



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10526/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 18 June 2019

Decision & Reasons Promulgated
On 16 September 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

TVN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Vokes

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born in 1984 and is a male citizen of Vietnam. He has lived in the United Kingdom since 2000. He has a considerable history of criminal offending. Most recently, in March 2015, he was sentenced to 4 months imprisonment for assault occasioning actual bodily harm. A deportation order was made on 9 February 2016. On 5 October 2017, a decision was taken refuse the appellant's application for international protection and his human rights claim. The appellant appealed to the First-tier Tribunal which dismissed his appeal. He appealed to the Upper Tribunal which, by a decision promulgated on 11 April 2019, set aside the decision of the First-

tier Tribunal and directed that the decision be remade in the Upper Tribunal at or following a resumed hearing. Following the making of a transfer order, the appeal came before me at Birmingham on 18 June 2019.

2. Both parties agree that the appellant may properly be described as a persistent offender for the purposes of paragraph 398(c) of HC 395 (as amended):

(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 or they are a persistent offender who shows a particular disregard for the law, 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.

3. Paragraphs 399 and 399A provide:

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; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

4. In addition, section 117C of the 2002 Act also applies:

117C 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.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

5. At the outset of the hearing, Mr Vokes, who appeared for the appellant, told me that the asylum claim was no longer pursued.
6. I heard evidence from the appellant. He was not cross-examined. I heard evidence also from the appellant’s former partner, LGN. She was cross-examined by Mr Mills, who appeared for the Secretary of State. LGN and the appellant have a daughter, M, who is now aged 11 years. She lives with LGN. LGN last visited Vietnam (she was born there and came to the United Kingdom as an asylum seeker) in 2018. M was in school and the appellant came to her home to look after M. M herself had last been in Vietnam but 5 to 6 years ago. Asked whether it would be possible for M to visit the appellant in Vietnam, LGN said that the flights were very expensive and that visits could not take place more often than every 5-6 years. She said that M was ‘not very keen to visit Vietnam.’ She does not like the climate. LGN said that M contacts the appellant every day using FaceTime.
7. I also had written evidence from the appellant’s present partner who is a student in the United Kingdom. The partner and appellant have a child, N, a boy aged 18 months. In her evidence, LGN said that M and N are very close.
8. I reserved my decision.
9. I found both witnesses to be truthful and I accept that they have, in particular, given an accurate account of the relationships between the appellant, M and N.

10. The central issue in this appeal is whether the consequences for M of being separated from her father by way of his deportation to Vietnam are likely to be unduly harsh. M, the natural child of the appellant and his former partner LGN, is a qualifying child for the purposes of the 2002 Act; she is a British citizen. The Secretary of State does not argue that it would be acceptable or reasonable M to have to live in Vietnam. There is evidence in the form of a social work report which indicates that the appellant and M have a close relationship. That evidence was not challenged by Mr Mills and I accept what is said in the report and in the evidence generally regarding the nature and depth of the relationship between M and her father. I accept also that M contacts her father on a daily basis using FaceTime. M and the appellant do not live in the same household although I accept that the appellant did assist his former partner in 2018 by caring for M in her home whilst LGN visited Vietnam. I accept also the evidence given by LGN regarding the likely frequency of visits to Vietnam by M to visit the appellant should he be deported there. I find that those visits are not likely to take place on an annual basis and that several years will elapse between visits. In the light of that finding, I attach limited weight to Mr Mills' submission that the harshness of separation could be mitigated by M visiting the appellant in Vietnam; it is likely that M and her father would only meet twice again during M's minority.
11. The factual matrix is further complicated by the relationship which has formed between N and M. There is no obvious reason why the appellant's current partner cannot return to Vietnam with N and the appellant although I note that she may be able to apply to remain in the United Kingdom at the end of her studies by which time she will have completed 10 years continuous residence here. However, the removal of N with his family will have a serious impact upon M. She would be faced at a significant stage in her development with the loss not only of her father but also of her stepbrother. Whilst M may possibly maintain a relationship by FaceTime Skype with her father, the infrequency of physical meetings will lead to her relationship with N being of a significantly different (and inferior) nature than if N remains in this country. I agree with Mr Vokes that it is necessary when assessing the harshness of the impact of deportation of the appellant upon M to take proper account of the damage to other relationships which will occur if, as seems likely, the appellant's partner and N may only maintain their own family life with the appellant by returning to Vietnam with him.
12. Mr Mills submitted that the public interest nonetheless requires the deportation of the appellant. He did, however, acknowledge that it was 'significant' that the appellant had not been convicted of any offence for more than four years. He told me that the appellant's apparent reformation could have the effect of reducing the public interest concerned with his deportation. Having regard to all the relevant circumstances, I agree with that observation without losing sight of the course of criminal conduct over a number of years which led to this appellant becoming a persistent offender within the meaning of the 2002 Act.
13. Having regard to all that I have said above, I am satisfied that the effects upon M of the appellant's deportation are likely to go beyond the likely consequences for any

child being separated by deportation from a parent. I accept that M and the appellant do not live in the same household but I do find that their relationship is nonetheless a very close one. I find also that M has a close relationship with her half-brother, N, and a collateral consequence of the appellant's deportation will be the effective termination of that relationship. In the appellant is deported, M will have to experience simultaneously the end of her relationship with N (or, at the very least, a significant diminution in its quality) together with separation from her father at the time she is on the verge of entering her crucial teenage years. Given the particular facts in this appeal as I have found them, I conclude that the child M will suffer as a consequence of the appellant's deportation effects which may properly be described as unduly harsh. I fully acknowledge the strong public interest concerned with the appellant's deportation although I accept, as both advocates appeared to do, that the public interest is diminished by the fact that the appellant has refrained from criminal offending for a several years.

14. In the circumstances, I allow the appeal.

Notice of Decision

I have remade the decision. The appellant's appeal is allowed on human rights grounds (Article 8 ECHR).

Signed

Date 22 August 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.