Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/00994/2020 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 20 April 2021 **On 28 April 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

CM

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr C Brown, instructed by Maya Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Zimbabwe with date of birth given as 16.6.80, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 22.9.20, dismissing his appeal against the decision of the Secretary of State, dated 19.9.19, to refuse his human rights claim and to maintain the decision to deport him from the UK made following his criminal conviction for serious drug-dealing offences for which he was sentenced to a term of 33 months' imprisonment.

2. Permission to appeal was refused by the First-tier Tribunal on 21.10.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge McWilliam granted permission on 11.11.20, on the basis that it is arguable that the judge erred when assessing 'unduly harsh', when considered in the light of the decision of the Court of Appeal in HA (Iraq) v SSHD [2020] EWCA Civ 1176, giving guidance on KO (Nigeria) v SSHD [2018] UKSC 53 and the term 'unduly harsh' found in s117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules. The grant of permission was on a ground not pleaded by the appellant in the grounds of application for permission to appeal to the Upper Tribunal.

3. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. The Upper Tribunal has also received and I have taken into consideration the respondent's skeleton argument, dated 15.1.21.

4. HA (Iraq) was promulgated on 4.9.20, a few days before the First-tier Tribunal appeal hearing and is not referenced in the decision. The point relied on in the grant of permission is set out between [51] and [58] of HA, guidance as to the meaning of 'unduly harsh', in the context in that case where the appellants contended that the effect of deportation on their children would be 'unduly harsh' within the meaning of Exception 2 in s117C(5) of the 2002 Act. At [51] Lord Justice Underhill considered the essential point that the criterion of undue harshness sets an elevated bar and carries a must stronger emphasis than mere undesirability. The various synonyms, some of which were cited by Judge Handler at [64] of her decision, were said to be helpful. However, it was "important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C(6)….The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal… and the (very high) level applying to serious offenders," (HA paragraph [52]).

5. At [53] Underhill LJ stated, "It is inherent in the nature of an exercise of the kind required by section 117C(5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of

deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

6. At [56] Underhill LJ agreed that a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent" may be misleading if used incautiously; "there is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, 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. That would be dangerous. 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"."

7. It is important to note that at [57] Underhill LJ concluded on this point, "Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50-53 above."

8. Mr Brown's submissions to me largely ignored the grounds as pleaded and focused on the grant of permission's reference to HA. His three points were advanced as follows:

   i. That the judge misdirected herself as the legal test as to what constitutes 'unduly harsh';

   ii. That it is unclear from the decision whether any relevance was given to the immigration status of the partner, JD, who had been granted exceptional leave to remain;

   iii. That the judge's assessment of the Section 55 of the Borders, Citizenship and Immigration Act 2009 best interests of the children ignored the opinion or intentions of the elder child, IM.

9. It should first be noted that the appellant represented himself at the First-tier Tribunal appeal hearing and whilst he and his partner JD gave oral evidence, no other evidence written or oral was submitted. In the premises, I agree with Mr Tan's submission that Mr Brown's reliance on (ii) above is entirely speculative. No information was provided to the First-tier Tribunal as to why JD had been granted exceptional leave to remain and even before me, Mr Brown was himself unable to provide that information. In the premises, nothing can turn on the alleged failure to take into consideration JD's immigration status. No error of law is disclosed by this ground.

10. Similarly, the argument raised by Mr Brown that the judge should have enquired into the wishes or intentions of IM, then 10 years of age, is made without any evidence having been put before the judge other than the oral testimony of the appellant and his partner, and does not feature in the grounds of application for permission to appeal. In reality, it is speculation on Mr Brown's part what the child might have said and indeed whether or not that was or was not canvassed during oral evidence. It is clear from [66], [72] and elsewhere in the decision that the judge made a careful consideration of the best interests of the children in which the observation is made that no evidence was presented that either child would be unable to go to Zimbabwe, the judge having noted visits there by their mother. The judge could only act on the evidence put before her. She reached the unsurprising conclusion that it would be in the children's best interests to remain in the family unit with both parents. However, the judge concluded on the evidence that this could be achieved if the family moved to Zimbabwe. The ground as advanced is speculative and fails to identify a material error of law.

11. In relation to the primary ground of the judge's assessment of undue harshness, Mr Brown accepted that there was an elevated bar but argued that the wording used by the judge at [64] of the decision implied that judge raised the bar too high. The judge correctly referenced KO (Nigeria) noting that an evaluation of the consequences and impact of deportation was required in the undue harshness assessment, focusing entirely on the family member concerned. Mr Brown pointed to the judge's statement, "Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher," which he submitted was a "hint" that the judge misdirected herself and applied a threshold more than the elevated one referred to by the Court of Appeal. He effectively submitted that on that evidence the Upper Tribunal should conclude that too high a bar was set by the First-tier Tribunal Judge. Reliance was also made on the judge's finding at [68] that if the appellant left for Zimbabwe and the children remained in the UK, they would suffer "significant distress"; an argument made in the written grounds, that this should be equated to being unduly harsh.

12. However, in the passage criticised the judge was but citing KO (Nigeria). I do not accept the submission that a finding of "significant distress" equates to 'unduly harsh', as the grounds and Mr Brown's submissions imply. Considering the decision as a whole, I find that there is no evidence that the judge applied too high a bar or that she effectively applied a test as high as very compelling circumstances. The judge was correct to note that the test was an elevated one. It is one that required the appellant to establish a degree of harshness going beyond a threshold acceptable level. That he did not do, particularly given the absence of supporting evidence. As Underhill LJ noted at [55] of HA, the evaluation involves an assessment of best interests of the

children, which I am satisfied the judge proceeded to make, setting out the various considerations and her reasons for the conclusions reached.

13. In summary, I am satisfied that Judge Handler followed the course Underhill LJ considered would lead to no error of law by carefully evaluating the likely effect of the appellant's deportation on each of the two children and then decided whether that effect was not merely harsh but unduly harsh, applying as she did the guidance in KO. In the premises, no error of law is disclosed by this ground.

14. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 20 April 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 20 April 2021