Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00753/2021
UI-2021-001499

THE IMMIGRATION ACTS

Heard at Field House
On 26 April 2022

Decision & Reasons Promulgated
On 26 July 2022

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JINGMING JIANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms E. Sanders, Counsel, instructed by Rahman & Co. Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State but for convenience I will refer to the appellant before the First-tier Tribunal as "the appellant".

2. The Secretary of State appeals against a decision of First-tier Tribunal Judge Chinweze ("the judge") promulgated on 21 December 2021 in which he allowed an appeal brought by the appellant under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") against a decision of the Secretary of State dated 12 January 2021 to refuse his human rights claim and make a deportation order in respect of him ("the Secretary of State's decision").

Factual background

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3. The appellant is a citizen of China. He arrived in this country clandestinely in 2004. He was encountered by immigration officials in 2008, and again in 2011. Removal directions were set for 22 March 2011. These were deferred when the appellant made a human rights claim on the basis of his relationship with his children from his relationship with his wife, a naturalised British citizen of Chinese descent. The appellant was granted discretionary leave on 5 January 2012 which was renewed until 21 February 2018.

4. On 8 May 2016, the appellant was arrested on suspicion of rape and criminal damage. On 24 May 2017, he absconded by leaving the United Kingdom for the United States of America. On 30 July 2019 he was extradited back to the United Kingdom. On 11 November 2020, the appellant pleaded guilty to 2 counts of being concerned in the supply of a class B drug, and a single count of the possession of a class a drug. The Crown offered no evidence on the rape and criminal damage charges. There are very few facts about the offence before this tribunal, other than those as summarised in sentencing remarks to which I will return. The appellant was sentenced to a total of 90 days' imprisonment by HHJ Arnold sitting in the Crown Court at Lewes.

5. It appears that the appellant was convicted in his absence, in this jurisdiction, of an offence of driving with excess alcohol in his blood, on 7 March 2019. That conviction was when the appellant would have been in the USA.

6. By a decision dated 11 November 2020, the Secretary of State notified the appellant that she had decided to make a deportation order against him under section 5(1) of the Immigration Act 1971 on the basis that she had deemed his deportation to be conducive to the public good.

7. The appellant made a human rights claim in response. He claimed that his deportation would have an "unduly harsh" impact on his two minor children, WJ, who was born in this country in February 2007, and DJ, who was born here in October 2010. Both children are British citizens; WJ naturalised on 16 November 2020. DJ was born after his mother, the appellant's wife, had been granted indefinite leave to remain, and so was a British citizen from birth. I will refer to the two minor children collectively as "the minor children". The appellant has an adult daughter, Mengying, who was born on 7 June 1998.

8. When refusing the human rights claim, the Secretary of State concluded that the appellant did not enjoy a genuine and subsisting parental relationship with the minor children. There was no evidence that he had any involvement in their upbringing. On the basis that the appellant was not the primary carer for either of his children, Secretary of State's decision accepted that it would be "unduly harsh" for them to accompany him to China (although the decision made clear that it was not accepted that the children would be unable to adjust to life in China and benefit from their Chinese heritage).

9. The Secretary of State considered that it would not be unduly harsh for the children to remain in the United Kingdom in the absence of the appellant, within the meaning of paragraph 399(a) of the Immigration Rules. Although the appellant may have helped in the care of his children, the Secretary of State did not accept that the appellant's deportation would affect their day-to-day welfare in the United Kingdom. The children had remained under the constant care of their mother and there was no reason to conclude that she could not provide the guidance and support they needed for a healthy and happy upbringing. The

appellant could maintain his relationship with his children through modern means of communication. Although the children would experience some sadness, over time they would be able to overcome their negative emotions.

10. In relation to the appellant's wife, Qiuyu Dong, the Secretary of State did not accept that the appellant enjoyed a genuine and subsisting relationship with her. His deportation would not result in unduly harsh consequences for her, for the purposes of paragraph 399(b) of the Immigration Rules.

11. As far as the appellant's private life was concerned, the appellant could not avail himself of the exception contained in paragraph 399A of the Immigration Rules. He had not been lawfully resident in the United Kingdom for most of his life. He was not socially and culturally integrated here. He would not face very significant obstacles to his integration in China.

12. The Secretary of State's decision addressed the appellant's offending in these terms:

> "Your conviction meets criminal case were criteria under the Bournemouth commitment. In September 2007, at the Bournemouth Labour Party conference the then Prime Minister, Gordon Brown, made a commitment that those foreign nationals involved in gun crime or the production, importation and supply of drugs would not be allowed to remain in the UK (Bournemouth commitment). By the very nature of your offence, you have shown no regard for the impact these drugs have on the fundamental interests in society. The present Prime Minister, Boris Johnson, and the Secretary of State remain committed to reducing the levels of gun -related crime and crime related to the use and sale of drugs which by their very nature have a disproportionate effect on society as a whole.
>
> Given the serious nature of your offence, and the potential to cause serious harm to the public, it is considered that this is evidence of your non-integration. Mere presence in the UK is not an indication of integration."

13. The decision went on to quote the sentencing remarks of HHJ Arnold on 11 November 2020:

> "Mr Jiang, dealing first of all with your being concerned in the supply of the ketamine to [Ms XX] and [Ms XX], whilst at first blush this is a category 4C offence, which would not normally be visited with a term of imprisonment, it is aggravated by the fact that you were supplying two young women with drugs on two quite separate occasions, and in the circumstances I do take the view that the matter is certainly capable of crossing the custody threshold, particularly when coupled with the fact that you were also in possession of a class A drug. "

14. The decision concluded by stating that there were no very compelling circumstances outweighing the public interest in the appellant's deportation. The public interest outweighed the appellant's claims to private and family life for the purposes of Article 8 of the European Convention on Human Rights ("the ECHR").

The decision of the First-tier Tribunal

15. The judge heard evidence from the appellant, his wife, and Mengying, at a CVP hearing on 13 October 2021.

16. Having set out the disputed issues at [15], the evidence of the appellant, his wife and Menying from [16] to [49], and the submissions of both parties from [50] to [62], the judge outlined the legal framework at [63] to [72]. The judge's operative analysis began with whether the appellant's crime had caused "serious harm" for the purposes of section 117D(2)(c)(ii) of the 2002 Act at [73] to [86]. The judge concluded that it had. The appellant had supplied a Class B drug (ketamine), while in the possession of MDMA, a Class A drug, to two young women, on two separate occasions.

17. At [91] to [109] the judge found that the appellant's deportation would be unduly harsh on WJ and DJ. The judge's analysis of this issue is in three parts. First, from [92] to [98] the judge found that the appellant enjoys a genuine and subsisting relationship with WJ and DJ. Secondly, from [99] to [103], the judge outlined the legal framework concerning the required evaluation of the best interests of the children, and the approach to be taken to the "unduly harsh" threshold pursuant to *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176. Finally, the judge's operative reasons for finding that the appellant's deportation would be unduly harsh on the children is at [105] and following. Some of the judge's reasoning re-states his findings concerning the existence of a genuine and subsisting relationship, but the reasoning adopted by the judge was as follows. At [106], the judge said that, "I find that the appellant's deportation, only a few months after he has been released on immigration bail, will have a considerable impact on [the minor children]".

18. At [107] the judge said:

> "I accept the evidence of the appellant's wife that both children are emotionally attached to the appellant. There are a number of letters written by the appellant's children whilst he was in prison expressing that they miss him. I have accorded these letters some weight as I did not hear evidence from the children themselves. Nevertheless, they are consistent with the evidence of the appellant, his wife and oldest daughter, Mengying. I note that [DF], also known as [DJ], was noted to be doing well at school in a school report in the appellant's supplementary bundle. However, the report covers a period of September 2019 to March 2020, which coincides with he appellant's return form [*sic*] America, when his children were able to visit him in prison. The appellant's presence in the UK could equally be responsible for his son doing well at school."

19. At [109] the judge said:

> "I find the appellant's deportation would result in a severing of a relationship between the appellant and his children, just at the time it is being re-established, I find this would cause considerable emotional upheaval and distress to both children beyond what is merely uncomfortable or inconvenient."

20. At [107], the judge accepted the evidence of the appellant's wife and Mengying that the appellant had maintained contact with WJ and DJ while he was in the USA. The judge found that the appellant had bought iPads for the children, so he could see them as well as talk to them, and accepted Mengying's evidence that

she had visited the appellant in the USA, as evidenced by the stamps in her passport. There were large numbers of untranslated *WeChat* transcripts. It was unfortunate that no translations had been provided, the judge said, but he found that the existence of the records was consistent with the oral evidence.

21. Having cited section 117C(2) of the 2002 Act ("the more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal") the judge said, at [113]:

> "After taking into account the lengths the appellant has gone in order to maintain his relationship with WJ and DJ in the relatively short sentence he received, I am satisfied that it would be unduly harsh for his two youngest children to remain in the UK without him. I am satisfied Exception 2 applies to the appellant and that pursuant to section 117C(3) of the 2002 Act the public interest does not require his deportation.

22. The judge addressed the position of the appellant's wife in brief terms, at [114] to [115]. He found that it would be unduly harsh for her to leave the UK for China with the appellant, as she was the primary carer of the minor children. But it would not be unduly harsh for her to remain here without him. She had endured lengthy periods of separation previously, during which she managed to maintain herself and her children and run a restaurant business. The judge found that her stated refusal while giving evidence to follow the appellant to China was "further evidence of her willingness to make a life for her children and herself in the UK, if the appellant was deported."

Grounds of appeal

23. The grounds of appeal were drafted by Mr E. Tufan, a Senior Home Office Presenting Officer. They contend that the judge failed to evaluate how the impact of the appellant's deportation would be unduly harsh on the children, as required by *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53.

24. Permission to appeal was granted by First-tier Tribunal Judge Elliott.

25. The appellant submitted a rule 24 notice dated 9 March 2022. It responds to the grounds of appeal, and additionally challenges the judge's finding that the appellant's offence caused "serious harm".

Submissions

26. Mr Melvin expanded upon the grounds of appeal, characterising the Secretary of State's appeal as a reasons-based challenge to the judge's findings, and a challenge to the judge's self-direction concerning what is "unduly harsh". The judge failed expressly to address the underlying question as identified by Underhill LJ at [51] of *HA (Iraq)*, namely "whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest". At [106], the judge failed to expand on the "considerable impact" he found the appellant's deportation would have on the children, and gave very few reasons going beyond a normal relationship between a parent and his children. There was no medical evidence concerning the impact on the minor children, and the judge did not have the benefit of an independent social worker's report. Coupled with the judge's findings at [115]

that the appellant's spouse could remain in the UK, and that she was willing and able to make a life for herself here in his absence, the evidence does not demonstrate that the unduly harsh threshold was met.

27. Ms Sanders relied on the rule 24 notice. She submitted that the judge correctly directed himself concerning the term "unduly harsh" in light of the leading authorities. There was no notional level of harshness against which the concept of "unduly harsh" should be assessed, and, in principle, there is no reason why the threshold cannot be met quite commonly in deportation cases involving children.

Statutory framework

28. The proceedings before the judge concerned the refusal of a human rights claim, made under Article 8 ECHR. The essential issue for the judge was whether the appellant's deportation would be a proportionate interference with his rights under Article 8(1) ECHR, and those of his wife and minor children, for the purposes of Article 8(2). That was an assessment to be conducted by reference to the statutory proportionality considerations contained in Part 5A of the 2002 Act. Although the Secretary of State's decision referred to various provisions of the Immigration Rules, those provisions have been placed on a statutory footing in section 117C of the 2002 Act, which is engaged in all cases concerning the deportation of "foreign criminals", and so this decision will focus on the primary legislation. The term "foreign criminal" is defined in section 117D(2)(c)(ii) to include those who have been "convicted of an offence that has caused serious harm".

29. Section 117C provides, where relevant:

> "(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.
>
> […]
>
> (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."

Exception 2 corresponds to paragraph 399(a) of the Immigration Rules.

Discussion

30. The Secretary of State's grounds of appeal and submissions fall into two broad categories. The first is a challenge to the judge's self-direction concerning the term "unduly harsh". The second amounts to a challenge to the judge's findings of fact pursuant to that self-direction, whereby he found, as a matter of fact, that the appellant's deportation would be unduly harsh on the children.

No material mis-direction concerning "unduly harsh"

31. This limb of the Secretary of State's appeal may be dealt with briefly. I consider that the judge correctly directed himself from the leading authorities on the meaning of the term "unduly harsh". At [101], he recalled that the strong public interest in the deportation of foreign criminals may only be defeated by a "very strong claim under Article 8", in light of *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 at [14]. At [102], quoting *HA (Iraq)* at [44], the judge recalled that "unduly harsh" means an enhanced degree of harshness, and at [103], the judge included four extracts from *HA (Iraq)* concerning the meaning of the term.

32. The judge's operative analysis was consistent with his self-direction, demonstrating that the citations from authority were not simply a placeholder, but informed the decision reached by the judge. The main example of this is at [109], quoted at paragraph 19, above, where the judge stated that the emotional upheaval and distress that would face the children in the event the appellant were deported would be "beyond what is merely uncomfortable or inconvenient".

33. Before I conclude on this point, I pause to highlight the fact that the Secretary of State did not challenge the judge's application of section 117C(2) of the 2002 Act, concerning the correlation between the seriousness of an offence, and the corresponding public interest in the deportation of the foreign criminal, at [111]. The judge found that, since the appellant had only been sentenced to a relatively short term of imprisonment, the public interest was correspondingly diminished on the facts of this case. There was no challenge to this aspect of the judge's reasoning and I say no more about it.

34. I find that the judge did not misdirect himself concerning the meaning of the term "unduly harsh ".

Findings of fact open to the judge

35. The remaining limb of the Secretary of State's appeal challenges the judge's findings of fact that it would be "unduly harsh" on the minor children for the appellant to be deported.

36. There are many authorities on the approach an appellate court or tribunal should take when considering findings of fact reached by a first instance judge. A recent summary of the appellate approach to first instance findings of fact may be found in *Volpi v Volpi* [2022] EWCA Civ 464 at [2] to [5], recalling, amongst others, the approach taken in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]. As stated in *Volpi* at [2.ii], "It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion." And at [2.vi]:

> "Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

37. In *Perry v Raleys Solicitors* [2019] UKSC 5, Lady Hale said that "the very real constraints facing an appellate court when invited to overturn a judge's findings of fact at trial" may be summarised as:

> "… requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding

> was one that no reasonable judge could have reached." (Paragraphs 49 and 52).

38. Against that background I consider Mr Melvin's submission that the judge's finding at [106] that the appellant's deportation would have a "considerable impact" on his minor children was unreasoned, and failed to demonstrate that the impact on the children would go beyond what would normally be expected in the case of the deportation of a parent. In my judgment, to the extent that submission contends that the judge fell into error by failing to calibrate the impact of the appellant's deportation against some objectively measurable benchmark for the "normal" impact of a parent's deportation, it is flawed. It is now clear from *HA (Iraq)* that there is no such objective criterion against which the prospective impact of a parent's deportation can be measured: [56].

39. The gravamen of the Secretary of State's challenge to the judge's operative reasoning is that his analysis concerning why the appellant's deportation would be "unduly harsh" omits the detailed consideration and explanation that the Secretary of State would expect when reaching a finding that the elevated threshold that is encapsulated by the term "unduly harsh". I accept that the judge's reasoning on this point is brisk, but, bearing in mind the appellate restraint with which trial judges' findings of fact should be approached, I accept Ms Sanders' submissions that, properly understood, the Secretary of State's appeal is a disagreement of weight and does not demonstrate an error of law.

40. When considering sufficiency of reasons challenges, it is necessary to consider the entirety of a judgment, and the evidence and submissions heard by the judge. A judge's reasons should be analysed in that context when being scrutinised for their sufficiency. In *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605, the Court of Appeal held at [118] that:

> "an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

41. The judge's finding at [106] concerning the "considerable impact" of the appellant's deportation on the children must be considered in the context of the judge having heard – and set out – the evidence and submissions in the case. For example, at [42] the judge summarised the evidence of the appellant's wife about the positive impact the appellant had had on family life since being released from immigration detention. At [46] he summarised Mengying's evidence that her younger siblings were very attached to their father and were anxiously waiting for his release from prison. The impact of the appellant now spending more time with them was that they were "very happy". The judge also recorded submissions advanced on behalf of the appellant concerning the impact of the timing of the appellant's deportation, just as the family relationships were beginning to be re-established: [60]. Moreover, the judge's "considerable impact" finding cannot be taken in isolation. The crux of his reasoning features at the end of [109], in which he concluded that the appellant's deportation would result in "considerable emotional upheaval and distress… Beyond what is merely uncomfortable or inconvenient." Pursuant to a simple textual analysis, therefore, Mr Melvin's submission that the judge failed to give expression to his "considerable impact" point at [106] falls away when one reads the decision as a whole, in particular reading [106] alongside [109].

42. The judge heard live evidence from the appellant, his wife, and Mengying, and had written evidence from the two minor children. He had the benefit of considering the whole sea of evidence, which contrasts with the ability of this tribunal merely to engage in "island hopping" (as to which, see *Fage v Chobani* at [114.iv]). The judge correctly directed himself concerning the term "unduly harsh", and applied his self-direction to the evidence he heard. His reasons were brief but, in my judgment, just sufficient. It is important to recall that reasons for a judgment will always be capable of being better expressed. It matters not if another judge, or even this tribunal, may have reached a different conclusion. The litmus test is whether the decision under appeal is one that no reasonable judge could have reached. Bearing in mind the appellate restraint with which I should approach findings such as those reached by the judge below, I consider that the findings he reached were open to him on the evidence he heard.

43. In light of the above analysis, it is not necessary for me to engage with the rule 24 notice's challenge to the judge's finding that the appellant's offence caused serious harm. It was common ground at the hearing before me that those issues only arose for consideration in the event I was with the Secretary of State in relation to her primary grounds of appeal.

Conclusion

44. The appeal is dismissed.

Notice of Decision

The decision of Judge Chinweze did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed Stephen H Smith Date 7 June 2022

Upper Tribunal Judge Stephen Smith