



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

Appeal Number: DA/00877/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

On 8 December 2015

**Decision &
Promulgated**

On 1 April 2016

Reasons

Before

**THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CONWAY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**A. R. A.
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Duffy
For the Respondent: In person

DECISION AND REASONS

1. In this case we maintain the designations as they were before the First-tier Tribunal. Thus Mr A.R.A is the Appellant, the Secretary of State the Respondent.

2. The Appellant is a citizen of Iran born in 1968. The immigration history is that he claims to have been in the UK since 1979. However the Respondent's records indicate that he was readmitted to the UK in 1992 and his passport was endorsed with indefinite leave to enter. He married a British citizen in 1997 and has four children below the age of 18.
3. Between 1997 and March 2011 he was convicted of numerous offences of dishonesty for which, variously, he received prison sentences, was given community service orders and ordered to pay costs and compensation.
4. On 21 March 2011 at Southwark Crown Court he was convicted of two counts of obtaining property by deception, four counts of dishonestly making false representations to make gain for self/another or cause loss to other/expose to risk, and nine counts of various other offences. He was sentenced to a total of nine years' imprisonment.
5. On 7 May 2014 a deportation order was made by virtue of Section 32(5) of the UK Borders Act 2007.
6. He appealed.
7. Following a hearing at Cardiff Crown Court on 26 January 2015 Judge of the First-tier Tribunal Burnett and Mrs Street, Non Legal Member allowed the appeal under the Immigration Rules and on human rights grounds.
8. The Tribunal at paragraphs [62] to [69] set out the applicable provisions of the Rules and various case law extracts which it considered relevant to the appeal. It acknowledged that the exceptions in paragraph 399 and 399A of the Rules do not apply and that he would have to demonstrate '*very compelling circumstances over and above those described in 399 or 399A*'.
9. Having gone on to consider the Appellant's offending history and the sentencing remarks of March 2011, the Tribunal found that the Appellant has an '*appalling record*' [81] and that the offences committed are '*extremely serious*'. They acknowledged the '*great weight*' to be given to the need to protect public security against crime and to deter [82].
10. Moving on to family life the Tribunal found (at [84]) that the Appellant maintains a genuine and subsisting relationship with his wife and children. They go on (at [86]) to acknowledge that the nature and quality of his relationship with his children needs to be assessed. They note that the children are British and that he had been involved in their lives until his incarceration in March 2011 [88].
11. They next go on to consider the best interests of the children and find that it would be '*very difficult*' for the Appellant's wife and children to visit him in Iran and conduct their family life there. They also find that it would be unduly harsh for the wife and children to remain in the UK without the Appellant. As such they made an overall finding that the best interests of the children are to be with both parents and remain in the UK.

12. They conclude that the circumstances amount to very compelling reasons over and above the matters listed in paragraph 399 and 399A. [105]
13. Advancing to consider Article 8 the Tribunal considered s117C(6). They find that having been in the UK for many years he has no ties in Iran and reintegration would be difficult. Also that the effect of the deportation on his wife and children would be unduly harsh. They concluded that there are *'very compelling circumstances over and above those in Exceptions 1 and 2'*. [114]
14. Permission to appeal was sought and granted on 22 April 2015.
15. At the error of law hearing before us Mr Duffy in essence sought to rely on the grounds. The Appellant left the matter for us.
16. We found the decision to be materially flawed.
17. It suffices to note the following: In ***Chege (Section 117D - Article 8 - approach) [2015] UKUT 00165*** the Tribunal stated that 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 s117D(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 s117B.
18. There is no dispute that the Appellant is a foreign criminal as defined.
19. The Tribunal acknowledged the legislative framework to be followed [62 ff]. However, they failed to carry out an assessment in accordance with the structured legal framework required.
20. The first problem is the assessment of family life. The Tribunal noted that there was no oral evidence or witness statements from his wife and children. Also the comment in the refusal letter that there was no evidence that the Appellant continued to maintain a relationship with them. Further, that he is a convicted fraudster. Despite that they found there was a genuine and subsisting relationship with his wife and children [84].
21. They did so because the Appellant provided photographs of his wife and children and these showed a change in the age of the children. Also, there was a letter about an 'Xbox' cable which *'shows she is still very much involved in the Appellant's life'*.
22. We consider that in the absence of oral evidence from his wife and children or even statements from them and noting that he is a *'convicted fraudster'* the finding that there was subsisting family life on the basis solely of some photographs and a single letter shows inadequate reasoning on a material matter.

23. The Tribunal then moved on to consider the children's best interests noting that there was no '*independent information from GP's and schools provided to confirm where the children lived and when...also...no professional reports before the Tribunal as to an assessment of the children's best interests and welfare*' [85]. They continue (at [86]) '*It is necessary to analyse the nature and quality of the Appellant's relationship with his children in looking at the next issue in this appeal*'.
24. The problem is that, apart from noting that the children are British and but for the youngest, at school and that prior to his incarceration in 2011 he was involved in their lives [86,87], the Tribunal gave no consideration at all to their best interests.
25. Issues that should have been considered included how would the children be affected were their parents to be separated; is the Appellant needed to prevent the children being ill-treated or their development significantly impaired; has their care been other than safe and effective. Also, the extent of any practical difficulties the mother would face in caring for the children as she presumably was caring for them during his imprisonment. Further, whether there is evidence that the children would lose contact with the Appellant or could such be maintained for example by phone, internet, by visits.
26. In failing to give adequate reasons on this material matter the Tribunal erred.
27. They went on to consider whether it would be '*unduly harsh for the child to remain in the UK without the person who is to be deported*' [89]. They concluded (at [104]) that it would be. They find that the Appellant has been in the UK since childhood and has no ties to Iran [96]. However, there is simply no analysis of why it would be unduly harsh for the children to remain in the UK without him (399 (a)(ii)(b)).
28. In failing again to give adequate reasons the Tribunal once more erred.
29. Further, in having failed adequately or at all to consider on the facts whether paragraph 399 or 399A applied, the Tribunal (at [105]) went straight to '*very compelling circumstances*' and concluded that there were such. They failed to engage with the requirement that the '*very compelling circumstances*' are '*over and above those described in paragraphs 399 and 399A*' (paragraph 398).
30. Once more the Tribunal in failing to give adequate or any reasons for their conclusion that there were very compelling circumstances over and above those in 399 and 399A materially erred.
31. Having apparently allowed the appeal under the Rules the Tribunal went on to consider Article 8. This was an error as the Rules as far as deportation is concerned are a complete code. In any event, yet again, their analysis was inadequate. There was no analysis of why the effect of

the Appellant's deportation on the children would be unduly harsh (s117C(5)). While they note s117C(6) they repeat the error of finding that there would be '*very compelling circumstances*' over and above those in Exceptions 1 and 2 without giving adequate reasons for that conclusion.

32. Having concluded for the reasons given at the error of law hearing that the decision was materially flawed we set aside the decision.
33. The Appellant stated that he would wish to lead evidence from his four children.
34. We considered that as facts will need to be found on material issues, the appeal should be remitted to the First-tier Tribunal to be reheard with no findings preserved.
35. We therefore direct accordingly.

Notice of Decision

The appeal is allowed to the extent of setting side the FtT decision and remitted for rehearing and fresh decision, to be heard by a differently constituted bench.

Direction regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Conway