IAC-FH-CK-V1

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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2015	**13 November 2015**
Oral judgment delivered on 27 October 2015	

Before

THE HONOURABLE MR JUSTICE HOLGATE
DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR JEYATHEVARAJ THANGIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Jaisri, Counsel instructed by Freemans Solicitors
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant, who was born on 13 February 1961, is a citizen of Sri Lanka. He appeals against the decision of the Secretary of State dated 30 December 2013 to issue a deportation order under Section 32(5) of the UK Borders Act 2007.

2. The Appellant entered the United Kingdom on 25 September 1986 on a Sri Lankan diplomatic passport. He applied for leave to remain which was granted until 29 June 1989. He was given further leave to remain and then on 11 March 1994 indefinite leave to remain. In September 2002 he married in Sri Lanka. His wife, a Sri Lankan citizen, was granted indefinite leave to remain in the UK on 11 July 2005. He has two sons, one born in 2004 and the other in 2009. They are both British citizens.

3. The Appellant was convicted of four offences of fraud committed between 30 April and 30 June 2010. The sentencing judge said that the evidence against him was overwhelming. He also said that the Appellant's behaviour could only properly be described as confidence fraud because he had abused the confidence placed in him as a letting agent by taking large sums of money as deposits from prospective tenants of residential property, and pretending to them that he had the authority to let the properties in question when he had nothing of the kind. He deceived them into parting with their money.

4. The trial judge said that the Appellant had then fobbed the victims off with lying excuses and raised their expectations by continually assuring them that they would be able to rent the properties even though he knew that there was no possibility of that happening. Worst of all, said the judge, when the Appellant was found out, he failed to give back the money even though he promised to do so. The judge found the offending serious because of the loss to the victims of their hard-earned money. Indeed he noted that in one case the victim had borrowed money in order to provide the sum to the Appellant.

5. The judge went through the mitigating circumstances relied upon by the Appellant, illness and absence from the office. He pointed out that they had not been supported by any evidence. The judge then referred to the attempt by the Appellant to blame his own staff for what had happened but he rejected that and said that the Appellant had been responsible for running the scam, no-one else was to blame. He said that the public was entitled to be protected from conmen like the Appellant. So he disqualified him from being a company director for a period of five years, in addition to imposing a prison sentence of 18 months.

6. The judge in the First-tier Tribunal said in paragraph 52 of her decision that she, like the sentencing judge, found this to be an extremely serious offence because in crimes of confidence fraud the public is at risk of being cheated of their hard-earned money. She also noted that the Appellant did not plead guilty at his trial and tried to put the blame on his own staff, which had been categorically rejected by the trial judge.

7. In her decision between paragraphs 7 and 8 the judge set out the relevant provisions of the Immigration Rules and also the principles to be applied under Article 8 taken from the decision of the House of Lords in **Razgar**. Between paragraphs 10 and 19 she summarised the evidence which had been given at the hearing. Her decision then fell into two parts. Between

paragraphs 21 and 39 she considered the application of the Immigration Rules and concluded by finding against the Appellant at paragraph 39 of her decision.

Ground 2

8. Between paragraphs 40 and 67 the Judge dealt with the application of Article 8. It was in this part of her judgment that she relied upon the Appellant's continuing failure to repay the victims of his crimes. In ground 2 of the notice of appeal the Appellant said that as a matter of law this was an immaterial consideration. However, at the hearing today Mr Jaisri for the Appellant very properly conceded that this matter was no longer pursued. We entirely agree with that concession.

9. Nevertheless for the avoidance of any doubt, we respond briefly to the criticisms made under ground 2. First, we note that before the Tribunal the Appellant asserted that he was remorseful for the four offences of fraud he had carried out. Plainly the offences had caused serious harm to victims in a vulnerable position seeking accommodation. The judge in the Tribunal was entitled to take into account the circumstances in which no repayment had been made in order to evaluate the claimed remorse. This was a relevant consideration.

10. Second, it was suggested that the sentence passed in the Crown Court of eighteen months imprisonment had already factored in the failure to repay victims. In our view the sentencing judge properly had regard to the level of harm caused to the victims in accordance with the sentencing guidelines. Reimbursement of the victims had not taken place by that stage and so was not available as mitigation of the sentence otherwise imposed. But the judge's sentencing remarks do not suggest that he increased the sentence on that account. The sentencing guidelines would not have supported his doing so, so we also reject this criticism.

11. Third, it is said that no compensation order was made because it was considered unnecessary to make one. This was mere assertion and unsupported by evidence before the Tribunal. We have not been shown any transcript of the adjourned hearing on the issues of compensation orders and costs. It cannot be inferred that the judge considered a compensation order to be unnecessary. He might have been satisfied that at that stage the Appellant lacked the means to make any payment. That would have been an entirely different point.

12. The fourth and last criticism was that the Tribunal's focus on non-repayment simply revealed an improper purpose to punish the Appellant further. That suggestion was entirely misconceived.

Ground 1

13. The ground of appeal which has been argued before us today is that the judge in the Tribunal failed to make any findings in accordance with

Section 55 of the Borders, Citizenship and Immigration Act 2009 as to what would be in the best interests of the two children, one aged 10 and the other 5 as at the date of the hearing before the Tribunal. The judge considered this issue entirely within the section of her decision dealing with the application of the Immigration Rules. Paragraph 24 referred to Section 55. Paragraph 25 referred to the decision of this Tribunal in **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)**.

14. There was some evidence before the Tribunal as to the effects of the children being separated from their father. For example, paragraph 11 of the determination records:

> "His criminality had a disastrous effect on his family and they suffered a lot. His eldest son had to go to a doctor because he was mentally disturbed. Since he has been out of prison, his eldest son is doing very well and there is a letter from the school to prove this."

Likewise paragraph 14, summarised the evidence of the Appellant's wife as follows: "Her eldest son missed the Appellant and reacted very negatively."

15. In paragraph 26 of her decision the judge recorded the agreed fact that both sons are British citizens. In paragraphs 27 to paragraph 31 the judge considered the position of the elder son. She began by saying that in her view she had to consider whether it would be unreasonable to expect the Appellant's eldest son to leave the United Kingdom or whether there was another family member who was able to care for him in the United Kingdom.

16. Paragraphs 28 to 29 of the decision appear to suggest that the judge took the view that the mother could look after both sons by herself. In paragraph 30 the judge said that there was no credible evidence that Sri Lanka does not have an education system suitable for a 10 year old boy or a 5 year old boy. The judge thought that both sons do speak some Tamil and could learn the language and adjust to life in Sri Lanka. In paragraph 31 she concluded that it would not be unduly harsh for the elder son to return to Sri Lanka although he is a British citizen entitled to live in the United Kingdom.

17. In paragraph 32 of her decision she simply added this in relation to the younger son:

> "The Appellant's second son is 5 years old and therefore has not lived in this country for about seven years. I find that he can return to Sri Lanka with the rest of the family as a family unit and it would not be unreasonable or unduly harsh for him to do so."

Of course, what was relevant here was not that this child had lived in the UK for less than seven years, but that he is a British citizen in any event.

18. The last sentence of paragraph 32 then dealt with a different aspect: "His mother who has indefinite leave to remain can also remain with her two sons in this country if that is her wish." So it is plain that in these paragraphs no consideration was given by the judge to, for example, the effects of separating the children from their father if they were to remain in the United Kingdom.

19. We refer briefly to the decision of the Supreme Court in **ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166**. In paragraph 26 of her judgment Baroness Hale laid down the principle that the best interests of the child must be a primary consideration and the Tribunal must ask whether the force of any other consideration outweighs that factor. In paragraph 29 she gave examples of matters which should be addressed in applying Section 55 and she dealt specifically in paragraph 31 with children who are British. She said that such children have an unqualified right of abode here; they may have lived here all their lives; they are being educated here; they have other social links with the community here.

> "It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if [the child] moves with both [his] parents to a country which they know well and where they can easily re-integrate in their own community… But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well."

20. She went on to say in paragraph 32 that the intrinsic importance of citizenship should not be played down. "As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language." We also bear in mind the well-known passages in the judgments of Lord Hope at paragraphs 40 and 41 and Lord Kerr at paragraph 46.

21. Of course, in cases such as the present one there may well be other considerations which are capable of outweighing a child's best interests. That is a matter for the Secretary of State initially to determine and on appeal by the Tribunal, but in order to carry out the balancing exercise required by the law it is necessary that the best interests of a child are identified from the material placed before the decision-maker so that those interests may be placed in the balance. That requirement is clear from authorities such as **MK (India) [2011] UKUT 475 (IAC)** at paragraph 19 and also **H v Lord Advocate [2013] 1 AC 413** per Lord Hope DDSc at paragraph 51.

22. We are fully satisfied that the judge failed to make any findings as to what would be in the best interests of each of these two children. Instead, she focused on another consideration which is relevant but is not the only consideration, namely their ability to adapt to life in Sri Lanka.

23. We conclude that the decision of the First Tier Tribunal involved the making of the error of law identified above and therefore this appeal must be allowed. The decision of 5 December 2014 is set aside and the appeal will be remitted to the First Tier Tribunal to be dealt with afresh before a different judge pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and practice statement 7.2(b).

24. No anonymity direction is made.

Signed Date: 30 October 2015

The Hon. Mr Justice Holgate