Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00065/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 4 June 2014	**On 28th July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

WITNESS MAHATA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J A Donkersley, South Yorkshire Refuge and Justice
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Witness Mahata, was born on 25 September 1973 and is a male citizen of Sri Lanka. The appellant appealed to the First-tier Tribunal (Judge Henderson) against a decision of the respondent dated 11 February

2013 to make a deportation order in respect of him by the provisions of Section 3(5) of the Immigration Act 1971 (as amended). His appeal was dismissed by the First-tier Tribunal in a determination promulgated on 31 March 2014. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant has appealed to the First-tier Tribunal on both human rights (Articles 3 and 8) and asylum grounds. It is clear from the determination that the judge rejected the appellant's appeal on asylum grounds although her decision is silent as to the Refugee Convention. In any event, no issue has been taken by the appellant with the judge's findings regarding asylum or Article 3 ECHR. The focus in the determination is upon Article 8 ECHR and the application of the Immigration Rules (in particular, paragraph 339).

3. The appellant challenges the First-tier Tribunal determination on the basis that the judge has failed properly to apply the relevant legal principles to the facts as she found them. We commence our analysis, therefore, by seeking to identify the facts found by the judge. The judge accepted that the appellant had been born in Zimbabwe where he had lived there for most of his life. She accepted that he had two children resident in Zimbabwe who are children by his first wife. There was little evidence of the appellant's involvement in the life of the Zimbabwean children during the time that he had spent living in the United Kingdom. The appellant claimed to have married for a second time in Zimbabwe and his two children, S and T, from this second relationship are, he claims, living in Huddersfield. The judge found that there was some evidence that he is in touch with S but the judge did not accept that there was adequate evidence to show that the appellant was the biological father of either S or T. She did not find that the appellant was playing an active role in the lives of either child. The appellant himself claimed that he had not seen those children since 2004, the year in which T had been born. The judge found that the appellant had lied in his asylum screening interview regarding the identity of the birth mother of T.

4. The appellant claims to be the father of another child, SH, who lives in the United Kingdom. The judge accepted that there was "adequate evidence" that SH is the appellant's child. The judge found that the appellant had been involved in SH's upbringing during the first five years of her life. The appellant now has no relationship with SH's mother.

5. The appellant was convicted of conspiracy to acquire criminal property at Leeds Crown Court and sentenced to two years' imprisonment. There was no evidence of any other criminal offences committed by the appellant whilst he has been in the United Kingdom. The appellant's appeal on asylum grounds to a previous First-tier Tribunal had been rejected in its entirety. That Tribunal had found that the appellant had claimed to have four children living in the United Kingdom because he believed that such a false claim might lead to his early release from detention. The Tribunal has considered the appellant's credibility to be "seriously damaged".

6. It was against the background of this factual matrix that Judge Henderson began her analysis. We shall not revisit her discussion of the evidence relating to asylum/Article 3 ECHR. At [50], Judge Henderson records briefly that "the appellant cannot meet the requirements of paragraph 339 or Appendix FM in remaining in the United Kingdom "as a parent or a partner". Notwithstanding the decisions in *Gulshan (Article 8-new rules-correct approach) [2013] UKUT 640 (IAC) Nagre [2013] EWHC 720* and *MF (Nigeria) [2013] EWCA Civ 1192,* the judge proceeded immediately [51] to a consideration of Article 8 outside the Rules. Although she did not pause to consider whether there were compelling circumstances in the appeal which justified such a course of action, the respondent does not suggest that the judge acted wrongly in law. Her approach to the evidence is structured and thorough, beginning at [52] with a statement of the familiar questions posed in *Razgar 2004 UKHL 27.* At [54], the judge wrote:

> Even though I have concluded that there have been difficulties with the appellant's marriages, he has a daughter [SH] who is in this country and with whom he has enjoyed a close relationship. I accept that he has strong ties to his daughter who he visits regularly. I do not accept the same ties can be found in respect of the two sons [S and T] he alleges are resident in this country. There was no doubt that he certainly established family/private life in the UK and that his deportation would constitute an interference with it.

7. It is at this point, in her discussion of the relevant public interest concerned with the appellant's deportation, that matters become less clear. At [56], Judge Henderson wrote:

> In this case, the respondent relies upon the legitimate aims being the prevention of disorder and crime, the protection of health and morals and the protection of the rights and freedoms of others. It is permissible for the respondent to rely upon more than one legitimate aim so long as this is made clear when the decision is taken. I do not accept the prevention of disorder and crime can be stated as a legitimate aim in this appeal given that the appellant was not stated in probation reports to be a danger to the public or there was a danger of him reoffending. He has not reoffended or been in danger to the public in the eight years since his offence. I am also unclear as to the issue of health and morals – this has not been properly argued by the respondent. I am aware that immigration control has been stated to be within the ambit of the protection of the rights and freedoms of others and therefore interference is in pursuance of one of the legitimate aims.

8. The judge did not err in law by indicating that more than one public interest may need to be considered in deportation cases. However, because she has not dealt in any detail at all with the refusal of the appellant's claim under the Immigration Rules, Judge Henderson has overlooked the fact that those Rules give a clear indication of where the public interest lies in the deportation of a foreign criminal. In the refusal letter at [111], reference is made to paragraph 398 of the Immigration Rules:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

Importantly, paragraph 398 gives details of the public good (or interest). The letter records that the Secretary of State "in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

9. At [112], the letter goes on:

> The Secretary of State in assessing your claim will consider whether paragraphs 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

Again, at [116] the letter records that:

> Paragraph 399A of the Immigration Rules specifies the criteria which must be satisfied in order for a parental relationship with a child to outweigh the public interest in deportation in line with Article 8 of the ECHR. The criteria reflect the duty in Section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK as interpreted in recent case law, in particular, *ZH (Tanzania)*. In view of this consideration has been given to the criteria in paragraph 399A and we have come to the following conclusions.

10. The respondent rejected the appellant's claim to be in a genuine and subsisting relationship with S and T. Judge Henderson took a rather different view, although the extent of the appellant's involvement with S and T is not entirely clear from her findings of fact. The refusal letter [125] also rejected the appellant's claim to be in a genuine and subsisting relationship with SH or that SH was, as the appellant claimed, a British citizen. In the light of the Secretary of State's rejection of the appellant's claimed relationship with these children, any claim to remain under the Immigration Rules was bound to fail. Although the judge should have applied the principles of *Gulshan* and *MF (Nigeria)*, it does seem clear that she proceeded with an Article 8 ECHR assessment outside the Rules because she found that the appellant's relationship with his claimed children went beyond what had been addressed in the refusal letter. What the judge does appear to have overlooked, however, was the statement of the public interest concerned with the appellant's removal contained in the Immigration Rules. We consider that the judge did fall into error by

rejecting the prevention of crime and disorder as part of the public interest concerned with the deportation of a foreign citizen on conducive grounds; paragraph 398 (c) uses different phraseology from Article 8(2) but the references to "serious harm" and "disregard for the law" align, in our view, the public interest of the Article with that expressed in the Immigration Rules . Whether the judge considered that interest was strong or weak in this case was a matter her; rejecting a relevant aspect of the public interest altogether was not. Further, it is not clear to us from the passage at [56] which we have quoted above whether, having found that control of immigration formed part of the legitimate public interest referred to in Article 8(2) ECHR, the judge proceeded to gave any weight to it.

11. The judge's assessment of proportionality at [57] is also problematic. The judge wrote:

> The final and most important issue is therefore an assessment as to proportionality. As a first step I must consider the interests of the appellant's child SH. I have read carefully through the letter provided by her mother. While this letter confirms a strong relationship between the appellant and his daughter I am mindful of the fact that the appellant is no longer living with her and although he has regular contact with her she is living with her mother in a separate family unit. I have no other evidence except a handwritten letter and a letter from his daughter's former nursery relating back to a time prior to starting school. There is no letter from her school confirming his involvement in her life. I am asked to accept his evidence and the evidence of his former partner who was stating that there was a strong relationship was not in court. The appellant has stated this was because he did not ask her. It is not clear why he did not ask her given that it is so important to his daughter's future that I hear evidence regarding his relationship with his child. I do not accept that the appellant has been truthful about whether he asked his former partner to attend. It is equally likely that she refused to come to court. There is some evidence to show that it would be in the child's best interests to have contact with her father in this country. The strength of that evidence diminishes when taking into account the appellant's criminal record in this country and his parental role with his other alleged children.

12. The judge does not identify the "some evidence to show" that SH's best interests would be addressed by her having contact with the appellant. Further, it is difficult to see how the "*strength"* of evidence might be diminished by factors such as the appellant's criminal record and his "parental role with his other alleged children" (presumably, those children in Zimbabwe). If "strength" is intended to include veracity we cannot see how that might affected by such factors.

13. However, when read as a whole, we consider that the determination is marred more by the infelicities of expression than it is by serious errors of law. It is clear that the judge found that, although the appellant has regular contact and a relationship with SH, his closest involvement with her took place some years ago and he is no longer living with SH or her mother. That state of affairs has, at least in part, been brought about by the appellant's criminal offending. Further, whilst it is reasonable to

assume that any child would benefit from at least having contact with both parents, there was no specific evidence in this appeal which might give an idea of the effect upon SH of a separation from the appellant. In addition, it was open to the judge [58] to find that S and T had little bearing on the analysis given that the appellant had not claimed to have seen these children since 2004 and had no part in their lives at the present time. Finally, at [59] the judge concluded that, "I do not think in all the circumstances [the appellant] has shown that his absence would be a great detriment to [SH's] future". She found that it would not "be in the best interests of SH for the appellant to be permitted to remain in the UK …" That seems to us to be an outcome manifestly available to the judge on the evidence. The judge's failure to have proper regard for the public interest particularised in the Immigration Rules was an error which had the potential to assist the appellant only in the Article 8 ECHR analysis; had she considered that public interest, she would have been more, not less, likely to dismiss the appeal. We find that any infelicities of language in the determination are not seriously misleading nor do they render unclear the judge's reasoning. We find that there are no errors of law in the determination of the First-tier Tribunal which are so serious that should lead us to set aside the decision. Consequently, this appeal is dismissed.

DECISION

14. This appeal is dismissed.

Signed Date 19 July 2014

Upper Tribunal Judge Clive Lane