



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/12372/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 7th February 2018**

**Decision & Reasons
Promulgated
On 16th February 2018**

Before

**RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUSTAPHA ALI SAID
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. T Melvin, Home Office Presenting Officer
For the Respondent: Mr. N Ahmed, instructed by Burton & Burton Solicitors

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Swinnerton promulgated on 8th December 2017 in which he allowed the appeal against the decision served by the Secretary of State on 9th February 2017, to refuse a human rights claim made by Mr. Said.
2. The appellant in the appeal before us is the Secretary of State for the Home Department and the respondent to this appeal is Mr Said. However, for ease of reference, in the course of this decision we shall

adopt the parties' status as it was before the FtT. We shall in this decision, refer to Mr Said as the appellant, and the Secretary of State as the respondent.

3. At the conclusion of the hearing before us, we announced that in our judgement, the decision of the FtT is infected by a material error of law and the decision of the FtT Judge is set aside. We directed that the matter is to be remitted to the FtT for hearing *de novo* with no findings preserved. We said that we would give the reasons for our decision in writing. This we now do.
4. The appellant is a national of Tanzania and his immigration history is set out at paragraph [2] of the decision of the FtT. He last entered the UK in March 2006 as a spouse with leave valid until March 2008. He was subsequently granted discretionary leave to remain in the UK until January 2017. The appellant's offending history is set out at paragraph [3] of the decision. On 1st February 2017, the appellant was convicted of interfering with a motor vehicle endangering other road users and received a 12-month sentence of imprisonment.
5. The respondent seeks to deport the appellant and to that end, applying paragraph A 362 and paragraphs A398 to 399D of the immigration rules, concluded that the appellant is unable to meet the family and private life exception to deportation. The respondent concluded that there are no compelling circumstances which outweigh the public interest in seeing the appellant deported, on Article 8 ECHR grounds.
6. The appellant relies upon the family life that he has with his wife and children. The appellant met his wife Mrs A K, a British citizen, in 1997 when the appellant had previously been in the UK. They married in 2005 after the appellant had returned to Tanzania after a lengthy period of unlawful presence in the UK. There are two children of the marriage, aged 10 and 7 respectively at the time of the hearing before the FtT.

7. The Judge found, at [16], that the appellant continues to have a genuine and subsisting relationship with his wife. He also found, at [17], that the appellant has a genuine and subsisting relationship with his children, and that the appellant plays an active part in the upbringing of his children. The Judge found that the appellant, his wife, and their two children live together as a family unit.

8. At paragraph [20] of the decision, the Judge states:

"..The children, aged 7 and 10, are at an important stage in their development and the deportation of their father would have a very substantial impact on the lives of the children, particularly as the Appellant's wife did not see how she could move with her children to Tanzania as the lives of the children have always been in the UK and they are British citizens."

9. At paragraph [21], the Judge states:

"...'. Deportation of the Appellant would lead to a break-up of the family unit given that the Appellant's wife and the two children involved are all British citizens and the Appellant's wife does not intend to return to Tanzania with their children. That said, the Appellant committed a criminal offence for which he was convicted and imprisoned recently and very considerable weight must be attributed to the public interest in deportation cases such as this. I have therefore been alive to and have attributed such weight to the public interest in this case. I have noted also that the deleterious effect upon the Appellant's children of his deportation is evident."

The appeal to the Upper Tribunal

10. The respondent contends that the Judge has failed to particularise the factors that establish that the effect of the appellant's deportation on his wife or children would be unduly harsh, so as to outweigh the public interest in deportation of the appellant. The Judge refers to the best interests of the children and the impact of deportation upon them but does not give reasons as to what differentiates this appellant's

circumstances from those of others facing deportation. Disruption and upset necessarily flows from deportation. There was no evidence of any specific medical or educational requirements that requires the appellant's presence in the UK, or that the children would not be adequately cared for, if the appellant is deported. In reaching the conclusion that the deportation of the appellant would be unduly harsh, particularly upon the two children of the appellant, the Judge failed to identify anything that is exceptional that would outweigh the public interest in the appellant's deportation.

11. Permission to appeal was granted on 19th December 2017 by First-tier Tribunal Judge Parker. The matter comes before us to determine whether the decision of the FtT contains a material error of law.

Error of Law

12. Before us, Mr. Ahmed candidly accepts, rightly in our judgement, that the decision of the FtT Judge could have been more structured and clearer. He submits that the Judge has found that the appellant plays an active role in the lives of his children and that the children, aged 7 and 10, are at an important stage in their development. The Judge appears to have accepted the evidence of the appellant's wife that she could not see how she could move with her children to Tanzania. Mr Ahmed submits that at paragraph [21], the Judge has considered all relevant factors and that it was open to the Judge to conclude that the deportation of the appellant would be unduly harsh, particularly upon the appellant's two children.
13. The Tribunal was faced with the requirements of the immigration rules and public interest considerations enshrined in statute that the deportation of the appellant is in the public interest. There is now a series of binding decisions relating to the construction and impact of the primary legislation provisions, and their interplay with the Rules; *Hesham Ali (Iraq) v Secretary of State for the Home Department*

[2016] UKSC 60 and *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11.

14. The Judge does not refer in his decision to the relevant provisions of the immigration rules. That is, paragraphs A 362, A 398, 398, 399 and 399A of the rules. The rules are relevant when a foreign criminal liable to deportation claims that his deportation would be contrary to the UK's obligations under Article 8. The immigration rules are an expression of the respondent's policy to which substantial weight must be attributed.
15. Since the appellant had received a 12-month sentence of imprisonment, paragraph 398(b) of the rules applies. That is, the deportation of the appellant from the UK is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than 4 years, but at least 12 months. Paragraph 398 goes on to provide that the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
16. The Judge of the FtT failed to consider whether paragraphs 399 or 399A apply, and if they do not, whether the public interest in deporting the appellant is outweighed by "*other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A*".
17. In our judgement, the Judge of the FtT failed to address the relevant public interest considerations by reference to the requirements of the immigration rules and Part 5 of the 2002 Act. We are not satisfied that a Tribunal properly directing itself to the relevant legal framework, and taking into account the relevant public interest considerations, would

reach the same conclusion and the error of law is therefore material to the outcome of the appeal.

18. Having carefully read the decision of the FtT Judge we are satisfied that the decision of the FtT discloses a material error of law and should be set aside.
19. As to disposal, we have decided that it is appropriate to remit this appeal back to the FtT for hearing afresh, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In light of the nature of the error of law, the extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

20. The appeal is allowed. The decision of FtT Judge Swinnerton promulgated on 8th December 2017 is set aside, and we remit the matter for a de novo hearing in the First-tier Tribunal.
21. No anonymity direction was made by the FtT and no application for an anonymity order was made before us.

Signed

Date

Lord Boyd of Duncansby
Mandalia

Deputy Upper Tribunal Judge

FEE AWARD

There was no fee award by the FtT since no fee had been paid or is payable.

Signed

Date

Lord Boyd of Duncansby
Mandalia

Deputy Upper Tribunal Judge