Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00433/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 31 July 2013	**On : 9 August 2013**

Before

UPPER TRIBUNAL JUDGE KEKIĆ
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BENIGNO BAUTISTA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr G O'Ceallaigh, instructed by Elder Rahimi Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Bautista's appeal against the decision to deport him from the United Kingdom.

2. For the purposes of this decision, we shall refer to the Secretary of State as the respondent and Mr Bautisa as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of the Philippines, born on 13 February 1953. He entered the United Kingdom lawfully on 23 May 1977 on a working visa and was subsequently granted indefinite leave to remain. He was convicted of theft on 2 June 1981, for which he was fined £50. According to the stamps in his passport he had travelled back and forth to the Philippines since his arrival.

4. On 3 July 2010 the appellant was convicted at Highbury Corner Magistrates' Court of possession with intent to supply methylamphetamine, a class A controlled drug, and was sentenced at Blackfriars Crown Court on 10 September 2010 to four years imprisonment. He was convicted at the same time and in the same court of possession of a prohibited weapon and received a sentence of one year imprisonment. He therefore received a five year sentence in total and accordingly fell for automatic deportation under section 32(5) of the UK Borders Act 2007. A deportation order was accordingly made against him and on 14 February 2013 a decision was made that section 32(5) applied.

5. The respondent, in making that decision, noted the sentencing remarks of the Crown Court Judge which showed the serious nature of the appellant's offence. Consideration was given to the immigration rules with respect to Article 8 of the ECHR. The appellant fell within paragraph 398(a) of the rules, applicable to offences leading to a sentence of imprisonment of at least four years, whereby it would only be in exceptional circumstances that his right to family and/or private life would outweigh the public interest in his deportation. The respondent noted that the appellant was married with four children and that he had been resident in the United Kingdom for 35 years and nine months including the time sent in custody. He had married his wife, a Philippine national, on 24 April 2004 and she had subsequently naturalised as a British citizen in 2007. He had four adult children who were British citizens. The respondent accepted that the appellant had established a family and private life in the United Kingdom. His details of employment were not known, but he had claimed to have worked as a waiter and chauffeur. It was not considered that there were insurmountable obstacles to the appellant's wife and children following him to the Philippines, but in any event it was noted that his children were no longer dependent upon him. The respondent noted that the appellant continued to have ties to the Philippines, having travelled there several times since his arrival in the United Kingdom. Although he had several medical conditions, it was considered that he could receive treatment in the Philippines. The respondent accordingly concluded that the appellant's deportation would not breach Article 8.

Appeal before the First-tier Tribunal

6. The appellant's appeal against that decision was heard in the First-tier Tribunal on 23 April 2013, before a panel consisting of First-tier Tribunal Judge Martins and Mr J O de Barros. The Tribunal heard from the appellant. It was noted from his statement that he had been granted indefinite leave to remain after four years of entry to the United Kingdom and had had 36 years of lawful residence here. He had met his wife in 1978 and had lived with her for a long time, but they were not married until 24 April 2004. Their daughter was 23 years of age and was studying and working in the US. He had grown-up children

from a previous relationship and grandchildren. The appellant claimed to have stayed away from anyone associated with his past and from the woman with whom he had been having an affair and in whose house he had been arrested. He claimed to have no-one left in the Philippines and to have all his family in the United Kingdom. On the occasions that he had visited the Philippines, it had been to see his mother-in-law who was currently 82 years old.

7. In his evidence before the Tribunal the appellant explained that he had not applied to be naturalised as a British citizen as he had not really thought about it. His wife had naturalised in order to be able to travel to Europe without a visa. He had visited the Philippines in 2006, 2007, 2008 and 2010 to visit his mother-in-law and also for a holiday. He had only his mother-in-law and two nieces there who lived with her. He had three daughters, aged 23, 34 and 38 and a son aged 41, all of whom were working. His three older children were from a previous partner. He had not worked since 2007 when he suffered a heart attack although he did some part-time work with his wife in terms of cleaning and maintenance at her place of work. He started dealing in drugs in 2006 and his family only became aware of that when he was arrested in July 2010. His source of income was not from drugs, but he sold them only to support his own addiction. With regard to the stun gun with which he was found, he claimed that that had been for his daughter for her protection, although the Tribunal noted that the Crown Court Judge had not believed that. He had been in a relationship with another woman for three years but his wife had not known about it until his arrest and he no longer saw his girlfriend.

8. The Tribunal heard from the appellant's wife and his two daughters and then heard submissions from both representatives. They found the appellant's wife and daughters to be credible witnesses and found the appellant credible for the most part. With regard to discrepancies in the evidence between that recorded in the OASys and that of the witnesses as to where he had been living, they accepted that the information at the time of his arrest and interview for the OASys report had been given in an attempt to protect his family and that he had always lived with his wife. They accepted that his family knew nothing of his drugs dealing or his girlfriend until his arrest. They did not accept the appellant's explanation for possessing a stun gun. They accepted that he was unlikely to re-offend. They accepted that he did not have social or cultural ties in the Philippines. They agreed with the submissions made on his behalf that the circumstances of his case were exceptional and accordingly found that he succeeded under the immigration rules. They found in any event that his deportation would breach his Article 8 rights in the wider context and they accordingly allowed his appeal.

9. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the Tribunal had not given adequate reasons for finding the appellant's circumstances exceptional and appeared simply to have adopted the submissions made on behalf of the appellant; that the Tribunal had erred by finding that the appellant had severed all ties to the Philippines; that the Tribunal had failed to give adequate reasons for setting aside the evidence contained in the OASys indicating that the appellant and his wife were not living together and that their findings in that respect were perverse; that the Tribunal had erred by applying a two stage approach to Article 8; and that in assessing the

appellant's case under Article 8 the Tribunal had failed to give adequate consideration to the public interest.

10. Permission to appeal was granted on 25 June 2013 on all grounds.

Appeal before the Upper Tribunal

11. The appeal came before us on 31 July 2013. We heard submissions on the error of law.

12. Mr Avery, in his submissions, expanded upon the grounds of appeal. He submitted that the Tribunal's findings on exceptional circumstances were limited and merely relied on the appellant's representative's submissions. They had not properly considered what the test was and had not dealt with the difference between "exceptional" and "unjustifiably harsh". They had not undertaken a rounded consideration of the appellant's circumstances, including the nature of his offence. Their assessment was therefore flawed. Likewise, their assessment of the appellant's links to his country of origin were flawed and their findings were not consistent with the guidance in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060. With regard to the grounds relating to Article 8, Mr Avery submitted that the Tribunal had failed to make any real reference to the public interest and that their approach was inconsistent with the principles in SS (Nigeria) v SSHD [2013] EWCA Civ 550.

13. Mr O'Ceallaigh submitted that the respondent's grounds were no more than a disagreement. The Tribunal referred to the "unjustifiably harsh" test in their determination. If the respondent was now suggesting that that went beyond "exceptional" then it should have been included in the immigration rules. Since it was not within the rules, it was not binding. The Tribunal did not find that the appellant had severed all ties to the Philippines, but that he had very little ties to the country, which was a sustainable finding. The principles in Ogundimu applied to those convicted of offences for which they had been sentenced to less than four years in prison and not to those demonstrating exceptional circumstances. The Tribunal did have regard to the seriousness of the appellant's offence. Their findings were not perverse and they were entitled to make the findings they did with regard to the appellant's living circumstances and ties to the Philippines. The appellant's circumstances were exceptional. With regard to their findings on Article 8 the Tribunal were clearly aware of the need to accord weight to the Secretary of State's view. In terms of the principles in SS, this was a strong Article 8 claim.

14. In response, Mr Avery reiterated the points made previously.

Consideration and findings.

15. Before setting out our findings we consider it of some relevance to make the following observation. The deportation decision refers to the appellant having entered the United Kingdom lawfully but appears to make no reference to his immigration status thereafter and prior to the deportation proceedings. The evidence before the Tribunal was

that he was granted indefinite leave to remain four years after entry to the United Kingdom and the Tribunal accordingly made their findings on the basis that he had been lawfully in the United Kingdom for the entire period of his residence. That has not been challenged and we accordingly proceed on the same basis.

16. We have carefully considered the submissions made on behalf of the Secretary of State but we find ourselves in agreement with Mr O'Ceallaigh's view that the respondent's grounds of appeal amount to no more than a disagreement with the Tribunal's findings.

17. We do not agree with the assertion made in the first ground, that the Tribunal simply endorsed and adopted the appellant's representative's submissions in regard to the exceptional circumstances without making their own findings. It is the case that the Tribunal agreed with the submissions made on behalf of the appellant and stated as much at the end of paragraph 88, but that in itself is not indicative of an absence of an independent judicial assessment. The Tribunal recorded in some detail at paragraph 74 the submissions for the appellant on exceptionality, referring to the "unjustifiably harsh" definition provided in the Immigration Directorate Instructions, as set out at paragraph 71. They clearly had that in mind when considering exceptionality. Furthermore, we find force in Mr O'Ceallaigh's submission that had the term "unjustifiably harsh" been intended to go beyond "exceptional", the term would, no doubt, have been separately defined in the immigration rules, which it is not.

18. Aside from asserting their agreement with the appellant's submissions as to exceptionality, the Tribunal undertook their own assessment of the appellant's circumstances, at paragraphs 86 and 87 of their determination. Contrary to Mr Avery's submission, it seems to us that that was a rounded assessment that took account of all factors, including the seriousness of the appellant's offence, to which they referred at paragraph 86. They also took account of the credibility issues that had arisen in the evidence, in particular the differing account of the appellant's place of residence set out in the OASys report, but they accepted the explanation given by the appellant. The grounds assert that the Tribunal failed to give adequate reasons for so doing and for setting aside the evidence contained in the OASys report. However they plainly did give reasons, at paragraph 84, namely that the appellant was attempting to protect his family. There was nothing perverse in such reasoning, as suggested in the grounds, and that was a finding that was open to the Tribunal, having heard extensively from various family members and found them to be entirely credible witnesses. Likewise, the Tribunal was entitled to accept, as they did at paragraph 84, that the appellant's family knew nothing of his drug dealing or of his girlfriend. The grounds assert that that was a perverse finding, but the threshold of establishing perversity is a high one and we do not consider that the grounds come anywhere near to crossing that threshold. The Tribunal had the benefit of hearing from the witnesses and were entitled to make the findings that they did on their evidence and, as such, we find the grounds to be no more than disagreement.

19. It is also asserted in the grounds that the Tribunal erred in law by finding that the appellant had severed all ties with the Philippines. However, as Mr O'Ceallaigh submitted, that was not what they found. At paragraph 87 they considered the evidence of

the various witness and reached a conclusion that the appellant had very little ties to the Philippines and that he could not be said to have social or cultural ties of any import. That was a conclusion they were entitled to reach. We do not consider that such findings were inconsistent with the principles in Ogundimu, in particular since the considerations in that case were relevant to a different part of the rules, and neither do we find that they were perverse.

20. Having taken all relevant factors into account, including the evidence of the appellant and the witnesses, the family circumstances and the effect upon them of the appellant's deportation, the appellant's age and medical history, his ties to his country of origin, the circumstances and nature of the appellant's offence, his immigration and criminal history and the risk of re-offending as outlined in the OASys report, the Tribunal were entitled to reach the conclusion that they did in regard to exceptionality. Whilst another Tribunal may have reached a different decision, and whilst the respondent plainly disagrees with the findings of this Tribunal, it cannot be said that their findings were perverse or that they did not take into account all relevant factors or give clear and cogent reasons for reaching the conclusions that they did. Accordingly we find no error of law in their decision with respect to the immigration rules.

21. Mr Avery did not actively pursue the second ground of appeal relating to the two stage approach to Article 8 and clearly the Tribunal were entitled to follow the approach in MF (Nigeria) [2012] UKUT 00393.

22. In the light of our findings on the Tribunal's decision with respect to the immigration rules, and considering that the immigration rules are an expression of the Secretary of State's view of the public interest, the respondent's challenge to their approach to proportionality in Article 8 in its wider context plainly falls away.

23. Accordingly we find that the Tribunal did not make any errors of law in their decision. They were entitled to reach the decision that they did and the grounds of appeal amount to no more than a disagreement with that decision.

DECISION

24. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal to allow the appellant's appeal stands.

Signed

Upper Tribunal Judge Kebede