**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/02319/2019

**THE IMMIGRATION ACTS**

| **Heard at The Royal Courts of Justice** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 September 2019** | **On 27 September 2019** |

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**[C Z]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr J Walsh, Counsel, instructed by SRP Law Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a very tragic case. The appellant is a citizen of China who was born on 13 July 1985. She arrived in this country in 2008 and was granted indefinite leave to remain in 2010. Her husband, also a Chinese national, also has indefinite leave to remain and they have three children, two daughters born in 2010 and 2011 and a son born in 2014. The family ran a restaurant together with the appellant's brother-in-law and his wife, [LL], who both also have indefinite leave to remain in the UK. That couple now have a very young son who is a British citizen and previously had a daughter. The families lived in the same house.

2. At the time of the tragic events, which was 2015, the appellant and [LL] would take it in turn to look after each other's children and on 22 March 2015, when the appellant's niece was just 7 months old, the appellant was looking after her own children and this very young baby. Apparently, this baby had difficulties in taking on food and, as babies do, was being a little difficult to control. The appellant, it seems, lost control of herself and shook this baby so hard that the baby died. Subsequently, she came up with an excuse for the injury to this baby, claiming that she had turned the baby upside down because she thought she was choking and had pushed her up and down two or three times. Apparently, she also at some stage attempted to blame [LL], the baby's mother, for what had happened.

3. The appellant was charged with and ultimately convicted of manslaughter, but not before the family had had to endure a six week trial, because until the end of this trial the appellant refused to accept responsibility for what she had done. As the trial judge unsurprisingly noted in his sentencing remarks, her actions "have devastated her family and have caused immense distress". The judge went on to say that "the pain of loss for [LL] was clear when she gave her evidence. That pain must have been intensified by knowledge that [the appellant] was falsely blaming her for [her daughter's] death".

4. It is a remarkable factor in this case that the family have continued to express their love for the appellant and the baby's father urged the judge to exercise compassion in terms which the judge recorded in his sentencing remarks as follows:

> "I therefore, on behalf of my family, sincerely plead to The Honourable Judge to be lenient when sentencing [the appellant] so that she could reunite with her family and to be with her children again as soon as possible".

5. The judge took account of the aggravating features, being first that she had not pleaded guilty but had continued to maintain her innocence until after her conviction and secondly that she had attempted to put responsibility for the death on the baby's mother. He also concluded that there had to be an "immediate and lengthy term of imprisonment" because the appellant's culpability was high and "there was significant albeit brief violence towards a very vulnerable defenceless baby". The judge also noted that "this loss of control was not precipitated by anything more than the mundane frustrations which a crying child can cause". Obviously, as the judge also was bound to record, the elements of harm could not be higher. The judge also took account of the appellant's previous good character and the harm that the sentence of imprisonment would cause to her own children. He sentenced the appellant to 6 years' imprisonment.

6. The respondent subsequently made a deportation decision and the appellant's appeal against this decision was dismissed by First-tier Tribunal Judge Gurung-Thapa, in a decision promulgated on 7 June 2019 following a hearing before her at Nottingham Justice Centre on 8 May 2019. The appellant now appeals against that decision, leave having been granted by Upper Tribunal Judge Kekić.

**Grounds of Appeal**

7. The grounds were settled by Mr Walsh, who has also appeared before the Tribunal today. It is noted that the First-tier Tribunal Judge made findings of fact first that the appellant had a genuine parental relationship with her three British children, secondly that she has a genuine relationship with her partner, who is settled in the UK, thirdly that it would be unduly harsh to require the children to move to China with the appellant, but fourthly that it would not be unduly harsh for the children to remain in the UK whilst the appellant was removed to China and that it would not be unduly harsh either for the appellant's partner to remain in the UK or move to China.

8. I note with regard to the last finding (that it would not be unduly harsh for the appellant's partner to move to China) that this finding does not seem to take account of the reality of the situation which is that were he to do so, given that it was held to be unduly harsh for the children to move to China, that would leave the children in the UK without either parent. However, that does not have a material bearing on the decision, as the judge approached this case on the basis that the effect of deportation would be that the appellant and her children would be separated.

9. It is submitted in the grounds that the judge erred in relying on a finding (at paragraph 62) that "there is no evidence before me to show that the emotional and psychological impact on the appellant's husband and her children would be anything other than that which is ordinarily to be expected by the deportation of a parent …".

10. It is submitted that the judge was wrong first to premise that "there is some yardstick or acceptable threshold of psychological impact associated with deportation which is acceptable" and secondly that the judge had failed to give "any proper weight to the evidence as to psychological impact of the deportation". While it is accepted in the grounds that the test of "unduly harsh" is a stringent one to meet, it is not accepted that what is "ordinarily to be expected" as a result of deportation "is a matter that prevents or causes the deportation not to be unduly harsh". The grounds rely on the findings of the psychiatrist that deportation would have a detrimental impact on the children's wellbeing and academic life. It is noted that the psychiatrist had reported that the children "had formed a close attachment with her, that if forcibly removed from the UK their happiness and satisfaction with family life 'will be affected further, for it will feel as if they lost a caregiver/parent and they will be going through a grieving process'".

11. The appellant also relies on the psychiatrist's finding that "the children's relationship with their mother has been very much based upon face-to-face and tactile activities and time spent together visiting her in prison as well as telephoning, card/letters".

12. It is submitted that the judge underplayed the impact of the psychological damage and that although they have experienced one separation already, the impact of a further separation by way of deportation would have a further detrimental impact.

13. It is also submitted that the judge was wrong in concluding at paragraph 77 of her decision "that rehabilitation plays no role in the proportionality assessment in the case", relying on the decision of the Presidential Tribunal in *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 00123. It is submitted that in this case the issue of rehabilitation was a relevant one because the offender had three young children of her own and she remained a carer of those children. This was particularly important, it is suggested, because the OASys Report as well as the sentencing judge both concluded that the risk of reoffending was low (in the case of the sentencing judge, he stated in terms that he did not consider that the appellant posed any sort of risk).

14. There is also reference within the grounds to the failure of the judge to consider the risk of double jeopardy but that submission was not maintained during oral argument.

**The Hearing**

15. In oral argument, Mr Walsh relied on the grounds, and invited the Tribunal to have regard at the outset to the psychiatric report, which is at pages 273 to 292 of the appellant's bundle. He reminded the Tribunal that the appellant was still in custody and was not due to be released until December of this year but that notwithstanding that she was not living with her family she had been seeing her children face-to-face while she was in custody. The psychiatrist had given a summary of her conclusions and her methodology at paragraph 2.2 of her report, where she had dealt with the impact on the children as follows:

> "2.2 [The two elder daughters] are doing very well at school and they are well-adjusted and have no emotional difficulties, however, this is not to say that if their mother was removed from the UK, they would not experience any emotional difficulties. Given [their] tender years, their psychological, social and educational development will most likely be impacted upon if their mother is separated from them in the long term. [The two girls] present with some dissatisfaction at present with family and home life and this is most likely as a result of their mother's absence".

16. Mr Walsh emphasised that this was a case where the appellant had maintained close ties with the family, who had, he said, almost daily contact with her and that this was not therefore a case where family ties would have to be re-established on release from prison.

17. The Tribunal was asked to note that at paragraph 2.4, the psychiatrist opined that:

> "It is my belief that the children's psychological health and academic performance may most likely deteriorate [and that] it is difficult to say whether this would only be in the short term and if it could ever be recovered …".

18. Then, at 2.7, the psychiatrist gave her opinion that the appellant's removal from the UK and returning her to China would not be in the best interests of any of the children.

19. At 6.6, the psychiatrist notes how the appellant's children's father has said that they have all developed a strong attachment with the appellant through the regular contact they have with her and informed the Tribunal that the children had been told that their mother would be coming home. At paragraph 8.5, reference is made to how the children and in particular one of the daughters had told the psychiatrist that she was really looking forward to seeing her mother again and how when they visit her the children would spend three hours with her, playing with toys and so on.

20. Referring to the First-tier Tribunal Judge's decision, Mr Walsh invited the Tribunal to note that at the end of paragraph 54 the judge had recorded that since March 2015 the appellant had not resided with her children. At paragraph 57, the judge had noted that the father was coping, albeit with some difficulties.

21. Mr Walsh referred to paragraph 61, where the judge had said that the suggestion that the appellant's removal would have a detrimental impact on their academic life was "somewhat speculative given the fact that the children are doing well at school and that the daughters are very well satisfied with their school", but submitted that it was not right to draw a parallel with their position now because although the appellant was not living with her children they were still able to see her but of course if she was deported that would no longer be the case.

22. While at paragraph 62, the judge had accepted that removal would affect the children emotionally and psychologically, Mr Walsh challenged the judge's finding that "there is no evidence before me to show that [this impact] … would be anything other than that which is ordinarily to be expected by the deportation of a partner/parent".

23. Mr Walsh then took the Tribunal through the passages in the decision from paragraph 67 onwards, referring to "very compelling circumstances, over and above the exceptions" but criticised the conclusion at paragraph 77 that rehabilitation was not an important factor in this case. He referred in particular to the decision in *RA*, where at paragraphs 32 and 33, the Tribunal had found as follows:

> "32. As the Court of Appeal pointed out in *Danso v SSHD* [2015] EWCA Civ 596, courses aimed at rehabilitation, undertaken whilst in prison, are often unlikely to bear material weight, for the simple reason that they are a commonplace; particularly in the case of sexual offenders.
>
> 33. As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance

> (see *SE (Zimbabwe) v SSHD* [2014] EWCA Civ 256, paragraphs 48 to 56). Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will *never* be capable of playing a significant role … Any judicial departure from the norm would, however, need to be fully reasoned".

24. Mr Walsh submitted that this would be one of the few cases where rehabilitation would be an important factor for three reasons. First, because, he says, the circumstances of offending in this case were highly unusual, rare and not likely to repeat themselves, secondly, because this was an offence within the extended family "like a domestic offence", and thirdly, because the two families have remained integrated and the baby's parents have forgiven her.

25. Mr Walsh submitted that these factors took this case outside the usual case which a Tribunal would be considering and it did drive or should have driven the Tribunal to look at the prospects of rehabilitation. In this case, we had the view with the trial judge that there was no real risk of reoffending.

26. On behalf of the respondent Ms Everett submitted that the Tribunal had not been pointed to any error of law in the decision. The facts of this case, as was often the case, were very tragic, but there was nothing in the First-tier Tribunal's decision which indicates that the judge had overlooked any of the facts. From paragraphs 52 to 56, she had dealt with whether separation would be "unduly harsh" and within that consideration from paragraphs 58 to 62, she had clearly engaged with the psychiatrist's report.

27. There was no indication in the judge's consideration that she had overlooked the psychiatrist's conclusion. The judge herself had also considered at paragraph 64 what is often glibly referred to as "modern means of communication" but had engaged with the glibness and acknowledged that this would not be the same as face-to-face communication. She was acutely aware of the difficulties which would be faced by the children as a result of the physical separation from their mother.

28. So far as rehabilitation was concerned, Ms Everett suggested that this submission was simply unarguable. The offence itself was very serious. Although it was said to be "rare" there are many cases where a very serious offence is committed which is unlikely to be repeated but that of itself could not tip the balance. The suggestion that this was a "domestic offence" was also a very bad point, because it is essentially saying that if you know your victim the crime is somehow less serious. So far as the forgiveness of the victim's parents is concerned, that cannot be legally determinative either. The judge did give this some weight, because at paragraph 72, he stated in terms that "the issues of reoffending and forgiveness of the victim's parents should be given due weight" but nonetheless was entitled to find that these factors were not determinative.

29. In reply, Mr Walsh again sought to persuade the Tribunal that the prospect of rehabilitation was a factor which needed to be considered in the balancing exercise

and the judge was wrong not to do so, when she found, in the last sentence of paragraph 76, that "there is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance".

**Discussion**

30. In my judgment, the judge, in an extremely thorough, detailed and careful decision, considered every aspect of this appeal with commendable care. So far as the rehabilitation point is concerned, she had in mind in particular the guidance given by the Presidential Tribunal in *RA* (see in particular at paragraph 76). She gave consideration to this argument, but her conclusion that it made no material difference to this case was not only one which was open to her, but on the facts any other conclusion would have been difficult to sustain.

31. Although Mr Walsh, as he was obliged to, placed great emphasis on the report of the psychiatrist, there is really very little, if anything, in the psychiatrist's report which could not have been said by any person looking at the facts dispassionately or about a very large number of cases indeed where a parent is being removed, deported and where his or her children will be remaining. As Sedley LJ noted in his very well known dictum at paragraph 27 of *AD Lee* [2011] EWCA Civ 348 "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does." It is only where there are very compelling reasons over and above those contained within the exceptions set out within the Rules, that deportation will not be proportionate in a case where an appellant has committed an offence as serious as in this case.

32. Ms Everett is, in the judgment of this Tribunal, entirely correct when she submits that the appellant has not identified any material error in the judge's decision, because there is none. The law is set out entirely correctly. She analyses what is set out both within paragraphs 399 and 399A of the Immigration Rules and also the provisions of Section 117C of the Nationality, Immigration and Asylum Act 2002, and in particular the effect of subSection (6), which states that, "in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

33. In this case, the judge found (and this finding is not now challenged) that Exception 1 does not apply because there would not be significant obstacles to the appellant reintegrating into China for the reasons which are given. So far as Exception 2 is concerned, although the judge finds that it would be unduly harsh for the children to relocate to China, she finds that it would not be unduly harsh for the children to remain with their father in the UK without the appellant, and her reasons for so finding are fully and carefully argued. While the judge accepts that the children will be affected both emotionally and psychologically (see paragraph 62), nonetheless this is not any greater than would ordinarily be expected to follow from the deportation of a parent in such cases. That is insufficient for a finding that the separation would be "unduly harsh", let alone that there are in this case "very compelling reasons"

beyond the exceptions why deportation would not be proportionate, and with regard to the issue of "very compelling circumstances, over and above the exceptions", as the judge correctly noted at paragraph 73, the seriousness of the particular offence of which the foreign criminal has been convicted is also a relevant factor.

34. In the circumstances of this case, not only was the judge's decision a sustainable one, but it is hard to see how she could have reached any other conclusion.

35. It follows that this appeal must be dismissed.

## Decision

**There being no material error of law in the decision of the First-tier Tribunal, this appeal is dismissed.**

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 23 September 2019