Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06289/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 2 May 2019	**On 24 June 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

NN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Levine
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision which I promulgated on 8 March 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> "1. The appellant was born in 1982 and is a male citizen of Vietnam. He first entered the United Kingdom in 2003. He was first encountered in 2007 and on, 6 August 2008, was convicted of 'being concerned in the production by another of cannabis' and sentenced to 12 months imprisonment. In 2008, he made an application for asylum based on religious affiliation. On 17 October 2008, the appellant was served with a liability to deportation notice. He subsequently withdrew his asylum

application. On 19 March 2009, a signed deportation order was served on the appellant and he returned to Vietnam on 1 April 2009.

2. The appellant was apprehended on 22 June 2014 attempting to re-enter the United Kingdom. Further representations were made in December 2015 that the appellant had been trafficked into the United Kingdom. On 3 March 2016, the Family Court granted a residence order in favour of the appellant in respect of his child HN, a British citizen born in 2015. Pursuant to the order, both the appellant and HN's mother retain parental responsibility. The appellant made further human rights submissions on five separate occasions between 2016 – 2017. The Secretary of State made a decision to refuse the appellant's protection and human rights claim on 23 June 2017. The appellant appealed against the refusal of the human rights claim to the First-tier Tribunal which, in a decision dated 12 June 2018, dismissed the asylum, humanitarian protection in articles 2/3ECHR appeals but allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals with permission to the upper tribunal.

3. There are two challenges to the decision of the judge. First, the Secretary of State asserts that the judge carried out a flawed assessment of credibility in reaching his findings of fact in respect of Article 8 ECHR. The judge found that the appellant is the sole carer of his British children (a second child, H, also British was born in 2016). The Secretary of State argues that the judge placed excessive weight on the outcome of Family Court proceedings (see above) and failed also to consider the fact that the appellant's partner did not give evidence operated against the credibility of his claim. Further, the judge had no grounds for finding that the appellant's cannabis conviction had probably been committed whilst the appellant was under duress.

4. I find the ground has no merit. The judge has given very detailed analysis of the evidence and has reached findings which were available to him. The observations regarding the background to the offence were, on the evidence, not unreasonable. I acknowledge, however, that a defence of duress did not succeed before the criminal court. Further, I find that the joint judge did not err when giving weight to orders of the Family Court; indeed, it is likely that the judge would have fallen into error had he not done so. I note that no challenge to the authenticity of the Family Court documents was made. As regards to the fact that the appellant's partner did not give evidence, I do not accept, as the grounds assert, that the judge considered this to be the matter supporting the appellant's case. At [57], the judge expressly states that he did not to intend to proceed on the basis of 'suspicions' and assumptions. He recorded the partner's absence but found, as he was entitled to do, that the appellant is the main carer of the two children primarily on account of the unequivocal evidence of the CAFCASS officer who had reported in the Family Court proceedings. The judge's methodology and findings of fact are, in my opinion, wholly free from legal error.

5. The second ground of appeal has more merit. This concerns the proper basis upon which the judge should have considered the appeal on Article 8 ECHR grounds. Mr Noor, who has appeared before both

tribunals, accepts that paragraph 399D of HC 395 (as amended) applies:

399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.

6. The Secretary of State argues that the appellant had applied for a revocation of the deportation order. The judge disagreed, stating at [75]:

Similarly, I agree with Ms Young [for the Secretary of State] that paragraphs 2 to 5 of Mr Noor's Skeleton Argument are in error – to the extent that they refer to the criteria in paragraph 390 of the rules. That is because there is no suggestion that the appellant has made a relevant application to the respondent for revocation of the deportation order in question – see paragraphs 138 to 143 of the RFDL. In other words, I am not deciding an appeal against a refusal to revoke a deportation order.

7. The judge was, in my opinion, correct. The decision in this appeal post-dates the new rights of appeal regime effected by the coming into force of the 2014 Act. The appellant's appeal to the judge complied with section 82 because it was an appeal against the refusal of an asylum and human rights claim; since October 2014, it has not been possible to appeal against the refusal by the Secretary of State to revoke a deportation order. However, it is important that the deportation context was acknowledged. The appellant had been removed and had returned to the United Kingdom in breach of the deportation order, returning prior to the expiry of 10 years following deportation. The judgement of the Court of Appeal in SU [2017] EWCA Civ 1069 makes it clear that, in circumstances where paragraph 399D applies, paragraph 391 is not applicable. The question in the instant appeal is whether the judge has recognised the importance of paragraph 399D which provides that the enforcement of the deportation order (i.e. by the removal for a second time of the appellant from the United Kingdom) is in the public interest and will be implemented unless there are very exceptional circumstances [my emphasis]. That is a discrete test imposed by paragraph 399D; whatever may be the other considerations relevant to an analysis of the appeal on Article 8 ECHR grounds, the circumstances of the appellant must properly be described as 'very exceptional' if the appellant is to avoid the implementation of the deportation order. If the tribunal did not clearly apply that test, then it is very likely to have fallen into error.

8. Mr Noor submitted that the judge had applied paragraph 399D. At [74] the judge wrote:

I have to consider the "article 8 rules" which are specific to that context – viz paragraphs A398 to 399D (as suggested through paragraph 90 of the RFDL) (and see sections 117B and 117C of Part 5A of the 2002 Act). [my emphasis]

The problem is that the judge makes no specific reference to the existence of 'very exceptional circumstances' nor has he sought to differentiate the paragraph 399D test from the various considerations

> set out at paragraph 398 et seq. As the Court of Appeal stressed in SU, the test of 'very exceptional circumstances' is more stringent than that of 'very compelling circumstances' in paragraph 398. I am not satisfied that the judge as expressly turned his mind to the application of the test of 'very exceptional circumstances'; one brief reference is, in my opinion, not enough. I do not consider that it is appropriate to 'read between the lines' of the judge's decision in the manner Mr Noor proposes. In consequence, I find that the judge has fallen into error.
>
> 9. I set aside the decision. I remake the decision in respect of asylum and humanitarian protection, dismissing the appeal on those grounds for the same reasons given by the judge, preserving his findings of fact in respect of those grounds. I find that the Secretary of State's challenge to the judge's credibility findings generally fails. The judge's findings of fact in the appeal on Article 8 ECHR shall stand, including his findings in respect of the nature of the relationship between the appellant and his children and the extent to which he acts as carer for them as at the date of the First-tier Tribunal hearing. There will be resumed hearing before me in the Upper Tribunal at Bradford on a date to be fixed at or following which I shall remake the decision on Article 8 ECHR grounds. Both parties may adduce further evidence provided copies of any documentary evidence are sent to the other party and filed at the Upper Tribunal no later than 10 days prior to the date fixed for the resumed hearing.
>
> **Notice of Decision**
>
> 10. The decision of the First-tier Tribunal is set aside. The Upper Tribunal (Upper Tribunal Judge Lane) shall remake the decision at or following resumed hearing at Bradford on the first available date (2 hours allowed). Directions as to fresh evidence, preservation of the findings of the First-tier Tribunal are set out at paragraph [8] above."

2. The only issue remaining to be determined is that in relation to Article 8 ECHR. The standard of proof is the balance of probabilities. At the resumed hearing at Bradford on 2 May 2019, I heard from the appellant who gave his evidence in Vietnamese with the assistance of an interpreter. The appellant's two daughters, H1 who was born in 2015 and H2 who was born in 2016, continue to live with the appellant who is their sole carer. The children are the subject of a Child Arrangements Order dated 3 March 2016 made in the Family Court at Chesterfield which provides, by consent, that they shall reside with the appellant. The appellant told me that H1 continues to have speech problems and is receiving therapy. He confirmed that children see their mother on a regular basis. She does not come to the appellant's home but he takes the children to where the mother works so that they may see her briefly. The appellant said that a friend also occasionally helps him with the children by collecting one from nursery at times when he has to provide a meal for the other child. The nurseries attended by the children are about a mile apart.

3. As identified in the error of law decision, this case turns upon whether there exist 'very exceptional circumstances' as provided for in paragraph 399D of HC 395 (as amended):

> '399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.'

4. There is no dispute that the appellant is in breach of the deportation order. He submits that the likely effect of his deportation upon his daughters H1 and H2 amounts to very exceptional circumstances. Mrs Pettersen, who appeared for the Secretary of State, submitted that the role, or lack of role, performed by the mother of the children in their lives was significant. She submitted that many of the observations contained in Ms Redfern's report rested on the assumption that the mother was 'unable' as opposed to unwilling to take on the care of the children in the absence of the appellant. She argued that, in reality, the mother would step in to assume day-to-day care for the children if the appellant were deported, thereby mitigating the effect of the deportation upon them.

5. Mr Levine, who appeared for the appellant, sought rely upon Ms Redfern's report and in particular her conclusion that it is 'clear that if the appellant is removed from the UK and thus removed from the family unit, H1 and H2 would be at risk of significant emotional harm.'

6. Judge Cruthers observed in the First-tier Tribunal [58], the force of that assessment may be blunted by the expert's reliance upon the assertion made by the mother of the children that she is unable to look after them. However, there is a danger here in placing too much weight on an assumption that the mother, by taking on responsibility for the children's material needs, will also inevitably provide an adequate substitute for the emotional bond which the children have enjoyed with their father. The children would, after all, be moving from the care of a parent who has been able to devote all his time and energies to their welfare to parent who has made clear throughout her unwillingness to care for the children. It is important to bear in mind that these two children have been living with the appellant in the case of H1 for the majority of her life and in the case of H2 since she was born. Whilst I have little doubt that the mother would be capable of providing the material needs of these children, I consider it likely that the expert was commenting primarily upon the emotional and psychological impact which separation from the appellant would have on the children. The position is further complicated by the close relationship which the two sisters have with each other which they have always enjoyed whilst in the day-to-day care of the appellant. It is, of course, very important that that relationship should develop and thrive. The 'significant emotional harm' predicted by the expert as a consequence of separation from the father may impact upon that relationship although I accept that the sisters may, even at their very young age, be able to offer each other emotional support.

7. I have not found as an easy case to determine. Given the unequivocal statement of the public interest in paragraph 399D in enforcing the removal of those who are in breach of deportation orders, I have borne in

mind throughout the severity of the test which the appellant needs to surmount. The children will be separated from their father if he is deported; the Secretary of State does not suggest that it would be reasonable for the children to travel with him to Vietnam. It is possible that, at their very young age, the children will adapt quickly to a new caring environment whether that be the home of their mother or elsewhere. I do not accept that the mother is actually unable to care for the children though I acknowledge that she has moved on to a new relationship and may well be unwilling to do so. I also do not accept the argument that the expert has given too much weight to the mother's categorical refusal to take on the care of the children. Her reference to 'emotional harm' seeks to identify something which goes beyond the children's material needs. Moreover, this is a case in which the assistance provided by the expert is significant given that the children are not old enough to express their own views as regards future separation from their father. Only the expert is able to provide an objective and independent assessment of the likely future harm to the children. Ultimately, I have decided that the balance of the assessment tips in favour of the appellant. This is because the appellant has been the sole carer of these two young children throughout their lives. I find that the bond which will have formed between the children and the appellant is likely to be so significant that the emotional harm and psychological disruption which they would suffer by being separated from him may properly be described as very exceptional. In reaching that finding, my focus has been upon breaking of the relationship between the father and the children and not upon concerns regarding the children's material well-being in the future; I find that, despite her protestations, the mother of the children would, should be necessary, look after the children. However, I conclude that this is a rare case in which the very significant public interest concerned with the appellant's removal is outweighed.

8. In the circumstances and for the reasons which I have given above, I find that the appeal should be allowed on human rights grounds.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State is allowed on human rights grounds (Article 8 ECHR).

Signed Date 2 June 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.