Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03942/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 20 November 2018	**On 18 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

XIAO [D]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bradshaw, instructed by Bankfield Heath, Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Xiao [D], is a male citizen of China. By a decision promulgated 16 August 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons for reaching that decision were as follows:

> 1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Xiao [D], was born on 18 November 1976 and is a male citizen of China. He entered the United Kingdom clandestinely in 1998. He

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was convicted on 8 February 2008 of being involved in the cultivation/manufacture of a controlled drug (cannabis) and sentenced to two years and eleven months' imprisonment. The appellant's sentence was reduced on appeal. He was served with a liability to deportation notice in January 2009. He appealed against the decision to deport him but his appeal was dismissed by the First-tier Tribunal on 11 May 2010. Further representations were made on the appellant's behalf but he subsequently absconded. He was encountered on 13 March 2013 during an immigration operation and was then arrested and detained. On 30 April 2014, the appellant made an application for leave to remain on the basis that he had established a family and private life in the United Kingdom. The appellant was granted bail and his appeal subsequent to a further refusal by the Secretary of State was dismissed by Judge Batiste but he was appeal rights exhausted by 25 June 2015. The appellant was detained again in July 2015 at which time he made further submissions on the basis that he had converted to Christianity and had been living as a Jehovah's Witness since January 2015. In the meantime, the appellant's partner and children have been granted indefinite leave to remain on 31 January 2016. The decision by the Secretary of State to refuse to revoke the deportation order dated 6 April 2017 was appealed by the appellant to the First-tier Tribunal (Judge G R J Robson) which, in a decision promulgated on 24 November 2017, allowed the appeal on Article 8 ECHR grounds. The appellant's asylum appeal (on the basis that he is a Jehovah's Witness) was dismissed. The Secretary of State now appeals, with permission, to the Upper Tribunal. There was no cross appeal in respect of the asylum decision of the First-tier Tribunal which the Upper Tribunal will not revisit.

2. I find that the decision of the First-tier Tribunal should be set aside. The primary challenge to the decision by the Secretary of State concerns a failure of the judge to make any finding as to whether the removal of the appellant to China would be unduly harsh. I note that the appellant's two sons (HTD and HWD) were registered as British citizens in 2016. The appellant's partner (the mother of HTD and HWD) applied for naturalisation as a citizen in February 2017.

3. As the appellant was convicted of an offence of less than four years, Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) 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.

4. It was necessary for Judge Robson to analyse all the relevant evidence and to determine whether or not the removal of the appellant from the family unit would be unduly harsh. He has failed to do this. In his decision at [118–122] the judge records that the appellant has a "strong relationship" with his children. The appellant looks after the children whilst the wife is at work. The judge noted the evidence of an independent social worker which indicated that "both boys felt very sad about the thought of their father being deported". The judge noted that both children were "clearly very attached to their father and cannot contemplate being separated from [him]". The judge concluded by finding that "the separation

> of the father from the children would have a very considerable negative impact on the children" [my emphasis]. The judge concluded that the "public interest is outwayed (sic) and that in the light of the above circumstances are acceptable". I have no idea what the second part of that last sentence is intended to mean but what is clear is that the judge has not made an unequivocal finding as to whether removal would have unduly harsh consequences. It is not enough for the judge to say that the separation of the children from the father would have a "very considerable negative impact on the children"; the same could be said in the vast majority of cases where a parent is separated from his/her children. The failure of the judge to make an unequivocal finding in respect of the relevant test has rendered his reasoning unclear and his decision unsafe. The decision will need to be remade on Article 8 grounds in the Upper Tribunal.
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> Notice of Decision
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> 5. The decision of the First-tier Tribunal promogulated 24 November 2017 is set aside. The findings and decision as regards asylum/Article 3 ECHR are preserved. There will be a resumed hearing in the Upper Tribunal (before Upper Tribunal Judge Lane) at Bradford on a date to be fixed (two hours) at or following which the Tribunal will remake the decision on the appeal on Article 8 ECHR grounds. Both parties may adduce fresh evidence prior to the resumed hearing provided they send copies of any written evidence to the other party and to the Tribunal no later than 10 clear days before the date fixed for the resumed hearing.

2. At the resumed hearing at Bradford on 20 November 2018, Mr Bradshaw appeared for the appellant. Mr Diwnycz, a Senior Home Office Presenting Officer, appeared for the respondent.

3. The appellant gave evidence in Mandarin with the assistance of an interpreter. He adopted his written statements as his evidence-in-chief. The appellant's appeal on asylum grounds was dismissed in the First-tier Tribunal, a decision which I have preserved. The appeal before the Upper Tribunal proceeded on Article 8 ECHR grounds only. The standard of proof in the Article 8 appeal is the balance of probabilities.

4. In his most recent witness statement, the appellant states that he continues to live with his wife and two children. The eldest child is 13 years old and is in year 8 of secondary school. The appellant's younger son was born in 2007 and is 11 years old. The eldest child is about to begin work on GCSE's. Both children are doing well in school. The appellant denies that he absconded (see paragraph 1 of my error of law decision).

5. I also heard evidence from Ruo Bin He, the appellant's wife. She also adopted her written statements as her evidence-in-chief. Neither the appellant nor his wife were cross-examined.

6. The Secretary of State accepts that the appellant has a genuine and subsisting relationship with his children. As both parties agree, this is a

case which will be determined by reference to the test of "undue hardship". Section 117C5 of the 2002 Act provides:

> 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.

7. Save for sub-paragraph 117B(6), Section 117B is also of general application:

> 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.
>
> .....

8. Paragraph 399(a) of HC 395 (as amended) provides:

> 399. 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; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

9. "Undue harsh" test has been recently examined by the Supreme Court in *KO* (CNL insert reference). In particular at [23] and [32]:

> 23. 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. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. 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 length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.
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> …

> 32 Laws LJ's approach has the advantage of giving full weight to the emphasis on relative seriousness in section 117C(2). However, on closer examination of the language of the two exceptions, and of the relationship of the section with section 117B, as discussed above, I respectfully take a different view . Once one accepts, as the Department did at that stage (rightly in my view), that the issue of "reasonableness" under section 117B(6) is focussed on the position of the child, it would be odd to find a different approach in section 117C(5) at least without a much clearer indication of what is intended than one finds in section 117C(2). It is also difficult to reconcile the approach of Judge Southern or Laws LJ with the purpose of reducing the scope for judicial evaluation (see para 15 above). The examples given by Judge Southern illustrate the point. On his view, the tribunal is asked to decide whether consequences which are deemed unduly harsh for the son of an insurance fraudster may be acceptably harsh for the son of a drug-dealer. Quite apart from the difficulty of reaching a rational judicial conclusion on such a question, it seems to me in direct conflict with the Zoumbas principle that the child should not be held responsible for the conduct of the parent.

10. The appellant relies upon a report by Rukhsana Farooqi, an independent social worker. Ms Farooqi considered that the separation of the children from their father would cause an emotional response similar to bereavement [46] – [48]. She noted that "both boys felt very sad about the thought of their father being deported." She found that there was "a great deal of emotional warmth between the children and their parents" and that it was "a very close cohesive and warm family with a close relationship. I found that the boys could not "contemplate being separated from their father.""

11. Both children are British citizens as is their mother. Mr Bradshaw submitted that the education of the children would be very severely disrupted if they accompanied the appellant to China. The children would be also deprived of exercising their rights as a British citizens if they were to leave the country permanently.

12. I am mindful of the education of these children, the eldest child, in particular, is reaching his GCSEs. On the evidence, I find that it would be unduly harsh for the children to accompany their father and, presumably, their mother to China. The remaining question in this appeal is whether it would be unduly harsh for the appellant to be deported whilst the children and their mother remain living in the United Kingdom.

13. I am mindful of the recent judgment of the Supreme Court in *KO (Nigeria) 2018 UKSC 53*. The assessment of 'undue harshness' must be made irrespective of the fact that the appellant has committed serious criminal offences involving drugs. As regards the allegation that the appellant absconded, I accept Mr Bradshaw's submission that the Secretary of State has not provided any evidence to support that allegation. On the standard of proof of the balance of probabilities, I find that the appellant did not abscond as alleged. However, that finding is of little relevance to the issue

in this appeal. Mr Bradshaw submitted that the eldest child's approach to the taking of his crucial GCSEs was an important a factor in the appeal. I accept that being separated from his father with whom he has a close relationship at a time when, for the first time in his life, the child is required to submit to serious study in preparation for public examinations may prove very difficult. However, unduly harsh consequences have to be more severe than circumstances which may occur in any case of separation. The children's possible reactions to deportation which are described in Ms Farooqi's report together with the likely difficulties that the elder child will suffer coming up to his GCSEs do not, in my opinion, enter the area of undue harshness. Distress similar to bereavement, emotional turbulence and a struggle to achieve academically against a background of such emotions are the likely consequences for any children separated from a parent by deportation. These are consequences which may be described as harsh or even 'duly' harsh (in the sense that they are likely to occur in any family) but they cannot, in my view, be described as unduly harsh. In reaching that conclusion, I have been careful to base my analysis on the evidence and to avoid speculation.

14. I have had regard to those parts of Section 117B which apply in this instance. I have considered also the effect of deportation upon the appellant's partner. Whilst I recognise that she would suffer distress by reason of the appellant's deportation, I do not find, by reference to [13] above, that the effect of that deportation upon would be unduly harsh. I find that the appeal should be dismissed.

Notice of Decision

The appellant's appeal is dismissed.

No anonymity direction is made.

Signed Date 1 February 2019

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 1 February 2019

Upper Tribunal Judge Lane