Upper Tribunal
(Immigration and Asylum Chamber) **Appeal no**: **HU/08366/2017**

THE IMMIGRATION ACTS

At Field House
On 20 March 2019

Decision & Reasons Promulgated
On 8 May 2019

Before:

LORD UIST
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE RINTOUL

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

BRUCE HART KARWOSKI
Respondent

Representation:

For the appellant: Mr Melvin, Home Office Presenting Officer
For the respondent: Ms Julian Norman, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (Judge Neville) dated 16 November 2018 allowing an appeal by the respondent against the deportation order made by the appellant on 19 July 2016 under section 35 of the UK Borders Act 2007 ("the 2007 Act"). The judge held that the respondent was not liable to deportation as he was covered by the exception to deportation in section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and article 8 of the European Convention on Human Rights ("ECHR").

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

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2. The respondent was born on 28 April 1963. He is a citizen of the United States of America. He has lived in the UK since around 1988 and was granted indefinite leave to remain on the ground of long residence on 5 September 2011. He was married to an American citizen from whom he separated in 2010 and from whom he was divorced in 2014. There are three grown-up children of that marriage, with whom he has no contact. In 1994 he became a physics and chemistry teacher at a school in the south east of England. He married his present wife, [AT], in 2014. He was arrested for sexual offences allegedly committed before he began his relationship with Ms [T] in 2011. On 12 April 2016 he was convicted in the Crown Court of 13 counts of sexual activity with a child contrary to section 16 of the Sexual Offences Act 2003, which makes it an offence for a person to engage in sexual activity with a person who is under the age of 18 and in respect of whom he is in a position of trust. There were two victims, who were aged 16 or 17 at the time of the offences and pupils at the school at which he taught. A probation report on him stated that he had pursued the victims for his own sexual gratification selfishly, deliberately and over an extended period. He was sentenced to 32 months imprisonment and thereby became subject to the notification requirements of the Sexual Offences Act 2003 for an indefinite period. That conviction also had the result that he became a “foreign criminal” within the meaning of section 2 of the 2007 Act. Upon his release from custody he was assessed as being at medium risk of serious harm in relation to children. His licence conditions prevented him from living, having unsupervised contact or performing a range of activities with anyone under the age of 18. He successfully completed his licence period, which expired on 3 March 2019.

3. At the hearing before the judge the respondent maintained that he fell within exception 1 in section 117C(4) and exception 2 in section 117C(5) of the 2002 Act. The judge, having considered the evidence, decided that the respondent did not fall within exception 1, but that he did fall within exception 2 in that he had a genuine and susbsisting relationship with a qualifying partner and that the effect of the deportation on her would be unduly harsh. Having considered the effect on Ms [T] of the respondent’s deportation, he concluded that the degree of harshness for her went well beyond what would necessarily be involved for most other women in her position and amounted to hardship that was undue. He therefore allowed the appeal. Permission to appeal against that decision was granted to the Secretary of State on the basis that it was arguable that the circumstances, if Ms [T] followed the respondent to the USA or if she remained in the UK, could not rationally be said to amount to undue harshness.

4. Before considering the evidence about the effect on Ms [T] of the respondent’s deportation the judge reminded himself of what Lord Carnwath had said in the Supreme Court about the exceptions in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 at paragraph 23. He then considered in detail the evidence about the effect on Ms [T] of the respondent’s deportation to the USA and made certain findings in fact. On the basis of evidence from a specialist US immigration lawyer he was satisfied that the respondent’s offending was no barrier to the couple relocating to the USA; that when a US citizen seeks to sponsor a foreign spouse he enters an agreement via an Affidavit of Support with the

US Government stating that he will be responsible for supporting her until she becomes a US citizen and she would need to show a minimum of $61,000 in assets; and that the process leading to the issue of a green card permitting her residency in the USA would take at least a year to complete. He found that Ms [T] would accompany the respondent to the USA rather than continue to live in the UK without him for any longer than necessary, but that there would be a delay of at least one year, during which time they would be separated, before the issuing of a green card to her. He found that on their return to the USA they would initially have to undertake menial work and have only basic accommodation and housing. Ms [T]'s career as a teacher would be over, and it would take her years to rebuild it. Her real passion was for the subject of geography, which had no similar place in the US curriculum. There were aspects to her personality, circumstances and relationship with the respondent which were relevant. He concluded at paragraph 72 that the degree of harshness for her went well beyond what would necessarily be involved for most other women in her position. The combination of losing her career, lossing the relationship with her mother and sister that went well beyond the usual ties between adult relatives, the loss of their protective support, the severe reduction in the likelihood of her ever having children, a severe reduction in her standard of living and the associated effect on her mental health would amount to hardship that is undue.

5. The appellant in his reasons for appealing asserts that the hardship Ms [T] may experience does not meet the high threshold of being unduly harsh. The respondent in his skeleton argument contended that the reasons for appealing were no more than an attempt to reargue the case, that the judge was entitled to reach the conclusion which he did and that he gave adequate and cogent reasons for doing so. It was submitted that he properly directed himself and reached a conclusion he was entitled to reach: he had had the benefit of hearing directly from the witnesses, including Ms [T], and was entitled to place weight on her vulnerability in concluding that in her particular circumstances the impact upon her would be unduly harsh. He correctly directed himself as to *KO (Nigeria)* at paragraphs 45 to 48 and properly applied it to the facts of this case. He gave proper reasons for his findings. In particular, he distinguished between features which would not amount to undue harshness (paragraph 53); he distinguished "aspects to Ms [T]'s personality , circumstances and relationship" with the respondent which had the potential to affect that analysis (paragraph 53); he analysed the medical evidence and highlighted key elements (paragraphs 54 and 55); he did not accept the medical evidence uncrticially, but assessed consistency and whether relaince could be placed on it (paragraph 55); he set out her family circumstances and gave reasons for his findings as to the evidence given by her witnesses (paragraphs 58 to 62); he explicitly stated that he did not pander to her choice to go with the respondent but recognised that this was an inevitable decision in light of her dependent personality (paragraph 62); and he gave detailed and cogent reasons for his finding of undue harshness in the circumstances of this case (paragraph 69) and correctly reminded himself that it was a high threshold (paragraphs 71 to 73).

6. In *KO (Nigeria)* Lord Carnwath stated as follows at paragraphs 23 and 27:

> "23. … the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' … 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 jusifiable 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.
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> 27. Authoritative guidance as to the meaning of 'unduly harsh' in this context was given by the Upper Tribunal (McCloskey J, President, and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC) .. a decision given on 15 April 2015. They referred to the 'evaluative assessment' required of the tribunal:
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>> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe or bleak. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
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> On the facts of that particular case, the Upper Tribunal held that the test was satisfied:
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>> "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and exiled to this struggling, impoverished and plague stricken West African State. No reasonable or right thinking person would consider this anything less than cruel."
>
> … I do not understand the conclusion on the facts of that case to be controversial."

7. Having considered the findings in fact made by the judge and the competing submissions, we are satisfied that the judge did make an error of law in respect that he did not properly apply the test of "unduly harsh" to the facts found by him. On no conceivable view of the facts can it be said that the effects of the respondent's deportation on Ms [T] would be unduly harsh. They may be uncomfortable, inconvenient, undesirable or merely difficult, but they cannot properly denote something unduly severe or bleak. While every case will depend on its own facts, the facts in *MK (Sierra Leone)* give something of the flavour of what is required to satisfy the "unduly harsh" test. The effects of the respondent's deportation on Ms [T] are in reality no more than the effects on any spouse of the other spouse having to move to a foreign country to live or work.

8. As the judge made an error of law his decision is set aside. We remake the decision on the basis of the facts found by the judge and dismiss the appeal by the respondent.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by dismissing the appeal

Appeal dismissed

Lord Uist
(a judge of the Upper Tribunal)

03 May 2019