



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

Appeal Number: PA/05541/2019

THE IMMIGRATION ACTS

**Heard at Manchester CJC
On 6 December 2019**

**Decision & Reasons Promulgated
On 16 December 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

V L

(ANONYMITY DIRECTION MADE)

Claimant

Representation:

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer

For the Claimant: Mr R Rashid, instructed by Binas Solicitors

DECISION AND REASONS

1. *Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity direction. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the claimant.*
2. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Foudy promulgated on 3 October 2019 dismissing the protection claim but allowing on human rights grounds the claimant's appeal against a decision of the Secretary of State dated 4 June 2019 to refuse his protection claim made on 8 November 2018 and an application

for leave to remain on human rights. This followed a deportation decision made on 5 November 2018.

3. First-tier Tribunal Judge Manuell granted permission to appeal on 23 October 2019.
4. For the reasons I will set out below I am satisfied that there was an error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside and remade.
5. There was not a copy in the file, but Mr Rashid handed up his Rule 24 response, comprising three pages and ten paragraphs contending that there was no material error of law in the decision.
6. In granting permission to appeal on all grounds Judge Manuell considered it arguable the judge's approach and reasoning was perfunctory and ignore the relevant Immigration Rules. In particular, in light of the deportation decision the judge failed to identify any very compelling circumstances and in the view of Judge Manuell no such circumstances were obvious in the facts of the case, "it's not easy to see why the appeal was allowed on family life Article 8 ECHR grounds, particularly as the only child in existence is the stepchild of a recent and short lived relationship."
7. The relevant background is that the claimant was convicted of an offence and deemed by the respondent to have caused serious harm so that, as he was advised on 4 June 2019, it was conducive to the public good to deport him from the UK.
8. The first point made by Mr Tan was that nowhere in the decision does the judge make an assessment of the seriousness of the claimant's offending behaviour. The Secretary of State considered that he had committed an offence which caused serious harm, but the judge made no assessment of that issue at all. Mr Rashid accepts this.
9. In relation to the protection claim the judge found the claimant a thoroughly incredible witness and therefore dismissed his protection and humanitarian protection claims. As Mr Tan has pointed out, there has been no cross-appeal on that finding and therefore that part of the decision must stand as made. In other words the protection claim on both asylum and humanitarian protection grounds remains dismissed.
10. In relation to human rights, as a foreign criminal falling within paragraph 398(c) it was for the claimant to bring himself within the exceptions under paragraph 399 or 399A or failing that to demonstrate that there were very compelling circumstances over and above the "unduly harsh" test in relation to family life with his partner. However it is difficult to see that the judge made any such assessment. The closest that one comes is in paragraph 29 of the decision, where the judge states that she has taken into consideration all the Section 117 factors:

“I have considered carefully the public interest in the removal of foreign criminals especially one who’s been involved in the wholesale production of drugs. However, I reluctantly find in the particular circumstances of this appeal that the best interests of the child R outweigh the public interest.”

11. The judge did not mention Section 117C of the 2002 Act, or any of the tests or factors relevant, and it is not clear that the judge had in mind Section 117C, rather than 117B.
12. At paragraph 24 of the decision, the judge began the Razgar assessment of the human rights claim, following the stepped approach to conclude at paragraph 30 that the claimant had established a private life in the UK and that Article 8 would be breached by his removal and at paragraph 31 that the removal was not proportionate.
13. At the date of the First-tier Tribunal appeal, the partner was expecting a child, but an unborn child is not considered under the Rules. However, the partner has another child, R, said to be a toddler, whom the claimant allegedly looks after while the mother works. There was expert social work evidence that removing the claimant would have a serious and negative impact on that child’s wellbeing and would not be in her best interests. The judge dealt with this at paragraph 28 before concluding at paragraph 29 as said above that the best interests of that child outweighed the public interest in his removal.
14. It is clear that the judge has entirely omitted to consider the requirements of paragraphs 398 to 399A and failed to consider either the “unduly harsh” test or whether there were any very compelling circumstances over and above the tests for the exceptions. This is a clear error of law that unfortunately undermines the entire human rights decision so that that part of the decision cannot stand and must be set aside and remade.
15. Where a decision of the First-tier Tribunal has been set aside Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either the case is remitted to the First-tier Tribunal with directions or it must be remade by the Upper Tribunal. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. In this particular case the judge has omitted to make an adequate assessment of the public interest in relation to a person who is subject to deportation proceedings.
16. In all the circumstances and at the invitation and request of both parties I relist this appeal for a fresh hearing in the First-tier Tribunal on the basis that it falls squarely within the senior president’s practice statement at paragraph 7.2. The effect of the error has been to deprive the Secretary of State of a fair hearing and the nature and extent of the judicial fact-finding that will be necessary for the decision to be remade is such that it is appropriate to remit it to the First-tier Tribunal to determine the appeal afresh in relation to the human rights part of the decision only.

17. As stated above there is no error and no challenge to the dismissal of the protection claim, so that part of the decision must stand.

Decision

18. The making of the decision in the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside, but only insofar as it related to the human rights grounds.

I set aside the human rights decision.

I preserve the findings and decision in relation to the asylum and humanitarian protection claim.

I remit the human rights appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



**Signed
Upper Tribunal Judge Pickup**

Dated

6 December 2019

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Manchester.
2. It may be heard by any judge other than Judge Foudy and Judge Manuell.
3. The decision and the findings in relation to the protection appeal, both asylum and humanitarian protection are preserved. The appeal is confined to the human rights issues only.
4. The estimated length of hearing is three hours.
5. An interpreter will be required in Vietnamese.
6. The First-tier Tribunal may give such further alternative directions as are deemed appropriate.



**Signed
Upper Tribunal Judge Pickup**

Dated

6 December 2019

**To the Respondent
Fee Award**

I make no fee award as the outcome of the appeal remains to be decided.



**Signed
Upper Tribunal Judge Pickup**

Dated

6 December 2019