Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/24426/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 26 March 2018	**On 27 April 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KUMARASAMY SIVAKARAN
(NO ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Kumarasamy Sivakaran, was born on 13 February 1971 and is a male citizen of Sri Lanka. The appellant appealed against the decision of the Secretary of State to make a deportation order against him on 29 June 2016. The First-tier Tribunal (Judge Doyle) in a decision promulgated on 18 April 2017, allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. A previous hearing before the Upper Tribunal was aborted. When the appeal came before me at Bradford on 26 March 2018, Mr McVeety, a

Senior Home Office Presenting Officer, appeared for the Secretary of State. The appellant appeared in person and spoke with the assistance of a Tamil interpreter. I explained to the appellant that the previous proceedings before the Upper Tribunal were null and void and that the Upper Tribunal would be starting the case from the beginning by considering whether the First-tier Tribunal had made any error of law. I told the appellant that no part of the deliberations of the previous panel of the Upper Tribunal would affect my decision. I was satisfied that the appellant could understand what I was saying and I am grateful also to Mr McVeety for making his submissions clearly and in a way in which I believe the appellant plainly understood.

3. There are two grounds of appeal. The first ground of appeal concerns what the Secretary of State describes as inconsistent findings by Judge Doyle. The appellant came to the United Kingdom in 1990 when he was 19 years old. He has, therefore, lived in the United Kingdom for more than half of his life. In 2000, the appellant married a Sri Lankan woman and the couple have two children. The appellant is now estranged from his wife and children who continue to live in the United Kingdom. It has not been argued by the appellant nor was it found by Judge Doyle that the appellant enjoys family life with any other individual or individuals in this country. At [10] of Judge Doyle's decision, the particulars of the appellant's offending are set out. The offending dates back to June 2008. The appellant has been convicted of a number of driving offences and also dishonesty and vandalism. He has breached a non-molestation order and community orders. He has been imprisoned for various periods in connection, in particular for the driving offences.

4. In his decision at [24], Judge Doyle considered whether the appellant fell within the definition of a "persistent offender. " He did so in order to consider the operation in this case of Section 117C of the 2002 Act (as amended):

> 117C Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) 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 Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

> (5) 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.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

5. At [25], Judge Doyle wrote:

> The number and nature of the appellant's convictions indicate that he is a persistent offender. The appellant had the threat of deportation hanging over him from 2011 to 2015. In July 2015 he was told that he would not be deported. He was convicted a month before he received the respondent's decision. He has been convicted five times since he received that decision.

6. At [27], Judge Doyle concluded:

> I therefore find that the appellant is a persistent offender who has shown a particular disregard for the law for seven years as a mature adult. Such offending behaviour is unusual. A normal pattern is for offending behaviour to start early in a man's life and to tail off as middle age approaches. In this case, the appellant's offending behaviour started as a middle-aged man. His offending has been at the lesser end of the criminal spectrum.

7. Judge Doyle, therefore, made an unequivocal finding that the appellant is a persistent offender. Having concluded at [29] that the appellant could not fall within the provisions of paragraph 276ADE of HC 395 or Appendix FM, the judge turned to Article 8 ECHR. At [39], the judge wrote:

> Ultimately, this case comes down to consideration of proportionality. The appellant has established private life in the UK. The problem for the appellant is the private life is now tainted by his offending behaviour. The respondent's decision is in pursuit of a legitimate aim. The decision to deport has been made on the basis that the appellant's behaviour requires deportation for the promotion of the public good. The appellant has never been sentenced to a period of custody which approaches twelve months. He is therefore not a "foreign criminal" however Section 117C of the 2002 Act provides some guidance.

8. At [42], the judge considered "the extent of the appellant's criminality does not reach the threshold for Section 117C considerations. He has made a nuisance of himself over the last seven years". The judge considered the appellant had been "lucky" to have received relatively lenient sentences for his driving offences.

9. The Secretary of State argues that the judge's reasoning is inconsistent. As I read [42] (see above) the judge has found that the appellant does not

fall within the definition of "a foreign criminal" for the purposes of Section 117C. The judge appears to have overlooked the interpretation section in the 2002 Act, in particular Section 117D (2):

> (2) In this Part, "foreign criminal" means a person—
>
> (a) who is not a British citizen,
>
> (b) who has been convicted in the United Kingdom of an offence, and
>
> (c) who—
>
> (i) has been sentenced to a period of imprisonment of at least 12 months,
>
> (ii) has been convicted of an offence that has caused serious harm, or
>
> (iii) *is a persistent offender. [my emphasis]*

10. It follows that, having found that the appellant was "a persistent offender", the judge should have treated him as a "foreign criminal". It is clear from the reasoning at [42]–[43], that the judge has overlooked the fact that a persistent offender may be a foreign criminal as much as an individual who has been convicted of at least twelve months' imprisonment. The judge's misunderstanding has led him into legal error. In particular, the judge should have applied Section 117C(4) (Exception 1):

> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

11. The judge's analysis is incomplete and flawed. In the circumstances, I find that his decision should be set aside.

12. The second ground of appeal concerns the judge's alleged curtailing of the Presenting Officer's submissions. Mr Andrew Bell, the Presenting Officer before the First-tier Tribunal, has provided a statement which is dated 19 May 2017. At [9], Mr Bell states that he was "preparing to make my closing submissions" which would include "[the appellant's] progressive criminal history in the UK as a primary reason for deportation". Mr Bell says that the judge did not allow him to make the submissions because the appellant was unrepresented. Judge Doyle himself has been invited by the Resident Judge of the Upper Tribunal to make comments which he has duly sent and which have been distributed to the parties. Judge Doyle has said that, "[the Presenting Officer] made no attempt to make any other submissions [beyond paragraphs 398 and 399 of the Immigration Rules and Article 8 ECHR] because I made it clear that I wanted him to restrict his submissions". Judge Doyle said that he "did so because I wanted to

ensure that both parties were treated fairly and to preserve equality of arms". Judge Doyle relies on paragraphs 2(2)(b) and (c) and 4(3)(g) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014:

> Overriding objective and parties' obligation to co-operate with the Tribunal
>
> 2. (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it —
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> **Case management powers**
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> 4. (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—

(a) extend or shorten the time for complying with any rule, practice direction or direction;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues;

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party;

(e) provide for a particular matter to be dealt with as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—

(i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case; or

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision.

13. Judge Doyle's reliance on paragraph 2(2)(c) is puzzling given that, according to Mr Bell, the judge prevented him from "participating fully in the proceedings". I appreciate that Judge Doyle was seeking to establish an environment in the court in which an unrepresented appellant which might be able to put across his case in the most effective way. I fail to see, however, how restricting the submissions of the Presenting Officer might achieve that end. Indeed, in the light of the issues which Mr Bell now says he would have referred to in his submissions, the judge might have benefited from hearing those submissions regarding the appellant's persistent offending and how such offending might result in his being treated as a "foreign criminal" notwithstanding the short periods of imprisonment to which he had been sentenced. Whilst I accept that Judge Doyle's intentions were entirely laudable, I find that he has, unwittingly, perpetrated a procedural unfairness.

14. For the reasons I have set out above, I set aside Judge Doyle's decision. The question remains as to which, if any, of his findings of fact should

remain. Neither of the two errors of law which I have identified infect the fact-finding in this case. Indeed, as I have recorded above, the judge did find unequivocally that the appellant is a persistent offender. Likewise, the findings regarding the appellant's estrangement from his wife and children are not controversial. Those findings are preserved. I have proceeded to remake the decision.

15. I refer to the provisions of Section 117 of the 2002 Act which I have set out above. The appellant told me that he had not seen his children for three years. He is currently living with his sister. He confirmed that he was not in any relationship at the present time. I have considered whether the appellant falls within Exception 1. I accept that he has lived in the United Kingdom for most of his life. However, there is little evidence that he is socially and culturally integrated into the United Kingdom. He has shown a persistent disregard for the laws of this country. He lives with his Tamil sister and there was no evidence before me that he has any integration with the wider community. As regards the obstacles facing him upon return to Sri Lanka, this aspect of the case was addressed in some detail by Judge Doyle. Again, there is no suggestion that the errors of law in Judge Doyle's decision have infected those findings. At [45], the judge acknowledged that the appellant in Sri Lanka would "have to start from scratch from the moment he arrives there. The appellant's family of origin and his estranged wife and children remain in the UK so that the appellant will be isolated. The purpose of isolating a middle-aged vulnerable man in his country of origin is to stop him committing another offence which might attract a financial penalty or community-based disposal". The judge went on to say that he did not consider the appellant presented a risk to the public; that finding is puzzling given the appellant's persistence in driving whilst disqualified. Moreover, at [22], the judge wrote:

> [The appellant] has a history of employment. Although he suffered a head injury in 1998 he has recovered sufficiently to be able to live independently and has survived in the British penal system. The appellant had already demonstrated that he has the resourcefulness to come to the UK and establish himself as a young man. His experience and maturity have not diminished his ability to re-establish himself in his country of origin where he is fluent in the language of that country.

16. The appellant has not disputed that finding. In the light of the finding, it is difficult for me to conclude that there are "very significant obstacles" preventing the appellant's reintegration into Sri Lanka. I find that the appellant does not fall within Exception 1. His deportation, therefore, is in the public interest. Further, in the light of the fact that he has not shown integration into British society and notwithstanding his lengthy residence in this country, I conclude that there would be no disproportionate interference with his private life if he were to be removed to Sri Lanka. The appellant's appeal against the decision to deport him is dismissed.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 18 April 2017 is set aside. I have remade the decision. The appellant's appeal against the decision to deport him dated 29 June 2016 is dismissed.

No anonymity direction is made.

Signed Date 20 APRIL 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 20 APRIL 2018

Upper Tribunal Judge Lane