



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

Appeal Number: DA/01128/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Centre
On 16 April 2015**

**Determination
Promulgated
On 27 May 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MUHAMMAD ATHAR BUTT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Blundell, instructed by DV Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 1 December 2014 of First-tier Tribunal Judge Miles. The decision of Judge Miles dismissed the appeal against an automatic deportation order. The deportation order was

made after the appellant was sentenced to 3 years' imprisonment for cheating the public revenue.

2. There was no dispute before me that at [3] and [8] and thereafter in the determination Judge Miles applied an incorrect version of paragraphs 396 to 399A of the Immigration Rules. He applied the version of those paragraphs brought into force by HC194 on 9 July 2012. At the date of the hearing on 18 November 2015 he should have applied the version brought into force by HC532 on 28 July 2014.
3. The application of the incorrect version of the Immigration Rules led Judge Miles to assess the Appellant's relationship with his wife on the basis of whether he had had valid leave continuously for at least fifteen years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and whether there were insurmountable obstacles to family life with the partner continuing outside the United Kingdom. It was common ground before me that the correct test to be applied from 28 July 2014 onwards is set out in paragraph 399(b) of the Immigration Rules that test being whether "it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."
4. It was also common ground that instead of assessing, as he did at [23] and [25], whether there "is no other family member who is able to care for the child in the United Kingdom" the First-tier Tribunal judge should have assessed whether "it would be unduly harsh for the child to remain in the UK without the person who is to be deported", as in the correct version of paragraph 398(a).⁸
5. Was this error material? It might seem to be where entirely the wrong test was applied. The reason for hesitating to answer that question in the affirmative, however, is that at [39] Judge Miles did conduct an "unduly harsh" assessment, that arising from the application of Section 117C(5) of the Nationality, Immigration and Asylum Act 2002¹. Judge Miles found that the circumstances of the appellant's wife and children would not be "unduly" harsh as they would not be "over and above what would ordinarily be the case" where a family is separated by deportation.
6. It was argued for the appellant that the assessment of undue harshness at [39] was flawed as that the First-tier Tribunal erred in requiring undue harshness "over and above what would ordinarily be the case". I did not accept that argument. As in the respondent's "Immigration Directorate Instructions Chapter 13: criminality guidance in Article 8 ECHR cases" at paragraphs 2.5.2 and 2.5.3:

¹ Section 117C(5) Nationality, Immigration and Asylum Act 2002:

"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 his "deportation on the partner or child would be unduly harsh."

“2.5.2 When considering the public interest statements, words must be given their ordinary meanings. The Oxford English Dictionary defines ‘unduly’ as ‘excessively’ and ‘harsh’ as ‘severe, cruel’.

2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal’s immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.”

7. The ordinary meaning of “unduly harsh” is therefore of excessive severity or cruelty and Judge Miles was entitled to look for a level of harshness more than ordinary.
8. It was also submitted that the “unduly harsh” assessment under paragraph 399(a) and (b) and that under s.117C(5) were materially different so the finding at [39] relating to s.117C(5) could not be sufficient to save the earlier failure to apply the correct version of paragraph 399(a) and (b). As I understood the argument for the appellant, the s.117C “unduly harsh” assessment includes other factors such as the seriousness of the appellant’s offending and the concomitant increase in the public interest in deportation. That was not so in the paragraph 399(a) and (b) assessment where the difficulties for the partner and children had to be assessed on their own merits, *simpliciter*.
9. I have some sympathy with that argument where the legislation set down in different sources to be applied in deportation cases concerning Article 8 has not proved easy to construe or apply and has led to a number of cases clarifying the correct approach. It is not an entirely straightforward task to marry the provisions of the Immigration Rules and s.117.
10. However, the introduction to paragraph 398 states:

“Where a person claims that their deportation would be contrary to the UK’s obligation under Article 8 of the Human Rights Convention ...”
11. Paragraphs 398 to 399D are therefore expressly stated to concern Article 8 of the ECHR. Indeed, it is now well understood that those parts of the Immigration Rules are a “complete code” for assessing breaches of Article 8 in deportation cases.
12. The introduction to s.117 states:

“117A Application of this Part

 - (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

- (a) breaches a person's right to respect for private and family life under Article 8, and
- (b) as a result would be unlawful under section 6 of the Human Rights Act 1998."

13. Where that is so, it does not appear to me that there can be a material difference in the approach to the assessment of what amounts to "unduly harsh" circumstances in 398(a) and (b) and s.117C(5). The relevant provisions of s.117 have to be taken into account when determining the Article 8 claim in a deportation case. Those provisions are not stated anywhere as not to be taken into account when addressing the requirements of the Immigration Rules. The "unduly harsh" assessment at 398(a) and (b) is not conducted in a vacuum from the relevant s.117 factors.
14. Judge Miles' finding that the wife and children of the appellant would not face unduly harsh circumstances were he to be deported was not in error in applying too high a threshold. He was entitled to place weight on material factors such as the appellant's wife having coped during his detention and having her own family members and family members of the appellant in the UK to assist were she to experience more difficulties than she has thus far after the appellant is deported. That finding is sustainable and remedies the failure to carry out what would have been the same assessment and results under paragraph 398(a) and (b).
15. For those reasons despite the regrettable error in applying the wrong version of the Immigration Rules, it is my conclusion that no material error arises here.

Notice of Decision

The determination of the First-tier Tribunal does not disclose a material error on the point of law and shall stand.

Signed 
Upper Tribunal Judge Pitt

Date: 19 May 2015