



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

Appeal Numbers: DA/00554/2014  
DA/00555/2014, DA/00556/2014  
DA/00557/2014, DA/00558/2014  
DA/00559/2014, DA/00560/2014  
DA/00568/2014, DA/00569/2014

**THE IMMIGRATION ACTS**

**Heard at: Columbus  
Newport  
On: 16 June 2015**

**House,**

**Decision and Reasons  
Promulgated  
On: 26 August 2015**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB  
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MNG, YM, HM, HM, HM, MM, SM, MNM, IMM  
(ANONYMITY DIRECTIONS MADE)**

Respondents

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer  
For the Respondent: Mr M Bandegani, Counsel instructed by Hoole & Co

**DECISION AND REASONS**

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited us to rescind

the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

2. This is the continuation of an appeal by the Secretary of State against the decision of a panel of the First-tier Tribunal (Judge Cresswell and Mr J H Eames) in which the panel allowed the appeals of MNG, YM, HM, HM, HM MM, SM, MNM and IMM, citizens of Afghanistan, against the Secretary of State's decision that section 32(5) UK Borders Act applied and to deport a family consisting of two married parents and their seven children to Afghanistan. Since the Secretary of State's decision two further children IDM and IQM (twins) were born on 31 August 2013. For convenience we will continue to refer to the parties as they appeared before the First-Tier Tribunal.
3. At a hearing on 31 March 2015 Upper Tribunal Judge Grubb decided that the First-tier Tribunal erred in law in allowing the appeals and set aside the decision of the First-tier Tribunal to be remade by the Upper Tribunal and in doing so upheld the primary findings of fact.
4. At the hearing before us Mr Bandegani appeared for the Appellants and submitted a written skeleton argument. Mr Richards represented the Secretary of State and did not submit any additional documents.

### **Submissions**

5. For the Appellants Mr Bandegani submitted an additional psychiatric report in respect of the Second Appellant, referred to the conclusions starting at paragraph 55 and offered to call the Second Appellant to give evidence if Mr Richards wished to cross examine. Mr Richards said that he had no questions.
6. Mr Bandegani said that on the basis of the First-tier Tribunal findings the critical issue relates to paragraphs 399(a)(i) and 399(a)(ii) of the Immigration Rules and whether it is 'unduly harsh' for the children to stay or go. Mr Richards interjected accepting that it would be unduly harsh for the children or any of them to remain in the United Kingdom without their parents so the only issue was whether all the family should stay or all the family should go.
7. Mr Bandegani referred to the meaning of 'unduly harsh' in the context of the Immigration Rules. There may be an approach other than that of 'reasonableness' by analogy to refugee law. AG Nigeria [2015] EWCA Civ 250 at paragraph 70 referring back to MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 suggests that the assessment of proportionality is ultimately an assessment for the Tribunal. MF (Nigeria) at paragraph 35 holds that the 'unduly harsh' test is not simply the imposition of a high hurdle but it is evaluative. The Secretary of State's approach to 'unduly harsh' is that it means 'very severe' but that the decision maker should look at the impact on the child and the family and

in deciding whether that impact is unduly severe the undueness of the severity must be informed by the nature and seriousness of the offence. The structure of the rules means that there must be an evaluation with regard to a range of factors. In this case however it makes little difference because of the findings of fact by the Tribunal. It is clear that the children are studying in Wales and have successfully integrated. They have known no other way of life. There is stark evidence from their teachers. The question is whether they should go to Afghanistan where there is limited access or right to education for children and young women.

8. For the Respondent Mr Richards said that there was a measure of agreement as to approach. He departed only in the conclusion when striking the balance. The findings include a wealth of positive findings in particular concerning the children and he did not seek to undermine those findings. However this is a serious offence striking at the heart of immigration control impacting upon the economic welfare of the country. The family is here as a result of that offence and they have become integrated into the community partly as a result of the prison sentence passed upon the First Appellant. The requirement is a finding of unduly harsh. Given the nature of the offences there is a strong public interest in deportation. The First-tier Tribunal said that the victim was the public purse. The cost to the public purse is significant. Whether the removal of the children is unduly harsh must be looked at in the context of the offence committed by their father.
9. We reserved our decision.

### **Discussion**

10. The factual findings of the First-tier Tribunal are not challenged. The First Appellant arrived in the United Kingdom on 26 October 2006 with his wife (the Second Appellant) and three of their children (the Fifth, Sixth and Seventh Appellants) and claimed asylum. They were joined by their two eldest children (the Third and Fourth Appellants) on 31 October 2009. Their other 4 children have all been born in the United Kingdom (on 9 April 2007, 5 October 2010 and 31 August 2013). The asylum claim made on arrival was refused and the appeal against that refusal dismissed on 15 March 2007. On 1 September 2008 the first Appellant was convicted of obtaining leave by deception and assisting unlawful immigration. There were four offences and the First Appellant was sentenced to 15 months imprisonment in respect of each offence with the sentences to run concurrently. As a result of these offences the Secretary of State decided to make a deportation order against the First Appellant (and the other Appellants as his family members) on 13 March 2014 under the automatic deportation provisions of the UK Borders Act 2007.
11. The First Appellant has significant sight and mental health difficulties. The Second Appellant also has significant mental health difficulties. In these respects there are unchallenged medical reports in respect of both the

First and Second Appellants. All of the Appellants have substantially integrated into their local community. In this respect the evidence given by the witnesses was overwhelming and the First-tier Tribunal concluded (at 26(vii))

“A crystal clear picture was painted of a very special and talented family, treasured by all who know and deal with them, the children being fine examples to their peers.”

This was not the end of the wholly positive findings made by the First-tier Tribunal. The eldest child was found to be

“... a quite exceptional young woman who has outstanding results in her studies to date and has gone a very long way to help other less fortunate than herself... she is studying AS levels at school and has prospects of study at Oxford and a career in medicine.”

The Respondent does not challenge these findings and Mr Richards very fairly said in submissions that the First-tier Tribunal had made a wealth of positive findings, in particular concerning the children, and he did not seek to undermine those findings.

12. The issue now to be decided is narrow. The First-tier Tribunal allowed the appeal under the Immigration Rules finding (at paragraph 39) that it would not be reasonable to expect three of the appellants (the three children who arrived with the First and Second Appellants and had therefore lived in the United Kingdom for more than seven years at the date of the Respondent's decision) to leave the United Kingdom and there was no family member (other than the First and Second Appellants) able to care for them in the United Kingdom. In doing so the First-tier Tribunal applied paragraph 399(a) of the Immigration Rules as pertaining prior to 28 July 2014 and that was an error of law. The Tribunal should instead have had regard to paragraph 399(a) of the Immigration Rules as in effect on and after 28 July 2014. The difference is highlighted in the error of law decision and we do not need to repeat it in detail here. The question is no longer whether “it would be reasonable to expect the child to leave the United Kingdom” but rather whether “it would be unduly harsh for the child to live in the country to which the person is to be deported”.
13. So the question we now need to determine is whether, on the same facts, it would be unduly harsh for the three children who have lived in the United Kingdom for at least seven years preceding the immigration decision to live in the country (Afghanistan) to which their parents are to be deported the Respondent having accepted that there is no question of those children remaining in the United Kingdom without their parents.
14. We have dealt with the facts in some detail above. In summary this is a large family comprising father, mother and nine children. Three of those children (two female and one male) have been in the United Kingdom since 26 October 2006 and as such had been in the United Kingdom for over seven years at the date of the Respondent's decision. The two eldest

children (both female) have been in the United Kingdom since 31 October 2009. The other four children (two female and two male) were all born here, the eldest was 4 weeks short of her 7<sup>th</sup> birthday at the date of the Respondent's decision. The children are of course innocent of any wrongdoing attributable to their parents. The overwhelming evidence before the First-tier Tribunal was of remarkable educational progress and social integration into United Kingdom society in respect of all children.

15. Much was made in submissions of the meaning of 'unduly harsh'. We have considered this meaning at length in our reported decision MAB (para 399: "unduly harsh") [2015] UKUT 435. Our conclusion by reference to the change in the wording of paragraph 399(a) from 28 July 2014 at paragraph 72 was as follows

...We do not consider that the replacement of "reasonableness" with "unduly harsh" had changed the approach to the Rules. Now, as then, the focus is on the impact upon the individual child (or partner). That said, we accept that the amendment has made some changes, for example phrase "unduly harsh" is intended, and may well, impose a heightened hurdle from that of "reasonableness" which was part of the Rules between 9 July 2012 and 28 July 2014. That is, in our judgment, reflected in [46] of MK and [109] of BM and Others. In our judgment, albeit to add a gloss of our own, the word "unduly" requires that the impact upon the individual concerned be 'inordinately' harsh. By that we mean that the impact would be "unusually large" or "excessive". We do not intend that to be a definition but rather a 'gloss' to assist decision makers applying para 399, and indeed, s.117C(5). That is, as the Tribunal recognised in MK at [46] "an evaluative assessment" but bearing in mind the "elevated" or "heightened" standard that must be applied. It is necessarily fact sensitive but is focussed upon the impact on the individual (whether child or partner) concerned.

## **Decision**

16. Addressing this approach to the facts of the case now before us we have no hesitation in finding that it would be unduly harsh to expect the three Appellants who had spent more than seven years in the United Kingdom by the time of the Respondent's decision to live in Afghanistan. The children were aged 6, 4 and 2 on arrival and 13, 11 and 9 at the time of the Respondent's decision. They are all at school and all speak English and Welsh. Two of the three are female. The disruption caused to their lives by a removal to Afghanistan where not only the security situation is vastly different from the United Kingdom but the social and education systems are also vastly different and, in the case of females, severely restricted would undoubtedly be of the greatest severity. Indeed it is difficult to imagine an impact on their lives that could be greater than a move from a settled and peaceful English/Welsh speaking environment with unrestricted access to education to an unstable and war torn Pushto/Dari speaking environment with severe restrictions on access to education particularly for females.

17. So far as these three children are concerned we take particular note of the factual findings of the First-tier Tribunal at paragraph 40 – 45 of the determination. Whereas the concluding finding was that it would not be reasonable to expect these children to return to Afghanistan it is in our judgement incontrovertible that, on the same facts, it would be unduly harsh to expect them to return.
18. It must follow that if it is unduly harsh to expect these three children (the Fifth, Sixth and Seventh Appellants) to return then their appeal must be allowed and the appeals of their parents the First and Second Appellants must also be allowed by virtue of the Immigration Rules (paragraph 399(a) (ii)).
19. This leaves the Third and Fourth Appellants (the two elder daughters who arrived in the United Kingdom on 31 October 2009), the Eighth and Ninth Appellants (born in the United Kingdom on 9 April 2007 and 5 October 2010) and the two youngest children who are not parties to this appeal. Mr Richards did not seek to distinguish any of the family members it being the Secretary of State's position that they are a family unit and that either they all go or they all stay. This is a sensible and pragmatic approach although one that requires consideration of their position outside the terms of the Immigration Rules by virtue of Article 8 ECHR which, in the particular and unusual circumstances of this matter is clearly justified. Bearing in mind the Respondent's approach it is not necessary for us to add to the detail already apparent or to findings already made on the depth of the integration of these Appellants. The Respondent accepts that they have an established family and private life in the United Kingdom. Taking into consideration section 117A-D of the Nationality Immigration and Asylum Act 2002 it would in our judgment be wholly disproportionate to require the Third, Fourth, Eighth and Ninth Appellants or their two infant siblings to be separated from the family unit and to be returned or in the case of those four children born in the United Kingdom relocated to Afghanistan. Their appeals succeed by virtue of Article 8 ECHR.

### **Conclusion**

20. The decision of the First-tier Tribunal involved the making of a material error of law and has been set aside.
21. We remake the decision in the following way
  - (i) The appeals of the First, Second, Fifth, Sixth and Seventh Appellants are allowed under the Immigration Rules.
  - (ii) The appeals of the Third, Fourth, Eighth and Ninth Appellants are allowed by virtue of Article 8 ECHR.

**Signed:**

**Date:**

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**J F W Phillips**  
**Deputy Judge of the Upper Tribunal**