Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01487/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 30 January 2019	**On 22 March 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

M D M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Praisoody, Legis Chambers
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Australia. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 10 January 2017 refusing his human rights claim.

2. The appellant had arrived in the United Kingdom in June 2001 and remained at all times with valid leave until the making of a deportation order against him on 18 November 2014. He had been convicted in 2013 on four counts of dishonestly making false representations and was sentenced to two years' imprisonment on each count to run concurrently.

3. The appellant's human rights claim was based on his relationship with his children, R who was born in July 2005 and whose mother had previously been married, with E who was born in September 2012, his relationship with her mother having broken down in 2013, and his wife whom he had met in 2015, AM, who was pregnant with their child at the time of the hearing before the judge.

4. The judge's decision is lengthy, careful and thorough. She noted that it was set out at paragraph 398 of HC 395 that for a person in the position of the appellant who has been sentenced to a period of imprisonment of at least twelve months but less than four years it must be considered whether paragraph 399 or paragraph 399A applies and if it does not, the public interest in deportation will only be outweighed where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

5. She noted the relevance of paragraph 399(a) and (b). Paragraph 399A did not apply because the appellant did not meet out the criteria set out in that provision.

6. With regard to his relationship with AM and whether that met the terms either of Exception 2 of section 117C of the Nationality, Immigration and Asylum Act 2002, or the Exception under paragraph 399(b) of HC 395, he concluded that the Exception under paragraph 399(b) could not be met as it was only applicable where the appellant's immigration status was not precarious at the time of the relationship was formed, and it had been precarious at that time. As regards whether or not the effect of his deportation on her would be unduly harsh, the judge noted that AM had spent all her life in the United Kingdom and had her career here as a vet and owned her own home. The judge noted that AM was diagnosed towards the end of April 2017 with what was believed to be an optic nerve meningioma (tumour of the optic nerve sheet) of the right eye. The judge set out the evidence in relation to this including the likelihood of an operation in 2018.

7. AM had said that it was highly unlikely that she would obtain a visa for Australia because it would require the declaration of pre-existing health conditions and this exceeded a threshold which she said her condition would exceed and she would be unlikely to get a visa and would not be able to take out medical insurance. The judge accepted that at the moment she would be unlikely to able to obtain any sort of visa for Australia or medical insurance to cover her to travel but was not satisfied that she would always be unable to obtain a visa in the future. She was satisfied that at the moment AM would be unable to live in Australia. She noted also the fact that AM was pregnant with an estimated date of delivery of 30 March 2018 (the hearing took place in August 2017). The judge was not satisfied that it would be unduly harsh for AM to face complex surgery, most of her pregnancy and the birth of her baby on her own without the appellant. She would be able to have support from family and friends in the United Kingdom and would not be left destitute.

8. As regards the children, the relevant children were R and E. As regards E, the judge did not accept that the appellant at the moment had a genuine and subsisting parental relationship with her. He had had supervised contact with her every fortnight since April 2017, and the judge set out in some detail the nature and progress of the contact. She did not doubt that he was capable of a genuine and subsisting parental relationship with her and might have it in the near future if he remained in the United Kingdom but it had not yet reached that stage. She did accept that it was in E's best interest that the appellant remain in the United Kingdom but could not find precisely how strongly this was the case because the Family Court had not yet made a final order.

9. As regards the appellant's relationship with R, the judge was satisfied that it was a close relationship. They were in regular contact, and she had a letter from R explaining his love for his father and the activities that they shared together. He repeatedly said to the appellant and AM that he wanted to live with them and got upset at returning to his mother's. He had always lived during the school term weekdays with his mother and it did not seem likely that his mother would support a court order and move across the country enabling him to live with the appellant.

10. The judge was satisfied that it was strongly in R's best interests that the appellant remain in the United Kingdom. The respondent had accepted it would be unduly harsh for him to move to Australia. The judge noted the appellant's witness statement which explained vividly the type of activities that he and R did together that they would not be able to do via Skype. The judge was not satisfied that it was the case that R would not be able to visit the appellant in Australia but visits were likely to be infrequent. R would lose the active involvement of his father in his life. He was a positive role model for his son, having been quite clear with R that his behaviour had been unacceptable.

11. The judge considered that the public interest in the deportation of foreign criminals was the only public interest in the appellant's removal from the United Kingdom since he had always had leave until his leave was revoked by the deportation order, he spoke English, and it was accepted that he was socially and culturally integrated into the United Kingdom and capable of being financially independent if he was allowed to work. There was nevertheless a very significant public interest in his deportation as a foreign criminal. The judge noted the detail of the offences, but also commented that she had considerable evidence since August 2013 that he had reflected and learned the necessary lessons, was not at risk of reoffending and could be a valuable member of society. He had been restored to the veterinary register by a decision of 15 September 2015.

12. Having considered the authorities the judge concluded that it would be unduly harsh on R for the appellant to be deported as she had found it to be so strongly in his best interests for the appellant to remain in the United Kingdom and that although great weight was to be given to the public interest in deportation even of those who would not reoffend, in this case there were no additional negative factors to add to that public

interest. Effectively R spent half the days he was not at school with the appellant. She concluded that the loss of that close relationship with the appellant would come at a critical stage in R's life and that the strength of that relationship would not be able to be maintained at a distance and with infrequent visits. As a consequence she found that since the appellant met the terms of paragraph 399(a) and Exception 2 of section 117C in respect of R, the public interest did not require his deportation and his deportation would be disproportionate and a breach of Article 8.

13. The judge then went on to consider whether there were compelling circumstances, on the alternative footing that she was wrong not as to the facts but in her conclusion that the effect on R of the appellant's deportation would be unduly harsh.

14. She concluded that particular circumstances of the case when taken together did amount to very compelling circumstances outweighing the public interest principally because of the strength of the best interests of the children when taken together. She gave little weight to the appellant and AM's family life, given that they had entered into the relationship knowing that the appellant was due to be deported, though she did give some weight to that relationship and it was a relevant additional factor that the couple would inevitably be separated at a time in AM's life which would be very difficult for her, when she would need additional support and care. The judge gave some weight to the appellant's private life in the United Kingdom as in recent years he had been in the United Kingdom with indefinite leave to remain although the weight she gave it was limited because he would be able to reintegrate into Australia and form an adequate private life there.

15. The Secretary of State sought and was granted permission to appeal this decision, and in a decision dated 31 August 2018 Upper Tribunal Judge King concluded that the judge had erred with regard to the findings of undue harshness in respect of R and also in her conclusions as to very compelling circumstances. Following a transfer order the matter came before me on 30 January 2019.

16. The appellant and EM both adopted their witness statements and were not cross-examined.

17. Ms Praisoody referred to the expert report of Tamara Licht dated 23 January 2019. In the summary at paragraph 1.03 it was said that R presented with mild separation anxiety disorder as a consequence of his father facing possible deportation to Australia, and that if his father were to be removed his mild separation anxiety disorder was likely to increase in severity deteriorating his overall socio-emotional wellbeing. It was concluded that there was a high risk of R presenting with an anxiety disorder should his father be removed from the United Kingdom. It was likely that due to his age and considering that he appeared to depend mostly on his immediate family, any situation that might distress his family environment would have the potential to have a negative impact on his mental health and quality of life. R was noted as saying that his

mother would not help him with his emotions because she was busy with his brother and needed her space and therefore his best friend and his father were his main emotional support. He will be taking his GCSEs next year. His father's impact on that was important. He will be devastated if his father left.

18. It was relevant also to note paragraph 4.01 where it was noted by the expert that R's symptoms currently do not meet the criteria for any diagnosis as stated in the diagnostic and statistics manual of mental disorder, but it should be noted from the email at page 28, the response to the appellant's email, that R could not be classified as having a diagnosis according to the guidelines the potential was there for him to develop such a diagnosis if not supported was that that was correct.

19. AM and the appellant now had a child who had been born on 11 March 2018. There were also the issues concerning AM's health, and the evidence in respect of that was set out at page 42 of the bundle onwards. She had undergone surgery for tumour debulking and decompression of her optic nerve, and had tolerated the surgery well and pathology was consistent with a grade 1 meningioma. She had had a recent MRI on 15 August 2018 which showed an expected small residual. The MRI was overall stable from 2017. She had a recent follow-up with ophthalmology which did not show any progression of her visual loss. She had been advised to watch clinically for any visual deterioration and progression of the headaches, and an MRI had been requested in one year's time. The date of this letter is 13 September 2018. It can be seen from AM's witness statement there was no-one in her family who could look after the baby or her. A combination of the baby and AM's health problems amounted, it was argued, to very exceptional circumstances under Exception 2.

20. The appellant had a subsisting relationship with the three children in the United Kingdom who were all British citizens. Their best interests required them to be given more weight. It was unreasonable to say that AM could go with the appellant and be treated in Australia. In any event there was the difficulties of the visa application that had been considered by the First-tier Judge.

21. As regards R there were two Family Court orders and there were no restrictions on the order but there were some restrictions with regard to the arrangements with E as she was very young and needed more time to get to know her father. The child arrangement was in progress and the Family Court would decide in due course. The decision to remove was not proportionate. The children's best interests and AM's critical situation needed to be borne in mind. She had to be treated in the United Kingdom.

22. In his submissions Mr Howells relied on KO (Nigeria) [2018] UKSC 53 and NA (Pakistan) [2016] EWCA Civ 662.

23. It was clear from the decision of Upper Tribunal Judge King there were two specific issues for consideration today. The first was whether it would be unduly harsh for R to remain in the United Kingdom without the appellant and the second was whether the public interest in deportation was

outweighed by very compelling circumstances going beyond the circumstances described in paragraph 399 and paragraph 399A.

24. With regard to the former there was now the guidance in KO (Nigeria). The seriousness and nature of the offending were not to be taken into account when assessing undue harshness in respect of the child, but it was a high test going beyond what would usually be experienced. Reliance was placed on what had been said at paragraph 23, where it was said that one was looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. If the consequence was separation of a child and parent that was not enough to be unduly harsh. The Supreme Court had approved what was said in MK (Sierra Leone) [2015] UKUT 223 (IAC), that "harsh" denoted "something severe or bleak" and the addition of the adverb "unduly" raises an already elevated standard still higher. The term "unduly harsh" could not be equated with simple undesirability (paragraph 35).

25. Relevant factors might be such matters as a child's health or contact difficulties. It is to be noted with regard to R that there were no NHS documents so he had not had to seek help with any mental health issues at the time when the appellant was in prison or subsequently when he had been facing deportation. The report noted that he had said he will be devastated and sad if his father departed but that was a typical account of a teenage son who would miss physical contact with his father if his father were deported. The report did not indicate any significant adverse effect on R. There was no claim with regard to the difficulties that there might be in maintaining contact.

26. With regard to the baby, M, there was no evidence of any effect on her going beyond what would necessarily be involved. With regard to E the judge had found that the appellant did not have a genuine and subsisting relationship with her but even if there was, there was no evidence of any impact going beyond what would necessarily be involved.

27. With regard to the second matter, the decision in NA was relevant to this. At paragraph 19 it was said that an Article 8 claim had to be especially strong to succeed on this basis. There was reference at paragraph 33 and 34 to the high public interest. The main additional factor in this regard was the appellant's relationship with his wife and her health problems. The circumstances were clearly sympathetic. It was accepted that she would be unlikely to get an entry visa from the Australian authorities. The question was whether it would be unduly harsh for her to remain in the United Kingdom on the appellant's deportation. They had entered into their relationship in full knowledge that he had precarious immigration status and that was relevant to the weight to be attached to the compelling circumstances issue which could outweigh the public interest in deportation. The judge had not considered it would be unduly harsh on AM who would be separated from the appellant. Very compelling circumstances going beyond paragraph 399 and paragraph 399A had not been made out. This was not one of the rare cases.

28. By way of reply Ms Praisoody argued that with regard to the evidence concerning R he had been having all his support from his father and was neglected by his mother and said she did not have time for him and the expert report and the response in the email were also very important.

29. As regards E and the arrangements concerning her, she needed more time to get to know him and he was seeing her in a centre supervised and she would not be able to understand why he was deported if he were. More weight needed to be given to the best interests of the child. The baby and her mother's situation also needed to be considered. AM had been very ill. At the moment the appellant was the only person looking after her and the baby. If he were removed there would be no support from him. Yes, she would get emotional support from her family but if anything happened to her then the baby would be on her own and those were compelling circumstances. There were three British children and AM was unwell and that amounted to compelling circumstances if anything did. The judge had noted there was no evidence that the appellant would reoffend and his financial circumstances led to the offence and he had been reinstated to practice in the United Kingdom. This was relevant to the public interest. The undue harshness test and compelling circumstances tests were met.

30. I reserved my determination.

31. I have set out in some detail the judge's findings since it is important to be clear what the matters for consideration are today, those are the two points as delineated by Mr Howells.

32. With regard to the first point, that of whether it would be unduly harsh for R to remain in the United Kingdom without his father, I have considered the report of Ms Licht, and it is relevant to note, as Ms Praisoody very fairly and properly pointed out, that his symptoms currently do not meet the criteria for any diagnosis and currently he presents with no mental health concerns. She did consider that R would need support in order to assist him with managing psychological distress that could result from his father's deportation were that to take place, and that if such support were not offered to him in the eventuality of his father's deportation it was likely that his personal, family, social and academic life could become severely affected. It is also relevant to bear in mind her response to the appellant's email that though he did not have a diagnosis the potential was there for such a diagnosis to be developed if he were not supported.

33. Clearly R would miss his father considerably if he were removed to Australia, even bearing in mind the fact that he does not live with them, but sees him, as the judge noted, on effectively half the days when he is not at school. The evidence has to be seen in the context of the guidance in KO (Nigeria) which is very clear on the point that what is in issue is a degree of harshness going beyond what would necessarily be involved for any child faced with a deportation of a parent and that it is a considerably more elevated threshold than an uncomfortableness, inconvenience, undesirability or difficulty.

34. In my view that high threshold is not crossed in this case. One can only have sympathy for R and indeed for the appellant if they are to be separated by the appellant's deportation. I accept that it is in R's best interests for his father to be in the United Kingdom, but his best interests are not the determinative factor, nor is sympathy enough for the high threshold to be crossed. Undoubtedly the consequences for R would be harsh. But I do not consider that that high threshold of undue harshness can properly on the evidence be said to be crossed in this case. As a consequence the test as set out at paragraph 399(ii)(b) is not satisfied.

35. The other issue is whether there are very compelling circumstances over and above those set out in paragraphs 399 and 399A such as to outweigh the public interest in deportation in this case. Here the factors relied on are in particular the health problems of AM and the difficulties she will experience partly in that regard and also in coping with the demands of a baby who is some 10 months old. It is also the case that she would be unlikely to be granted a visa by the Australian authorities, due to her health problems. It is accepted on her behalf that she would have emotional support. It is also the case that the medical evidence indicates no particular concerns at this stage other than there will be another MRI scan a year on from the letter to which I have referred above. It is unduly speculative to consider what the position would be for the baby were AM to experience severe health problems. No prognosis has been provided to indicate that that kind of risk exists. I have to deal with the facts as they are and not as they might be unless it has been shown, which it has not, that there is a real possibility of them occurring. The test of very compelling circumstances above and beyond those set out at paragraphs 399 and 399A is a very high test indeed. In considering whether that test is met I bear in mind not only the evidence concerning AM but also the best interests of the children to have their father in the United Kingdom, including in this E, whose relationship with the appellant is developing but is not as yet at a point where contact has gone beyond supervised contact at a contact centre. These are all relevant issues to be placed into consideration. They are not in my view compelling let alone very compelling circumstances over and above those set out in paragraphs 399 and 399A such as to outweigh the public interest in deportation. Accordingly the appeal is dismissed on that basis also.

36. In conclusion therefore the appellant's appeal against the decision of 10 January 2017 is dismissed.

Notice of Decision

The appeal is dismissed.

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 his 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 20 March 2019

Upper Tribunal Judge Allen