



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

Appeal Number: DA/01507/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 September 2014**

**Determination  
Promulgated  
On 14 October 2014**

**Before**

**UPPER TRIBUNAL JUDGE KING TD**

**Between**

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

Appellant

**and**

**VIJAYAKARAN TISSAWEERASINGAM**

Respondent/Claimant

**Representation:**

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer  
For the Respondent: Ms M Seehra, Counsel, instructed by Nag Law Solicitors

**DETERMINATION AND REASONS**

1. The claimant is a Sri Lankan national, born on 3 March 1979. He seeks to appeal a decision made by the Secretary of State for the Home Department on 15 July 2013 that he be deported from the United Kingdom

as a foreign criminal, he having been convicted on 17 March 2010 of two counts of theft, and sentenced to a total of twelve months' imprisonment.

2. The claimant sought to appeal against that decision on the basis that to remove him from the United Kingdom would be in breach of his fundamental human rights.
3. That appeal came before First-tier Tribunal Judge Elliman and Dr Okitikpi (non-legal member) for hearing on 9 June 2014. The appeal was allowed.
4. The Secretary of State for the Home Department sought to challenge that decision on the basis that the panel was in error in concluding that there were exceptional circumstances in the case such as to permit the appeal to be allowed. It was contended that there were no identifiable or exceptional circumstances in this particular case and that the panel, therefore, was in error in finding such a route as to overturn the deportation decision that had been made.
5. Permission to appeal was granted on a somewhat different basis that the test of whether the claimant was "constantly and unceasingly engaged in criminal activity" was not a proper test to be applied in the circumstances of the case.
6. Thus the matter comes before me in pursuance of that grant.
7. The claimant came to the United Kingdom on 21 May 1999, arriving illegally in Dover. He was arrested the following day and made a claim for asylum. That claim was refused on 9 July 2013 on the grounds that he had failed to comply with the asylum process.
8. In March 1999 he was convicted of indecent assault and sentenced to six months' imprisonment. In January 2001 he received a police caution for attempting to obtain property by deception. On 8 June 2006 he was convicted of driving offences. On 17 March 2010 he was convicted on two counts of theft and sentenced to twelve months' imprisonment. There was a further driving offence in May 2012.
9. The claimant was interviewed about his asylum claim on 13 June 2013. He feared returning to Sri Lanka on the basis of his support for the Tamil Tigers. The Secretary of State for the Home Department, in the reasons for refusal did not accept that account and made findings as to the adverse credibility of the claim. Thus the Secretary of State saw no reason not to sign the deportation order against the claimant, which was done on 11 July 2013.
10. In terms of his family and private life, the claimant married a British citizen on 1 July 2012 and a baby has been born to that relationship on 29 November 2013.

11. It would seem that the claimant and his wife first met when he was at college and she working. It was only after his release from prison that the relationship became more serious, leading to the marriage in July 2012 and their beginning to live together. The wife has family commitments in the United Kingdom and without her help her parents would be unable to afford to pay for their home. The claimant's wife has lived in the United Kingdom all her life and has no cultural ties or any ties to Sri Lanka, her parents being from India and Singapore. She is a Hindu.
12. At the hearing the panel heard evidence from the claimant and also from his wife. The evidence from her was that her family are all in the United Kingdom.
13. The Tribunal considered the asylum aspect to the claim in paragraph 25 of the determination and concluded that there was no risk to the claimant were he to return.
14. The Tribunal accepted the genuine nature of the relationship which the claimant has with his wife and expressed themselves satisfied that he had a genuine and subsisting parental in relationship with the child. It was the conclusion of the panel that it was in the child's best interests to have the support of both parents.
15. The panel reminded themselves of the factors set out in **MF (Nigeria) [2013] EWCA Civ 1192** and reminded themselves of the following:-

"‘Exceptional’ does not mean ‘unusual’ or ‘unique’. Decision makers should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. .... Instead, ‘exceptional’ means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely."
16. The panel noted paragraphs 399 and 399A and noted that if those paragraphs did not apply it would only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors.
17. It was the conclusion of the Tribunal that there were in this case matters which were capable of being exceptional in the way expressed. Those factors are set out in paragraph 31 of the determination in particular.
18. The situation of the appellant and his wife and her family were to be considered as a whole. The wife was not from Sri Lanka and did not speak the language of Sri Lanka and had never lived there. She was a British citizen and her removal to Sri Lanka would be to a completely alien environment. She had commitments in the United Kingdom that were over and above the normal ties of family, social life and employment. She

had her financial and emotional commitments to her family in the form of a mortgage that she shared with her mother. It was accepted that if she could not meet her share of the payments, the impact on the family members who live in that home would be significant and as also the risk of losing the home for non-payment.

19. The Tribunal commented as follows:- “It is this wider impact that we consider to be significant and to render the appellant's circumstances exceptional.”
20. The panel went on:

“The family have no option other than to live separately (with the child being left without one or other parent at any one time) or to live together in Sri Lanka leaving the appellant's wife’s mother and grandmother at the risk of losing their home and security which is an option we consider unreasonable for his wife”.
21. It was considered that there was nothing to indicate that the family as a whole could reasonably relocate to Sri Lanka.
22. It was recognised that the appellant's offending history was not minor but neither did it involve violence, drugs or sexual offending. The Tribunal found that so far as the appellant's wife was concerned, all her family, career and livelihood are in the United Kingdom and that she is the sole breadwinner for the family providing all the support for her husband and child as well as for her parents. Also that it was in the best interests of the child to be brought up in the United Kingdom.
23. It is clear and I so find that the panel, in considering the factual situation, reminded themselves correctly as to the law and the fact that it was only in the most exceptional circumstances that the public interest in effecting deportation would be outweighed by other considerations.
24. The grounds of appeal do not contend that the First-tier Tribunal misdirected themselves as to the law but rather contend that the circumstances identified by the panel as exceptional were in fact not exceptional. It is contended that the First-tier Tribunal had been materially misdirected in concluding that the individual circumstances of the claimant were so exceptional that they outweighed the pressing public interest in deporting him. It is contended therefore that that assessment is flawed.
25. Mr Duffy, who represents the Secretary of State for the Home Department, contends that the court fell into fundamental error in approach by considering that the presence of a British born wife and child were elements capable of meeting the high threshold envisaged as being exceptional. It would be the case in the majority of matters leading to deportation that there would be a family who would suffer as a

consequence of the offending behaviour of the claimant. He submits that to allow the appeal on that basis would be to defeat the whole purpose of the legislation and of the importance which parliament has decreed should be placed upon removing foreign criminals. He invites me to find that the panel has wholly overlooked that matter.

26. Miss Seehra, who acts on behalf of the claimant, invited me to find that it was not simply a consideration confined to the wife and child but was a consideration involving the whole family unit and their financial interdependence. She submitted that the best interests of the child was not a factor specifically set out in the Immigration Rules and therefore was a factor properly to be borne in mind in considering the question as to whether removal was such as to result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate.
27. The merits of this appeal are finely balanced. It seems to me, however, and I so find that the burden of the grounds of appeal and indeed of the submissions of Mr Duffy are more to the merits of the matter rather than identifying any obvious error of law.
28. The Tribunal correctly identified the legal issues and the test to be followed and interpreted the facts before them in a particular way which led to a particular result. The Secretary of State for the Home Department disagrees with those conclusions.
29. The difficulty which faces me is of course that I am to determine errors of law and not to adjudicate upon disputes as to fact unless it can be demonstrated that there was, in the finding of the Tribunal, a lack of reasons or a perversity of approach such as to amount to an error of law. I do not find that to be so in this case.
30. It may be considered that the approach taken by the panel was a somewhat generous one. They were entitled to come to the conclusion that removal would have unjustifiably harsh results. I bear in mind the interests of the family as a whole and not just those of the claimant.
31. Even if the panel was in error a relevant consideration is whether that error is a material one in the light of the legislation that has now been enacted under Section 19 of the Immigration Act 2014. I note in that regard Part 5A Article 8 of the ECHR public interest considerations of the Nationality, Immigration and Asylum Act 2002 as amended. Part 5A only applies where the Tribunal considers Article 8(2) ECHR directly. It requires that consideration be given under Section 117C to the number of matters where foreign criminals are involved.
32. The issue of proportionality is recognised given the wording of 117C(2) "the more serious the offence committed by the foreign criminal, the greater is the public interest in deportation of the criminal". It goes on to

provide that in the case of a foreign criminal who has not been sentenced to a period of imprisonment for four years or more the public interest requires deportation unless Exception 1 or Exception 2 applies. Exception 2 applies where “C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a ‘qualifying child’ and the effect of C’s deportation on the partner or child would be unduly harsh.”

33. It would seem that on a preliminary consideration that the situation of the appellant was more likely than not to be one that fell within that Exception. If there were to be rehearing of the case then clearly regard would be paid to Section 117C. Mr Duffy did not disagree with that proposition but submitted that there would still be an area of argument as between the parties as to whether or not the effect of removal was unduly harsh.
34. Thus it seems to me that Section 117C and the relevant Exception as set out therein is supportive of the approach than was in fact taken in this case by the Tribunal. The Tribunal has asked the correct questions and applied the correct test and also noted that the claimant had been fifteen years in the United Kingdom and that his family situation was a compelling factor in his favour.
35. As I have indicated, I regard the grounds of appeal as submitted by the Secretary of State for the Home Department to be in this particular case more of a merits challenge than identifying a clear error of law.
36. In all the circumstances therefore the Secretary of State's appeal is dismissed. The original decision of the Tribunal shall stand, namely that the appeal against deportation is allowed as also is that in relation to human rights.

Signed

Date

Upper Tribunal Judge King TD