Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15418/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 March 2021	**On 14 April 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KM
(ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Mr Lindsay, Senior Home Office Presenting Officer.
For the Respondent: Ms Griffiths, Counsel instructed by Turpin and Miller LLP.

This has been a remote hearing to which both parties have consented. 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. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience, I will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant is a citizen of Zimbabwe, born in 1981, who has been in the UK since 2002 (with Indefinite Leave to Remain since 2010). He has a son, born in 2004, who is a British citizen.

3. In 2016 the appellant was convicted of theft and sentenced to 24 months' imprisonment. A deportation order was made against him. The appellant made a human rights claim, arguing that his deportation would be contrary to article 8 ECHR. On 4 September 2019 the respondent refused the claim.

4. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Stedman ("the judge"). In a decision promulgated on 17 April 2020, the judge allowed the appeal. The respondent is now appealing against that decision.

Decision of the First-tier Tribunal

5. The central issue before the judge was whether the conditions of section 117(C)(5) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") were satisfied; that is, whether the effect of the appellant's deportation on his son would be unduly harsh.

6. The judge, who heard evidence from the appellant, the appellant's brother, and the appellant's former partner (the mother of his son), gave several reasons for finding that the effect of deportation would be unduly harsh on the appellant's son. The following reasons were given:

    a. The appellant lived with his son until going to prison in 2015 and played a major role in his upbringing (as the primary carer whilst his former partner was working).

    b. Whilst in prison he spoke to his son every day.

    c. The appellant and his son have a loving and caring relationship and family life has been flourishing since the appellant left prison three years ago.

    d. The appellant's son struggled a great deal when separated from his father (whilst his father was in prison) and was destabilised by this.

    e. The relationship would be completely fractured by deportation.

    f. The appellant's son is at a fragile stage. At paragraph 41 the judge stated that there will be:

        > "serious repercussions from a mental health perspective if he is once again separated from his father."

g. The appellant has a positive influence on his son. The judge stated at paragraph 41 that:

> "The appellant sets boundaries for [his son] on the one hand, and on the other has supported him in his playing football, which is so important and provide him with a healthy outlet for his time and energy".

h. There would be little scope for the appellant's son to visit the appellant given the financial cost.

Grounds of Appeal

7. The respondent's grounds of appeal submit that the judge erred because there was no evidence to support the conclusion that the appellant's son would suffer serious repercussions to his mental health. Although Mr Lindsay relied on all of the grounds of appeal, this was the only ground pursued at the hearing.

8. It is also submitted in the grounds that the judge reasons given for finding that the effect of deportation would be unduly harsh or insufficient because they do not go beyond what would ordinarily result from the deportation of a parent. It is argued that the judge did not have regard to the established threshold for undue harshness, which requires the harshness to go beyond what would necessarily be involved for any child faced with the deportation of a parent, as set out in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 and *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213.

Submissions

9. Mr Lindsay began his submissions by accepting that this is a perversity challenge where there is a high threshold. He argued that the evidence did not support the judge's finding, in paragraph 41, that there will be a serious mental health repercussions for the appellant's son if he is separated from the appellant and therefore it was not open to the judge to make this finding which forms an integral part of the reasoning as to why there would be undue harshness. Mr Lindsay stated that there was no medical evidence to show that the appellant's son has, or would develop, a mental health problem.

10. Ms Griffiths disagreed with Mr Lindsay on the question of whether there was evidence to support the judge's conclusion about the effect of the appellant's deportation on his son's mental health. She noted, in particular, the opinion of the Independent Social Worker, as set out in the report dated 22 January 2020, that separating from his father would be likely to be extremely damaging for the appellant's son. The concluding comments of the report are:

> "I am concerned [that the appellant's son's] presentation and behaviour is likely to deteriorate again (previously reflected in stress-related behaviours) if his father is deported with potentially very serious implications for his emotional well-being and educational progress…"

11. Ms Griffith drew attention to recent judgments in deportation cases where, as she put it in her skeleton argument, the Court of Appeal has cautioned the Upper Tribunal against reopening a decision on the basis that the First-tier Tribunal's broad evaluative judgment should or could have been exercised differently. The cases she relied on were *Lowe v The Secretary of State for the Home Department* [2021] EWCA Civ 62, *KB (Jamaica) v Secretary of State for the Home Department* [2020] EWCA Civ 1385, *AA (Nigeria) v Secretary of State* [2020] EWCA Civ 1296 *and HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 117.

Analysis

12. It is clear from paragraphs 21 – 25 of the decision, where the judge set out the "unduly harsh" test, that the judge directed himself to the correct legal test, having regard to the relevant authorities including in particular *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. It is also clear from this part of the decision that the judge recognised the elevated threshold that must be met where undue harshness is claimed. Notably, at paragraph 23 the judge cited paragraph 46 of *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC), where it is stated:

> 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. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher.

13. There is therefore no basis to the contention in the grounds (not pursued in oral submissions by Mr Lindsay) that the judge did not have regard to the established threshold for undue harshness.

14. Nor is there merit to the submission in the grounds (also not pursued by Mr Lindsay) that the judge erred by not making findings that show that the harshness the appellant's son would suffer go beyond that which would ordinarily result from deportation. This is because there was no need for such an assessment. On the contrary, had such an analysis been undertaken, the judge would have had to be very cautious to avoid making an error. As explained in *AA* at [12]:

> "[I]t is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of 'ordinariness'."

15. The respondent's argument that there was no evidence to support the finding at paragraph 41 of the decision that the appellant's son will suffer "serious repercussions from a mental health perspective" if the appellant is deported is also without merit. As noted by Ms Griffiths, there was evidence to support this conclusion, in the form of the independent social worker's report, where a firm view was expressed that the appellant's son is likely to face serious implications for his emotional well-being in the event of the appellant being deported.

16. I accept that an independent social worker is not qualified to express a view on the likelihood of the appellant's son developing a mental health disorder or illness. However, that is not what the social worker said, or what the judge found. The judge did not state that the appellant's son will, or is likely to, develop a mental health disorder. Rather, the judge found that there would be serious repercussions from a mental health perspective, which broadly equates to what was said by the independent social worker about there being serious implications for his emotional well-being. I am satisfied that the judge's finding at paragraph 41 was consistent with the evidence from the independent social worker and that it was open to - and not perverse for - the judge to accept this evidence.

17. This is a case where the judge (a) identified the correct legal test, (b) applied the test consistently with recent Court of Appeal authorities, (c) gave cogent reasons to explain why he reached the decision he did, (d) did not take into account irrelevant matters, (e) took into consideration all relevant matters, (f) made a finding on the mental health of the appellant's son that was consistent with expert evidence, and (g) undertook a fact specific detailed assessment of the circumstances of the appellant's son and, based on that assessment, reached an overall conclusion that, for the reasons given by the judge (as summarised above in paragraph 6), was not perverse.

Notice of decision

18. The Secretary of State's appeal is dismissed.

19. The decision of the First-tier Tribunal did not involve the making of an error of law. The decision stands.

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 the appellant or any member of the appellant's 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

D. Sheridan

Upper Tribunal Judge Sheridan Dated: 1 April 2021