



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

Appeal no: **DA/01387/2014**

THE IMMIGRATION ACTS

At **Royal Courts of Justice**
on **23.11.2015**

Decision signed: **23.11.2015**
sent out: **13.01.2016**

Before:

Upper Tribunal Judges
John FREEMAN and Susan KEBEDE

Between:

AN

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: *Gordon Lee* (counsel instructed by Duncan Lewis & Co, Harrow)

For the respondent: Mr Keith Norton

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Kevin Moore), sitting at Hendon on 22 April, to dismiss a deportation appeal by a citizen of Iran, born 2 December 1976, here since 2000 and sentenced in 2007 to 27 months' imprisonment for what on the sentencing judge's view was the industrial-scale forgery of asylum

NOTE: the anonymity direction made at first instance will continue until the close of the fresh hearing directed.

registration cards. He has a son, P, born here on 19 September 2003 and a British citizen.

2. This was the statutory framework, so far as relevant, for the decision under appeal, under s. 117C of the Nationality, Immigration and Asylum Act 2002:
 - (1) The deportation of foreign criminals is in the public interest.
 - (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
 - (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
 - (4) Exception 1 [*is not relied on in this case*]
 - (5) Exception 2 applies where C has ... a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the ... child would be unduly harsh.
3. The judge dealt with the case under paragraphs 399 and 399A of the Rules, which are in similar terms. The legislation does not of course preclude the need to consider the best interests of the child or children concerned, nor did the judge overlook that. Our decision turns on the reasons he gave for his decision on that point, and on the ‘unduly harsh’ question.
4. The judge had reservations (justifiably, as we shall mention later) as to the way in which P’s evidence had been put before him in a letter; but he accepted at paragraph 59 that this letter, giving details of the regular week-end contact between him and the appellant, and of his own feelings, was “... an honest and genuine reflection as to the relationship between father and son”. Of course this contact would stop with the appellant’s removal; but, inexplicably on his own findings, the judge concluded that he could not be satisfied that “... it would be in the best interests of the son for his father to remain in the United Kingdom and not to return to Iran”.
5. That finding was wrong in law, because it is not supported by the judge’s own reasoning. Of course the best interests of P were a primary consideration for him; but, as will be clear from the terms of s. 117C, set out above, it was not the deciding point, which was whether the effect of the appellant’s deportation on the child would be unduly harsh, in terms of both his interests and the public’s. This rather obvious point was underlined in the judicial head-note to *KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC):

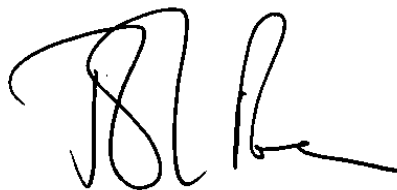
“... the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child ... of the foreign criminal being deported is inordinately or excessively harsh.”

6. It follows that the judge might have justified his negative finding on the 'unduly harsh' point, despite his inadequate reasons on P's 'best interests', by referring to those of the public. However, this was not what he did: his conclusion on it, at paragraph 65, was this:

"For reasons that I have found earlier in this detention I do not find that it would be unduly harsh for [P] since [P] would be remaining in the UK with his mother who would continue to look after and care for the child in the family home."
7. While the judge set out, very briefly, the facts of the appellant's offence at paragraph 21, as part of the respondent's case, he did not go into the full facts from the sentencing judge's remarks, as best practice would require in anything but a very straightforward case. Nor did he say anything else, as he might have done in this case, to justify his decision on the 'unduly harsh' point in terms of the public interest.
8. The result is that the judge's decision cannot be upheld on the reasons he gave for it, and the decision will have to be re-made. This will not be an easy business, and it will be very much better for it to be done by a judge, or better still a panel who have heard the parties themselves, rather than by us on the papers. Mr Lee was anxious, if there were to be a re-hearing, to put forward a report by an independent person with reference to P's interests, and we should very much encourage that. Judges ought not to be left, as this judge was, to do the best they can to assess not only the authenticity, but the spontaneity of a document purporting to come from the most important person in the case.
9. We also gave encouragement, and Mr Lee agreed with us, that means should be found for P to give his own views directly to the judge. At his age this is likely to be by way of an informal conversation between him and the judge. In our view this should be standard practice in a case of this kind, where the interests of a child or young person able to give their own views are likely to be crucial, if not decisive. This would be an ideal case for listing before a panel including an experienced judge and a lay member.

Appeal allowed: decision set aside

Fresh hearing before First-tier Tribunal (not Judge Moore)



(a judge of the Upper Tribunal)