



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/17906/2012

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7th August 2015

Decision Promulgated  
On 13th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR DUONG THANH NGUYEN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Sayeed, counsel instructed by Wesley Gryk Solicitors  
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. This is an appeal against a decision of FTTJ KSH Miller, promulgated on 10 November 2014, in which he dismissed the appellant's appeal against a decision to refuse to revoke the deportation order made against him.

## Background

2. The appellant arrived in the United Kingdom in August 2003 and applied for asylum a month later. That claim was refused and his appeal against that decision dismissed in a determination promulgated on 9 February 2004 by Adjudicator Nicholas Paul. On 26 June 2007, the appellant pleaded guilty to producing cannabis and was subsequently sentenced to 18 months imprisonment. The appellant made a belated attempt to appeal the respondent's decision to deport him in 2008, however a FTTJ Astle refused to extend time for appealing. In August 2011, the appellant entered into a relationship with Van, a British citizen and the couple has two children born in 2012 and 2013. Van also has two children from a previous relationship. On 2 April 2012 the appellant was convicted of drink driving. On 2 August 2012, the respondent refused to revoke the appellant's deportation order. The appellant's appeal against that decision was dismissed by FTTJ Warren L Grant on 27 November 2012. That decision was set aside by Deputy Upper Tribunal Judge J C Macdonald and remitted to the First-tier Tribunal for the decision to be remade.

## The hearing before the FTTJ

3. The appellant, his partner and Ms Diane Jackson, an independent social worker, gave evidence before FTTJ Miller, who heard the appeal on 15 October 2014. The FTTJ found that the appellant could not benefit from paragraph 399 of the Rules because there were other family members to care for the appellant's children. He also concluded that the appellant could not satisfy paragraph 399a of the Rules because the appellant had not lived in the United Kingdom with valid leave for fifteen years.

## Error of law

4. Upper Tribunal Judge Freeman granted permission solely on the basis of the FTTJ's treatment of the children of the appellant and his partner.
5. The Secretary of State's response of 26 June 2015 indicated that the respondent opposed the appellant's application for permission to appeal on the basis that the FTTJ directed himself appropriately, that the appellant's children were very young and heavily focused on their mother and the decision followed the reasoning in Lee v SSHD [2011] EWCA Civ 348.

## The hearing

6. Mr Sayeed commenced his submissions by reference to the second ground of appeal, that is the FTTJ made no freestanding best interests consideration of the four children affected by the respondent's decision. He drew my attention to specific extracts from the report of an independent social worker, which set out the background to the family unit and each member's concerns regarding the deportation of the appellant. He indicated that he still relied on the other grounds and could address me accordingly if necessary.

7. For his part Mr Tarlow submitted that Mr Sayeed was seeking to reargue the matter before me, with reference to the evidence. He argued that it could not be said that the FTTJ was unaware of the evidence in the social worker's report, which was mentioned in the decision and reasons. He asked me to note that the FTTJ had grasped at [29] that the key issue was whether the decision to deport the appellant was unduly harsh on the children; that the FTTJ noted that this was a very serious offence [30], that positive findings were made regarding the appellant and the children [32] and that after careful consideration [34] the FTTJ was entitled to reach the conclusions he did on the evidence [33].
8. In reply, Mr Sayeed asked me to note that Mr Tarlow had made no reference in his submissions to a best interest analysis having been carried out by the FTTJ and that it could not be said that the FTTJ's decision would have been the same had such an analysis taken place. In response to my question as to the materiality of any error of law, owing to the phrase "*The only arguable point is as to the judge's treatment of those of their children D and A, both under 3,*" employed by Upper Tribunal Judge Freeman in his grant of permission, Mr Sayeed submitted that the appellant's natural children are British citizens and therefore on the same footing as those non-British children with longer residence and accordingly their age was irrelevant.

#### Error of Law

9. The FTTJ made a material error of law in concluding that the effect of the appellant's deportation would not be unduly harsh on the appellant's children without having made any express reference to or consideration of their best interests. The only mention of the concept of best interest in the FTTJ's decision and reasons is at [2] when he recites the history of the appeal in the following terms; "*Judge JG MacDonald held that the decision of the First-tier Tribunal involved the making of an error on a point of law on the ground that the Panel did not give proper consideration to the best interests of the Appellant's own child and the two others in the household in which he was living.*" Regrettably, the FTTJ fell into the same error.
10. I have considered the relevant legal principles paraphrased in Zoumbas v SSHD [2013] UKSC 74 at [10];
 

*"(4) While different judges might approach the question of the best interests of a child in different ways; it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;*

*(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations."*
11. Lee V SSHD [2011] EWCA Civ 348 at [27] makes a similar point as to the need for a "*properly structured appraisal of the evidence, informed by a correct understanding of the legal importance of a child's best interests.*"

12. I am also persuaded by Mr Sayeed's submission that the standards expected of the respondent in complying with its duty under section 55 of the Borders, Citizenship and Immigration Act 2009 apply with equal force to the First-tier Tribunal. In MK(section 55 - Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC) at [8], the following was said;

*"The substance of the primary duty must be properly acknowledged, the relevant children must be identified and their best interests must then be considered, to be followed by a considered balancing exercise." And;*

*"Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot be realistically or sensibly be undertaken unless and until the scales are properly prepared."*

13. There was no structured approach by the FTTJ to the best interests principle and no appraisal of the evidence relating to the children in the his decision.
14. The vast majority of the information regarding the appellant's children was contained in an extensive report of an independent social worker who visited the family unit on three occasions and spent five and a half hours with them in total. There is no record of any challenge to the social worker's observations and conclusions by the presenting officer who appeared before the FTTJ. The said report set out, over 30 pages, the complex relationship history of the appellant's wife, the abandonment of the appellant's stepchildren by their natural father and the individual effect the appellant's deportation would have on each of the four children. The sole reference to the social worker's evidence is at [19] of the FTTJ's decision when he recites her oral evidence regarding the likely effect of the appellant's deportation on his wife. There is no reference anywhere in the decision to the detailed information contained in the report regarding the children of the family, particularly the appellant's natural children.
15. There is no mention of the phrase "best interests" in the FTTJ's decision where he records his findings, from [21] onwards. Nor is there any recognition of the primary importance of ascertaining the best interests of the children or a need to conduct a free-standing assessment. While the FTTJ correctly recognised that the appeal turned on the issue of whether the appellant's deportation would have an unduly harsh effect on his children, that issue was addressed without any identification of the children's best interests. Furthermore, what consideration there was of the children's circumstances was inadequate, in that the FTTJ stated at [33] that *"the impact on the children will be significant"* but does not provide any reasoning which might indicate that there was any consideration of the evidence before him or of the children's best interests.
16. In these circumstances I am satisfied that there are errors of law such that the decision be set aside to be remade. None of the findings of the FTTJ are to stand.
17. The best interests of the appellant's children have yet to be considered at the First-tier

Tribunal and accordingly I decided, with the agreement of the parties, that the matter ought to be remitted to the First-tier rather than retained in the Upper Tribunal.

18. Further directions are set out below.

19. No anonymity direction was made by the FTTJ and I see no reason to make one now.

### **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

### **Directions**

- This appeal is remitted to be heard de novo by any First-tier Tribunal Judge except FTTJ Miller, Astle or Paul
- The appeal should be listed for a hearing at Taylor House
- A Vietnamese interpreter is required.
- Time estimate is 4 hours
- The FTT is to give consideration to an early listing of this appeal.

Signed

Date: 9 August 2015

Deputy Upper Tribunal Judge Kamara