



IAC-FH-NL-V1

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

Appeal Number: DA/00190/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 October 2015
Prepared 5 October 2015**

**Decision & Reasons Promulgated
On 8 October 2015**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TUAN QUANG NGUYEN

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr F Khan, of Counsel instructed by Messrs Hudson
Solicitors

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against a decision of the First-tier Tribunal (Immigration Judge Finch and Ms J A Endersby) who in a determination promulgated on 29 August 2014 allowed the appellant's appeal against a decision of the Secretary of State dated 15 January 2014 to make a deportation order. The decision followed from a conviction of the appellant on 3 May 2005 of conspiracy to cultivate a class C drug.

2. The relevant factual details in this case are that the appellant entered Britain illegally in August 2003 and applied for asylum. That application was refused on 10 January 2004 and his appeal was dismissed in July that year. He was sentenced to a period of imprisonment for two years on 3 May 2005. After serving his sentence the appellant did not leave Britain . In August 2012 he made an application for a residence card as a carer of a British citizen child. The appellant's partner originally came from Vietnam in 2002 but is now a British citizen. They have two children who are British citizens.
3. The Tribunal set out their findings and conclusions in paragraphs 12 onwards of the determination. Reference is made to paragraph 398(b) of the Rules and to paragraphs 399 and 399A. It was stated that paragraph 399A did not apply. It appears to be the case that the tribunal also considered that paragraph 399(b) did not apply. It does appear however that the Tribunal considered the appellant's deportation to be unlawful because the appellant's wife would not be able "to provide Cam and Vu if the appellant was deported and therefore his deportation would be unlawful". It is not quite clear what the Tribunal meant in that sentence. The Tribunal went on to consider the judgment in the House of Lords in **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4** and then discussed at some length the issue of the best interests of the children before concluding that the respondent had not established that the appellant's deportation would amount to a proportionate breach of his rights under Article 8 of the ECHR. They therefore allowed the appeal on human rights grounds.
4. The grounds of appeal claimed that the determination of the Tribunal did not contain a properly structured approach under of the Rules or state what exceptional factors might have indicated that deportation would be disproportionate. Moreover the Tribunal had not taken into account the public interest in the deportation of someone who had committed a serious offence. Finally it was pointed out that the Tribunal had ignored the provisions of Section 117A-117D of the Nationality, Immigration and Asylum Act 2002 which had come into force on the day of the hearing.
5. Judge of the Upper Tribunal Grubb granted permission on those grounds.
6. At the beginning of the hearing Mr Khan quite correctly conceded that there was an error of law in the fact that the Tribunal had ignored the provisions of Section 117A-D of the 2002 Act.
7. Mr Avery submitted that the Tribunal had erred in their assessment of the provisions of the rules and indeed that there was no clear framework in the determination as to how they had considered the rights of the appellant within the context of the Rules. He further argued that they had misunderstood the concept of the best interests of the children and that they did not appear to appreciate that the relevant test was not whether or not the appellant's wife would have difficulties in bringing up the children on her own but whether or not the decision was proportionate

taking into account the rights of the children. Mr Avery relied on the determination of the Tribunal in **KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC)**.

8. Mr Khan submitted that the findings of fact made by the Tribunal were fully sustainable and that it would be appropriate for me to re-make the decision and again allow the appeal on the basis of those findings of fact.

Discussion

9. As accepted by Mr Khan there was a clear material error of law in the determination of the Tribunal who had ignored the provisions of Section 117A-D of the 2002 Act. On that basis alone it would be appropriate to set aside the determination of the First-tier Tribunal. However there are further material errors. The determination is unstructured and it is really not clear whether or not the Tribunal have allowed the appeal under the Rules or on some exceptional basis. They have not in any event pointed out any exceptional reasons as to why this appellant should not be deported or why his deportation and have ignored the public interest in the deportation of a convicted criminal, indeed, one who had never had leave to be in Britain. While I note that Mr Khan pointed out that the appellant had not committed any further offences since 2005 and was a reformed character that really is not the relevant substantive test.
10. I find therefore there are material errors of law in the determination of the Tribunal and there set aside the decision. Furthermore I consider that the terms of the Senior President's Tribunal's Practice Directions are met and that it is appropriate that this appeal should be remitted to the First-tier Tribunal so that further findings of fact can be made.

Notice of Decision

11. The determination of the First-tier Tribunal is set aside.

Directions

- (1) This appeal will proceed to a hearing in the First-tier Tribunal at Taylor House.
- (2) A Vietnamese interpreter is required.

Signed

Date

Upper Tribunal Judge McGeachy