



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: RP/00056/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20<sup>th</sup> February 2018

Decision & Reasons Promulgated  
On 2<sup>nd</sup> March 2018

Before

**THE HONOURABLE MR JUSTICE NICKLIN**  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
**UPPER TRIBUNAL JUDGE BLUM**

Between

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

and

**AMIR [E]**  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Ms A Patyna, Counsel, instructed by Fletcher Dervish & Co

**DECISION AND REASONS**

1. Mr [E] is a citizen of Iran. He is now 28. He first came to the United Kingdom in 2004 when he was aged 14. He accompanied at that point his mother and his brother. His mother claimed asylum on the grounds of her conversion from Islam to Christianity. After an initial refusal of her claim by the Secretary of State, Mr [E]'s mother successfully challenged that decision. She was granted indefinite leave to remain from 4<sup>th</sup> October 2004 as a refugee and he was granted refugee status in line

with his mother. On 23<sup>rd</sup> August 2010, Mr [E] pleaded guilty to conspiracy to supply of cocaine and heroin. In total he was sentenced to 40 months' imprisonment or detention consisting of two concurrent sentences of equal length.

2. On 24<sup>th</sup> June 2015, the Secretary of State decided to cease Mr [E]'s refugee status. Thereafter followed a series of further decisions to deport Mr [E] and to refuse his human rights claim. Mr [E] challenged these decisions. His appeal came before Judge Walters on 10<sup>th</sup> and 11<sup>th</sup> August 2017. The judge's decision was promulgated on 14<sup>th</sup> September 2017. The judge dismissed Mr [E]'s challenge to the cessation of his refugee status. It was common ground before the judge that, as a result of his conviction in 2010, Mr [E] fell to be treated as a "foreign criminal". As such the Secretary of State was required to make a deportation order unless Mr [E] fell within one of the exceptions in Section 33 of the UK Borders Act 2007. The judge was nevertheless satisfied pursuant to Section 33(2) that the removal of Mr [E] would breach his Convention rights, namely his Article 8 rights in view of his "*genuine and subsisting relationship*" with his daughter [M], born on [ ] 2016, and his partner, [AP], a UK citizen.
3. The judge found that Mr [E] did not qualify under paragraph 399A of the immigration rules but that his claim did succeed under paragraphs 399(a) and (b) on the grounds that he had a genuine and subsisting relationship with [AP] and a genuine and subsisting parental relationship with his daughter, who is entitled to British citizenship through her mother, and that it would be unduly harsh for [AP] and [M] to live in Iran.
4. The judge also found that "*it would be unduly harsh for the appellant's daughter to remain in the UK without the appellant because that would deprive her of her father*", paragraph 75 of the judgment. He therefore allowed Mr [E]'s appeal against the deportation order and the refusal of his human rights claim.
5. With the permission of Upper Tribunal Judge Kekić, the Secretary of State challenges the judge's finding that it would be unduly harsh for the appellant's daughter to have to remain in the United Kingdom without the appellant. She relies upon the decisions of *KMO (section 117 - unduly harsh) (Nigeria) [2015] UKUT 543 (IAC)*, *MM (Uganda) [2016] EWCA Civ 450* and *AJ (Zimbabwe) [2016] EWCA Civ 1012* to the effect that unduly harshness requires a high threshold beyond the expected harshness that would follow from the separation of a child from his or her parent.
6. In *MM (Uganda)*, Laws LJ held that when determining undue harshness the court should have regard to all of the circumstances. These included the applicant's immigration and criminal history. At paragraph 24 he said this:

"This steers the Tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh."

That decision was followed in *MA (Pakistan) & Ors -v- Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705*.

7. As I have mentioned, the Secretary of State relies on *AJ (Zimbabwe)* (and the cases identified in that decision) in challenging the lawfulness of the judge's conclusion that the impact on Mr [E]'s child would be unduly harsh. Having considered the relevant legal principles and relevant authorities, the court, at paragraph 17 indicated, that it would be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals.

"Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. ... In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the Rule of any practical significance",

and then at paragraph 31 the court stated:

"It was not open to the First-tier Tribunal to find that the separation of the children from the father or stepfather was a compelling reason to allow the respondent to remain. Far from being an exceptional circumstance, this is an everyday situation as the authorities I have set out demonstrate. They show that the separating parent and child cannot, without more, be a good reason to outweigh the very powerful public interest in deportation. No doubt the First-tier Tribunal was right to say that these children would unfortunately suffer from the separation but for reasons I have already explained, if the concept of exceptional circumstances can apply in such a case, it would undermine the application of the Immigration Rules",

and at paragraph 46 the Court of Appeal indicated on the facts of that case that there would be some emotional damage to the children but noted that this was not unusual whenever a parent is deported and the child is unable to live with that parent outside the UK.

8. In *NA (Pakistan) -v- Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662 [34] the Court said:

"The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Lady Justice Rafferty observed in *Secretary of State for the Home Department -v- CT (Vietnam)* [2016] EWCA Civ 488 at paragraph 38: 'Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.'

9. In *WZ (China) -v- The Secretary of State for the Home Department* [2017] EWCA Civ 795 [14] Sir Stanley Burnton said:

“I bear in mind that he has an established family life in this country, that his family and children have UK nationality, and that his wife would have to give up work to look after the children if he were removed and they were to remain in this country. However, none of these facts takes his case out of the ordinary. Deportation necessarily results in the break-up of the deportee’s family if they remain in this country after his removal.”

10. It is apparent from the authorities that I have set out that the “unduly harsh” test in paragraph 399(a) of the Immigration Rules, reflected in Section 117C of the Nationality, Immigration and Asylum Act 2002, has a very high threshold and that the separation of parent and child (even where this may result in some emotional damage to the child) will not ordinarily meet the test. The submission is that the judge’s assessment in respect of undue harshness in paragraphs 75 to 77 of the judgment is “*is inadequate and not reasoned, being one dimensional and therefore incomplete*”.
11. It is unfortunate that the Secretary of State did not raise the complaint about the inadequacy of reasons with the First-tier Tribunal Judge. In *English -v- Emery Reimbold & Strick Ltd.* [2002] 1 WLR 2409 the Court of Appeal stated [22]-[25]:
  - “22. In *Flannery’s* case [2000] 1 WLR 377 at 383 the court made two suggestions with a view to preventing unnecessary appeals on the ground of the absence of reasons. It suggested that one remedy open to the appeal court would be to remit the matter to the trial judge with an invitation or requirement to give reasons. In *Flannery’s* case this was not considered appropriate because more than a year had passed since the hearing. The delay between the hearing and appeal will normally be too long to make a remission to the trial judge for further reasons a desirable course. The same is not true of the position shortly after judgment has been given.
  23. The other suggestion made by the court in *Flannery’s* case was that the respondent to an application for permission to appeal on the ground of lack of reasons should consider inviting the judge to give his reasons, and his explanation as to why they were not set out in the judgment, in an affidavit for use at the leave hearing and at the hearing if leave be granted.
  24. We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a rehearing will involve a hideous waste of costs.
  25. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision

of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well-founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, for his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.”

12. In this case, we find there is substantial force in the Secretary of State’s submission that the judge failed to give adequate reasons to support his conclusion that it would be unduly harsh for [M] to have to remain in the UK without Mr [E]. What is clear from the authorities is that there are many factors that a court needs to consider. The decision of *WZ (China)* shows that even findings of what might be regarded as consequences of some harshness in relation to deportation and the effect on the deportee’s family nevertheless did not meet the required standard.
13. It is plain, I regret to say, that paragraph 75 does not contain a reasoned conclusion as to why it would be unduly harsh for the appellant’s daughter to remain in the UK without the appellant. As such that finding cannot stand for the lack of reasons.
14. What should we do now? Well, given the nature of the work of the First-tier Tribunal, and the very large number of cases that the judge will have dealt with, it is unrealistic to expect this judge to remember at this distance what else he had in mind, if anything, to support his finding of undue harshness. We therefore have two choices. One is to remit the matter for reconsideration by the First-tier Tribunal or for the Upper Tribunal to decide the point itself. We are not in a position to do so today because we do not have the evidence that would be relevant to making that decision.
15. Consequently, the appeal is allowed and the case will be remitted to the First-tier Tribunal, to be heard by a judge other than Judge of the First-tier Tribunal R G Walters.

**Notice of Decision**

**The Secretary of State’s appeal is allowed. The case is remitted to the First-tier Tribunal to reconsider afresh the article 8 appeal only, there being no challenge to the First-tier Tribunal’s decision in respect of the protection appeal.**

No anonymity direction is made.



Signed:  
The Honourable Mr Justice Nicklin

Date: 20 February 2018