IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01024/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 November 2015	**On 4 December 2015**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QDB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr T Lay, of Counsel instructed by Messrs Wilson Solicitors LLP

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Flynn who in a determination dated 10 September 2015 allowed the appeal of QDB against a decision of the Secretary of State made on 29 May 2014 to make a deportation order under Section 32 of the UK Borders Act 2007.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the

First-tier. Similarly I will refer to QDB as the appellant as he was the appellant in the First-tier.

3. The appellant is a citizen of Vietnam who was born on 27 January 1987. He entered Britain in August 2003 and claimed asylum. His application was dismissed in a determination promulgated on 21 January 2004.

4. On 25 August 2010 he was issued with a certificate of marriage and married NV, who is also Vietnamese, on 24 August 2010. She has an autistic son, HT, who had been born on 29 September 2008. The respondent has accepted that he is British although his birth certificate states that his father was Vietnamese and there is no evidence before me to show that his father had indefinite leave to remain when he was born. On 3 February 2012 the appellant was granted discretionary leave to remain because, it appears, of his relationship with HT. The appellant and NV have a son, WB, who was born on 22 November 2009 and a daughter, JB, was born on 22 December 2012. They all were granted discretionary leave until 2 February 2015. There is no evidence of the current status of NV, WB and JB.

5. On 6 September 2013 the appellant was convicted of five counts of sexual assault and was sentenced on 18 October 2013 to 30 months' imprisonment. He was required to sign the Sex Offenders Register indefinitely.

6. Thereafter the respondent notified the appellant that he was liable to automatic deportation and in a letter dated 2 June 2014 she gave her reasons for concluding that it was appropriate that the appellant should be deported under the provisions of Section 32 of the UK Borders Act 2007.

7. The Secretary of State noted that HT was aged 5 years and 8 months and a British citizen but considered it would be unreasonable to expect HT to leave Britain stating that there was another family member who was able to care for HT in the UK. The Secretary of State pointed out that although it might be difficult for NV to raise and care for HT without the appellant being physically present, she had done this whilst he was in prison with no concerns from social services. In any event it was considered that HT would be able to readjust to life in Vietnam with the help, care and support of his mother and stepfather if the appellant and his wife wished to remain as a family unit. It was stated there was no reason or evidence to suggest it would be impossible or exceptionally difficult for HT to relocate to Vietnam.

8. It was noted that the appellant's own children were of a young age and considered that it would not be unreasonable to expect them to leave Britain but should it be decided that they should not do so NV would be able to look after them. It was further pointed out that NV was, in any event, not British or settled in Britain and that there were no insurmountable obstacles to family life continuing outside Britain.

9. It was also considered there was no reason why the appellant should not be returned to Vietnam where he had family roots and ties.

10. The decision was appealed. On the day of hearing the appellant's Counsel produced a supplementary bundle which included a social worker's report and a letter from HT's school. The Presenting Officer asked for an adjournment so that these could be considered by the caseworker but this was refused by the judge.

11. The judge heard evidence from the appellant who stated he regretted what had happened, that he would not commit an offence again and asked for a chance to start again. He said that he had not taken any courses in prison to address his offending behaviour because none was available. There were no prison or probation reports.

12. The judge heard evidence about HT who is autistic and whose behaviour is difficult and erratic.

13. In paragraphs 72 onwards the judge set out her conclusions. She set out the terms of paragraphs 390, 398 and 399 of the Rules and Section 117 of the Nationality, Immigration and Asylum Act 2002 as amended by Section 19 of the Immigration Act 2014.

14. In paragraph 79 she stated that she was satisfied, having heard the appellant's evidence, that he had accepted responsibility for his offence and was remorseful and although she had not had the benefit of reading any report assessing the risk of re-offending she was satisfied that the current risk had been reduced by the appellant's "significant change in attitude".

15. The judge went on to state that she was satisfied that it would be unduly harsh for HT to accompany the appellant to Vietnam. She referred to a report by an independent social worker, Diane Jackson who had said that HT was at risk of suffering emotional harm that would affect his ability to reach his educational and social potential if he did not receive good care throughout his minority and that would happen if his father were removed from caring for him.

16. Miss Jackson stated that she considered that HT's behaviour would deteriorate if the appellant were deported and that it was extremely likely in her opinion that the children would be looked after by the local authority, HT would be separated from his siblings which would lead to further loss for HT in that he would lose his mother and his siblings. It was Miss Jackson's opinion that the best interests of the children could only be met if their father was allowed to remain in the United Kingdom with their mother.

17. HT's former head teacher had written stating that the appellant made a significant contribution to the care of his family and that she had been particularly impressed with the quality of his engagement with HT.

18. Having noted HT's education, health and care plan which gave it a "diagnosis for severe disorder in understanding of language and spoken language" the judge noted the terms of the psychiatric report which dealt with NV's depressive symptoms.

19. The judge concluded that the appellant was central to the life of his family and stated that the respondent did not afford any basis on which she could conclude that NV could look after HT satisfactorily if the appellant were removed to Vietnam and found that it was unduly harsh to leave HT in the UK without his father. She therefore stated that the decision was not in accordance with the law and allowed the appeal.

20. The Secretary of State appealed stating that the judge had failed to give adequate reasons as to why she considered the removal of the appellant would have an "unduly harsh" impact on family life if they remained here without the appellant. The grounds quoted from the judgment of the Court of Appeal in **LC (China) [2014] EWCA** which stated:-

> "... It follows that neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation. The appellant's children will not be forced to leave the UK since, if she chooses to do so, their mother is free to remain with them in this country."

21. The grounds of appeal also refer to the judgment of the Court of Appeal in **Lee [2011] EWCA Civ 348** where it had been stated that:-

> "The tragic consequence is that this family, short-lived as it has been, will be broken up forever because of the appellant's bad behaviour. That is what deportation does ..."

    It was stated that the judge had failed to identify what set the case apart from the normal consequences caused by deportation.

22. The grounds went on to refer to the public interest in deportation stating that the impact of deportation could be harsh or even very harsh without being unduly harsh depending on the extent of the public interest in deportation and of the family life affected. It was stated that the judge had failed to adequately reason why the case fell within the definition of "duly harsh" as there was no evidence that the children would be neglected or suffer any harm if they remained here without the appellant. There was nothing to show why the children's mother could not provide adequate care for the children's essential needs to be met and why family life could not continue from Vietnam. There was clearly a support network in Britain.

23. It was pointed out that NV would be entitled to receive assistance from the local authority and that should have been taken into account and therefore the impact on the children would not be unduly harsh.

24. The respondent referred to the terms of the determination of the Upper Tribunal and **MAB (para 399 "unduly harsh") USA [2015] UKUT 00435** in which "unduly harsh" was stated to be more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult in challenging" consequences and imposed a considerably more elevated or higher threshold. Moreover it was stated there was nothing to show there would be an unduly harsh impact on the children if they went with their mother and the appellant to Vietnam. While it was accepted that HT was a British citizen it would be a matter for the parties to decide whether or not NV and the children would accompany the appellant to Vietnam or remain in Britain. The fact that the appellant's partner and children might not wish to relocate with him was not enough to tip the balance considering the public interest.

25. It was argued that the judge had failed to consider the public interest in the deportation of those who commit crimes. Reference was made to the judgment in **Danso [2015] EWCA Civ 596** which stated that the protection of the public from harm by way of future offending was only one of the factors that made it conducive to the public good to deport criminals. Other factors included the need to mark the public's revulsion of the offence and the need to deter others. It was stated that the judge had not considered those factors. It was argued that there was no evidence on which the judge could have reached the conclusion that there was a low risk of offending but even if there was a "low risk" that still amounted to a "real risk".

26. It was pointed out that the appellant's criminal history included multiple sexual assaults on a young female and it was pointed out that the judge had noted that the appellant had not initially taken responsibility for the offence and had given an inconsistent account in relation to his trafficking claim. It was therefore unclear how the judge had come to the conclusion that the appellant was at a low risk of re-offending.

27. It was also argued that the judge had failed to acknowledge the factors in Section 117C of the Nationality, Immigration and Asylum Act 2002 and balance the clear public interest against the rights of the appellant.

28. Finally, it was argued that the judge had given weight to material matters in that she had relied on the reports presented on the date of hearing and that it was unclear from the letter from HT's head teacher whether or not she was aware of the serious nature of the appellant's offending. Similarly the social worker report and the psychiatric report had not taken that factor into account. The judge had simply accepted the reports at face value without considering they would have predominantly been based on the appellant's and NV's oral testimony.

29. At the hearing of the appeal before me Mr Bramble relied on the grounds of appeal. He further argued that the judge had not considered whether or not the whole family could return to Vietnam and had given no reasons for finding it to be unduly harsh for HT to accompany the appellant to Vietnam

that was a matter which had been dealt with in the refusal letter which had been ignored by the judge. It was, however, an option available to the appellant and NV. Moreover he emphasised that the judge had failed to analyse the public interest in deportation and the importance of the effect of deportation on foreign criminals. He stated the judge had not engaged with the sentencing remarks and nor had she properly considered the issue of whether or not the removal of the appellant would have an unduly harsh effect on HT.

30. In reply Mr Lay argued that the judge had followed the decision in **MAB**. The basis of that decision had been that the issue of proportionality was not a factor when dealing with the issue of whether or not removal was unduly harsh. He referred to the headnote in **MAB** which stated that:-

> "1. The phrase "unduly harsh" in paragraph 399 of the Rules (and Section 117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (where the child or partner of the deportee). The focus is solely upon the valuation of the consequences and impact upon the individual concerned."

Quite correctly, however, Mr Lay refers me to the determination in **KMO (Section 117 – unduly harsh) [2015] UKUT 543 (IAC)** which made it clear that the Immigration Rules, in the context of the deportation of a foreign criminal were a complete code, that it was necessary to have regard to all relevant factors and that that included the public interest in the deportation of a foreign criminal and that the word "unduly" the phrase "unduly harsh" required consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that came into play, the impact on the child, children or partner of a foreign criminal being deported was inordinately or excessively harsh.

31. Mr Lay went on to argue that the decision in **KMO** had not been promulgated at the time of the determination and therefore the judge would be entitled to follow the determination in **MAB** – the judge was applying the law as it stood. He argued that the judge had taken into account all relevant factors and had properly weighed them up and reached conclusions which were open to her. In any event she argued that the judge had made a clear decision under Rule 399A that it would be unduly harsh for HT to live in Britain without the appellant. Having done so conclusions under paragraph 398(c) were in effect an alternative conclusion – a belt and braces exercise. He emphasised that the clear decision under **MAB** was that exception 2 in Section 117C(5) made no reference to the issue of the public interest in the deportation of this appellant. He argued they would find that therefore there was no error of law in the determination of the judge.

32. In reply Mr Bramble again referred to the headnote at **MAB** and the definition of unduly harsh and emphasised what he referred to as the over-arching position of the public good in the deportation of foreign criminals.

Discussion

33. I find that there are material errors of law in the determination of the First-tier Judge. The reality is that the public interest in the deportation of foreign criminals is clearly set out in Section 32 of the UK Borders Act 2007 which emphasises that the Secretary of State must make a deportation order in respect of a foreign criminal and that the deportation of a foreign criminal was conducive to the public good. The conditions to be met include that the person must have been sentenced to a period of imprisonment of at least twelve months. The provisions of the Rules must then be considered. When considering the rights of an appellant under Article 8 of the ECHR paragraphs 398 and 399 must be considered. Paragraph 398(b) states that the deportation of the foreign criminal is conducive to the public good when they have been the victim of an offence for which they had been sentenced to a period of imprisonment of less than four years but at least twelve months.

34. The exceptions in paragraph 399A raise the issue of whether or not it would be "unduly harsh" for the child to live in the country to which the person is to be deported or for the child to remain in Britain without the person who is to be deported.

35. The judge has simply not engaged with the issue of whether or not it would be unduly harsh for HT to live with the appellant and other members of his family in Vietnam. The term unduly harsh is defined in the headnote in the determination in **MAB** and there was nothing put forward – and in the determination there is certainly no evidence cited - that it would be unduly harsh for HT to live in Vietnam. It is accepted that he cannot be expected to leave Britain but as is made clear in the judgments both in **Lee** and in **LC (China)** the decision on whether or not this family decides to leave Britain and return to Vietnam is a matter for them. The reality, of course, is that the appellant and his wife's own two children are young and could clearly adapt to living in the country of their nationality and neither NV nor the appellant has settled status here.

36. The evidence before the judge regarding the difficulties which would be faced by NV should the appellant be removed and should she decide to remain in Britain with HT was based upon the social worker's report and that of HT's head teacher. There is nothing in those reports to indicate that either of them were either aware of the importance of the public interest in the deportation of a man who had committed a serious sexual offence or that they had engaged with the question of what life would be like for this family in Vietnam. Moreover they have failed to deal with the fact that in the past NV was able to look after the children without the help of social services while the appellant was in prison. It appears that the social worker's report was only based on what the appellant and NV had told her. There is no critical analysis of the reports.

37. Moreover there appears no reason why the judge has concluded that the appellant was not likely to re-offend but while I accept that that is what

the appellant stated and indeed that was his wife said that is at odds, not only with the persistent nature of the appellant's offending, but also the sentencing remarks of the judge and the judge's conclusion that the appellant remained in "total denial". It is of note that the judge ended his comments by stating "As long as you remain in denial there remains a significant risk of harm in this case." On the basis of those remarks it is difficult to understand how the judge would reach the conclusion that the appellant was no longer at risk. Moreover, of course the appellant remains on the Sex Offenders Register.

38. Of particular concern is the fact that the judge did not engage with the public interest in the deportation of this foreign criminal. While I realise that the decision in **MAB** was before the judge and that in **KMO** was not, I still consider that the whole context of the consideration of deportation and the terms of Section 32 of the 2007 Act, through the terms of the Rules and, indeed, also the terms of Section 117C of the 2002 Act as amended make it clear that the public interest issue is one that should be at the forefront of a judge's mind when considering deportation.

39. For these reasons I find there are material errors of law in the determination of the First-tier Judge and I set aside her decision.

40. I consider that, taking into account the Senior President of Tribunal's Practice and Directions that it is appropriate that this appeal be remitted to the First-tier Tribunal for a hearing afresh.

Decision

1. The determination of the Judge in the First-tier is set aside.
2. The appeal is remitted to the First-tier tribunal for a hearing afresh.

Directions.

- The appeal will proceed to a hearing afresh in the First-tier.
- Both parties should produce skeleton arguments to be served on the Tribunal and on each other 14 days before the hearing.
- The appellant's skeleton shall be cross referenced to an indexed and paginated bundle of all statements and reports which must be served 14 days before the hearing.
- Time estimate 3 hours; Vietnamese Interpreter.

Signed Date

Upper Tribunal Judge McGeachy