IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05110/2018

THE IMMIGRATION ACTS

Heard at George House, Edinburgh **Decision & Reasons Promulgated**
On 7 July 2021 **On 24 August 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ZI FENG WENG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie instructed by Latta & Co
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of the First-tier Tribunal made on 17 January 2018 that he is a person to whom Section 32(5) of the UK Borders Act 2007 applies and to deport him. The Secretary of State also refused his human rights application.

© CROWN COPYRIGHT 2021

Procedural History

2. The decision that the appellant is a person to whom Section 32(5) of the UK Borders Act 2007 applies is consequent upon the appellant's conviction on 19 September 2017 of being knowingly involved in the production of drugs for which he was sentenced to a period of one year's imprisonment. The reasons given for the decision to remove him are set out in the letter of 15 February 2018. His appeal against that decision was heard by First-tier Tribunal Judge S T Fox on 17 August 2018 and, for the reasons set out in his decision of 1 November 2018, the appeal was dismissed. That decision was in turn set aside by the Upper Tribunal which remitted it to the First-tier Tribunal. For the reasons set out in her decision of 20 May 2019, First-tier Tribunal Judge Lea, allowed the appeal. The Secretary of State successfully sought permission to appeal against that decision, the appeal then coming before Upper Tribunal Judge Macleman on 15 August 2019. For the reasons set out in his decision of 22 August 2019 Upper Tribunal Judge Macleman found that the decision of the First-tier Tribunal involved the making of an error of law and remade the appeal, dismissing it.

3. The appellant then sought permission to appeal to the Inner House of the Court of Session. Although his application was refused by the Upper Tribunal, it was granted on a renewed application to the Court of Session. In the joint minute it was agreed that:

> "3. The UT erred in law when remaking the deportation decision at [32] as its reasons failed to demonstrate adequate engagement with the psychological evidence relating to the impact of deportation on the appellant's children.
>
> 4. The present appeal should be allowed for this reason."

4. It was also agreed that the decision should be remitted to the Upper Tribunal for reconsideration.

The Appellant's Case

5. The appellant was born on 10 January 1974 and as a citizen of the People's Republic of China. He claims to have arrived in the United Kingdom in 1999 but did not regularise his status until encountered by Strathclyde Police in September 2009. After that he made an asylum claim which was refused. He was later granted discretionary leave to remain initially until 20 September 2013 but later extended until 12 March 2018.

6. The appellant is in a genuine and subsisting relationship with his wife whom he met in Glasgow in 2013. They have two sons, J and W who are now respectively 15 and 11 years of age. Both of them are at school.

7. The appellant's wife is in full-time employment.

8. The appellant's case has two limbs: first, that he is at risk of ill-treatment and further punishment for his conviction for being involved with the supply of drugs in Scotland; and, second, that it would be unduly harsh either for his wife and children to be expected to go to live with him in China or, for them to remain here and he to be separated from them by being deported.

The Respondent's Case

9. The respondent's case is set out in the refusal letter of 15 February 2018 supplemented by a decision of 20 July 2018.

10. In summary, at that stage the Secretary of State, although accepting he had two children who were British citizens, and that it would be unduly harsh for them to live in China, did not accept that it would be unduly harsh for them to remain in the UK. The Secretary of State did not, however, accept that the appellant was in a relationship with his wife, although that is no longer her case. The Secretary of State did not consider either that the appellant met the requirements of paragraph 399A of the Immigration Rules.

11. In addition, the Secretary of State did not accept that the appellant was at risk of "double jeopardy". Although it was accepted that the Chinese authorities would be aware of the appellant's conviction she did not consider following JC (double jeopardy: Article 10 CL) China CG [2008] UKAIT 00036 and YF (double jeopardy – JC confirmed) China CG [2011] UKUT 32 or on the basis of Dr Dillon's report of 9 July 2018, the appellant would be at risk of reprosecution, given the lack of international publicity for the offending, lack of any specific concerns about him raised by the Chinese authorities and there being no evidence that Chinese nationals were the victims of his client's actions. She noted the lack of double jeopardy in prosecutions and that limited weight could be placed on Dr Dillon's evidence.

The Hearing

12. The hearing took place in a hybrid fashion. Both representatives were present in court but the appellant and his wife gave evidence via a video link with the assistance of a Mandarin interpreter who was also present by video link. No difficulties arose during the proceedings and it was not suggested at any point that there was any difficulty with the interpreter or in the evidence being transmitted.

13. In addition to the oral evidence, I had before me a consolidated bundle running to 767 pages produced by the appellant and the bundle produced by the respondent.

14. I also heard submissions from both representatives which I have taken into account in reaching my decision.

The Law

15. Section 117C of the Nationality, Immigration and Asylum Act 2002 provides as follows:

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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.

…

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

16. The Immigration Rules provide, so far as is relevant, as follows:

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

17. Paragraph 399 and 399A provide:

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

…

18. With respect to Section 117C and paragraph 398 of the Immigration Rules the key issue here is undue harshness. The law on this is summarised in TD (Albania) [2021] EWCA Civ 619 at [20]ff:

20. In *KO (Nigeria)*, Lord Carnwath, with whom the other members of the Supreme Court agreed, explained the nature of the test of undue harshness:

"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…"

21. The appeals in *HA (Iraq)* arose from decisions of the Upper Tribunal giving guidance on the application of *KO (Nigeria)*. The decision of this court underlined that what is required in all cases is an informed evaluative assessment of whether the effect of deportation on a child or partner would be unduly harsh in the context of the strong public interest in the deportation of foreign criminals. The leading judgment of Underhill V-P contains these passages:

"51 … The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest in the deportation of foreign criminals."
"53 … 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 the 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."
"56 … 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". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.

57 … 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."

22. The decision in *HA (Iraq)* does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness. It affirms that this is not what *KO (Nigeria)*, properly understood, requires.

19. I note further that the issue in this case the best interests of the children are in issue but the best interests of the children are simply a factor to be weighed when assessing proportionality.

20. I turn first to the issue of double jeopardy.

21. In YF (double jeopardy) the Upper Tribunal said this:

1. The guidance given by the Tribunal in JC (double jeopardy: Art 10 CL) China CG [2008] UKAIT 00036 is confirmed save for the addition of the words underlined immediately below:

"The risk of prosecution or reprosecution will be a question of fact in individual cases but is more likely where (a) there has been a substantial amount of adverse publicity within China about a case; (b) the proposed defendant has significantly embarrassed the Chinese authorities by their actions overseas; (c) the offence is unusually serious. Generally, snakehead cases do not have the significance they have in the West and are regarded as ordinary (but serious) crimes requiring no special treatment; (d) political factors (which may include the importance attached by the Chinese authorities to cracking down on drugs offenders) may increase the likelihood of prosecution or reprosecution; and (e) the Chinese Government is also particularly concerned about corruption of Chinese officialdom."

2. Reprosecution/double punishment of a returnee through the administrative disciplinary procedure system is extremely unlikely, since for a person to be considered under this system by virtue of an overseas offence the Chinese authorities must have decided his case was not serious enough to justify reprosecuting him through the criminal law system.

22. The Tribunal in that case also noted [7] that in JC there had been a number of reports from expert witnesses including Dr Dillon who has produced a report in this case.

23. The Upper Tribunal found, having summarised Dr Dillon's evidence:

> 61. Unlike the Tribunal in JC we have not had the benefit of evidence from several experts, which would have given us the ability to compare their position. However, since in relative terms not that much time has passed since JC, we do not think that has handicapped our task. Like the Tribunal in JC we have found the evidence of Dr Dillon of considerable assistance but have noted that he is not an expert in the Chinese criminal law and many of his observations on the issue of double jeopardy are based on his own general views about the Chinese political system and state policies. It is very understandable that he should wish to re-emphasise the point he made in JC that lack of evidence of reprosecutions must not be equated with conclusive proof that they do not or will not happen. At the same time, we have not found persuasive his suggestion that they could be happening secretly, since there are strong reasons for considering that the Chinese authorities attach significant importance to the notion of deterrence of criminality through publicity and are also concerned to show the international community that they are tough on narcotic drugs. In addition, whilst we accept that much is still not known about the workings of the Chinese criminal justice system, efforts to ensure secrecy have not prevented international observers such as Amnesty International from compiling a very significant body of data about such matters as to the numbers of persons executed and numbers imprisoned.
>
> 62. We think Dr Dillon must be right in suggesting that the lack of any official monitoring by the UK (and seemingly other countries) of what happens to returned Chinese offenders should also be a relevant consideration. But we cannot agree with him

that we can infer from that that double jeopardy could be visited upon returned nationals without international observers knowing about it. In our judgement it is extremely unlikely that offenders forcibly returned to China would not be in a position to alert international observers, via their friends or family, in the event that they found themselves facing further legal punishment for the same offence(s) from the Chinese authorities on return. It is common sense that when they knew when they were to be flown back they would notify a friend or family or a legal representative in the UK beforehand and arrange to contact them after return. In most cases it is also likely they will be able to inform family or friends back in China when they are due to return and to where. This is the age of the mobile phone and the internet and the Chinese people have these technologies in large number. Even though there is evidence that the Chinese authorities seek from time to time to control such forms of communication Dr Dillon agreed that normally mobile phone communication to and from China was straightforward. The notion therefore that there are likely to be a significant number of returning offenders who are then secretly removed from circulation and subjected to serious punishment is in our view not tenable. We consider there would be reports finding their way to organisations such as AIJ noting that such and such a returned offender failed to notify his contact as arranged or that friends/family awaiting their return after airport processing were unable to trace them.

24. It also found:

The administrative justice system

86. It will be apparent from the above that we have not accepted the submission of Mr Selway that even if a national of Chinese convicted of crimes overseas would not face reprosecution/double punishment through the Chinese criminal justice system he could face its equivalent through the Chinese administrative/disciplinary system.

87. We are bound to say first of all that we found Mr Selway's submission on this matter somewhat surprising given that it was not supported by Dr Dillon and indeed we know from the evidence Dr Dillon gave to the Tribunal in JC that he (like the other experts save for Dr Sheehan) considered that this system was unlikely to be applied in foreign-related cases. Certainly the evidence of Dr Dillon in JC was that the laojiao system applies to minor law violations and that serious crimes were more likely to be punished by the laogai system (see JC, paras 112,120, 254, 273(14-16; see also paras 100, 163, 167(d), 175, 262)).

88. Secondly, we did not find the evidence submitted by Mr Selway concerning the Chinese disciplinary procedure system very helpful. The article by Professor Jianlin contains a number of passages that are difficult to understand and it does not make clear the role played in this procedure by the laojiao (re-education through labour) system. Whereas this article describes disciplinary punishments as not extending to restriction or deprivation of liberty, we know from the COIS for January 2010 at para 12.19-20 that Article 9 of the Law of Administrative Penalty states that "Different types of administrative penalty may be created by law. Administrative penalty involving restriction of freedom of person shall only be created by law": we do not know whether there is any such law that covers laojiao, although paras 12.11-17 of the same COIS would suggest not. However, taking this article on its face it would appear to confirm that (except when they are used as a complement) disciplinary procedures are normally

applied to types of illegal conduct that are less serious than those that are subject to criminal prosecution and punishment. The same article appears to suggest that insofar as "double jeopardy" principles are applied in China they are less present in the disciplinary procedure system and this system even contains some provisions prohibiting double jeopardy.

89. We accept of course that this parallel system of justice is very important in China and may be particularly relevant when considering cases in which the risk on return is related to likely punishments facing a person in China for violations committed in China. But in the context of reprosecution/double punishment we do not see use of this system as a real risk, since if an overseas offence is not seen as serious enough for the Chinese authorities to pursue through their criminal justice system with a view to double punishment, it is even less likely they would pursue an adverse interest through the administrative/disciplinary procedure system.

25. The CPIN on double jeopardy dates from March 2018. In terms of material that postdates YF I note that at [3.2.2] the Australian Department of Foreign Affairs and Trade had stated that the authorities were less likely to pursue those who committed offences overseas carrying a sentence in China of three years or less but it is unclear whether that would apply to the offence for which this appellant was convicted. I note that [3.2.3 to 3.2.4] several Chinese and Taiwanese nationals who had been tried for cyber crime in Kenya face prosecution on return there. That said, it has to be borne in mind the particular political sensitivities of those who come from Taiwan and that the victims were in China, neither of which applies here. Beyond that the CPIN adds little.

26. In evaluating Dr Dillon's report, I bear in mind the observations of the Tribunal in YF. His most recent report from 2021 updates an initial report from 9 July 2018.

27. Dr Dillon states that his opinions are as previously expressed in the reports in JC and YF although modified and updated in the light of the different circumstances being changes to the Chinese legal penal system. Principally the decision to abandon the Laojiao "education through labour" system of labour camps. He notes it has been extremely difficult for legal practitioners or anyone else in the West to follow up the case of individuals who have been returned to China where the evidence given relating to Gal Zhi Sheng relates to a person who had a high profile as a human rights lawyer. He does, however, note that since the accession to power of Xi Jinping in 2012 authoritarian tendencies have intensified and resistance to criticism by westerners has increased.

28. Dr Dillon states, when considering the likelihood of re-prosecution, as follows:

> "I consider that the re-prosecution is most likely in cases where the accused is deemed to pose a particular threat to social order in China; where the authorities wish to make a public example of an individual or a group of individuals; or where the case is considered to tarnish the image of China. This would apply in the case of Zi Feng Weng because of the nature of his offence. Drug related crimes are regarded as a particular social evil by the government of the PRC and are the subject of regular and high-profile campaigns which are widely reported in the press and other media."

29. Dr Dillon refers again to the deportation of 37 citizens from the PRC and Taiwan from Kenya as reported in the CPIN noting that this was not an isolated case, the German broadcaster Deutsche Welle reporting 29 Taiwanese citizens arrested for the involvement in fraud deported from Spain to China, were tried and sentenced up to fourteen years' imprisonment. He concludes:

> "In the light of the points made above about the Chinese legal system, it is impossible to say with any certainty how Mr Weng would be treated on his return to China. However, I am expecting him to be detained until Ministry of Public Security officials determine his fate. As the FCO clearly indicated in their letter cited above, there are no formal procedures for monitoring this."

30. He also says:

> "In my judgment, however, Ze Feng Weng, if deported, is likely to be detained at the airport on arrival and questioned. He would not be released directly into the general population, being questioned at length [about] his contacts and would be at significant risk of being sent to a labour camp or to a court for reprosecution. The fact that he has had leave to remain in the United Kingdom and his wife and children are here would have a negative impact on his treatment, somebody who is demonstrably not loyal to China."

31. In assessing risk to the appellant I bear in mind that the authorities in China will know that the appellant has been convicted of an offence. They have already been informed of that. I accept that they will not, unless they question him further, be aware of the length of the sentence or any other details of the offending.

32. But I do not accept that the appellant is nonetheless at risk of double jeopardy given that this is not an offence which has the international characteristics of the examples given above. There is no evidence of any Chinese nationals being involved other than the appellant nor evidence of widespread publicity of his offending in the United Kingdom.

33. I accept that the appellant's offending does involve drugs which has a particular resonance in China as noted by Dr Dillon but even allowing for the lack of transparency in China, I am not satisfied on the basis of the factors set out in YF that the appellant is at risk. This appellant has no particular high profile, nor does there appear to be any other reason for making an example of him. Dr Dillon gives no proper reasoning or sources for his conclusion that this appellant is at risk because of the nature of his offence. There appears to be no good reason why they would want to make a public example of him, given the low level of his offending and the lack of evidence of the Chinese authorities taking a similar approach with others deported in similar circumstances. Accordingly, I am not satisfied the appellant is at risk of double jeopardy.

34. I do, however, accept that he would be at risk of being held for a short period on return and questioned but there is insufficient basis to show that that would result in his ill-treatment of sufficient severity to engage Article 3 of the Human Rights

Convention. Accordingly I am not persuaded by Mr Caskie's submissions that the appellant faces re-prosecution on return to China.

35. I accept from the evidence before me, which is unchallenged, that the appellant has two major health problems: he has a heart condition and he has type 1 diabetes. I accept that he is under hospital supervision in respect of these and that he has regular check-ups. He is also on medication, but as he accepted in oral evidence, if he had money, he would be able to afford the necessary drugs.

36. Turning to the position of the children, I accept that he has formed a large part of their life. The family had been a single unit, apart from when the appellant was in jail, and I accept the evidence that the appellant and his wife have cohabited since before the children were born.

37. I accept also from the evidence in the witness statements, again unchallenged, that the family are a close unit and that the appellant has taken, except whilst in jail, a very active part in their lives. He has taken them to extracurricular activities and, when they were younger, walked them to school. I accept also now that the appellant does or did most of the housework as he was not employed and I accept also that the children are aware that he may be removed to China.

38. I have no doubt that the appellant does fear being arrested, detained and possibly imprisoned again on return to China but, for the reasons given above, I do not find that that is objectively justified. That is not to say that it does not affect him and it is not a worry for him, his wife and his children.

39. It is also the consistent evidence of the appellant and his wife that they have become more depressed and anxious over the last year during lockdown and that this has impacted on them and their family. That is understandable.

40. I accept also that the appellant has a particularly close relationship with his sons who are now teenagers and that he is to a significant extent the peacemaker in the family.

41. Beyond the evidence of the appellant and his wife, as well as the letters of support from the children, I also have before me three reports from Dr Ul-Hassan, a clinical psychologist who has significant experience with adolescent difficulties. I am satisfied that she is entitled to be treated as an expert and that her evidence is something on which I can rely.

42. Dr Ul-Hassan assessed the family in July 2008 and April 2019 as well as in February 2021. It is of note that Dr Ul-Hassan has used a number of specific tests on each occasion including the Beck Depression Inventory, Beck Anxiety Inventory as well as the Beck Youth Inventories with children, resiliency scales on each occasion. The reports are detailed, explain the results of the tests and their relevancy and the conclusions reached are dependent on these.

43. There is no challenge by the respondent to these reports, or materially to Dr Ul-Hassan's expertise. In dealing with the first report from 29 June 2018 I note [3.5] that

the appellant has been the main care provider at home prior to his imprisonment, that the appellant's wife was in the category of severe depression [4.10] and as regards the children, J had reduced resilience and was prone to being more vulnerable with regard to his mental health [5.12] and scored below average in the range for recovery suggesting difficulties in bouncing back from some situations or events which caused him emotional distress [5.11].

44. In respect of W it is observed that when the tests were administered [6.8] he scored highest on withdrawal and wishful thinking indicating a lack of positive coping and that thus he may be vulnerable to developing mental health difficulties if faced with difficult life events. It is observed also [6.21] that in terms of psychological importance of family members that he sees his father as occupying a central important position in his life.

45. Dr Ul-Hassan noted also [7.1] that the children interacted very well with their father.

46. Asked to give her clinical opinion on the psychological impact on the children if the appellant were forced to be removed from the United Kingdom and they are separated from him, she said:

> "The direct and indirect assessment methods I have used with each member of the family suggests that Mr Weng has a genuine and meaningful relationship with both of his children. There seems to be clear evidence of secure attachment relations between him and his children. Although his absence, while he was in prison, was challenging for his sons and his wife, it seems as though the security of their relationships were able to be maintained due to regular face to face contact they had during this time.
>
> …
>
> My direct assessment with J suggests that in terms of the psychological importance of the different relationships in his life, it is clear that he highly values his father and sees him as being key in his upbringing and care. Reports suggest that his emotional wellbeing deteriorated when Mr Weng was in prison, however since his release he has been more settled in his moods. He is currently doing well in all areas of the curriculum and school, he says he wants to take advantage of a number of social leisure activities afforded to him. It is important to note that J's various responses and the psychometric measures administered suggest that he is vulnerable to experience clinical/significant anxiety. Furthermore, results suggest that he is also prone to reduced resilience. Increased anxiety and reduced resilience will make J much more vulnerable to developing problems with his mental health particularly if he is faced with significant life stressors. His father being removed from the UK is a clear example of significant life stressor."
>
> W is a young boy who is currently doing well in school both academically and socially. Reports suggest he had also struggled with his mood and with anxiety when Mr Weng was in prison. He is also noted to frequently ask for reassurance that he will stay with the family. Responses on the psychometric measures suggests that W is also currently experiencing clinical and significant anxiety and this is clearly reflected in his reassure seeking. Furthermore, responses on the kid questionnaire suggest that he does not possess a particular well-developed coping strategy. This, coupled with his tendency

> towards anxiety suggests he is also prone to developing problems with his mental health particularly if he is forced to undergo significant and traumatic separation from his father. The various assessment tools which explored his sense of relationship suggests that he sees his father as being very important in terms of both his practical and emotional needs. I do not believe that the children's secure attachment relationships with Mr Weng would always be maintained if he is permanently removed from the family and sent back to China. I also do not believe that any modern means of communication such as telephone or Skype would be anywhere near adequate in maintaining relationships.

47. It is of note also that the report indicates that the appellant's wife experienced anxiety and depression whilst he was in prison and responses on the psychometric measures completed confirm that she is prone to experiencing clinical and significant levels of anxiety and depression. She states:

> "In my clinical opinion, Ms Li is at considerable risk of experiencing a significant deterioration to her mental state and wellbeing if her husband is to be removed permanently from the UK. This would place a great strain on her and I am very concerned about her ability to cope with such extreme levels of stress. Lone parenting can place a significant emotional burden on an individual and is indeed more likely to be the case if there was a permanent separation between Mr Weng and the rest of his family.
>
> Reduced resilience and coping in Ms Li will undoubtedly impact on her ability to parent her children effectively. This is then very likely to have a direct impact on the mental health and wellbeing of her children. … Compounding this for Ms Li is the fact that aside from her husband she has few other close supports in Glasgow."

48. With regard to the second report, it is observed [3.10] that the appellant has seen an increase in his depression symptoms and also with anxiety [3.14]. At [4.11] Dr Ul-Hassan summarised J's position as being "in summary, [J]'s resource index score of 20 in the low range, while his vulnerability index score of 69 is in the high range." This suggests there are clear areas of vulnerability when it comes to his resilience and he is a young boy who may be vulnerable to developing problems with his psychological health and wellbeing particularly when faced with any stressful life events. It is perhaps unsurprising that [4.21] Dr Ul-Hassan observes in terms of the psychological importance of family members for Junjie this very much begins with his father, mother and young brother.

49. With respect to the younger child, W, it is observed at [5.6] the same problems exist as previously.

50. At [8.10] Dr Ul-Hassan opines she did not believe that the appellant's secure attachment relationship to the appellant would be maintained if he is removed from the family and sent back to China. She also observed [8.12] that the appellant's wife was at considerable risk of experiencing significant deterioration in her mental health, making it difficult for her to parent the children.

51. In the most recent report, both the appellant and his wife were noted to have increased depression symptoms [3.10] to [3.11] and as regards W Dr Ul-Hassan noted [4.8] that he continues to score below average in adaptability suggesting he struggled to be adaptable. He does, however, appear to have improved in terms of vulnerability and activity "this may be because he perceives himself to have a close and supportive relationships with the main people in his life who were able to help him when he experiences negative emotions."

52. With regard to W, the reports from the test are "highly consistent" with the previous results [5.4] and again [5.8] that he has continued weakness in area of resilience. He has also observed [5.20] that he sees his father as occupying a central important position in his life. It is observed also [8.7] that both boys have vulnerabilities in coping with unwanted changes in their lives and [8.12] severe concerns remain but the appellant's wife's ability to cope with extreme levels of stress as would occur if the appellant is deported. Again, it is said that this is likely to impact on her ability to parent the children leading to an adverse impact.

53. Drawing these observations together, in assessing the effect of deportation on the children I have no doubt that it is in their best interests for them to remain part of the same family unit with both parents. They have always formed that part of that unit which I accept is a close unit and it is important to note, they do not have any extended family in the United Kingdom although I do accept that the older boy is beginning to develop relationships outside the immediate family and has strong relationships at school and with his peer group. I accept that the family were separated for a relatively short time whilst the appellant was imprisoned and I accept that there would be significant and serious impacts on the children were their father to be deported. I consider that it is reasonable to infer also if their mother's ability to parent them was also diminished as a result, for which there is significant psychological evidence, that this would exacerbate the situation.

54. It would be difficult for the mother to maintain the household as it is at present although there would be limited financial impact. The children are now of an age when their needs for childcare are decreasing but equally that is supplied to a significant extent by the appellant.

55. I am satisfied that the children live as part of a close-knit family group encompassing them and their parents. It is not possible or correct to treat them in isolation from their mother as the effects of deportation on her would impact on her ability to parent. I accept also, as a result of the appellant being their main carer in terms of time spent with them, that they have a very close bond with him and that the effect of his removal would have a serious and traumatic effect. Whilst it is clear that they understand that he would be removed for them to maintain any meaningful contact. I accept that there would be emotional support from the mother but, as noted above, she is likely to be affected also by the removal of the appellant. The removal is in the case likely to be at least very long-lasting and not of finite duration. That is different from the position when he was in imprisonment when there was a clear end date and

it is notable that in her oral evidence the appellant's wife drew attention to that and she was able to count down the days until they would be back together again.

56. It is of particular note in this case that the children have particular needs in that they are vulnerable to psychological harm from the removal of a parent. They do not have the resilience that might otherwise be expected. His scores are consistent and are below average and I accept, on the particular facts of this case of the impact on their children given their age and stage in their education that they have reached and significant dependence on their father as a primary carer would be unduly harsh. I consider also on the basis of the reports of Dr Ul-Hassan that this is likely to impact significantly on their ability to develop and mature as adults.

57. I bear in mind also the observations made in the refusal letters, to which Mr Diwnycz said he had little to add. I bear in mind also that the threshold to establish undue harshness is high, and is the exception.

58. Taking all of these factors into account cumulatively, while no single one of them is determinative, I find that the impact of deportation on these children, given their vulnerabilities, and the impact on their mother's ability to parent them, given also the very close nature of the relationship with the father, would on the particular facts of this case, be unduly harsh for them to be separated from him. Accordingly, I am satisfied that Exception 2 is made out.

59. Having found that Exception 2 is made out it is unnecessary for me to consider whether Exception 1 is made out.

60. Accordingly, for these reasons, I am satisfied that the appellant meets the requirements of the Immigration Rules and Exceptions 2 as set out in Section 117 of the 2002 Act. Accordingly, I am satisfied on the particular facts of this case that deportation would be disproportionate and I therefore allow his appeal.

61. The appellant should, however, be under no illusions that should he offend again there is a real likelihood of him being deported.

<u>Notice of Decision</u>

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remake the decision by allowing the appeal on human rights grounds.

No anonymity direction is made.

Signed Date 3 August 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul