Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00307/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2018	**On 26 March 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

JEYATHEVARAJ [J]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms I Ahmed, Home Office Presenting Officer
For the Respondent: Ms G Thomas, Counsel, instructed by Freemans Solicitors

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Sri Lanka. The appellant is the Secretary of State (hereafter the SSHD). In a decision sent on 26 July 2017 I set aside the decision of Judge Dineen who had allowed the claimant's appeal against a deportation order the SSHD had made against him on 30 December 2013. This order had been made because the claimant had been sentenced to eighteen months' imprisonment for dishonestly making false representations. Judge Dineen's decision was set aside because he had not addressed paragraph 399(b) which considers whether in the case of the parent of a British citizen child "it would be

unduly harsh for the child to remain in the UK without the person who is to be deported". However I stated at paragraph 9:

> "Whilst it is not necessary for me to address [the Secretary of State's] grounds 2 and 3, it may assist the next Tribunal dealing with the case if I state my assessment of them. I do not consider ground 2 is made out. Whilst the judge's decision is somewhat brief on the issue of whether for the family unit living in Sri Lanka would be unduly harsh, almost all of his assessment is directed at explaining why he considered it would be unduly harsh. Paragraph 24 traverses a wide range of conclusions relevant to assessment of this matter …"

2. At the further hearing I heard submissions from Ms Ahmed and Ms Thomas.

3. Ms Ahmed said she relied on the SSHD's written submissions of 18 October 2017 drafted by Mr Melvin. There was a strong public interest in deportation of the claimant. On 21 September 2012 he had been convicted on four counts of fraud committed in 2010 and sentenced on 12 October 2012 to a total of eighteen months' imprisonment.

4. As regards the best interests of the children, Mr Melvin's submission stated that it was accepted that the two children (aged 9 and 13) are British citizens and have lived in the UK all their lives and while being brought up by Sri Lankan parents will have little cultural knowledge of that country. Neither child is at a critical juncture in their education but it is accepted that the educational system is different in Sri Lanka. The written submissions went on to state that it was accepted that it would be in the children's best interests to remain with both parents.

5. The written submissions ended by making four main points: that removal of the appellant would not be unduly harsh as the family had coped well whilst the claimant was in prison and since his release has coped financially given that the claimant had his status removed and was unable to support his family; the claimant's index offence was not a one off but a series of offences committed over a lengthy period and according to the criminal judge's sentencing remarks involved victims who were desperate, vulnerable people who did not have much in the way of resources; that the claimant did not plead guilty to the offences but denied the charges and was convicted; that the public interest in the matter outweighs the best interests of the children to remain in the UK with their father.

6. Ms Ahmed's submissions reinforced those made by Mr Melvin adding that even though the children may be well-integrated into British society they have clearly been exposed to Sri Lankan culture; that even though the claimant had had ILR previously his immigration status had been rendered precarious by his committing crimes; the children would be adversely affected by their father's deportation, but they managed for nine months without their father (when he was in prison).

7. Asked by me, what relevance if any the IDI policy of the Secretary of State relating to parents of British citizen children had in this case, Ms Ahmed submitted that its terms clearly excluded parents such as the claimant, whose criminality fell within the scope of paragraph 398. If, however, that policy were taken to reflect EU law principles as elaborated by the Court of Justice in **Case C-304/14 SSHD v CS**, then she would not be able to submit that the claimant posed a present and sufficiently serious threat to public order, as he had not re-offended in over five years.

8. Ms Ahmed referred to a number of higher court authorities including **MM (Uganda)** and **AJ (Zimbabwe) [2016] EWCA Civ 1012** in which at [31] of the latter Elias LJ had stated that "separating parent and child cannot, without more, be a good reason to outweigh the powerful public interest in deportation".

9. Ms Thomas elaborated her submission by reference to a detailed skeleton argument. She submitted that two matters that might normally be in dispute in a case such as this had been broadly settled by proceedings so far. The SSHD had accepted that it was in the best interests of the children to remain with the claimant and his wife in the UK. Further, in my decision finding an error of law I had stated that I saw no error in the assessment made by the FtT Judge that it would be unduly harsh for the family unit to resettle in Sri Lanka.

10. Given that the only remaining issue was therefore whether it was unduly harsh for the children to remain in the UK without their father, Ms Thomas submitted that it would clearly be contrary to their best interests to separate them from their father. She drew attention to the evidence from their school headteacher who noted that the older child's progress was adversely affected during the time his father was in prison and expressed her view that if the claimant were deported that that would have "a devastating effect on the family". Consistent with having lived in the UK for over 30 years the claimant had organised his children's lives on the basis that their future lies in the UK. The claimant is the children's authority figure and has taken a close role in supervising their education and taking them to sports activities. The claimant understandably identified as British on account of the time he has lived here and had brought his sons up to speak English at home. Both children have lived their entire lives in the UK and are of an age where they have established meaningful private lives of their own, outside the family unit. The claimant's wrongdoing cannot be held against the children in an assessment of what is in their best interests (**ZH (Tanzania) [2011] UKSC 4**). The claimant had lived lawfully in the UK since 1986 and obtained ILR as long ago as 1994. During that time, he has become socially and culturally integrated. He no longer enjoys meaningful ties in Sri Lanka.

11. As regards the public interest factors, Ms Thomas submitted that the claimant had not sought to condone his past wrongdoing nor does he seek to diminish the impact of his offending upon his victims; his fraud was

short-lived encompassing a two month period between April–June 2010; the offence was committed within the context of spiralling debt with the claimant being unable to adequately manage, culminating in repossession of the family home; the offence was a product of desperate circumstances rather than a pro-criminal attitude; he was of hitherto unblemished character; whilst in prison he was commended by the governor for his "exceptional work ethic", "positive attitude and trustworthiness"; prison records show he was respected amongst staff as diligent, "a major support to other prisoners" and someone who had been entrusted with a range of duties.

12. In relation to the public interest factors identified within S117B of the NIAA 2002, the claimant and his family all spoke good English; they do not represent a burden to the taxpayer; the claimant has an impeccable immigration history; the ties on which he now relies have not been formed when his immigration status was precarious.

My Assessment

13. It is common ground that the claimant is entitled to succeed in his appeal if able to establish that he meets the requirements of paragraph 399 which provides:

> *"This paragraph applies where paragraph 398 (b) or (c) applies if –*
>
> *(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*
>
> *(i) the child is a British Citizen; or*
>
> *(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case*
>
> *(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and*
>
> *(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or*
>
> *…"*

Also applicable is S117C(3) which provides that 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 2 applies. S117C(5) enjoins that "Exception 2 applies where C … has a genuine and subsisting potential relationship with a qualifying child, and the effect of C's deportation on … the child would be unduly harsh". It is not in dispute that the claimant's two children are both qualifying children.

14. The different stages of the proceedings in this case has not made it an easy one for the parties to target their submissions. In certain respects their written and oral submissions talked past each other and still sought

to raise arguments relating to the first limb of paragraph 399(a)(ii)(a) which relates to whether "it would be unduly harsh for the child to live in the country to which the parent is to be deported". In my error of law decision I stated that I saw no error on the part of the judge in concluding that this limb of paragraph 399(a)(ii) was met. Ms Ahmed did not ask that I revisit that opinion in the context of re-making my decision and I do not consider it would be appropriate to revisit it as neither Mr Melvin's written submissions nor Ms Ahmed's oral submissions directly challenged it.

15. The sole issue then is whether the claimant satisfies the second limb of paragraph 399(a)(ii), namely whether "(6)it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

16. It is well-established that the assessment of this unduly harsh requirement calls for a wide-ranging assessment of relevant factors and that these include the strong public interest in deportation.

17. In the claimant's case his was a "white collar" crime but it was one that had devastating consequences for those he duped. It was not a one-off offence but was carried out over a period of two months in 2010. The claimant used his reputation and position of trust as the company director of a letting agency to commit four counts of fraud. He did not plead guilty. The sentencing judge described him as a "con-man". For these he received a sentence of eighteen months. Whilst he obtained ILR in 1994, he did not take steps to apply for British citizenship prior to his committing his offences, although he would have been eligible at the time.

18. Also even though he had ILR at the time he committed his offences, his decision to embark on criminality was sufficient to render his immigration status precarious for the purposes of S117B(5): see **AM [2015] UKUT 0260 (IAC)** paragraph 33.

19. Weighing against the effect on his children being unduly harsh is the fact that his wife managed to continue to care for them for the period of nine months whilst he was in prison without significant difficulties. The oldest boy was assessed as to whether he required special needs, but it was found he did not. Also relevant is the fact that if the claimant was deported it is reasonable to expect that he would find well-paid employment in Sri Lanka and would be able to support and assist his family financially out of his earnings there.

20. On the other side of the scales, the children are both British citizens. Both have lived all their lives in the UK and both have lived here over seven years. It is not in dispute that they are socially and culturally integrated into British society. Whilst it is not entirely clear to what extent they have developed cultural and linguistic ties with Sri Lanka through their parent's influence, it is clear that they have developed a strong British identity. The evidence relating to how they coped for the time their father was in prison does not indicate they suffered significant difficulties, but I attach weight to the letter from the oldest boy's headteacher that his school

progress was affected in that he found it difficult to concentrate. It is not in dispute that the claimant has been closely involved in the boys' upbringing and schooling. The most recent witness statements from the parents, whose contents is not disputed by Ms Ahmed, attest that he is playing a very prominent role as a primary carer, and that his wife has health problems that reduce the degree to which she can look after them.

21. As regards the public interest considerations, I have already identified that they count heavily against the claimant. That said, the offences in 2012 were his first and only offences. He has not re-offended for over four and a half years. All the documentation relating to his stay in prison attest to him playing a very positive role in carrying out designated tasks and being a major support to other prisoners. That is evidence of rehabilitation. Whilst the claimant pleaded not guilty no issue is taken with the view expressed by Ms Thomas that he had fully accepted responsibility and was remorseful. These last two considerations cannot carry significant weight in the deportation context, but they are nevertheless part of the overall picture.

22. I have given consideration to whether the claimant is entitled to benefit directly from jurisprudence of the Court of Justice relating to Union citizen children who have a parent who commits criminality, in particular case **C-304/14, SSHD v CS**.

23. In this case the CJEU noted that a Member State may adopt on expulsion measure against a non-Union citizen who is the primary carer of a young child who is a national of that Member State in which he has been residing from birth without having exercised his right of freedom of movement, when the expulsion of the person concerned would require the child to leave the territory of the European Union. However the expulsion measure must be founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that Member State.

24. I do not consider that I should seek to determine the claimant's case on the basis of this judgment nor by making any assumption that the IDI policy on parents of British citizen children is grounded in the CJEU jurisprudence (although arguably it has to be). What I do derive from it, however, is that it reinforces the importance in cases of foreign criminals with British citizen children of considering whether their conduct is not only serious historically but in the present. As already noted, the evidence in the claimant's case does not indicate that he is a "present" threat to the fundamental interests of UK society, although he clearly was in 2012. Ms Ahmed specifically acknowledged he no longer posed a present threat. Whilst I have weighed the factors relating to the issue of the unduly harsh effect on the children without regard to this judgment, it underlines the importance I have attached to the fact that the claimant has not re-offended and appears to have taken steps to ensure better financial management, so that it is unlikely he will face a similar situation to that

which led him to his serious criminality in 2012. Whilst such considerations do not on their own carry significant weight this is a case in which the best interests of the child considerations weigh heavily in the claimant's favour.

25. Having weighed all the competing considerations in the balance, I am satisfied that the claimant comes within the terms of paragraph 399(a)(ii)(b). Accordingly it is not necessary for me to consider separately whether he comes within Exception 2 of S117(5), although it is clear to me, pari passu, that he does.

26. To conclude:

    The decision of the FtT Judge has already been set aside for material error of law.

    The decision I re-make is to allow the claimant's appeal under the Immigration Rules.

No anonymity direction is made.

Signed Date: 22 March 2018

Dr H H Storey
Judge of the Upper Tribunal