



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00624/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 January 2015**

**Decision & Reasons
Promulgated
On 28 January 2015**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

**HD
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Victor-Mazeli
For the Respondent: Ms A Everett

DECISION AND REASONS

1. The appellant is a citizen of Vietnam. He is married to a British citizen and they have two young children. The respondent decided to make a deportation order against the appellant in March 2014. The appellant

appealed that decision to the First-tier Tribunal. Following an oral hearing and by a decision promulgated on 24 October 2014 the appeal was dismissed under the Immigration Rules and on human rights grounds.

2. The appellant sought permission to appeal to the Upper Tribunal. I summarise the grounds seeking permission as follows:-

(a) The panel was satisfied that the appellant has a genuine and subsisting parental relationship with his children who are under the age of 18 and who are British citizens. There was evidence supporting the appellant's claim that he takes the children to nursery and to GP appointments. The panel had the benefit of seeing the appellant and his children interact (albeit briefly) during the hearing. Nevertheless, the Tribunal concluded that it was not satisfied that it would be unduly harsh for the children to live in Vietnam, or that it would be unduly harsh for them to remain in the UK without him. That conclusion is inconsistent with the evidence.

(b) The Tribunal found at paragraph 50 that the appellant and his wife are in a genuine and subsisting relationship but was not satisfied that the appellant met the requirements of paragraph 399(b) of the Immigration Rules. Although the appellant may not meet the requirements of paragraph 399(b)(i) the Tribunal had a duty to consider the effect that deportation would have on the appellant's wife who is a British citizen. The Tribunal was bound to consider the impact of deportation of a foreign national on a British national spouse.

(c) The Tribunal failed to make any reference to Section 55 of the Borders, Citizenship and Immigration Act 2009. Generally, the Tribunal failed to consider the best interests of the children and the effect on the children if their father were to be deported.

(d) The Tribunal did not consider adequately or at all the oral evidence of Mrs BC, the family's close friend, who stated that the appellant is the primary carer for the children. He is very important to them. He is central to their lives and without him she imagines that they will be scarred for life. If they are sent to Vietnam she would be very worried about how they would cope there.

(e) The Tribunal failed to consider adequately the appellant's family life in the UK in light of the case law.

3. The judge granting permission to appeal stated that although most of the grounds are not arguable, it is arguable that in failing to consider the best interests of the children and make findings in relation to their best interests, the panel may have made a material error of law. Both children and the appellant's wife are British citizens. Findings in relation to the children's best interests may arguably have affected the outcome of the proportionality exercise.

4. The respondent filed a Rule 24 response submitting that the First-tier Tribunal directed itself appropriately. Although there is no direct reference to Section 55 in the totality of the determination the Tribunal took account of the relevant issues, not least of which is that the children are in full-time nursery despite the appellant's claimed presence at home. The children are not apparently cared for by the appellant who cannot work. Both children are very young and clearly able to adapt to life elsewhere. In the light of recent legislation and current case law it is not unreasonable for the family to be split. Both parties were aware of the appellant's status when the children were conceived. The appellant evaded immigration control on two occasions. Comments are then made in the response that the panel failed to deal with other matters, not the subject of the application to appeal and which do not form any part of a cross appeal. I have therefore not taken those matters into account.
5. I heard submissions. Ms Victor-Mazeli for the appellant relied on all of the grounds, but in the main relied on the submission that the Tribunal failed to consider the true impact on the children of the appellant's deportation.

My consideration

6. At paragraph 44 and onwards of the determination the Tribunal directs itself correctly on the law. Under 398(b) of the Immigration Rules where a person claims that their deportation will be contrary to the UK's obligations under Article 8 of the Human Rights Convention, the deportation of the person from the UK is conducive to the public good and in the public interest because the appellant in this case has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than four years, but at least twelve months. This is so unless outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A of the said Rules.
7. What the Tribunal found and reasoned in paragraphs 48 and 49 of the determination are that the Tribunal was not satisfied that it would be unduly harsh for the children to live in Vietnam, or that it would be unduly harsh for them to remain in the UK without the appellant. The Tribunal reasoned that the children are very young (they are aged 3 and 2), and whilst accepting that initially the removal of the appellant would create a considerable void in their lives, they are young enough to adapt and to continue with their lives in the UK with their mother. The Tribunal recognised that they could not be required to accompany their father. That would be a decision that would have to be taken for them and they would be able to keep in contact with him through various means of communication. No reasons were advanced why they could not visit him in Vietnam.
8. The Tribunal was satisfied that the appellant and his wife are in a genuine and subsisting relationship. That relationship began in 2003. There have been interruptions to it. The relationship was formed at a time when the

appellant was in the UK unlawfully. They went through a traditional form of marriage and had two children in the full knowledge that the appellant could be removed. The appellant “has not helped himself by absconding on two occasions from immigration detention ...”. The Tribunal expressed that it had given careful consideration to the position of the appellant’s wife who has been here since the age of 14 and who very recently, in May 2014, acquired British citizenship. The panel took into account that the wife could not be removed but she has a choice and would not find it unduly harsh to return to Vietnam. She came to the United Kingdom as a teenager and has adapted to life here. The panel could find no reasons why she could not readapt to life in her home country whose language she still speaks. The panel at paragraph 53 found that the children are in full-time nursery and it was not accepted that the children’s mother would not be able to find alternative additional childcare arrangements in the absence of the appellant. Further findings and comments were made in paragraph 57 of the determination viewing the overall position.

9. Although it is true that the panel has not referred specifically to paragraph 55 or stated in terms that the best interests of the children are a primary consideration, it is nevertheless apparent that the panel very much had the best interests of the children in mind, and indeed considered the interests of the family as a whole. The Tribunal considered also the consequences of the appellant being deported and the effect upon the children and the appellant’s wife if that happened.

Notice of Decision

10. The panel could have placed additional wording in the decision which might have avoided any attempt at further appeal. However, read overall this is a careful determination that reveals no error of law, such that the appeal should be reheard or for any other reason requires the circumstances to be further examined.
11. For these reasons the decision of the panel in the First-tier Tribunal is upheld.

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 him or any member of their 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

Date

Upper Tribunal Judge Pinkerton