IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004808
First-tier Tribunal No:
HU/00354/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 February 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

JG
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Nadim, City Law Immigration Ltd
For the Respondent: Ms T Rixom, Senior Home Office Presenting Officer

Heard remotely at Field House on 14 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By the decision of the First-tier Tribunal (Judge Hamilton) the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Blackwell) promulgated 9.10.23 allowing the appellant's appeal against the respondent's decision of 5.12.22 reconsidering the decisions of 2.7.21 and 15.2.22 to reject the application for Leave to Remain (LTR)

on human rights grounds against the decision to deport him from the UK to Zimbabwe following his 2011 conviction for criminal offences, including sexual assault on a female by penetration (his former partner) for which he was sentenced to 2 years' imprisonment.

2. Following the submissions of both parties, I reserved my decision to be provided in writing, which I now do.

3. The lengthy chronology is set out in Judge Blackwell's decision and need not be rehearsed here but it is noted that the appellant has fathered 5 children with 3 different women, including the victim of his sexual offence, but is only involved with his youngest daughter.

4. The First-tier Tribunal allowed the appeal on article 8 ECHR grounds, concluding that deportation would lead to unduly harsh consequences for the appellant's daughter, relying on exception 2 (family life) pursuant to s117C(5) of the 2002 Act, as amended.

5. In summary, the grounds argue that the First-tier Tribunal made a material misdirection in law and failed to provide adequate reasons as to precisely why the appellant's removal would lead to unduly harsh consequences for his daughter remaining in the UK. In particular, it is submitted that between [56] and [57] of the decision, the judge conflated the issues of 'best interests' with 'unduly harsh'.

6. In granting permission, Judge Hamilton considered it arguable that the First-tier Tribunal Judge failed to provide adequate reasons for finding that deportation would have unduly harsh consequences for the appellant's daughter.

7. Unarguably, the 'unduly harsh' threshold is a high one. In KO (Nigeria) [2018] UKSC 53, the Supreme Court confirmed the Upper Tribunal's direction in MK (Sierra Leone) [2015], 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 advert 'unduly' raises an already elevated standard still higher." In HA (Iraq) v Secretary of State [2022] UKSC 22, the Supreme Court reaffirmed KO and stated that the level of harshness which is acceptable or justifiable is elevated in the context of the public interest in the deportation of foreign criminals and that 'unduly' raises that standard still higher. It is then for the Tribunal to make an evaluative judgement as to whether that elevated standard has been met on the facts and circumstances of the particular case before it. HA (Iraq) was not referred to by the First-tier Tribunal, although the MK definition was cited at [53] of the decision.

8. It was common ground that the appellant had a genuine and subsisting relationship with his daughter, with whom he now lives. The respondent also accepted that the child would find it distressing for the appellant to be removed but noted that she would have the support of her mother, the NHS, the educational system, and the local authority, and will be safe and supported in the absence of the appellant (see [44] of the decision). There is some confusion within the decision, including at [44] where the judge mistakenly refers to the appellant in place of his daughter. At [45] the judge accepted that the appellant helped his daughter with her homework and provided her with "emotional care". They do activities together, such as cycling, visiting the park, and gym sessions. At [46] the judge noted the mother's evidence that their daughter relies on the appellant to cope with her anxiety and separation issues. At [47] the judge referenced the daughter's witness statement that puberty was a tough time for her, and her father's presence makes her feel safe and loved. She feared his

absence would impact her school performance and that without him her whole world would crumble.

9. The the relationship between father and daughter is summarised from the report of Dr Markantooakis, consultant child psychiatrist, who in 2020 diagnosed separation anxiety disorder. It is stated that the appellant's presence provides reassurance, confidence and a feeling of safety, adding: "It is also my opinion that (the daughter) will suffer intensely emotionally, socially and educationally if her father is deported back to Zimbabwe… I anticipate that she will suffer from an escalation of her symptoms of separation anxiety and panic attacks." The judge noted with some concern the age of this report and that the expert had not met the child face to face and had not seen the daughter's medical records and was only able to accord limited weight on the report.

10. However, at [51] the judge relied on the therapist report of Ms S Ryder, which explained how the daughter first became anxious when her father was detained at which time she was 3 years of age. The report "expresses concern as to how the removal of the appellant would affect (the daughter's) performance at school. However (the daughter) has evolved techniques to assist with coping."

11. At [52] the judge noted a change in circumstances from a time when the appellant had no direct involvement in his daughter's life and Children's Services were involved because of the potential risk to the child, to where the offender manager now "accepts he is a loving husband and father who presents no risk. It is very evidence from the testimony of the appellant's partner and daughter this is the case."

12. The only explicit reasoning provided within the decision in relation to whether removal would be unduly harsh for the daughter appears at [56] and [57] of the decision under the heading 'Unduly harsh', as follows:

> *"I accept some relationship could continue to exist, by modern means of communication. However it is evident that the best interest of D is for the appellant to remain in the UK. While she is a child, she is a teenager and has a good conception of her own interests. She is quite clear that she would benefit deeply from the appellant's presence in her life. The emotional support and parental involvement in everyday aspects of life are clearly in her best interests. It could only very partially be provided by modern means of communication. Whilst having due regard to the public interest, having regard to all the evidence in the round, I find the appellant's removal would be unduly harsh on D."*

13. Given that little weight was given to the psychiatric report, because of its age and absence of access to medical records, it is not clear to me that the remaining evidence, including that of the therapist Ms Ryder, who is not an expert but who has worked with the daughter over some 52 sessions, would have been sufficient for the judge to conclude that the appellant's removal would be unduly harsh for the appellant's daughter. However, I accept that each case must be considered on its own facts and merits, and I make no finding as to the sufficiency of the evidence.

14. Whilst I accept that the judge has read and carefully considered the supporting evidence, summarised in the earlier paragraphs of the decision, I accept as well-founded the submission that there is a failure to provide any or any adequate reasoning for the 'unduly harsh' conclusion. Frankly, it is not possible to discern from a reading of this decision what the reasons are for concluding that the unduly harsh threshold is met. Almost every phrase of the reasoning provided actually relates to best interests and whether modern means of communication

would be sufficient to meet those needs. It follows that whilst the judge made a correct self-direction in law as to the 'unduly harsh' threshold, I find that the reasoning provided is both inadequate and conflates the best interests considerations with the high 'unduly harsh' threshold assessment.

15. In the circumstances, the decision is flawed for material error of law and cannot stand but must be set aside in its entirely, to be remade. I have carefully considered whether this is a matter that ought to be retained in the Upper Tribunal but I acknowledge that any rehearing of the appeal will require up-to-date evidence as to the appellant's and daughter's circumstances. It follows that this case falls squarely within paragraph 7 of the Practice Direction for remittal to the First-tier Tribunal.

Notice of Decision

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside to be remade, with no findings preserved.

I remit the appeal to the First-tier Tribunal for a de novo hearing.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 February 2024