



IAC-FH-AR-V1

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

Appeal Number: DA/00277/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27 October 2014**

**Decision and Reasons Promulgated  
On 5 November 2014**

**Before**

**UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**BAS VAN NGYUEN (BVN)**

**Respondent**

**Representation:**

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondent: Miss E Cantor, Counsel instructed by Norton Folgate Solicitors

**DECISION AND REASONS**

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Nightingale who, in a determination promulgated on 7 August 2014,

allowed the appeal of the respondent against the decision of the Secretary of State to make a deportation order against him. The respondent shall hereinafter be referred to as the claimant.

2. The claimant is a citizen of Vietnam born on 26 December 1978. He claims to have arrived in the United Kingdom illegally in June 2005. He was convicted on 17 February 2009, for a fraud offence and sentenced to six months' imprisonment. Deportation was not pursued, but he was placed on reporting restrictions, and the Secretary of State claims that he absconded. Notwithstanding his alleged absconding, he made an Article 8 application for leave to remain on 4 August 2010. His application was successful and on 31 October 2011, he was granted discretionary leave to remain until 30 October 2014.
3. On 19 April 2013 the claimant was convicted of production of a Class B controlled drug (cannabis) and sentenced to 20 months' imprisonment. He was served with a notice of liability to automatic deportation on 25 May 2013 and made representations to the Secretary of State with regard to his family life with his British partner and his three British children aged 3, 5 and 6. He also argued that he had a private life in the United Kingdom.
4. In deciding this appeal, the judge had regard to the applicable law, which she set out at pages 9 to 15. They were sections 32 and 33 of the UK Borders Act 2007, The Human Rights Act 1988, Article 8 of the European Convention and Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended) which provides the factors which the Tribunal must have regard where the Immigration Rules, found at Appendix FM and paragraph 276ADE, reflecting the respondent's Article 8 obligations do not apply.
5. The judge concluded as follows:

"62. Considering all the evidence before me, including the compulsory considerations at Section 117, in the round, I find that the appellant has established that the effect of his deportation on his British partner and British children would be unduly harsh. Section 117C(3) now makes it abundantly clear that where exception (2) applies, the public interest does not require deportation. Whilst I am not entirely certain that I would have come to the same conclusion absent the requirements now set down in Section 117 of the 2002 Act, I am mindful that the respondent has now taken the decision to set down in statute factors to which the Tribunal must have regard in assessing her obligations. I may not, therefore, ignore those factors and find on balance that Section 117C(5) applies and deportation is not required in these circumstances. The exception found at Section 33(2)(a) applies and I am therefore bound to find that the decision is not in accordance with the law.

63. This decision has been reached, in part, on the basis that the appellant is remorseful and has made a genuine decision never to offend again in view of the hurt he has caused his British family.....
6. The Secretary of State appealed on two grounds; first, it was argued that the Tribunal erred by failing to give genuine and proper regard as to the Government's view on what are unduly harsh effects on a partner or child. The ground identified parts of the claimant's evidence, which in their view showed that the consequences of the claimant's deportation would not result in unduly harsh effects on his partner or children and that the Tribunal failed to identify why the effects would be genuinely harsh. The ground relied on **D Lee** where it was held "*The tragic consequence is that this family, short-lived as it has been, would be broken up forever because of the appellant's bad behaviour. That is what deportation does*". In light of **AD Lee** it was argued that the claimant's circumstances would not result in consequences that would be unduly harsh and any separation has not only been caused by the claimant's own actions, but that it is proportionate to deport him. There are no factors in the claimant's case which set it apart from an ordinary family life claim. The Tribunal in effect has found that the claimant's assistance is preferable and in the children's best interests, but this would not led to unduly harsh consequences and the claimant's circumstances are not very strong to outweigh the public interest in line with the case law of **SS (Nigeria) [2013] EWCA Civ 550**.
7. The second ground argued that the Tribunal failed to give adequate consideration to the Secretary of State's public interest policies and that given the severity of the offence committed, the Tribunal's findings were inadequate. Mr Avery relied on the appellant's grounds.
8. Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) which the judge relied on to allow the claimant's appeal provides as follows:
- "Article 8: Additional considerations in cases involving foreign criminals.
- (1) The deportation of foreign criminals 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.
  - (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."

9. In this case the judge recorded at paragraph 55 the evidence that the Secretary of State accepted. She accepted that the claimant has a genuine and subsisting relationship with three British citizen children, one of whom is a stepchild and the other two are his biological children. There is no indication that the eldest daughter's biological father plays any role in her life. The claimant has a genuine and subsisting relationship with his British citizen partner. With regard to her duty under Section 55 of the Borders, Citizenship and Immigration Act 2009, the Secretary of State acknowledged that the claimant and his partner were the primary carers for their three children and that it would be unreasonable to expect the three British citizen children to leave the United Kingdom. It would be more difficult for the witness to raise and care for their three children without the claimant being physically here to help and support them. The claimant's absence will be to the children's disadvantage. The deportation of the claimant is likely to result in some negative emotional impact on the three British children and may have a financial impact on the family. The contact between the claimant and his family from Vietnam would not be of the same quality as remaining in the family home or even living separately but in the same country. There is resulting interference with Article 8 rights by virtue of the claimant's deportation.
10. At paragraph 56 the judge directed herself correctly that with these factors accepted by the Secretary of State, the question which arises under the new Section 117C(5) is whether or not the effect of this claimant's deportation on his partner or children would be unduly harsh.
11. Mr Avery submitted, and I accept, that the unduly harsh test is a high one. I find that the test is one of proportionality which involves the balancing of the claimant's circumstances against the effect of his removal on the British partner and the British children. I also accept his submission that it is the circumstances of the claimant's case which determine whether the effect of the claimant's removal on the partner and their children would be unduly harsh.
12. I accept Counsel's submission that the judge took as her starting point the judge's sentencing remarks. The judge said that the sentencing remarks indicate that it was accepted to some extent that the claimant has been naïve and fallen into offending as a result. The judge also noted that the claimant has in the past been convicted of a previous offence involving the use of a false driving licence. However the appellant was well aware of this offence when she decided to grant him discretionary leave to remain on Article 8 grounds. I find contrary to Mr. Avery's submission that the judge was entitled to take this evidence into account.
12. With regard to his production of cannabis in his home for which he was sentenced to 20 months' imprisonment, the judge regarded the claimant's offence as serious, not least his apparent reluctance to accept that he knew he was doing anything wrong, which he did not accept entirely the view of the judge's sentencing remarks, but also the fact that he used his family home where children were living in order to cultivate cannabis. The judge was in no doubt that this is a serious offence but took into

account that this is not an offence involving violence, sex or the invasion of another individual's home. Nevertheless she regarded the nature of this offence was such that the public interest in deportation was considerable.

13. I do not find that the judge was attempting to undermine the seriousness of the claimant's crime when she said it was not an offence involving violence, sex or the invasion of another individual's home or by her finding that whatever the truth of the matter, the claimant's offending has been linked to his desire to provide financially for his partner and his children. It was clear from the determination that the judge regarded the claimant's offence as very serious and that the public interest in his deportation was considerable. The judge did not at any time lose sight of the seriousness of the claimant's offence.
14. The judge considered that the claimant presented as a genuinely remorseful man, who regrets bitterly the effect of his offending on his partner and daughters. In view of his genuine commitment to his British family, the judge found it unlikely that the claimant would risk further criminal convictions knowing, as he now does, that this may well separate him from his family forever. The judge had no OASys Report or NOMS report before her and, in the circumstances I find that it was reasonably open to the judge to draw her own conclusion from the totality of the evidence that he represents a low risk of reoffending at the present time.
15. The judge also considered that the Secretary of State's lawful aim has aspects to it beyond the protection of society from an individual reoffending. She said there are also the further aspects of public revulsion and the need to deter others from undertaking criminal activity. Along with the other factors set out in the new Section 117C, the judge gave these facets of the respondent's aim considerable weight in the balancing exercise. She came back to the wording of Section 117C(3) and noted that by statute public interest, although she had given it considerable weight, did not require deportation where the effect of the deportation on the partner or child would be unduly harsh. She found that the effect on both the claimant's British partner and three children would be unduly harsh.
16. Her reasons for that finding can be found at paragraphs 60 and 61 as follows:

"60. I accept the appellant's financial contribution to the family household is not large, but I accept that he has, now, begun to learn some English and that he wishes to support his family. Everything he has done indicates that he does wish to support his family financially. I accept that he is a committed and involved parent and, also, that his daughter wish him to return to the family unit and household. The appellant was keen to shown, with out inconsiderable pride, the colourings and card his children have sent him whilst he has been detained. I accept the witness's evidence that she is suffering considerable stress managing as a single mother with three children whilst the appellant is detained. Not lease, she describes fielding continual questions from these three young girls as to the whereabouts of their father and the timing of his return

home. I also accept, as set out at paragraph 8 of the witness's statement that the appellant's involvement with his children goes beyond the mere emotional and into the practical. I accept that he is involved in helping with homework, dropping them at school and assisting his partner in running the house. Deportation does not simply remove the appellant from the United Kingdom, but prevents him from applying to re-enter for a number of years until that order is revoked. The effect of the appellant's deportation is that three British children will grow up in a single parent household without the presence of the father who raised them from birth. Their contact with their father will be limited to telephone calls, email and, possibly, very occasional visits to Vietnam. I also find it highly unlikely that this household will ever be able to become financially self-sufficient if their mother is left to raise three daughters single-handedly. The implications of deportation go beyond the emotional and, I find, into the practical and financial.

61. The witness impressed me as a woman doing her best to cope in difficult circumstances, but was clearly finding a strain on her time and her ability to manage the three children and her household chores alone. The letter from the appellant's neighbour, Mrs. Patricia Richardson-Jones, indicates that the family have had difficulties in the appellant's absence. She also attests to the close relationship between the appellant and his children and his role as an involved father. I have no doubts that the effects of deportation on both the witness and children would be considerable. The question is whether they would be "unduly" harsh. This will obviously depend upon the weight to be given to the respondent's lawful aim which, in turn, amounts to whether those harsh effects are "due" on the basis of the offending. I have found, on the evidence before me, that the appellant does not pose a high risk of reoffending and, also, whilst I consider his offending to be serious, it is non-violent offending it has been as a result of his desire to support his family.

17. I find that the factors identified by the judge cumulatively meet the unduly harsh test. I find no error of law in the judge's decision.
18. The judge's decision allowing the claimants appeal shall stand.

Signed

Date

Upper Tribunal Judge Eshun

**3 November 2014**