Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01387/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2018	**On 6 March 2018**

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE PERKINS

Between

AN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Lee, Counsel
For the Respondent: Mr Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This case has a long history. In brief the respondent made a deportation order on 21 July 2009 following the appellant's conviction in 2007. An appeal against the decision was refused on 4 March 2010. Since then the appellant has made a number of further representations regarding a claim for asylum and a claim under article 8 ECHR. On 25 June 2014 the respondent refused the appellant's human rights and other claims in the context of an application to revoke the deportation order. The appellant appealed that decision. The procedural history is set out in paragraph 5

but for present purposes in a decision promulgated on 9 November 2017 First-tier Tribunal Judge Henderson refused the appeal. The appellant has appealed that decision.

2. The appellant is an Iranian national born 2 December 1976. He arrived in the UK in December 2000 and claimed asylum. That was refused. In 2002 he married PG who is now a British citizen. They have one son, P born 19 September 2003, who is now 14 years old. The appellant and PG were divorced in 2010. P lives with his mother but sees the appellant regularly.

3. In 2007 the appellant was convicted on his plea of offences contrary to section 25 of The Identity Card Act 2007. In October 2008 he was sentenced to 27 months imprisonment. He has no other convictions.

Grounds of Appeal

Ground 2

4. There are two grounds of appeal. Taking in reverse order the first relates to alleged misunderstandings by the Judge of, first, the submissions of counsel, secondly, evidence from the appellant, thirdly the interpretation placed on the evidence of Ms Tyrell, a social worker and fourthly failing to note that there was evidence of problems with P's mental health.

5. In support of the first two branches of that ground counsel produced a witness statement from Emma Daykin, counsel who represented the appellant before the FtT along with contemporaneous notes from her and and her pupil, Aphra Bruce-Jones. The respondent's rule 24 response did not challenge the accuracy of their account. Accordingly we accept the factual basis upon which this ground of appeal is based.

6. At paragraphs 7 and 30 the Judge records that Ms Daykin confirmed that the appellant was not relying on matters relating to his mental health. This was inaccurate. She confirmed that there was not a standalone article 3 case based on the appellant's mental health. But she went to submit that it was relevant to the article 8 issues and whether it was unduly harsh for the child to remain without his father. She submitted that there was evidence from Dr Cohen that if he was separated from his son the appellant's mental state would deteriorate very significantly. This would exacerbate his depression and PTSD and significantly raise his risk of suicide. This was a factor to be weighed in the balance when considering the unduly harsh question since it would impact on the quality of the relationship that the son would have with his father. **MM (Uganda) [2016] EWCA Civ 617** makes it clear that all the circumstances are relevant when considering the unduly harsh question.

7. At paragraph 25 the appellant is recorded as stating that he would not be able to keep in touch with his son, even if he was able to remain alive. What he in fact said was that if he remained alive he would make contact with his son. "So long as I could I would make contact with him."

8. At paragraph 24 the Judge comments on the appellant's attitude to his offending. He is recorded as saying that he did not regard the use of fake ID cards as a crime because he needed to work to support his son. Everyone was doing the same thing in order to work and the employers were prepared to allow it as they needed the people to do the work. The Judge then comments that it appeared from the tenor of his evidence that he did not appear to accept that he had done anything wrong; it was better than selling drugs or being violent. The Judge then commented that this evidence was not consistent with Ms Daykin's submission that he was remorseful. The note from Ms Daykin's pupil is in the following terms, Q: "Why did you commit your crime?" A: "I didn't know I made a crime. It was fake ID cards. Reason I got involved. I had no work, no support. I see everyone is using fake work permissions. I was wrong. I didn't know it was a crime. I would never have done it."

9. The Judge records the evidence of Ms Tyrell, the social worker, in paragraphs 29 to 35. At paragraph 31 she records that P was experiencing some symptoms associated with reduced emotional wellbeing due to concerns about separation from his father. This Ms Tyrell had said could lead to deterioration in his mental health if he were separated from his father at this point in his life. The Judge commented that there was no supporting medical evidence on this matter. However Ms Tyrell had used a Department of health tool to evaluate whether P was suffering from a depressive illness. That showed that he was not. The Judge commented that on an objective basis given the test score the likelihood of P suffering from a depressive disorder is currently low to middling and did not appear to support Ms Tyrell's conclusions. The submission was that the Judge had missed the point. It was future deterioration which the expert was concerned about. Moreover there had been evidence from P's mother to the effect that P had been referred to CAM, an organisation specialising in child depression, when the appellant was sent to prison. This together with Ms Tyrell's evidence about anticipated mental health problems were factors that the Judge had failed to place any or sufficient weight.

Respondent's response to ground 2

10. As noted above the rule 24 response did not suggest that the factual basis on which ground 2 was based was incorrect. In summary it was to the effect that the Judge had recorded and considered all of the circumstances. Mr Melvin submitted that there was no materiality in the appellant's mental health issue. On the appellant's attitude to his crime she had made findings open to her. The Judge had made detailed findings about the expert report. The fact was that there was no medical evidence about P's mental health.

Conclusions on ground

11. It is clear that the Judge misunderstood the submission made by Ms Daykin in relation to the appellant's mental health. There was no article 3 point being taken but Ms Daykin did make submissions that his mental

health did impact on the article 8 considerations and whether it would be unduly harsh on P for the appellant to be deported. The evidence of Dr Cohen is contained in a letter dated 24 January 2015, so it is now some 3 years old. She expresses the opinion that if the appellant were to be separated from his son again his mental state would deteriorate very significantly and "exacerbation of his depression and PTSD would significantly raise his risk of suicide. His relationship with his son is the protective factor in preventing his from suicide and if he were for example to be faced with removal to Iran this protective factor would feel to him as if it was no longer there."

12. We are satisfied that the judge was in error in not taking this into account in the assessment of whether it was unduly harsh on P for the appellant to be deported. Nevertheless this is not an article 3 case. The evidence before the FtT was nearly three years old and it was not directed to the effect on P. We are not persuaded that the Judge's omission of this evidence from her consideration is a material error.

13. So far as the complaint regarding the appellant's attitude to the offence is concerned we are not persuaded that there is any material error. The sentencing judge's remarks, as well as the sentence imposed, make it clear that this was a serious offence. The appellant was found with 52 forged asylum registration cards in the course of preparation, a laminator necessary for creating false documents and an extensive range of paraphernalia such as a skilful forger might require. He had computer equipment with files demonstrating a technical expertise to create false Iraqi driving licences. This was not just the possession of a fake ID card in order to obtain work. This was a sophisticated criminal operation and to our minds the Judge was entitled to be sceptical that he was not aware that it was criminal at the time.

14. We are not persuaded that there is any material error in the way in which the Judge dealt with the evidence of Ms Tyrell or her comments on lack of medical evidence. There was no medical evidence. On a fair reading of her assessment of Ms Tyrell's evidence she was entitled to reach the view that the prospects that P would suffer from a depressive disorder were low to middling.

Ground 1

15. Ground 1 is to the effect that the Judge fell into error in relying on the decision of the Court of Appeal in the case of **AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012.** That case considered the issue of exceptional circumstances under the then version of IR 398. Consideration of exceptional circumstances only arose if the issue of unduly harsh had been considered under IR 399 and IR 399A. Accordingly the Judge had misdirected herself and imposed a higher test than was appropriate under the rules.

Respondent's response

16. Mr Melvin accepted that reference to **AJ (Zimbabwe) and VH (Vietnam)** was inappropriate but argued that the significant point that was being drawn was a general one about the strength of the public interest. It was clear on a fair reading of the decision that the Judge had applied he correct test.

Conclusions on ground 1

17. In **AJ (Zimbabwe) and VH (Vietnam)** the Court of Appeal was addressing IR 398. That rule requires the respondent to consider whether IR 399 or 399A applies and, if not whether there were exceptional circumstances that outweighed the public interest in deportation. (The requirement has now been strengthened to one of very compelling circumstances over and above those described in paragraphs 399 and 399A.) In other words the approach in **AJ (Zimbabwe) and VH (Vietnam)** applies after the decision maker has applied the 'unduly harsh' test in IR 399 and 399A. Even on the old wording, it was necessarily more stringent than the unduly harsh test.

18. We do not understand why the Judge felt that she had to refer to the case at all. If it was, as Mr Melvin suggests, to emphasise the public interest in the deportation of foreign criminals that is more than adequately covered in the direction in section 117C of the Nationality, Immigration and Asylum Act 2002. In our opinion it has clearly infected the Judge's assessment of whether it would be unduly harsh under the rules. Had matters been left there we may very well have been persuaded that there was a material error of law.

19. However the Judge went on to consider the appeal under reference to section 117C of the 2002 Act. There is of course a difference to the status of the rules as opposed to the statute. As Lord Reed pointed out in **Hesham Ali [2016] UKSC 60** the rules are not law though they are a relevant and important consideration for tribunals determining appeals brought on Convention grounds. They do not have the same degree of democratic legitimacy as legislation made by Parliament (paras 17 and 53). However where, as here, the wording of the rules mirrors that of the statute we are not clear what purpose there is in making an assessment under both the rules and the statute. It is the Act which has primacy. In any event we do not consider that there can be a different approach as to what constitutes "unduly harsh" in the assessment of the effect on a child depending on whether one is looking at the rules or statute.

20. At paragraphs 41 to 45 the Judge makes an assessment of proportionality as she says outside the rules. She correctly applies the provisions of section 117C of the 2002 Act. She takes into account the guidance in **MM (Uganda) [2016] EWCA Civ 450.** She notes that the expression 'unduly harsh' requires consideration of all the circumstances including the criminal's immigration and criminal history. At paragraph 44 she accepts

that P's separation from the appellant would be distressing for him. However she was not presented with any evidence which suggested that there was any likely emotional or physical detriment over and above what would be expected from such separation. She bore in mind the nature of the appellant's offence which, she said went to the heart of enforcing an effective immigration system. She concluded that the appellant's deportation would not be unduly harsh on P.

21. We do not find that there is any error in that assessment. Deportation is inevitably harsh on children. The question is however whether it is unduly harsh. There is nothing in the evidence that elevates the natural consequences of separation for a child to the standard of unduly harsh.

Notice of Decision

The appeal is dismissed.

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

Lord Boyd of Duncansby
Sitting as a Judge of the Upper Tribunal