Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/50006/2020
UI-2022-001747; IA/00118/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd August 2022	**On 23rd November 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL AUSTINE PIUS
(ANONYMITY DIRECTION MADE
ONLY IN RESPECT OF CHILDREN)

Respondent

Representation:
For the appellant: Mr Tufan, Senior Home Office Presenting Officer
For the respondent: Ms Dirie, instructed by Wilsons Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, we shall refer to the parties as in the First-tier Tribunal. The appellant is a citizen of Nigeria born on 20 April 1977. His appeal against the decision of 26 May 2020, refusing his human rights claim and deporting him from the UK, was allowed by First-tier Tribunal Judge Burnett ('the judge') on 25 November 2021 on human rights grounds.

2. Permission to appeal was granted by First-tier Tribunal Judge Caruthers on 12 April 2022 on the following grounds:

> "It is arguable that the judge should have classified the appellant's index offence as one causing 'serious harm' (cp the judge's paragraph 53) – so bringing in more rigorous tests that the appellant would have to have met to establish that the decision under appeal represents a disproportionate breach of article 8 rights (the article 8 rights of the appellant and others affected by the respondent's decision in question)."

Appellant's immigration history

3. The appellant entered the United Kingdom in 2001 using a counterfeit passport. In August 2007, the appellant made an application whilst in the UK illegally to the British Embassy in Nigeria for an entry clearance visa which was refused. On 31 March 2010, the appellant was included in an application as a dependent of his ex-partner. She had applied for leave to remain under the long residence rules. The application was refused with no right of appeal in February 2011.

4. In July 2014, the appellant was served with a notice of liability to removal as an illegal entrant. On 22 July 2015, the appellant submitted an application for leave to remain on the basis of his private and family life. This was rejected on 9 September 2015 as the fee for such an application was not paid.

5. On 9 March 2016, the appellant was convicted at Blackfriars Crown Court of possessing an identity document with intent. He was sentenced to 8 months imprisonment. The appellant was recommended for deportation.

6. On 17 March 2016, a notice of intention to make a deportation order was issued. On 4 April 2016, the appellant responded to the letter. On 6 June 2016, the appellant was served with a deportation order, the deportation decision letter and a letter refusing his human rights claim.

7. On 8 September 2016, the appellant claimed asylum. On 8 March 2017, a decision was made to refuse the appellant's asylum and human rights claim. The previous certificate under section 94B was removed. The appellant appealed against the decision. The First-tier Tribunal dismissed the appellant's appeal in a decision dated 9 August 2018. The appellant sought to challenge the decision but permission to appeal was refused by the First-tier Tribunal and Upper Tribunal. On 14 December 2018, the appellant became appeals rights exhausted. He was subsequently detained to enforce his removal to Nigeria.

8. The appellant sought judicial review in September 2019, claiming there had been a material change in circumstances. Upper Tribunal Judge Bruce granted the application holding that the appellant's children had now become qualifying children since the previous decision creating a realistic prospect of success. The respondent made a new decision against which the appellant appealed.

The judge's findings

9. The judge considered whether the appellant had caused 'serious harm', such that the appellant should be classed as a foreign criminal under section 117D(2)(c)(ii) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The judge gave the respondent an adjournment to take further instructions as to whether she intended to produce evidence to demonstrate that the appellant's offending had caused 'serious harm'. The presenting officer in his submissions stated that there was nothing more he could put forward and appreciated that there was little evidence to substantiate 'serious harm' in this case. The respondent also conceded that the likely result would be in favour of the appellant if 'serious harm' was not found.

10. The judge considered Mahmood, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Ors EWCA Civ 717 and the case of Estnerie v SSHD referred to therein. Muraley Estnerie had been convicted of six offences that he had falsified documents. In the decision letter the Secretary of State had stated that falsified documents can be used for identity theft, deception, illegal immigration and organised crime, with identity-based fraud for undermining the integrity of a wide variety of institutions and systems.

11. The judge relied on and quoted [66] of Estnerie:

> "No doubt each offence of this nature contributes to a serious and perhaps widespread problem. However, the issue under s.117D(2)(c)(ii) is whether the offender has been convicted of 'an offence' which has caused serious harm. We accept that an individual offence of this sort can be said to cause serious harm, but there has to be some evidence that it has done so. The decision letter refers to the undermining of the integrity of the revenue and benefits system, banking and employment, and even national security; but there was insufficient evidence that these offences, even if aggregated, had such an effect. These offences usually result in a prison sentence because identity fraud is regarded as a serious matter; but that cannot, of itself, be enough to satisfy the requirement of causing 'serious harm'.

12. The judge considered the sentencing remarks and stated that the appellant had been sentenced to a period of imprisonment of eight months. The respondent did not suggest or argue that the appellant was a persistent offender. The length of sentence meant that the only way the appellant would be classed as a foreign criminal was if his offending had caused 'serious harm'. The judge found the respondent had not proved that 'serious harm' had been caused by the appellant's offending and allowed the appellant's appeal under Article 8 of the European Convention on Human Rights.

Grounds of appeal

13. In summary the grounds submit:

> "… the appellant's conviction was a serious attack upon the integrity of the passport system which, mirroring the comments of the sentencing judge, ensures that individuals are the persons they claim to be and that their presence does not serve to undermine the security and social/economic fabric of the UK. In furthering the activities of a corrupt official, the very controls underpinning the integrity of an effective immigration system have been diminished. Whilst matters are framed as a single offence, this is against the background of having used at least two false passports and making an application for entry clearance whilst still in the UK. It is submitted that the appellant abused the immigration system on several occasions, and over time. Further, employment was secured to the detriment of others who were either nationals or had legitimately obtained lawful entry and leave. It is self-evident that calls upon the public purse can be directly attributed to the appellant, his case having progressed through the court system and resulted in a prison sentence, the cost of which has been met by taxpayers, as indeed is the present process."

14. The respondent relied on the case of Mahmood and submitted:

> "Therefore, it is respectfully submitted that the appellant meets the SSHD definition of serious harm as per the published guidance which states that an offence that has caused 'serious harm' means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general. It is submitted that it is at the discretion of the Secretary of State whether she considers an offence to have caused serious harm."

15. The respondent submitted, if the correct threshold for a foreign criminal is applied to the appellant, his deportation is not unduly harsh and the appeal should have been dismissed.

Submissions

16. Mr Tufan relied on the grounds of appeal and submitted the issue in this appeal was a narrow one: whether the appellant is a foreign criminal. He conceded that the appellant's appeal would succeed if 'serious harm' was not established. He relied on Benabbas, R v [2005] EWCA Crim 2113 which stated that forged passports undermine the good order of society and constituted a threat by the appellant. The judge erred in law in concluding the appellant was not a foreign criminal. The offence, in itself, was enough to meet the 'serious harm' threshold and by not accepting it, the judge fell into material error.

17. Ms Dirie submitted the respondent's challenge was a mere disagreement and there was no material error in the judge's decision. She submitted the presenting officer at the hearing accepted there was little evidence to substantiate 'serious harm', even with the sentencing remarks. The judge took into account the case law and presidential guidance. The judge explained why he departed from the previous decision and took into account the concessions made by the presenting officer at the hearing. Ms

Dirie submitted the case of Estnerie explained in Mahmood was very similar and the Court of Appeal was clear that the respondent cannot make big overreaching arguments but needs to provide evidence. Estnerie was the case of a persistent offender. In this case the respondent does not argue that the appellant is a persistent offender.

Conclusions and reasons

18. We find the judge considered the totality of the evidence and properly directed himself in law following in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 (IAC).

> "The current case law on 'caused serious harm' for the purposes of the expression 'foreign criminal' in Part 5A of the 2002 Act can be summarised as follows:
>
> (1) Whether P's offence is 'an offence that has caused serious harm' within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.
>
> (2) Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.
>
> (3) In determining what factors are relevant or irrelevant, the following should be borne in mind:
>
> (a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;
>
> (b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused 'serious harm', as categorised in the Sentencing Council Guidelines;
>
> (c) A victim statement adduced in the criminal proceedings will be relevant;
>
> (d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;
>
> (e) The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;
>
> (f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;
>
> (g) The mere potential for harm is irrelevant;
>
> (h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

19. The judge took into account the sentencing remarks:

> "… this is a 48 year old man who … made a completely bogus asylum application, which failed and he did not attend the hearing, being out of the country at the time, that is the first aspect; the second is between 2013 and 2016, he made a string of immigration applications from within the United Kingdom and deceived his wife into supporting him along the way by becoming a sponsor; and the third aspect is that, having been issued in the midst of all of this, with a temporary residence permit, he extended it himself by falsifying the expiry date and used that document to obtain work, indeed difficult and important work, for which he was paid … he worked for a period of 15 months in the particular employment that he obtained with the false identity card.

20. The judge considered the respondent's review which stated:

> "The SoS does indeed rely upon the seriousness of an attack upon the integrity of the passport system which, mirroring the comments of the sentencing judge, ensures that individuals are the persons they claim to be and that their presence does not serve to undermine the security and social/economic fabric of the UK. In furthering the activities of a corrupt official, the very controls underpinning the integrity of an effective immigration system have been diminished. Whilst matters are framed as a single offence, this is of course against the background of having used at least two false passports and making an application for entry clearance whilst still in the UK. Further, employment was secured to the detriment of others who were either nationals or had legitimately obtained lawful entry and leave. It is self-evident that calls upon the public purse can be directly attributed to A, his case having progressed through the court system and resulted in a prison sentence, the cost of which has been met by taxpayers, as indeed is the present process."

21. The judge accepted the generic harm done by such crimes and went on to consider Estnerie and Mahmood. We find the reasoning of the judge is not perverse and the jurisprudence supports his conclusion that 'serious harm' must be demonstrated by the respondent and that it cannot be presumed. There must be some evidence that the actual offence has caused harm.

22. The judge took into account the presenting officer's submission that there was little evidence to substantiate 'serious harm', even with the sentencing remarks, and in light of this, the judge adequately explained why he departed from the earlier decisions and found that the threshold for a foreign criminal was not met. The respondent did not argue the appellant was a persistent offender.

23. The judge found that the respondent, on whom the burden of proof lies, has not proved sufficient evidence to show that the appellant's offence caused 'serious harm'. We conclude this finding was open to the judge on the evidence before him.

24. It was conceded that if the respondent could not establish 'serious harm' there was no error in the judge's decision to allow the appellant's appeal under Article 8.

25. Accordingly, we find that there is no material error of law in the decision dated 25 November 2021 and we dismiss the Secretary of State's appeal.

Notice of Decision

Appeal dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant's children are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant's children, likely to lead members of the public to identify the appellant's children without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

Signed by

Deputy Upper Tribunal Judge S Chana

Dated 12 October 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.