted on 5 April 2005.

2. The Appellant submitted further representations on 29 May 2008 and on 16 December 2009 he was granted indefinite leave to remain. On 14 July 2011 he was refused naturalisation as a British citizen, as he had failed to disclose the fact that he had been convicted on 8 October 2009 of using a vehicle whilst uninsured and driving otherwise than in accordance with a licence.

3. On 10 July 2014 the Appellant was convicted on two counts of possession of a Class A drug with intent to supply and one count of possession of a Class C drug with intent to supply and on 11 July 2014 he was sentenced to three years and six months imprisonment

4. The Appellant was put on notice that he was liable to deportation on 15 September 2014 and on 6 October 2014 he returned the questionnaire which had been sent to him. Nevertheless, on 26 February 2015 the Respondent refused the Appellant's human rights claim and made a deportation order against him. He also certified his human rights claim under section 94B of the Nationality, Immigration and Asylum Act 2002 and the Appellant was removed from the United Kingdom on 1 August 2016.

5. The Appellant appealed against this decision on the basis that deportation would breach Article 8 of the European Convention on Human Rights as he had lived in the United Kingdom for twelve years and had a wife and three children who were British citizens. First-tier Tribunal Judge Beach dismissed his appeal in a decision promulgated on 23 November 2017. The Appellant appealed against this decision and he was granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Hollingworth on 8 July 2018. His appeal was dismissed by Mrs Justice Moulder and Upper Tribunal Judge Storey in a decision promulgated on 4 July 2018. However, on 21 January 2019, The Honourable Mr. Justice Lane reviewed the Upper Tribunal's decision under rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008

6. The Appellant sought permission to appeal to the Court of Appeal against this decision and on 21 January 2019 the Honourable Mr Justice Lane reviewed the decision made by the Upper Tribunal under rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and set it

aside. This was on the basis that *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 was decided after the Upper Tribunal reached its decision and may have had a material effect on it. The parties were given 14 days to make any representations under rule 46(3) but have not chosen to do so.

**ERROR OF LAW HEARING**

7. The parties were directed to file their skeleton arguments no later than five days before the date of the re-hearing in the Upper Tribunal. The Appellant filed his skeleton argument and his bundle on 7 March 2019. He also applied to amend his grounds of appeal in order to take into account the Supreme Court decision in *KO (Nigeria).* At the start of the error of law hearing, the Home Office Presenting Officer stated that, in the light of the litigation history of this appeal, she was content for the Appellant's grounds to be amended.

8. Permission to appeal against the decision reached by First-tier Tribunal Judge Beach was granted by First-tier Tribunal Judge Hollingworth on 8 July 2018. Rule 23 of the Tribunal Procedure (Upper Tribunal) Rules 2008 states that:

> "In an asylum case or an immigration case in which the First-tier Tribunal has given permission to appeal, subject to any direction of the First-tier Tribunal or the Upper Tribunal, the application for permission to appeal sent or delivered to the First-tier Tribunal stands as the notice of appeal…".

9. However, the law has moved on this 8 July 2018 and I note that the Upper Tribunal has the power to direct that grounds for an application for permission to appeal can be amended. When doing so, the overriding objective in rule 2 applies and I find that, in order to hear this appeal fairly and justly and to avoid any further delay in reaching a final decision, it is in the interests of justice for the Appellant to be permitted to amend his grounds of appeal to take into account the decision in *KO (Nigeria).* I also use the powers deriving from rule 5(3)(c) of the Procedure Rules to permit such an amendment.

10. The parties also agreed that, as the Upper Tribunal's previous decision had been reviewed and set aside, the first issue was whether there was an error of law in First-tier Tribunal Judge Beach's decision. Both counsel for the Appellant and he Home Office Presenting Officer

made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

**ERROR OF LAW DECISION**

11. The Appellant had been sentenced to three years and six months imprisonment and, therefore, section 32 of the UK Borders Act 2007 applied and he was subject to automatic deportation unless to do so would amount to a breach of the European Convention on Human Rights. The sentencing remarks confirm that when the Appellant was detained he had a quantity of methylamphetamine in his pockets, bag and home and that ecstasy tablets and a meth lab in an unlocked room were also found in his home. The Sentencing Judge noted that he had relied on a false account at his trial and that he had not displayed any regret or remorse.

12. In keeping with this statutory provision, paragraph 397 of the Immigration Rules states that:

> "A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention…".

13. This is also an appeal which had been certified under section 94B of the Nationality, Immigration and Asylum Act 2002 on the basis that the Respondent considered that, despite the appeals process not having been begun or not having been exhausted…removing P from…the United Kingdom, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998… This was because, for the purposes of section 94B (3) of the Act, the Respondent had certified that his removal would not give rise to a real risk of serious irreversible harm. The Appellant did not challenge this certification and, therefore, he was not in the United Kingdom at the time of his appeal.

14. Paragraph 398 of the Immigration Rules states that:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been

sentenced to a period of imprisonment of less than four years but at least 12 months…

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

15. Paragraph 399 states that:

"This paragraph applies where paragraph 398(b) or (c) applies if

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported"

16. Section 117A of the Nationality, Immigration and Asylum Act 2002 states that:

"(1) This part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result, would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard-

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C".

17. Section 117C states:

“Article 8: additional considerations in cases involving foreign criminals

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

(2) The more serious the offence committed by a foreign criminal, that greater is the 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 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”.

18. The Appellant has three sons, who are British citizens. One was born in 2007, one in 2009 and one in 2010. The Appellant’s wife and mother of these children is also a British citizen. First-tier Tribunal Judge Beach had found that it would be unduly harsh to expect the Appellant’s wife and children to join him in China and this part of her decision has not been challenged by the Respondent in his Rule 24 Response, dated 24 April 2018.

19. The first of the Appellant’s amended grounds was that the test which First-tier Tribunal Judge Beach has applied when considering whether it would be unduly harsh for the Appellant’s wife and children to remain here without him, was incorrect in the light of the decision in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 52.

20. In paragraph 76 of her decision, First-tier Tribunal Judge Beach directed herself that “the question then is whether, taking account of all of the circumstances, including the appellant’s offending, it is unduly harsh for the children and/or the appellant’s wife to remain in the UK without the appellant”. This approach was expressly disproved in paragraph 23 of *KO (Nigeria),* where Lord Carnwath found that:

“The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminal. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. 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 the length of sentence".

21. The Home Office Presenting Office accepted that First-tier Tribunal Judge Beach had applied an incorrect self-direction and submitted that no part of the decision could stand. Therefore, ground one of the amended grounds clearly identifies an error of law in First-tier Tribunal Judge Beach's decision.

22. She had also noted that there was no reference to the Appellant's criminality in paragraph 78 of First-tier Tribunal Judge Beach's decision. However, as counsel for the Appellant submitted, that one paragraph cannot be construed in isolation from the earlier parts of the decision.

23. In ground two of the amended grounds, it was submitted that First- tier Tribunal Judge Beach set the threshold for considering whether it would be unduly harsh for the children to remain here without the Appellant too high. Counsel for the Appellant relied on paragraph 23 of *KO* where Lord Justice Carnwath also found that:

> "Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2017] 1 WLR 240, paras 55 and 64) can [the unduly harsh test] be equated with a requirement to show "very compelling circumstances". That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more".

24. In paragraph 27 of *KO (Nigeria)*, Lord Justice Carnwath found that:

> "Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
>
> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

25. In paragraph 23 Lord Justice Carnwath had also found that:

> "On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level".

26. First-tier Tribunal Judge Beach did remind herself that it had to be shown that the circumstances said to give rise to circumstances which were unduly harsh had to be more than uncomfortable, inconvenient, undesirable, unwelcome or merely difficult or challenging. As the Home Office Presenting Officer submitted there was no indication that First-tier Tribunal Judge applied an additional test to that recommended in *KO (Nigeria)* when considering whether exception 2 applied.

27. Counsel for the Appellant also submitted that the cumulative effect of the evidence relied on by the Appellant amounted to an effect on the Appellant's children and wife which would be unduly harsh. In particular, he relied on the Child Welfare Report, dated 10 July 2017, and the fact that it said that there was a risk that the children would develop insecure attachments. However, at paragraph 140 of the report it was said that the children had a secure attachment with their mother and the following few paragraphs only speculate about the possibility of the children developing any insecure avoidant attachment behaviours because their father was absent. There was no evidence that this had occurred.

28. He also relied on the fact that the children had been separated from both of their parents in the past and that when the Appellant returned to live with them on 25 April 2016, shortly before he was deported, he had a good relationship with them. These changes were referred to as "transitions" in the Child Welfare Report but again the effect of these transitions was merely speculative.

29. In paragraph 105 of the Report, it was also said that the children's social life had become more restricted since the Appellant was deported to China. But what one of the children is reported as saying in paragraph 103 is that life had become more boring as his mother had to go out to work. At the same time, at paragraph 100 it was reported that the boys had lots of

friends at school and at paragraphs 72 to 74 the children's teachers reported that they have good relationships with adults and children at their school. The report also confirmed that two of the children had an attendance record of 100% and the other an attendance record of 98.8% and that this was only lower because of two authorised absences. In addition, it was said that they were also making good progress in their studies. There is no evidence that the Appellant's absence was having a detrimental effect on their studies, as asserted by their mother in paragraph 40 of her witness statement.

30. Emphasis was placed on the fact that the family's financial circumstances were limited. At paragraph 133, it was said that the mother had a very meagre wage of £500 per month but this failed to take into account the income she derived from housing benefit and working tax credits. There was also no evidence that the family were experiencing a significant degree of deprivation as asserted in paragraph 131 of the report. It was also said that, if the Appellant were permitted to return, this would enhance the family's financial circumstances. In my view this had to be assessed in the context of the fact that, at page 16 of the OASys report, it was stated that the father was only working part-time at that date of his offence as he was unable to work additional hours as this would mean that he was not entitled to housing benefit and that he had also fallen into debt.

31. In addition, there was no medical evidence which indicated that the children were suffering from any physical or mental illness that can be attributed to the Appellant's absence. The psychosocial report provided by Ms Pagella, dated 26 January 2017, speculated on the possible effects on the children of their father's removal but provided no evidence that his absence had in fact had profound and far reaching consequences for their physical and emotional growth and no further evidence has been provided to confirm that these developments have occurred in the two years and nearly eight months since he was deported.

32. For the same reasons, the Appellant has not established that it is not in the children's best interest to remain in the United Kingdom with their mother.

33. For these reasons, I find that the on the present evidence it was not possible to go on and remake the appeal in the Appellant's favour

34. I also find that, given the time that has passed since the Appellant was deported and the relative age of the evidence in the Appellant's file, this appeal should be remitted to the First-tier Tribunal so that further evidence can be submitted and considered.

**Decision**

(1) The Appellant's appeal is allowed in so far as First-tier Tribunal Judge Beach made an error of law when applying the unduly harsh test for the reasons given above.

(2) The appeal is remitted to be heard by a First-tier Tribunal Judge other than First-tier Tribunal Judge Beach or Hollingworth, in order for a decision to be made on up to date evidence.

*Nadine Finch*

Signed Date 18 March 2019

Upper Tribunal Judge Finch