Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03972/2018

THE IMMIGRATION ACTS

Heard at the Birmingham CJC	**Decision & Reasons Promulgated**
On 24 January 2020	**On 11 February 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA
(ANONYMITY DIRECTIONS APPLY)

Respondent

Representation:
For the Appellant: Ms H Aboni
For the Respondent: Mr A Mackenzie, Counsel

REMAKING DECISION AND REASONS

Background

1. These are a written record of the oral reasons given for my decision at the hearing.

2. This is a remaking decision following the finding of an error of law by Deputy Upper Tribunal Judge Lever in a decision promulgated on 14 May of 2019. The issues in the remaking decision are, albeit very serious, very narrow. Judge Lever's error of law decision is annexed to these reasons.

3. As recorded in subsequent directions given by Judge Lever on 9 July 2019, on 10 December 2015, the respondent notified the appellant that a deportation order was to be issued against him as he was a foreign criminal who had been sentenced to a period of imprisonment of at least twelve months. In the appellant's case, he was sentenced to a period of imprisonment of two years. Following representations made by the appellant, the respondent refused his human rights claim on 1 February 2018 and the appellant appealed that decision. His appeal was heard by the First-tier Tribunal ('FtT') on 11 September 2018 and the FtT allowed the appellant's human rights claim. The respondent made an application for permission to appeal that decision and permission was granted. On 3 April 2019, Judge Lever heard the appeal in the Upper Tribunal on whether or not an error of law had been made by the FtT. For reasons provided in the decision promulgated on 14 May 2019, Judge Lever found that an error of law was made by the FtT in this case and decided that the FtT decision needed to be set aside and the decision remade in the Upper Tribunal.

4. I will come to provide further detail as to exactly the errors of law and in particular the scope of appeal identified. On finding an error of law, Judge Lever gave directions, which provided that the parties be at liberty to provide fresh evidence so long as it complied with the appropriate Upper Tribunal rules and that there should be a resumed remaking hearing in the Upper Tribunal. In that context, more recent evidence, not limited to, but focusing on, a report of a consultant psychiatrist, Dr C Pourgourides, dated 29 September 2019 was produced and indeed that is the report on which both representatives before me focused.

5. As recorded by Judge Lever in the error of law decision, which is annexed to this decision, at paragraph 9:

> "*9. The central issue was whether the appellant could satisfy the relevant provisions of the Immigration Rules, namely paragraph 398(a) or Section 117C(3) of the 2002 Act. In both instances the issue was whether the effect of deportation would be unduly harsh on the couple's child.*
>
> *10. The judge had concluded that it would not be unduly harsh for the appellant to be removed to India but his wife remain in the UK (paragraph 129). The grounds for permission to appeal did not find that the decision was arguably erroneous and it is indeed sustainable for the reasons provided by the judge. The judge had further concluded that it would be unduly harsh for the child to expect to relocate to India in all the circumstances, principally those summarised by him at paragraph 133 of the decision. Again the grant of permission had found that no arguable legal error was made in the finding and it is also a sustainable finding and the adequate reasons were provided by the judge at paragraph 133.*
>
> *11. The judge had then considered as he needed to, whether it would be unduly harsh upon the child if the appellant was removed to India in circumstances whilst the child remained in the UK with his mother and the extended family members referred to within the evidence. The judge had acknowledged that it was not an easy decision but had decided it would be unduly harsh for reasons provided essentially summarised at paragraph 135. The judge referred to the 'hugely negative impact upon the son that*

> *would not be compensated by indirect contact, the fact the appellant had only one conviction and that he did not present a high risk of reoffending.' In respect of the first factor the judge clearly was influenced by the written evidence of a social worker, Ms Harris."*

6. Judge Lever then went on to consider the case law of WZ (China) [2017] EWCA Civ 795 and the well-known authority of KO (Nigeria) [2018] UKSC 53 and in particular paragraph [14] of WZ (China), which stated:

> *"I bear in mind that [the appellant] has an established family life in this country, that his family and children have UK nationality and that his wife would have to give up work to look after the children if he were removed and they were to remain in this country. However, none of those facts takes his case out of the ordinary. Deportation necessarily results in the break-up of the deportee's family if they remain in this country after his removal."*

7. Judge Lever then went on to consider KO (Nigeria) as consistent with that, in particular noting at paragraph [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 SSHD [2011] EWCA Civ 248."*

8. Judge Lever held that the FtT had erred in law as the decision did not provide adequate reasons for why the effect of the appellant's deportation would be unduly harsh on hi son, given that that would be the normal consequence of deportation. The FtT relied on the social worker's statement, as noted in the grounds granting permission, which the respondent criticised as providing little or no evidence to support her contentions on potential future risks. Essentially, it was asserted that the social worker had strayed into speculation.

9. Judge Lever concluded that there was nothing on the face of the evidence and inadequate reasons provided by the FtT to indicate why this case fell outside the ordinary in terms of the necessary effects of deportation as referred to both in WZ and KO.

Identified issues and preliminary matter

10. I discussed with Ms Aboni and Mr Mackenzie the fact that the Court of Appeal in a separate case has granted permission on the issue of whether section 117C(5) of the 2002 Act relating to the effect on the child being unduly harsh, required the effect to relate to both that child living outside the UK; and remaining in the UK without their deported parent, as was required by paragraph 399 of the Immigration Rules. Permission had been granted to the Court of Appeal in respect of an appeal which I understood would be heard on 12 March 2020 to consider the point, which if it were confirmed that either one or other of those criteria but not both was required for the purposes of section 117C(5) of the 2002 Act, might be determinative in the appellant's favour. Mr Mackenzie indicated that his client wished to proceed with the hearing,

whilst Ms Aboni sought an adjournment pending that decision. I ultimately concluded that it would be in accordance with the overriding objective that I proceed. I did so on the basis that if the current understanding of the law, namely that unduly harsh within the meaning of Section 117C(5) imported both requirements that was a matter that could be readily rectified in the appellant's favour if there were a finding that he had not met the test of undue harshness in relation to separation, whereas conversely, if I found that it would be unduly harsh for the appellant to be separated from his son, then the Court of Appeal's decision would not affect my remaking. The principal benefit with proceeding today was that it would not be necessary for there to be a further hearing and that the remaining issues by reference to the undue harshness of the separation of the appellant from his child could be considered today. In the circumstances, I regarded it as in accordance with the overriding objective that I proceed and I did not grant the application for an adjournment by Ms Aboni. I should emphasise that no other basis for the adjournment application was made and it was solely on the issue outlined.

11. In terms of the scope of the issues, it is important to note the narrowness (albeit the seriousness) of the issues. Ms Aboni and Mr Mackenzie agreed both the correct legal analysis of the requirement of undue harshness and they agreed that in respect of the report of Dr Pourgourides, her conclusions would, had those conclusions been justified, meet the requirements of undue harshness. I refer to the agreement on the narrowness of the issues because it then limits the findings of fact necessary in this remaking decision.

12. The correct legal analysis of the test under section 117C(5) of the 2002 Act (and not a substitution for that test) was agreed between Ms Aboni and Mr Mackenzie as being that set out at [11] to [19] of Mr Mackenzie's skeleton argument:

> *"11. …the Supreme Court said that when deciding what is unduly harsh the focus is on the child and matters relevant to the public interest do not require to be weighed in the balance other than is inherent in the fact that Section 117C is engaged at all. It is simply a matter of looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. The phrase moreover denotes something severe, or bleak and means more than just uncomfortable, inconvenient, undesirable or merely difficult: KO (Nigeria) at paragraph [27].*
>
> *12. At the same time, however, the Supreme Court also warned against inappropriately elevating the threshold for success: see [23], where Lord Carnwath pointed out that the test is not one of the very compelling reasons.*
>
> *13. In none of the individual cases in KO (Nigeria), by contrast to this one, is any finding recorded that the children concerned risked facing mental health or developmental difficulties as a result of separation from the person being deported. Nor does KO (Nigeria) say that developmental or mental health difficulties are necessarily or normally to be expected for children whose parents are deported.*
>
> *14. Other authorities point in the same direction (albeit it is accepted that authorities predating KO (Nigeria) must be approached with care as they may have applied the wrong test) …*

> *15. By contrast, in SSHD v ZP (India) [2016] 4 WLR 35 (which also predates KO (Nigeria)), the Court of Appeal upheld a decision of the FtT allowing an appeal against refusal to revoke a deportation order, where there was evidence from family members and a child psychologist that the child in question was suffering psychological harm as a result of separation from his deported parent."*

13. The written submissions go on to deal with the authority of SSHD v JG (Jamaica) [2019] EWCA Civ 982, noting of course that that was a case dealing with very compelling circumstances.

> *"18. Other cases applying KO (Nigeria) of which the appellant was aware such as SSHD v KF (Nigeria) [2019] EWCA Civ 2051 similarly do not refer to any evidence of potential damage to the mental health of any children concerned."*

14. Paragraph [19] of the skeleton argument concludes (and both representatives were in agreement as to the correctness of that conclusion):

> *"What follows from KO (Nigeria) as applied in JG (Jamaica) as well as from the earlier decision in ZP (India) is this: the threshold in 117C(5) is met if there is evidence showing a harsh effect on a child or partner which goes materially beyond what is normally to be expected where their family member is deported. It is not necessary that the effect should go substantially or extensively beyond what is normally expected."*

15. I discussed Ms Aboni and Mr Mackenzie the most recent report of Dr Pourgourides and in particular her conclusion at page [21] of the supplemental bundle:

> *"Although the decision as to whether separation would be unduly harsh is a matter for the Tribunal, I am of the view that the foregoing discussion evidences the potentially highly negative possible effects on [child A] arising from a separation from his father."*

16. Ms Aboni expressly accepted that if this were a conclusion that had been permissibly open to the expert to make, then it did meet the test of Section 117C(5).

17. On other preliminary matters, I discussed whether it was necessary for live witness evidence to be heard from any family members and whether they would be able to do so. Neither Mr Mackenzie nor Ms Aboni indicated that they wished to lead on any evidence, although the appellant's family members were present and willing to do so. This is noteworthy because of subsequent criticism that Dr Pourgourides' report was reliant upon what Ms Aboni asserted was self-serving reporting of the appellant's son's mental health difficulties, by his parents, which Dr Pourgourides had simply recited. I emphasise that Ms Aboni did not seek to cross-examine any of the witnesses who were in attendance in the Tribunal today.

18. Having identified these issues, I therefore come on to the crux of the submissions.

The Secretary of State's submissions

19. Ms Aboni accepted that the whilst the expertise of Dr Pourgourides was not challenged and she could be treated as an expert witness, first, she had indeed relied solely on the account of the appellant's family members as to the son's distress, in particular when the appellant had been in prison. These reports were consequently self-serving and were absent of any reports from any third parties or schools as to the

son's distress. She also added that they were not based on any long-term observations but a single meeting and assessment of the child.

20. Ms Aboni also asserted that the report was internally inconsistent, as it referred at page [6] to the appellant's son as a 'happy, intelligent, sociable, well-adjusted child growing up in a loving family', which was not consistent with the assessment of an anxiety disorder. She added that the availability of family support for that child, in the event of the appellant's removal, had been properly considered by the FtT, notwithstanding the finding of an error of law.

The appellant's submissions

21. The parties were agreed on the correct legal analysis and the sole question was whether I could have confidence in the conclusion of Dr Pourgourides. One point to note, if it needed emphasising, was the significant expertise in terms of her previous credentials, which were set out at pages [22] and [23] of the supplemental bundle and which indicated that she had been a member of the Royal College of Psychiatrists since 1994. Ms Aboni accepted that Dr Pourgourides's expertise as an expert in the field was unchallenged.

22. Meeting the central criticism head on in relation to a concern that Dr Pourgourides had simply recited self-serving evidence from the appellant's family, this could be dealt with in two ways. First of all, that was an assertion that was often made, but more rarely supported and in that regard, I was referred to the authority of R (M) v IAT [2004] EWHC 582 (Admin), where Mr Justice Moses rejected as "unusual" and "unsupportable" the view that psychiatrists accept their patients' account uncritically. Given the expertise of Dr Pourgourides over many years, there was nothing to regard this report as being 'unusual' or supporting the view that Dr Pourgourides had accepted the account uncritically.

23. Second, however, and more importantly, it is clear that in fact the child's supporting family were not the only source of evidence. Whilst Dr Pourgourides had to interview the child in a very controlled environment, noting that the child was not fully aware of the circumstances of his father's offending, the evidence is explicit on the point about the direct experiences of that child. The report was not internally inconsistent, balancing the child's upbringing with the effect on that child of the appellant's imprisonment and subsequent anxiety. It made clear that the presence of family support could not adequately mitigate the risk of real harm to the appellant's son, if the appellant were removed.

Discussion and conclusions

24. I accept the parties' agreed proposition that what follows from KO (Nigeria) as applied in JG (Jamaica) as well as from the earlier decision in ZP (India) is this: the threshold in 117C(5) is met if there is evidence showing a harsh effect on a child or partner which goes materially beyond what is normally to be expected where their family member is deported. It is not necessary that the effect should go substantially or extensively beyond what is normally expected.

25. As also agreed between the parties, Dr Pourgourides' expertise as an expert in respect of the potential psychiatric harm to the appellant's son, in the event of the appellant's removal, is unchallenged. Her report is based on interviews not only with the appellant, but with other family members and the appellant's son himself. There is no suggestion that Dr Pourgourides is intentionally biased, but instead that her information is based on a lack of objective source evidence. The report itself is lengthy, detailed and gives a full explanation for how the conclusion is reached.

26. I accept Mr Mackenzie's submission that the report does not rely solely on an account from the appellant or his wife. Dr Pourgourides interviewed the appellant's son, as recorded at page [12] of the report:

> *"He greeted me somewhat shyly but with some confidence. He sat between his parents while I introduced myself, using the previously agreed introductory and explanatory remarks I had discussed with his parents. He understood I was a psychiatrist and would be compiling a report. He readily agreed to proceeding with meeting me without his parents though we all agreed he could call upon them if he needed to, which did not prove necessary.*
>
> *He made good eye contact and relaxed readily. He gave a good account of himself. He was articulate and thoughtful. He smiled appropriately at times and appeared excited and engaged when discussing aspects of his home, school and social life.*
>
> *When discussing his previous separation from his father, his demeanour markedly changed and he became visibly distressed and tearful, becoming less communicative and more withdrawn."*

27. The report continued with a discussion of his current mood and his progress at school. At page [14], it stated:

> *"He had been in year 4 and starting preparation work for his 11 plus exams. He said he didn't know how to study or learn at his time and doing this with mum (instead of dad) proved quite stressful. She had 'left everything to the last minute' whereas dad would have planned better. It was very upsetting and he never knew when dad would come back. Dad would send him stories in his letters and call him and this made him feel a little bit better.*
>
> *At this [child A] became tearful, as described above. I didn't persist in detailed questioning or probing as I was mindful of his distress. He described that hearing his father's voice had been difficult as it made him miss him all the more and he felt scared and sad. He told me that 'mum knew [he] was sad but [he] tried not show it and decided to keep it to [himself] and try and get on'.*
>
> *In response to a direct question he said that memories of this time do come back into his mind but he has tried to ignore them. At such times these feelings make it hard for him to sleep."*

28. As noted from the previous passage, the assessment was conducted directly with the appellant's child in the absence of his parents and included an assessment of the consequences of the appellant's previous absence, when he was in prison. Dr Pourgourides made an assessment under the Revised Children's Anxiety and

Depression Scale, or RCADS. Her summary of that assessment at [15] was as follows:

> *"The striking finding is that [child A] has scored a clinically significant score above the threshold for separation anxiety. It is also apparent that he otherwise scores most highly for obsessive compulsive symptoms, but the score is below the threshold of clinical significance."*

29. Dr Pourgourides then referred to the independent social worker report, which referred to increased risk of developing mental health issues, about which Judge Lever had concerns that such concerns were unsubstantiated. However, Dr Pourgourides continued at page [16]:

> *"Conclusions*
>
> *I have based my opinion on a range of sources, including the information contained in my letter of instruction; the written reports and documents made available to me in advance, in particular the report provided by the independent social worker, my interview and observations with the [parents], my mental state examination of [child A] and the information provided in the questionnaires he completed. In addition, I have referred to other evidence in the academic literature which I list where applicable below. I am of the opinion that [child A] does not currently meet diagnostic criteria for any psychiatric, psychological or neurodevelopmental disorder.*
>
> *He does, however, currently display, and has displayed in the past, some signs and symptoms of emotional and behavioural disturbance, which whilst not currently amounting to a mental disorder are nonetheless significant, and I discuss this below. He is described as, and appears to be, a happy, intelligent, sociable, well-adjusted child growing up within a loving family."*

The report further states:

> *"There are however features in his history which may predispose him to developing a mental disorder or render him more vulnerable to stress. These features are independent of the later impact of the separation from his father in the past and the current uncertainty about the future which I will discuss later in my conclusions.*
>
> *The first is the evidence from the history provided by the parents of signs and symptoms of significant separation anxiety in [child A's] early childhood. Separation anxiety is the manifestation of distress on separation from home or major attachment figures. It is normal in very young children … [Child A's] anxiety was significant in that it persisted beyond this age to a significant degree. The symptoms of this appear to have resolved spontaneously, which is not uncommon … However, I think this history predisposes him to the development of a mental disorder particularly when separation may be likely. This predisposition is not possible to quantify but it is significant.*
>
> *The second relevant predisposing factor concerns aspects of his personality, namely the fact he is described as a thoughtful, sensitive, emotionally astute child who is able to read and respond to the emotional state of others and with a tendency to hide his feelings for fear of causing concern to the adults around him. This personality profile also predisposes him to some degree to the development of a mental disorder.*

Turning to the issue at hand, in predicting the impact of a future possibly permanent separation from his father, it is relevant to examine the impact of the past, protracted separation from him during his incarceration and to some extent also the subsequent shorter separations during the family holidays.

The description of his behaviour and symptoms during his father's incarceration indicate that he may have met the diagnostic criteria for adjustment disorder. … An adjustment disorder is the development of emotional or behavioural symptoms in response to an identifiable stressor. Such symptoms or behaviours are clinically significant as evidenced by marked distress … The separation anxiety he experienced during his father's incarceration was clinically significant. There was evidence of fear of separation; difficulty in separating at night; repeated occurrence of physical symptoms such as stomach-ache or nausea on occasions that related to separation from a major attachment figure.

I note however that the separation anxiety he experienced during his father's incarceration actually persisted over time even following his father's return home. … It has only in recent months diminished according to his parents. However, I note that on objective, validated assessment using the RCADS I administered, he continues to score for this to a clinically significant degree. Hence he is still suffering from a clinically significant degree of separation anxiety…

This persisting separation anxiety therefore acts further as a predisposing factor to the possible development of a mental disorder. [Child A] displays a number of other behaviours which act as markers of possible underlying anxiety. These are the behaviours around handwashing and the routines relating to adjusting his ties and shoes. These behaviours are obsessive-compulsive in nature but are not currently clinically significant …

It follows from the foregoing therefore that a future, more prolonged or even permanent separation is likely to be particularly stressful for [child A] and I am of the view that its impact upon him would be highly detrimental, indeed harmful and potentially catastrophic. It would place him at a very high risk of developing a significant mental disorder…

The risk would be mitigated but not entirely offset by a range of protective factors such as the presence of his mother, access to the support of his extended family, and his school and social networks."

30. The report then deals with the wider objective evidence about the loss of parents compared with permanent separation from them. This in particular related to an analysis of the important role that fathers played; that parental roles were not interchangeable and the limited extent to which one parent could compensate for the absence of another. Dr Pourgourides noted child A's particularly strong attachment to his father for a number of reasons, including their compatible personalities. Dr Pourgourides continued:

"[Child A] is also now at an age in his development where the presence and significance of a male role model is particularly important to him. This identification is arguably emerging with the onset of puberty when he may begin all the more to see his father as a role model. Again, the loss of his father would be mitigated by the presence of other

adult males in his wider family but in my view the evidence is that this would not be sufficient to offset the loss of his father in particular."

31. Dr Pourgourides then reached the conclusion already outlined.

32. Having considered the evidence set out above, I do not except Ms Aboni's submission that Dr Pourgourides had simply relied upon source material which might be self-serving from child A's relatives. She interviewed the appellant's son alone, and assessed him by reference to RCADS, a diagnostic tool.

33. Second, I rejected Ms Aboni's submission that Dr Pourgourides' report was internally inconsistent. The reference to child A being a happy, intelligent, sociable and well-adjusted child has to be seen within the context of the wider assessment and conclusions referred to. The report contained clear and detailed reasons not only on child A's predisposition to mental health issues but the reasons why they had manifested themselves in the past and the likelihood of them manifesting themselves in the future. The report had referred to the very high risk of child A developing a significant mental health disorder.

34. Dr Pourgourides had expressly considered the issue which Ms Aboni raised about the extent to which child [A]'s extended family could provide him support and the extent to which that would mitigate the harm to him as a result the appellant's removal. She noted that whilst it would mitigate, to some extent, the harmful effects, it would not do so entirely and it was in that context of mitigating factors that she concluded that the separation of child A and the appellant would be potentially catastrophic.

35. In summary, the three challenges that Ms Aboni raised, namely (1) that Dr Pourgourides had uncritically accepted evidence that was self-serving is not sustained because child A was also assessed by reference to objective diagnostic criteria; (2) the assertion of internal inconsistencies in the report is not sustained when the reference to child A having a happy childhood is considered in context; and (3) the mitigating factors of child A's wider family were considered and expressly analysed by Dr Pourgourides but nevertheless she reached the conclusions that she did.

36. In the circumstances, and noting that Ms Aboni accepted that if the conclusion reached by Dr Pourgourides was one that was reasonably open to her as an expert to reach, it does meet the legal test of separation between the appellant and child A as being 'unduly harsh', I concluded without reservation that the report produced by Dr Pourgourides, whose expertise is unchallenged, was a conclusion open to her to reach.

37. On one final aside, I accept the force of Mr Mackenzie's submission that where the relatives of the appellant provided input into Dr Pourgourides' report, they had been regarded by the FtT as particularly impressive witnesses. In particular, Judge Aziz noted at [106]:

"I next turn to the appellant's wife. It was very clear from the way in which she gave her evidence and the emotions she displayed whilst sitting in the public

> *gallery listening to the evidence of her husband and other family members that the appellant's conviction has impacted upon her enormously. It goes without saying, but she has also been a victim in all of this. She was courageous in giving her evidence and I found her to be a highly credible witness."*

38. At [107], the FtT also noted that in hearing evidence from the appellant's father and brother-in-law, whilst it was not an easy matter for them to come to give evidence, nevertheless they were accepted as credible witnesses. Whilst the FtT may have had concerns about the appellant's credibility, nevertheless the fact that Dr Pourgourides had referred to evidence from the appellant's wider family, where those same family members had been available to give witness evidence today, but their credibility and honesty has not been called into question until in closing submissions by Ms Aboni, her criticism of their input as self-serving, lacked force. In any event, Dr Pourgourides drew her conclusions from a number of sources, including an independent assessment that she carried out of child A alone.

Conclusion

39. It follows from my findings set out above and on the basis of the narrowly agreed issues between the representatives that for the purposes of section 117C(5) of the 2002 Act, that the appellant's separation from child A would be unduly harsh and in the circumstances, I remake the FtT's decision by allowing the appellant's appeal on human rights grounds.

Notice of Decision

The appeal is allowed on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed J Keith Date 7 February 2020

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, I have decided to make a fee award to the appellant of £140.

Signed J Keith Date 7 February 2020

Upper Tribunal Judge Keith

Annex – error of law decision

IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03972/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3rd April 2019

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR MANAV ARORA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie
For the Respondent: Ms S Cunha

DECISION AND REASONS

Introduction

1. The Appellant born on 28th February 1978 is a citizen of India. The Appellant was represented by Mr Mackenzie of Counsel. The Respondent was represented by Ms Cunha a Presenting Officer.

Substantive Issues under Appeal

2. On 10th December 2015 the Respondent had notified the Appellant that a deportation order was to be issued against him as he was a foreign criminal who had been sentenced to a period of imprisonment of at least twelve months. In response to that matter the Appellant made a number of representations sought to challenge the decision to deport on the grounds that such a decision would be in breach of his human rights. The Respondent refused his human rights claim on 1st February 2018. The Appellant appealed that decision.

3. His appeal was heard by Judge of the First-tier Tribunal Aziz sitting at Birmingham on 11th September 2018. The judge had allowed the Appellant's human rights claim. The Respondent had made application for permission to appeal that decision but that permission to appeal was refused by the First-tier Tribunal on 19th October 2018. The Respondent had renewed that application to the Upper Tribunal and on 24th January 2019 permission to appeal was granted. The Upper Tribunal Judge found that it was arguable that there had been insufficient reasons given for the finding that the deportation of the Appellant would be unduly harsh upon the child if the Appellant was removed from the United Kingdom with his child remaining with his mother and extended family particularly given that a number of the issues relied upon by the judge for the normal consequences of deportation or related to statements and submissions not supported by evidence. It was also argued that the judge had factored into this aspect irrelevant factors including the fact the Appellant had only one conviction and did not represent a high risk of reoffending. Directions were issued for the Upper Tribunal firstly to decide whether an error of law had been made in this case and the matter came before me in accordance with those directions. A Rule 24 response had been provided by the Appellant dated 11th February 2019.

Submissions on Behalf of the Respondent

4. The Presenting Office relied on the Respondent's grounds that had been provided to the First-tier and renewed in the permission to appeal before the Upper Tribunal. The main ground was identified as being that the judge had failed to properly consider whether it was unduly harsh for the child to remain in the UK if the Appellant was removed and it was submitted that no good reasons had been given. I was referred to the case of **WZ (China) [2017] EWCA Civ 795** and in particular paragraph 14 which, it was submitted were similar factors to that in the case before me and reinforced the point that deportation necessarily causes family breakup if the family remain in the UK after the Appellant's removal.

Submissions on Behalf of the Appellant

5. It was submitted that the only real ground for permission to appeal that had been granted was in respect of the question of whether it was unduly harsh for the child if the Appellant was removed from the UK. It was submitted by Mr Mackenzie that the Grounds of Appeal amounted to essentially a disagreement with the judge's findings which were reasonable. It was said that the Respondent's submission ignored the social worker's report and the Appellant's wife's evidence and that the question of unduly harsh was a matter for the judge and he had focussed on the

correct matters. It was said that as long as the judge has identified matters that went beyond the normal harshness occasioned by deportation then that was enough. The case of **KO** was referred to me in this instance.

6. At the conclusion I reserved my decision to consider the submissions and evidence in this case. I now provide that decision with my reasons.

Decision and Reasons

7. The Appellant had married a British citizen in India in 2002 and had entered the United Kingdom in 2003. He had been granted indefinite leave to remain in 2004 and the couple's son had been born in 2006. In September 2015 the Appellant had been convicted of one count of sexual assault and sentenced to two years' imprisonment with a requirement to sign on the Sexual Offenders Register for a period of ten years. The Appellant had argued that his deportation would interfere with his family life and with his private life.

8. Paragraph 398(b) of the Immigration Rule applied in this namely that deportation of the Appellant from the UK was conducive to the public good and in the public interest given his sentence of imprisonment was for a period of more than one year but less than four years.

9. The central issue was whether the Appellant could satisfy the relevant provisions of the Immigration Rules namely paragraph 398(a) or Section 117C(3) of the 2002 Act. In both instances the issue was whether the effect of deportation would be unduly harsh on the couple's child.

10. The judge had concluded that it would not be unduly harsh for the Appellant to be removed to India but his wife remain in the UK (paragraph 129). The grounds for permission to appeal did not find that that decision was arguably erroneous and it is indeed sustainable for the reasons provided by the judge. The judge had further concluded that it would be unduly harsh for the child to expect to relocate to India in all the circumstances, principally those summarised by him at paragraph 133 of the decision. Again the grant of permission had found that no arguable legal error was made in that finding and it is also a sustainable finding and adequate reasons were provided by the judge at paragraph 133.

11. The judge had then considered as he needed to, whether it would be unduly harsh upon the child, if the Appellant was removed to India in circumstances whilst the child remained in the UK with his mother and the extended family members referred to within the evidence. The judge had acknowledged that was not an easy decision but had decided it would be unduly harsh for reasons provided essentially summarised at paragraph 135. The judge referred to the "hugely negative impact upon the son that would not be compensated by indirect contact, the fact the Appellant had only one conviction and that he did not present a high risk of reoffending." In respect of the first factor the judge clearly was influenced by the written evidence of a social worker Miss Harris.

12. The case law of **WZ (China) [2017] EWCA Civ 795** and **KO (Nigeria) [2018] UKSC 53** (in cases referred to within the judgment) provide clear guidance on this issue. **WZ (China)** at paragraph 14 stated:

> "In my judgment the Upper Tribunal was right to set aside the determination of the First-tier Tribunal. Quite apart from the reasoning of the First-tier Tribunal I cannot see how a Tribunal properly applying the law as it was at the date it heard the Appellant's appeal and given the public interest in the deportation of a person sentenced to two years' imprisonment the weight that was appropriate could have allowed his appeal. I take into account that until he committed his offence he had been of good character in that the reports before the Tribunal showed that he was unlikely to reoffend. I bear in mind that he has an established family life in this country, that his family and children have UK nationality and that his wife would have to give up work to look after the children if he were removed and they were to remain in this country. However none of these facts takes his case out of the ordinary. Deportation necessarily results in the breakup of the deportee's family if they remain in this country after his removal".

13. It is right to say that the facts in this case disclose no basis for a shift in the general principles clearly asserted in that judgment of the Court of Appeal.

14. In **KO** Lord Carnwath had looked at the Upper Tribunal decision earlier in **KO** together with other decisions in **MK** and **MAB** referred to within the body of the judgment. At paragraph 32 of **KO** it was noted that if Section 117B(6) focussed on the position of the child as accepted by the Respondent 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). Further the court said that quite apart from the difficulty of reaching a rational judicial conclusion on the question of individual's culpability it seemed to be in direct conflict with the **Zoumbas** principle that the child should not be held responsible for the conduct of the parent. At paragraph 36 in **KO** the court said

> "It is notable that in that passage contrary to the thrust of the earlier discussion no account is taken of the seriousness of the particular offences or of the particular criminal history of the father. On its face that approach seems no different from that which I have accepted as correct in the earlier discussion. It is also consistent with that in the end adopted by the Upper Tribunal on the facts of **MAB** and by contrast with its response to the much more severe situation considered in **MK**."

15. The court had further quoted from paragraphs 43 and 44 of the original decision in **KO** and in particular I note at paragraph 44 the following "nor do I have any difficulty in accepting the submission that the children who have enjoyed a close and loving relationship with their father who will find his absence distressing and difficult to accept. But 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 consequences that this family short lived as it has been would be broken up forever because of the Appellant's bad behaviour. That is what deportation does." This family relationship was not of course short lived but the point is the same. Nothing out of the ordinary has been identified to demonstrate that in the case of this particular family when balanced against the powerful public interest considerations in play although the children will find separation from their father to be harsh it will not be in all of the circumstances unduly harsh for them each to remain in the United Kingdom after their father is removed to Nigeria."

16. Paragraph 135 of the judge's decision does not sufficiently provide adequate reasons why the removal of the Appellant would be unduly harsh to the child remaining in the UK with his mother given that would be the normal consequence of deportation. If in terms of abnormal features the judge was relying upon the social worker's statement, as noted the grounds granting permission commented that the Respondent's submission reflected the decision essentially there was little or no evidence to support the contentions raised by the social worker in what may be, it was said, potential future risks. Essentially those were speculative matters not evidence based. It is also the case as noted in the grounds granting permission that the judge appears to have factored into his reasoning in paragraph 135 matters that were irrelevant.

17. There is nothing on the face of the evidence and no sufficiency or adequacy of reasons provided to indicate why this case fell outside the ordinary in terms of the necessary effects of deportation as referred to both in **WZ** and in those cases within and including **KO**. It is for those reasons that a material error of law was made in this case.

Notice of Decision

18. I find that a material error of law was made by the judge in this case such that the decision of the First-tier Tribunal needs to be set aside and the decision remade in the Upper Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed J. Lever Date 14/5/19

Deputy Upper Tribunal Judge Lever