IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00190/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2016	**On 22 March 2016**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TUAN QUANG NGUYEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr K Norton
For the Respondent: Ms R Akther

DECISION AND REASONS

1. For ease of reference purposes hereafter the parties are referred to as they were when the appeal was heard in the First-tier Tribunal.

2. Mr Nguyen appealed a decision of the respondent to make a deportation order against him dated 15 January 2015. The First-tier Tribunal allowed

the appeal. The respondent sought and was granted leave to appeal that decision submitting that the judge made a material misdirection in law when making the paragraph 398 assessment under the Immigration Rules. The judge looked at exceptional circumstances (the old rule) rather than very compelling circumstances over and above those described in paragraphs 399 and 399A which were implemented into the Rules on 28 July 2014. Furthermore the judge failed to make a finding as to whether it would be unduly harsh for the appellant's partner and children to accompany him to Vietnam only making a finding that it would be unduly harsh to permanently separate the appellant from his family by looking at the circumstances of his partner and children were they to remain in the United Kingdom without him. The judge failed to consider the public interest considerations applicable in all cases when looking at Article 8 through the lens of the exceptions expressed at Section 117C of the 2002 Act. Family and private life was established while the appellant was in the United Kingdom unlawfully.

3. In granting permission to appeal the judge doing so said that it was arguable that the judge misdirected himself in law so far as the test under paragraph 398 was concerned and also that he applied the wrong version of paragraph 399 which led to the apparent "inconsistent" finding that paragraph 399 does not apply but then finding that the similar provisions expressed at Section 117C(5)(2) do apply.

4. The judge granting permission went on to say that whilst the appellant met the terms of exception 2 of the 2002 Act it is arguable that the judge failed to consider whether it would be unduly harsh for the appellant's partner and children to accompany him to Vietnam. Although this is not an explicit requirement of Section 117C (whereas it is in paragraph 399(a)) it is arguable that considering whether the effect of deportation on the partner and children would be unduly harsh includes consideration of whether it would be unduly harsh for the family to relocate to Vietnam. In **MF (Nigeria) [2013] EWCA Civ 1192** the Court of Appeal equated "exceptional circumstances" and "very compelling reasons" and it is apparent that the judge considered the "exceptionality" test was met as well as exception 2. However the judge did not follow the approach laid down in **Chege [2015] UKUT 165** which involves taking into account the factors set out in Section 117B of the 2002 Act when considering "very compelling reasons" over and above those falling within paragraphs 399 and 399A. He did not consider the factors set out in Section 117B(4) and (5) of the 2002 Act when coming to his assessment that there were exceptional factors outweighing the public interest in deportation.

5. For these reasons the judge granting permission found it arguable that if the judge erred in applying the wrong version of the Rules this may have affected his approach throughout. It could not be said that the judge would inevitably have come to the same conclusion had he applied the correct version of the Rules and followed the **Chege** approach.

6. Mr Norton on behalf of the respondent submitted that the unduly harsh test had not been properly considered and that if the correct test had been applied there would have been a different result.

7. The head note in the case of **Chege** is of assistance in relation to this appeal. It states as follows:-

> "The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:
>
> i. is the appellant a foreign criminal as defined by Section 117D(2)(a), (b) or (c);
>
> ii. if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
>
> iii. if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in Section 117B.
>
> Compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.
>
> The purpose of paragraph 398 is to recognise circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A.
>
> The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8.
>
> It follows from this that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR."

8. The criticisms made of the judge's decision are well-founded. The structure of the decision is loose knit and it is not clear that the judge has followed the step by step procedure that is necessary in cases of this sort. Having said that it is clear that the judge gave very careful consideration to the competing positions of the appellant and respondent.

9. The appellant entered the United Kingdom without entry clearance in 2003. He has never had substantive leave to remain. His asylum appeal was refused. In May 2005 he was convicted of conspiracy to produce a class C drug namely cannabis, and was sentenced to 24 months' imprisonment. The F-tT judge found that the appellant's partner and his

two children aged 11 and 3 are all UK citizens and that they live together with the appellant. The respondent has accepted that it would not be reasonable to expect the appellant's children to leave the United Kingdom.

10. A matter that struck a particular chord with the judge was that the deportation order was not issued until January 2014. This was approximately eight and a half years after the appellant's conviction. No explanation was offered as to why the respondent had taken such a very long time to issue the order.

11. In paragraph 18 the judge recites what the respondent has and has not accepted namely that it would not be reasonable to expect the children to leave the UK but (under paragraph 399(a)(ii)(b)) that it would not be unduly harsh for the children to remain in the United Kingdom without the appellant on the basis that the appellant's partner would be able to care for them. The judge found that the appellant's partner may well have difficulty managing as a single working parent, making arrangements for the children to be transported to and from school etc. He continues that he is satisfied that if the appellant was deported there would be another family member who, with suitable adjustments to her working day, would be able to look after the children.

12. The judge then proceeded to consider (in paragraph 19) the public interest (in deportation) and whether that was outweighed by other factors. He makes reference to Section 117C of the 2002 Act and refers to two exceptions with regard to those who have been sentenced to less than four years imprisonment. Exception 2 applies in this case. The appellant has a genuine and subsisting relationship with a qualifying partner and a genuine and subsisting parental relationship with a qualifying child, and the effect of the appellant's deportation on the partner or child would be unduly harsh. The judge gives his reasons for finding that exception 2 applies in paragraph 20 of the decision. He finds that the permanent separation of a family, so that the two children would be brought up in the absence of their father by a single working mother with a limited use of English, would be unduly harsh. The harshness of the separation is compounded by the delay in issuing the deportation notice, so that the appellant's daughter (especially) has become used to the presence of her father and that the family life of the family unit has become firmly established. It is a reasonable assumption that given these circumstances the judge felt that it would be unduly harsh for the wife and children to relocate to Vietnam with the appellant.

13. In paragraph 19 the judge refers to there being "an exceptional factor to this appeal". It is apparent from an overall reading of the decision that the delay by the respondent in taking any action towards removing the appellant until many years after his conviction for a period of less than four years weighed heavily with the judge. This led him to conclude in the final sentence of paragraph 19 that the exceptional factors in this appeal outweigh the public interest in deportation. Although he uses the word "exceptional" it is apparent that having considered the conviction and

sentence, the long period of time before steps were taken to remove the appellant; his relationship with a British citizen who has borne him two children who are also British citizens, one of whom is now 11 years old, those factors informed the judge in such a way that he concluded that there are very compelling circumstances over and beyond those falling within 399 and 399A.

14. As referred to in the headnote of **Chege** , compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing. The judge weighed all these matters and decided that the public interest in deportation was outweighed by other factors. He was entitled to do so.

Notice of Decision

15. It is for the reasons set out above that I find that such errors as there are in the decision are not such that it should be set aside. The decision therefore stands.

16. There is no application for an anonymity direction and in the circumstances of this appeal I do not find that there is good reason to make one.

Signed Date

Upper Tribunal Judge Pinkerton