



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

Appeal Number: DA/00737/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Given orally at Field House  
On 29 September 2014**

**Determination  
Promulgated  
On 7 October 2014**

**Before**

**UPPER TRIBUNAL JUDGE PETER LANE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**CRYTON SIJAONA**

Respondent

**Representation:**

For the Appellant: Mr Shilliday, Home Office Presenting Officer  
For the Respondent: Ms H Short instructed by Turpin & Miller Solicitors

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against the determination of the First-tier Tribunal, First-tier Tribunal Judge Mailer sitting at Richmond on 23 June 2014, in which he allowed the claimant's appeal against the decision of the respondent that the claimant should be deported from the United Kingdom. Permission to appeal was granted by the First-tier

Tribunal on 7 August 2014. That Tribunal noted that it was arguable the judge had failed to take into account paragraphs 399 or 399A of the Immigration Rules and associated case law.

2. Before me, Mr Shilliday represents the Secretary of State. He has helpfully provided a bundle of authorities, including statutory authorities. Ms Short represents the claimant, as she did before the First-tier Tribunal. The facts of the matter are essentially as follows.
3. The claimant is a national of Tanzania, born in January 1969. He arrived in the United Kingdom on 11 November 2001 with a visa that was valid until 6 September 2002. He made an application for leave to remain as a dependant of his wife who was then studying in the United Kingdom. He was granted further leave until 17 September 2007, together with his wife and then child as dependants. In September 2007 his leave was extended until 7 September 2012. In 2008 he, his wife and now three children were granted indefinite leave to remain. He applied for registration of his three children as British citizens and that was granted in August 2009. Later that year he and his children were issued with British passports. The three children were at the date of the First-tier Tribunal's determination aged 11, 9 and 7. The eldest, E, has an autistic spectrum disorder.
4. In May 2012 the claimant was convicted of three counts of obtaining leave to enter or remain in the United Kingdom by means including deception. It appeared that between 2003 and 2007 he obtained his leave to remain in the United Kingdom on the basis of a fraudulent United Kingdom ancestry claim. On 11 May 2012 he was sentenced to ten months' imprisonment for the first count, four months for the second count to run consecutively and four months for the third count, also to run consecutively, these making a total sentence of eighteen months' imprisonment. In June and August 2012 he was notified of liability to deportation.
5. The current letter of decision is that dated 27 March 2014. Having set out the circumstances of the claimant's immigration history and the circumstances of his offence, including the remarks of the sentencing judge, the letter continued by noting the presumption in favour of deportation, before embarking upon an analysis of Article 8 of the European Convention on Human Rights. It is relevant to observe that the sentencing judge stated that the claimant's offences were so serious that only immediate custodial sentences were justified and that they were the shortest which in his judgment matched the seriousness of the offences, taking account of the nature of the deceptions employed, the sentencing guidance of the Court of Appeal, deterrence and mitigation. The letter analysed family life by reference to the claimant's family life with his wife and his three children. It noted with some care the position of the three children. It concluded, however, that there were "no exceptional circumstances known and no reason apparent why you could not continue your family life in Tanzania if it is decided that your children and wife will join you in Tanzania". There then followed reference to the claimant's

private life. It is common ground that no reliance is placed upon private life as such in these proceedings. The position of the eldest child who is autistic was specifically noted, although it was considered that there were non-governmental organisations available in Tanzania who might provide assistance in that regard.

6. The determination of the judge bears some scrutiny. It is of considerable length. That is not to say that it must as a result be free from legal error; indeed Mr Shilliday's submission is that, having recorded accurately the nature of the task that he faced, the First-tier Tribunal Judge in effect failed to apply the relevant legal tests in his conclusions on the evidence.
7. The submissions are recorded in some detail, as is the evidence. There is also supporting evidence from third parties, including the Church of England Chaplain of the prison where the claimant had been held, attesting to positive character traits of the claimant.
8. There was also a probation report, recorded at paragraph 120 of the determination as presenting "a low risk of serious harm given that the claimant does not have any previous convictions indicative of serious harm".
9. The submissions of Mr Bassi and Ms Short are then noted in detail. Mr Bassi was recorded at paragraph 128 as submitting that the interests of the children could not be regarded as a "trump card", a phrase repeated today by Mr Shilliday in his submissions to me.
10. At paragraph 136 we see reference made to the leading case of Nagre v Secretary of State [2013] EWHC 720 (Admin) as guidance on the assessment of what might be meant by "exceptional circumstances" in the context of a criminal deportation.
11. At paragraph 139 the judge recorded Ms Short as submitting that this was a case where the interests of the three children "constitute compelling circumstances". There then follows reference to the case of Omotunde (best interests - Zanbrano applied - Razgar) Nigeria [2011] UKUT 247 (IAC) and other cases bearing on this matter.
12. The judge's findings begin at paragraph 146. He found at paragraph 149 that "from the evidence produced I find that the appellant has a very strong bond with his children. He and his wife managed to be employed at different hours during the day in order that each would be able to provide full-time care to their daily needs. Accordingly, the appellant worked at nights so as to be available to look after the children during the day."
13. At paragraph 150 the judge noted that, as well as taking the children to school and other appointments, the appellant assisted them and devoted himself to their extra curricular activities, including taking E for piano lessons.

14. The position whilst the claimant was in prison was noted at paragraph 151. This was a difficult time for the children.
15. At paragraph 152 the judge noted that the claimant's wife was registered for a degree and away during the day: "it is the appellant who therefore attends to their day-to-day needs. Her degree has a few years to run." All this led the judge to find that, if faced with deportation, "the family face a difficult dilemma and choice". It was plain in the judge's view that it would be unreasonable to expect the children to relocate to Tanzania.
16. At paragraph 156 we find this: "It is accordingly not disputed and thus I find that the removal of the appellant from the family unit would have significantly adverse impacts on them". Having concluded that telephone communication and other modern forms of communication would not provide a satisfactory alternative, the judge at paragraph 158 recognised the need to find exceptional circumstances when conducting the balancing exercise required for proportionality under Article 8.
17. At paragraph 159 the judge noted that the claimant's claim "must be considered in the context of the relevant provisions of the Immigration Rules and in particular paragraphs 398, 399 and 399A".
18. At paragraph 160 the judge observed that if the claimant's case fell within paragraphs 399 and 399A, then the exercise involved a single stage only; but if it did not fall within either of those provisions, it was necessary to determine whether there were exceptional circumstances outweighing the public interest in deportation.
19. There then follows a recitation of the well-known five stage test set out by Lord Bingham in Razgar v Secretary of State for the Home Department [2004] UKHL 27 and other cases including importantly the Court of Appeal judgment in SS (Nigeria) [2013] EWCA Civ 550. At paragraph 169 the judge noted that he had "had regard to the authorities that have been provided to me and the principles derived from them". Having taken account of all this, the judge found at paragraph 170 that the welfare of the children was a primary but not paramount consideration. It was not the only consideration and not necessarily determinative.
20. Again, at paragraph 175 the judge reminded himself that the new Rules provided that it would only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors.
21. The judge then looked again at the position of the eldest child. Although that child appears to have made substantial progress in education, he was about to embark in secondary school and it was likely that this would require further monitoring in respect of his disorder.

22. At paragraph 184 the judge came to his overall conclusions. He found that “it is clearly in the children’s best interests for them to remain in the UK with both parents. There is, as already found, a strong relationship between the appellant and the children. Were that bond to be severed by the appellant’s deportation to Tanzania there is no doubt that this would have an adverse effect on each of them. I do not find that such severance could be adequately addressed by indirect contact or even possible visits to him in future. In any event the financial circumstances of the appellant’s wife are currently not known and in particular it is not known whether she will after graduating from her economics degree find the professional employment she hopes for”.
23. At paragraph 185 the judge noted the low likelihood of re-offending and in particular the low risk of serious harm.
24. At paragraph 186 the judge concluded as follows: “Having considered the evidence as a whole I conclude that notwithstanding the strength of the countervailing interests the best interests of the children must prevail. They give rise to a compelling case which displaces the public interest in his deportation. I conclude that the case established under Article 8 is sufficiently strong and compelling so as to prevail over the pressing public interest in the appellant’s deportation”.
25. Before me, Mr Shilliday mounted an energetic and able attack on the judge’s determination. As I have already stated, it comes down to the assertion that the judge has in effect failed to apply the case law and rules which govern decision-making in this context. Mr Shilliday submitted that the judge had in fact conducted a freewheeling Article 8 exercise, evidenced perhaps by the references to the case of Razgar. At my request, Mr Shilliday then made submissions as to what hypothetically might be the outcome were I to find an error of law and embark on re-making the decision. He drew my attention to section 19 of the Immigration Act 2014, which at the end of July 2014 brought into force a new Part 5A of the Nationality, Immigration and Asylum Act 2002. Mr Shilliday submitted in effect that this test was to all intents and purposes the same as had faced the judge in the present case. Looking at section 117C(5), the question on the facts was whether the effect of the claimant’s deportation on the partner or child would be “unduly harsh”. Mr Shilliday submitted that the provisions of Part 5A, and in particular 117C, apply to the claimant because insofar as 117C is concerned the claimant is a “foreign criminal” as defined in section 117D(2) of the 2002 Act. This is because, although he has not been sentenced to a single term of imprisonment of at least twelve months, he has “been convicted of an offence that has caused serious harm”.
26. Mr Shilliday drew my attention in that regard to the Secretary of State’s Guidance Instructions, Chapter 13, Criminality Guidance in Article 8 ECHR cases, valid from 28 July 2014. There we find at 2.1.3 the definition, albeit non-statutory, of an offence that has caused serious harm as constituting

“an offence that has caused serious physical and psychological harm to a victim or victims or that has contributed to a widespread problem that causes serious harm to a community or to society in general”.

27. Paragraph 2.1.5 puts some flesh on those bones by indicating that where a person has been convicted of one or more violence, drugs or sex offences “he will usually be considered to have been convicted of an offence that has caused serious harm”.
28. For the claimant, Ms Short submitted that the approach taken by the Secretary of State’s representative at the First-tier hearing essentially followed that set out in the refusal letter of 27 March 2014. This was the approach which the First-tier Judge essentially adopted and it was therefore in Ms Short’s submission wrong for the Secretary of State at this stage in proceedings to seek to take what she described as a different stance. On the basis of the totality of the facts and the relevant law, Ms Short submitted that the First-tier Judge had made a good, or if not good, adequate decision. He had correctly directed himself to the relevant law. There were ample instances in the determination to show that the judge was well aware of the need for exceptionality, albeit not as a legal test as such. All relevant considerations had been taken into account.
29. So far as Part 5A of the 2002 Act is concerned Ms Short submitted that the claimant’s offence could not be said to fall within the definition set out in section 117B(2)(c) for if it did, then all other offences would necessarily in practice have to fall within the same category. But even if the claimant were regarded as a foreign criminal for these purposes and if the Upper Tribunal were to embark upon re-making the decision, for the reasons given by the judge it was plain that the effects on the children and family in general would be unduly harsh.
30. I am grateful for both sets of submissions. I am conscious that it is only where an error of law is found that it is possible for the Upper Tribunal to set aside a determination of the First-tier Tribunal. I therefore have to consider whether such an error has been demonstrated.
31. I will not repeat those passages of the determination to which I have made reference. It is in my view abundantly plain from those passages that the judge was entirely aware of the nature of the legal task before him. The criticism of the judge in my view comes down to no more than that he should have used the language of exceptionality or undue harshness expressly, in the concluding paragraphs of his determination. But to require that of a fact-finder seems to me to be distorting what is meant by error of law. It is quite apparent to me that the judge knew the ambit of his task. There was ample evidence in front of him, in particular in relation to the position of the eldest of the three children but also as regards the important part played by the claimant in the lives of all three children and the way in which he and his wife were organising themselves to attend to the children’s needs, to show that deportation of the claimant would

indeed have disproportionately harsh effects on the family. In coming to that conclusion the judge undoubtedly and rightly had regard to the nature of the offence which the claimant had committed. He was entitled to conclude that there was a low risk of re-offending. Accordingly, I accept the submissions of Ms Short as regards error of law. That means that it is strictly unnecessary for me to embark upon any analysis of Part 5A of the 2002 Act. I will however say that, had it been necessary for me to re-make the determination, I would have reached the same conclusions of the judge; namely that it would be unduly harsh to deport the claimant. In doing so, I would have parted company with Mr Shilliday, as regards the test of serious harm. It strikes me that the guidance at paragraph 2.1.3, in describing a widespread problem that causes serious harm to a community and to society in general, is looking at such things as drugs offences, rather than the offences for which the claimant was convicted. That is not to say that those offences were not significant; and that is not to say that society is not fully entitled to proscribe them. But I do have some difficulty in seeing why, if this is to be the test of serious harm, there is any purpose in having the additional threshold of the sentence of one year's imprisonment. But I conclude that, even if Part 5A is engaged, it would be unduly harsh for this claimant to be deported for the offences which have triggered the deportation action being taken against him.

32. The claimant should not regard the First-tier's determination and my dismissing the challenge against it as any indication that he is entitled to remain in the United Kingdom indefinitely, whether or not he commits any further offences. If he does commit further offences, no doubt action will be taken against him. However, for the reasons I have given, this appeal by the Secretary of State is dismissed.

Signed  
Date

Upper Tribunal Judge Peter Lane