IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001598

First-tier Tribunal No: HU/52443/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th January 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

CHUAN ZHONG
(no anonymity order requested or made)

Appellant (in the FtT)

and

S S H D

Respondent (in the FtT)

For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 9 January 2024

DECISION AND REASONS

1. This is the SSHD's appeal against the decision of FtT Judge Connal, promulgated on 17 February 2023, allowing the appellant's appeal against deportation.

2. Parties are referred to as they were in the FtT.

3. These are the grounds: …

Making a material misdirection of law/lack of adequate reasoning – Unduly Harsh Test

2. The FTTJ has found that the appellant meets Exception 2 of s117C(5) in that he has a genuine and subsisting relationship with his wife and a subsisting parental relationship with his 3 daughters, all of whom are British, and it would be unduly harsh to separate the family.

3. … the FTTJ's reasoning does not establish the high threshold requirement of the 'unduly harsh test' as set out in *HA (Iraq)* [2020] and as confirmed in the *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213 46. *'When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will.'*

4. Following the decision of the Supreme Court in *KO (Nigeria) and others v Secretary of State for the Home Department* 2018 UKSC 53 the seriousness and nature of the offending should not be taken into account in assessing whether deportation would be "unduly harsh". However, the Supreme Court also confirmed that the "unduly harsh" test is a high one, going beyond what would necessarily be involved for any child faced with the deportation of a parent. It is respectfully submitted that the evidence does not support the FTTJ's conclusions. There is no evidence that the circumstances in this case go beyond the established threshold as set out in the case law.

5. The test of 'unduly harsh' is an extremely demanding one. The Court endorsed the approach described by the UT in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), see [§27]: *"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*."

6. The Court also upheld the UT's application of this test to the specific facts in *KO* itself *"44. …Nor do I have any difficulty in accepting the submission that the children, who have enjoyed a close and loving relationship with their father, will find his absence distressing and difficult to accept. But it is hard to see how that would be any different from any disruption of a genuine and subsisting parental relationship arising from deportation. As was observed by Sedley LJ in AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 248: 'The tragic consequence is that this family, short-lived as it has been, would be broken up for ever, because of the appellant's bad behaviour. That is what deportation does.'*

7. *HA [Iraq]* [2020] EWCA Civ 1176 does not lower the threshold of "unduly harsh". Underhill LJ, approves the formulation of McCloskey J in *MK (Sierra Leone),* approved by Lord Carnwarth in KO. The SSHD takes the view that *KO* is very clear about there being a need to identify a level of harshness above that which would ordinarily be experienced by a child if a parent were deported.

> At §42 of HA, Underhill LJ reminds himself of §23 of *KO. '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.'* This is an unambiguous statement and fundamental to the ratio of all but one of the cases approved of by Underhill LJ at §61 of *HA* (CI is a 399A case and does not involve children). At §56 of *HA* Underhill LJ warns of the "risks of treating KO as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent"'… misleading if used incautiously… no reason in principle why cases of "undue" harshness may not occur quite commonly…if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern.'
>
> *'How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.'*
>
> 8. The guidance set out in *HA (Iraq*) [2020] and more recently in *HA (Iraq)* [2022] by the Supreme Court, recognizes that the undue harsh test involves an appropriately 'elevated' standard and the circumstances should reflect that standard to a sufficient degree to outweigh the public interest.
>
> 9. At [34] (i) and (ii) the FTTJ has shown that the appellant's wife managed the affairs of the home and was the primary carer of her three daughters during the period of the appellant's incarceration. In addition, she also has the option of making alternative arrangements to enable her to continue working in the appellant's absence. There is no evidence to show that the absence of the appellant from the family unit has previously had such a detrimental impact that they could not function normally or survive without him, albeit it is recognized that the preference is for him to remain with the family as he is involved in his children's upbringing.
>
> 10. At [36] and [37], the FTTJ has also found that if the appellant is removed the family can continue to remain in contact by modern means of communication and can visit the appellant in China. As stated at [33] whilst the best interests of the children is a primary consideration it is not a determinative factor.
>
> 11. … the unduly harsh test has not been made out.

4. On 19 May 2023 FtT Judge Gibbs granted permission: …

> I have considered the grounds of appeal which criticise the judge's assessment of "unduly harsh" test with respect to the appellant's children. I find that there is some merit in the assertion that the judge failed to highlight the facts that take the separation of the children from the appellant to the level of undue harshness. I find that the grounds disclose an arguable error of law. The grant of appeal is not limited.

5. In a rule 24 response, the appellant submits that the grounds do not amount to more than disagreement.

6. Mr Mullen said that the Judge had not identified anything which reached the threshold of undue harshness, and had not explained how the appellant had discharged the burden of proof.

7. However, Mr Mullen accepted that the Judge had not misdirected herself on the law, which is set out in the decision as it is in the grounds of challenge. He also accepted that she had fallen into no error in deciding the facts.

8. I pressed the question whether the respondent, in effect, says that this as an irrational decision, beyond the scope of any Judge.

9. That is not, of course, how the grounds are framed; and Mr Mullen expressly declined to submit that on the facts found, the appeal could only rationally have been dismissed.

10. Mr Winter relied on the response and referred in particular to *HA (Iraq) v SSHD* [2021] 1 WLR at [58], referring back to guidance given at [50 – 53]. He said that the Judge, adopting the language of [58], plainly did "carefully evaluate the likely effect of the parent's deportation on the particular child" and then decided "whether the effect is not merely harsh but unduly harsh"; which, referring back to [53], involved not "an objectively measurable standard" but an "informed evaluative assessment".

11. Mr Winter did not dissent from my observation that another Judge, on the same facts, might have dismissed the appeal, without falling into error of law. However, he argued that as the respondent stopped short of a rationality challenge, nothing was shown to be wrong with the decision.

12. In closing his response, Mr Mullen said that the logic of the grounds was that the outcome should be that if the decision was set aside, it should also be reversed; there was no basis for a remit to the FtT.

13. I indicated that the appeal to the UT would be dismissed.

14. The decision is meticulous both on the facts and on the law. It clearly identifies what the Judge took as crossing the threshold into undue harshness. The respondent expressly stops short of submitting that the appeal could only rationally have been dismissed.

15. Accordingly, the Judge did not misdirect herself on the law; fell into no error of fact; and reached a conclusion within the tribunal's rational scope.

16. The respondent's grounds and submissions disclose no error on a point of law.

17. The decision of the FtT stands.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
9 January 2024