Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00284/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 January 2016	**On 13 January 2016**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

H N

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:
For the appellant: Mr J. Martin, Counsel, instructed by Direct Access
For the respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Vietnam who was born on 23 June 1987. The appellant had arrived in the United Kingdom in 2010, according to an answer he gave in interview, obtaining entry unlawfully and thereafter remaining without any substantive right to do so. He worked illegally. He came to the attention of the authorities when he was arrested for the offence of which he was subsequently convicted on 8 August 2014. He had been found in a cannabis factory and was convicted for taking part in its production. He was sentenced

to 10 months imprisonment. The respondent made a decision to deport the appellant on the basis that his deportation was conducive to the public good in accordance with s. 3(5)(a) and s. 5 (1) of the Immigration Act 1971 on the basis of his conviction.

2. The appellant sought to avoid the effect of the deportation order by claiming asylum and by asserting that his removal would violate the private and family life that he had acquired since his arrival in 2010 or perhaps 2009. His asylum claim was lawfully rejected by First-tier Tribunal Judge Jackson in a determination promulgated on 17 September 2015. No challenge is made to the dismissal of the asylum appeal.

3. The challenge to the Judge's determination is focussed exclusively in her treatment of the Article 8 claim. It should be recalled that the Judge was required to consider this claim through the prism of the Immigration Rules and, in particular, paragraphs 398, 399 and 399A. In doing so, the Secretary of State had determined that the appellant's deportation was conducive to the public good, the public interest in deportation only being outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

4. In the respondent's decision, the Secretary of State concluded that the appellant's deportation was conducive to the public good because the appellant was involved in the production of prohibited drugs, an offence which had caused serious harm ('the conducive ground'). No challenge is made to the conducive ground on which the Secretary of State relied. Hence, the respondent's consideration was restricted to the exceptions found in paras 399 and 399A, none of which applied. Once again, there is no issue that the appellant was not able to meet the exceptions in either of those paragraphs. Hence the appellant as a matter of law was forced to fall back on arguing his case upon whether very compelling circumstances had been established. It is, of course, apparent that the current legislative framework sets a very high threshold when an appellant seeks to avoid deportation in circumstances such as this.

5. This is made clear by the Immigration Rules which provide

> '**Deportation and Article 8**
>
> 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
>
> ...
>
> (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 …, 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.

399. 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;…'

6. Note that there are now two limbs to the 'unduly harsh' test, both of which have to be satisfied: unduly harsh for the child to live with the appellant in a different country and unduly harsh for the child to remain in the UK without the appellant. Neither of these limbs applies unless the appellant first establishes the child is British or has spent the relevant seven-year period in the UK. It follows that if a child is under 7 neither limb of the unduly harsh test has any application.

7. Section 117C of the Nationality, Immigration and Asylum Act, 2002 as inserted by s.19 of the Immigration Act 2014 as Part V to the Act ('Part V') provides a mandatory duty placed on a First-tier Tribunal Judge to have regard to a number of criteria:

'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.
>
> [By s.117D the appellant fell to be treated as a foreign criminal because of the Secretary of State's reliance upon the conducive ground.
>
> Further, a "qualifying child" means a person who is under the age of 18 and who—
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more …]'

8. The appellant formed a relationship with a girlfriend, MN, in 2012. MN has settled status in the United Kingdom. She has a daughter, ATN, born 10 May 2009 and is now aged six. Both are citizens of Vietnam. At the hearing before the First-tier Tribunal Judge, MN was pregnant with the appellant's child. She is due to give birth a few days hence. The Secretary of State did not accept that the appellant had a genuine and subsisting relationship with ATN but the First-tier Tribunal Judge rejected that and substituted a finding of fact that there was such a relationship. Importantly, however, the Secretary of State said on page 13 of the refusal letter [O.14]:

> 'It is accepted that it would be unduly harsh for ATN to live in Vietnam. We have taken this view as ATN was born and raised in the UK; her mother, a recognised refugee in the UK, has evidently been her primary carer and as she is now at an age where she is likely to be attending school. If ATN was to live in Vietnam, her mother would not be able to follow suit, and as she would be unaware of the linguistic, cultural and societal norms of Vietnam, her integration to life in Vietnam would most likely be challenging. The foreseeable deprivation of her primary carer and sole responsible parent as well as the social and cultural norms to which she is accustomed and is visibly integrated, has been deemed by us unduly harsh.'

9. At the hearing before the First-tier Tribunal, the Home Office Presenting Officer, Mr Little, adopted a different approach as recorded in paragraph 56 of the determination. Mr Little then submitted that MN's previous asylum claim had been advanced on the basis that she would be returning to Vietnam as a single mother and as a minor. Neither of those factors applied by the date of the hearing. MN remains a Vietnamese citizen, her daughter speaks Vietnamese and the family would be returning together as a single unit if they chose to do so. Inevitably, it would be in the best interests of ATN to remain with her mother. Whilst in the refusal letter, the decision that it would be unduly harsh

to require ATN to leave the United Kingdom was predicated on her being separated from her mother, which would be unquestionably unduly harsh, different considerations would operate if return was predicated on the nuclear family remaining intact.

10. It is unclear what Mr Martin, who appeared before the First-tier Tribunal Judge as he did before me, made of this. As a matter of law, a concession made by an official of the Secretary of State can be withdrawn but it is axiomatic that such a withdrawal must permit the appellant a proper opportunity of responding to the fresh argument. The determination does not make clear whether this ambiguity was resolved. Mr Martin told me that he is likely to have referred the Judge to the contents of the refusal letter and, as an experienced practitioner, I consider this very likely. The Judge knew the earlier stance adopted by the Secretary of State because she made specific reference to the passage I have cited in the refusal letter in paragraph 30 of her determination. Had it been argued that the Secretary of State was not, as a matter of law, permitted to remodel her approach to whether removal to Vietnam would be unduly harsh for ATN, I would have expected this to have been made the subject of specific argument and a preliminary ruling. I would have thought that it was a fresh argument capable of being dealt with by both sides without an adjournment. The grounds of appeal do not claim that the Judge was not permitted to go behind the concession as a matter of law. Rather, they assert there was no reason to do so but that is factually incorrect as the reasons for doing so were clearly set out in the respondent's submissions to that effect set out in paragraph 56 of the determination which I have summarised in paragraph 10 above.

11. What, however, is clear from paragraph 81 of the determination is that Mr Martin accepted the appellant did not fall within any of the exceptions in paragraphs 399 and 399A of the Immigration Rules and therefore there had to be very compelling circumstances over and above those described in paragraphs 399 an 399A to outweigh the public interest in favour of deportation. That concession has to be correct. First, ATN is not a British citizen. She is now aged six. Hence, she is not a qualifying child for the purposes of the Immigration Rules or Part V. As the 'unduly harsh' test only applies to children who meet the qualifying conditions, whether removal would be unduly harsh was not the ultimate issue. Whilst the consequences of removal will always be material when considering the application of the combined effect of the Immigration Rules/Part V, the test was *'very compelling circumstances over and above those described in paragraphs 399 and 399A'* (that is, over and above the fact that there would be consequences found to be unduly harsh). Absent a finding as a starting-point that the consequences would be unduly harsh, the very compelling circumstances test finds no traction because that test kicks in at a point over and above the criteria set out in paragraphs 399 an 399A (which includes the 'unduly harsh' criterion but only in the case of a child that qualifies).

12. In granting permission to appeal against First-tier Tribunal Judge Jackson's determination, First-tier Tribunal Judge Nicholson treated the concession made by the Secretary of State in the refusal letter that it would be unduly harsh for the child to be removed to Vietnam as preventing the Judge from reopening that issue. That was not a ground advanced in the grounds of appeal. For the reasons that I have already given, it is permissible for a concession to be withdrawn provided that, in doing so, the appellant is provided a sufficient opportunity to deal with the respondent's remodelled case. I am not satisfied that Judge Jackson acted unfairly in dealing with the respondent's submissions that the decision maker in the refusal letter had previously found that it was unduly harsh principally because he treated MN as a refugee who could not be returned but circumstances had since changed; since her recognition as a refugee was made on the basis that she was a single mother and a minor, her refugee status no longer prevented her returning as part of the family unit. That, however, was not the central issue.

13. Having decided the respondent could not resile from that concession, Judge Nicholson granted permission as a result of a single sentence in paragraph 88 of the determination. I set out the entire contents of paragraph 88, underlining the material part:

> "In circumstances where it is clearly in the best interest of the appellant's partner's daughter to remain with her mother and only some factors pointing to her maintaining a relationship with the appellant, I do not find that the effect of the appellant's deportation on the child would be unduly harsh if she and her mother chose to remain in the United Kingdom. <u>This is particularly so when I do not consider that it would be unreasonable, if they wish to maintain family life as it is now, for them to relocate to Vietnam with the appellant</u>."

14. Pausing there, it was undoubtedly open to the Judge to conclude that it would not be unduly harsh for the appellant to be removed notwithstanding the effect this would have on the relationship with ATN, were she to remain here with her mother. The Judge supported this reasoning in paragraph 91 of the determination:

> "They are settled in the United Kingdom, the appellant's partner is working and her daughter is in school having been born in the United Kingdom. The relationship between the appellant and his partner/daughter was formed at a time when his immigration status was not only precarious but he was in the United Kingdom illegally - a fact which the appellant's partner confirmed that she knew shortly into their relationship."

15. The Judge might also have added that the appellant never advanced his case on the basis that he had any substantive right to remain in the United Kingdom either as a spouse or as a fiancé or as a partner. Not only was he here illegally, but he was working illegally. Not only was he working illegally but, in doing so, he committed a criminal offence. Not only was it a criminal offence, but it was a criminal offence that respondent lawfully determined caused serious

harm. There were, therefore, compelling circumstances why the appellant, as a person with no right to enter or remain in the United Kingdom should be removed notwithstanding the relationship he had developed over a relatively short period of time with MN and her daughter; a relationship formed at a time when both he and MN knew his status was 'precarious', a synonym for non-existent.

16. What, therefore, was the basis upon which permission to appeal was granted? It is based on the concluding words of paragraph 88: *This is particularly so when I do not consider that it would be unreasonable, if they wish to maintain family life as it is now, for them to relocate to Vietnam with the appellant.* On its face, this sentence makes no sense. Whether it is unduly harsh for the child to remain in the United Kingdom with her mother when the appellant is removed has nothing whatever to do with the quite separate consideration of whether it would be reasonable or, indeed, unduly harsh for the family to re-locate to Vietnam. Neither one of the separate considerations is strengthened or weakened by the other. Neither has a bearing on the other. Paragraph 399 (ii) is a two-limbed test applying an unduly harsh test in two distinct sets of circumstances: paragraph 399 (ii) (a) and (b), set out in paragraph 5 above. However, in granting permission Judge Nicholson treated it as arguable that by relying on what he considered the impermissible departure from the concession in the refusal letter, the Judge may have tainted his decision on whether it was unduly harsh for the child to remain in the United Kingdom without his mother.

> "It is arguable in the circumstances that the Judge's conclusion that it would be reasonable for the child and her mother to relocate to Vietnam with the appellant was a constituent part of the finding that it would not be unduly harsh for them to remain in the United Kingdom without him."

17. Having heard argument, I am satisfied that this approach is wrong. First, the Judge reached a sustainable conclusion that it would not be unduly harsh for MN and ATN to remain in the United Kingdom without the appellant. Second, the words in paragraph 88 '*This is particularly so when I do not consider that it would be unreasonable, if they wish to maintain family life as it is now on the them to relocate to Vietnam with the appellant*' does not impact upon that finding. Third, neither paragraphs 399 or 399A applied as, in the context of ATN, she was not a qualifying child. Fourth, the test was not whether it was *unduly harsh* but the much more stringent test of *very compelling circumstances over and above those described in paragraphs 399 and 399A*. Finally, (although this is not crucial to the determination), the grant of permission was predicated on a misconception about the binding nature of the 'concession' made in relation to one of the limbs of paragraph 399(ii), namely that the Secretary of State was not permitted to resile from the stance adopted in the refusal letter. I am not satisfied that it was unfair to depart from the approach adopted by the respondent in the refusal letter. If it was not unfair, the First-tier Tribunal Judge's reasons for departing from the respondent's original approach are sound.

18. It is in paragraph 92 of the determination that the Judge finally turned to the issue that was crucial to the determination of the appeal when she found that there were no very compelling circumstances outweighing the public interest in deportation. As a simple matter of fact, no circumstances - far less very compelling circumstances - were advanced over and above consideration of whether it would be unduly harsh. Even if the Judge had found that it would be unduly harsh (which she had, of course, rejected) the case was still bound to fail, absent very compelling circumstances identified in the evidence and established to the appropriate standard.

19. For the sake of completeness, I shall deal briefly with the consequences of MN's pregnancy. Once the child is born, he or she will become a British citizen and also an EU citizen. The consequences of this are for the future and were not for the determination of the First-tier Tribunal or the Upper Tribunal. Section 55 does not apply to an unborn child. It is premature to speak of there being any Article 8 rights engaged. That said, the fact that a male appellant in the full knowledge that he has no status in the United Kingdom fathers a child who becomes a United Kingdom citizen would not, without more, prevent his removal. The child's birth was a choice made on the part of the parents and does not bind the hand of the Secretary of State. If there is to be a later claim made by the appellant that the birth of his British child alters the Article 8 assessment, this can only be made in the context of a fresh claim. It is for the Secretary of State to consider and decide upon the effect this may have on the appellant's immigration status. There are a number of discretionary elements that may come into play. It is not for the Tribunal at first instance. It can have no bearing on an error of law jurisdiction.

DECISION

The Judge made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
6 January 2016