Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00820/2012

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 12 September 2013	**On 01 October 2013**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR S M

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed, instructed by Peer & Co
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bosnia Herzegovina. He was born on 5 July 1979.

2. This is an appeal against the decision dated 9 January 2013 of First-tier Tribunal Judge Astle and Mr A F Sherward which dismissed the appeal

against the respondent's decision dated 10 October 2012 to refuse to revoke a deportation order made against the appellant.

Background

3. The appellant came to the UK on 6 November 1998 using a false Slovenian passport. His wife entered at the same time. They made independent asylum claims but both were refused by the respondent.

4. On 11 July 2005, the application of the appellant's wife for indefinite leave to remain for herself and the couple's five children. The application was refused on 23 August 2006 due to the wife's unspent conviction for theft.

5. On 18 May 2010 the couple's oldest child became a British citizen, having been born here on 10 July 1999. On 19 January 2011, the second child became a British citizen, having been born here on 1 December 2000. On 24 April 2012, the third child became a British citizen, having been born here on 25 December 2001.

6. On 9 February 2012, the appellant's wife and two daughters, born 25 March 2013 and 15 May 2004 respectively, were granted 3 years discretionary leave to remain (DLR), valid until 8 February 2015.

7. On 31 July 2012, the couple had their sixth child, a son.

8. Meanwhile, on 21 May 2004 the appellant was sentenced to 8 years imprisonment for wounding with intent to cause grievous bodily harm and 3 years imprisonment for threatening to kill, the latter sentence to be served concurrently. The circumstances of these offences were that the appellant attacked his victim, a post office counter worker, with a Swiss army knife, cut his throat causing a wound of over 10 centimetres which was deep at the centre. Later the same day, the appellant telephoned the post office and made threats to kill another worker.

9. A notice of a decision to make a deportation order was made on 8 October 2008. On 20 October 2008 a notice of a decision to make a deportation order was made against the appellant's wife and children. Those decisions were appealed but the appeals dismissed and appeal rights exhausted on 10 May 2010 following an oral permission hearing in the Court of Appeal.

10. The appellant was kept in immigration detention after his period of imprisonment ended on 16 April 2009. He was released from immigration detention on 22 February 2011 following a decision of Mr Justice Beatson in the High Court.

11. On 3 May 2011 the appellant made an application for the deportation order against him to be revoked, relying on a fresh asylum claim to the effect that the family were stateless and a claim under Article 8 of the

ECHR. The refusal on 10 October 2012 of that application is the subject of the appeal before me.

12. The respondent now accepts that the appellant's wife and the children cannot be deported or expected to leave the UK.

Preliminary Issues

13. Mr Ahmed made an application for an adjournment. A number of reasons were put forward in support of the adjournment request.

Adjournment ground 1

14. Firstly, Mr Ahmed maintained that the new solicitors had not had sufficient time to prepare the case adequately.

15. I did not find that this reason for adjourning the hearing had any merit for a number of reasons.

16. As he confirmed at the hearing, when the appellant had previously been before me on 15 August 2013, he sacked his previous legal advisers because they were unable to confirm that the hearing that day would be the definitive last stage in his case; he wanted finality and considered that they were in some way profiting from the ongoing proceedings. Having sacked his legal advisers, the appellant was without a legal representative and requested an adjournment. I granted that adjournment. The appellant agreed that the next hearing should go ahead whether or not he had managed to obtain legal representation. The appellant cannot be held to that agreement, of course, and confirmed on 12 September 2013 that his instructions were now that the appeal should not go ahead without further time being afforded for preparation.

17. It remains the case that there has been one adjournment of this matter already at the request of the appellant and that is a factor weighing against a further adjournment now, particularly where the appellant has had at least some legal advice since then.

18. Further, the correspondence before me indicated that the new solicitors were instructed by 20 August 2013 at the latest, over 3 weeks prior to the hearing. There was nothing before me to indicate that they had taken any steps to expedite any delay in the appellant's file being transferred to them. I gave the appellant his own copy of the tribunal bundle on 15 August 2013, in any event, which contained the essential documents. It was my view that there had been sufficient time to prepare the appeal for hearing.

19. Further, the respondent's decision in this matter was made nearly a year ago and the decision of the First-tier Tribunal was made in January 2013. This appeal follows the extensive history of other proceedings from as long

ago as 1999 concerning the appellant and his family, set out above. As above, there has already been one adjournment of the appeal to the Upper Tribunal. This is a case in which the principles of fairness and justness call for a final determination.

Adjournment ground 2

20. Mr Ahmed's second ground for requesting an adjournment was that the appeal could not properly proceed until the respondent confirmed whether the Bosnian authorities accepted that the appellant is a Bosnian citizen and disclosed a letter dated 11 September 2009 from the Bosnian authorities relating to his citizenship and return.

21. The hearing before me is to establish whether the First-tier Tribunal made an error on a point of law. Judge Astle and Mr Sherward did not have the letter of 11 September 2009 before them. There was nothing to show that they had been asked to adjourn in order for that letter to be provided or in relation to any aspect of the appellant's claim to be stateless or unreturnable.

22. Mr Ahmed did not provide any explanation as to why the legal advisers who had represented the appellant before the First-tier Tribunal (and in the litigation which gave rise to the letter of 11 September 2009) had not put it before the First-tier Tribunal.

23. I could not see any ground in law for adjourning the error of law hearing for a document that could have been before the First-tier Tribunal but was not, no reason having been given for that being so. This was really an argument directed towards re-opening the evidence rather than something of relevant to the error of law challenge. I did not find that this ground for an adjournment had any merit.

Adjournment ground 3

24. The third reason given to justify an adjournment was that the Upper Tribunal had not made a decision on the application dated 5 August 2013 for the appellant's three British children to be joined as interested parties under Rule 9 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

25. I asked Mr Ahmed to show how the three British children being joined as interested parties would make any substantive difference to the appeal given that their best interests fell to be weighed as a primary factor and their rights under Article 8 of the ECHR were fully before me following Beoku-Betts [2008] UKHL 39. Mr Ahmed was unable to identify any aspect of the British children's circumstances that would be treated differently in substance if they were joined as interested parties.

26. Mr Ahmed referred to the fact that the children were interested parties in the judicial review proceedings before Mr Justice Beatson. That did not

appear to me to have any relevance here. Before the High Court, the respondent was maintaining that the British children could be removed with the rest of the family. That was the conflict arose that led to the British children being represented separately. It does not arise here.

27. Again, this was not a point that was raised before the First-tier Tribunal.

28. I did not find that this reason for adjourning the hearing had any merit.

29. I proceeded to refuse the application dated 5 August 2013 for the three British children to be joined as interested parties under Rule 9 of the Procedure Rules as nothing before me showed that this was necessary in order for the appeal to be determined justly and fairly.

Adjournment ground 4

30. Mr Ahmed's final submission was that there was no prejudice to the public interest in an adjournment. I was unclear as to where my jurisdiction in that regard lay, as the public interest is a matter usually argued in an Article 8 proportionality assessment. It is not something that I am required to consider under the Procedure Rules when considering an adjournment. I have given my view in [16] on the need for finality in this matter. I did not find that this ground for adjournment had any merit.

Variation of Grounds of Appeal

31. Having been refused an adjournment, Mr Ahmed sought to vary the grounds of appeal.

Variation of Grounds of Appeal dated 12 August 2013

32. First of all, Mr Ahmed sought to rely on an earlier application to vary dated 12 August 2013, drafted by previous counsel. Those grounds maintained that the grounds should be varied to include a challenge to the decision made by the First-tier Tribunal's under paragraph A362 of HC395 (the new Immigration Rules). The argument was that as the application to revoke the deportation order was made prior to 9 July 2012 when the new Immigration Rules came into force, the panel was not entitled to consider the new Rules. By way of justification for the omission of this ground from those submitted to the First-tier Tribunal and the Upper Tribunal, the point was stated to be "Robinson obvious" in line with R v SSHD, ex parte Robinson [1997] 3 WLR 1162.

33. I declined to vary the grounds to include this challenge for a number of reasons.

34. As the application for permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal and so renewed to the Upper Tribunal, there have been two sets of grounds appeal in this matter. Both were

prepared by a firm of solicitors specialising in immigration law. Neither set of grounds argued that the new Immigration Rules should not be applied.

35. Mr Ahmed sought to argue that the new Immigration Rules should not have been applied but was unable to take me to any primary or secondary legislation or any transitional provisions that showed this to be so.

36. He referred to the comments in the case of MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 on retrospectivity. That was an appeal against a decision to make a deportation order, that decision and the appeal decision of the First-tier Tribunal both made before 9 July 2012. In the appeal before me the decision is against a decision dated 10 October 2012 to refuse to revoke a deportation order. It did not appear to me that this case could be usefully compared with MF.

37. In any event, this ground is not material, so has no merit and should not be admitted. The argument is that only a second stage Article 8 assessment should have been conducted. The First-tier Tribunal carried out that assessment, however. They specifically indicate that this is what they did at [52], referring in terms to the freestanding Article 8 claim, distinguishing it from their consideration under the new Immigration Rules as "there is no test of exceptionality". There is no suggestion in any of the formulations of the grounds before me that the second stage Article 8 assessment was tainted by the consideration of that claim under the new Immigration Rules.

38. Mr Ahmed conceded that the other grounds in the application to vary the grounds of appeal dated 12 August 2013 were misconceived as they related to automatic deportation under the UK Borders Act 2007. This is an appeal against a decision to revoke deportation order made under Section 3 (5) of the Immigration Act 1971 as the respondent deemed the appellant's deportation to be in the public good.

Variation of Grounds of Appeal in Skeleton Argument dated 11 September 2013

39. Mr Ahmed also submitted at paragraph 4 (c) of his skeleton argument that a further "Robinson obvious" variation in the grounds of appeal should be permitted. He argued that:

> "The FTT erred in failing to take into consideration the failure by the Bosnian Authorities to issue a ETD [thus amounting to a failure to recognise the appellant as a citizen of Bosnia/denial of citizenship] which was a significant factor in determining the validity of the deportation order; the claim for protection under the refugee/human rights Conventions but also in the overall assessment of proportionality under article 8(2)."

40. Insofar as it concerns the appellant's claims for asylum and humanitarian protection, the application to vary the grounds to include the appellant's

statelessness or inability to return him cannot have merit as the First-tier Tribunal upheld at [44] to [46] the certification of the Refugee Convention claim under Section 72 of the Nationality, Immigration and Asylum Act 2002 and found that the appellant was excluded from Humanitarian Protection because of the seriousness of his offences. Those findings are not challenged in any of the formulations of grounds of appeal before me. Indeed, the determination at [42] records that it was conceded that the appellant was not entitled to asylum.

41. I indicate below why the proposition that the appellant is stateless and unreturnable is not made out. Even if it were, that alone would not necessarily found a claim for asylum, humanitarian protection or under Article 3 of the ECHR.

42. The assertion that the appellant is stateless and unreturnable is not accurate. The First-tier Tribunal had before it documents from the judicial review lodged by the appellant and his family which resulted in the decision dated 23 February 2011 of Mr Justice Beatson. His decision sets out at [14], [17], [18], [27], [29], [32] and [88] how the appellant has not compiled with the emergency travel document procedures and has been inconsistent in the information he has provided about his history and that of his family on a number of occasions. At [87] Mr Justice Beatson found that the appellant "bears a considerable degree of responsibility for the time it is taking the Secretary of State to deal with the Bosnian authorities."

43. The First-tier Tribunal dealt with the appellant's proposition that he was stateless and unreturnable in their assessment under Article 8. At [62] the panel indicated that:

> "We are not satisfied at this stage that there is no realistic prospect of him being removed. We were told that the file has recently been transferred to a new caseworker. We have seen form the judgement of Beatson J that the Appellant has not always been corporative (sic) in completing the necessary paperwork. There have been inconsistencies in the details given by him of his name and identity, including where he was born and where he was married. In the circumstances any present difficulties do not cause us to depart from our assessment".

44. The "assessment" that they decline to depart from was that it was proportionate for the appellant to be deported to Bosnia. In my judgement, [62] and the other references in the decision to the appellant being a Bosnian citizen show that they dealt with the assertion of statelessness and whether the appellant could be returned but found against him. A ground of appeal stating that they did not deal with this part of the case could only amount to disagreement and is without merit therefore.

Conclusion on Application to Vary the Grounds of Appeal

45. I therefore declined all of the applications to vary the grounds of appeal.

46. I should merely add that having announced that decision, when Mr Ahmed began his oral submissions he sought to argue that the decision under the new Immigration Rules disclosed an error on a point of law. When I queried this, he accepted that he could not do so as there had been no application to vary the grounds of appeal to include such a challenge.

Grounds of Appeal

47. Having dealt at some length on the grounds that do not fall to be addressed by me, I turn to those that do.

48. The admissible grounds relate only to the First-tier Tribunal's assessment of the second stage or freestanding Article 8 consideration.

49. The grounds of appeal to the First-tier Tribunal were that :

    a. the panel should have adjourned for a further expert report on reoffending

    b. there was inadequate consideration of the evidence in various regards:

        (i) the appellant's wife would have difficulty caring for the children if the appellant was deported and her grief would impact adversely on the children
        (ii) the wife intended to go to Bosnia with the appellant
        (iii) the implications for the children of the wife going to Bosnia
        (iv) the respondent did not contact the Office of the Children's Champion (OCC).
        (v) the appellant would face discrimination in Bosnia
        (vi) he would not be accepted as Bosnian
        (vii) attempts to remove him over an extended period of time had failed
        (viii) the length of time since the offence was committed, the appellant's conduct since release, strength and durability of family life, likelihood of contact from abroad, social and cultural ties to the UK and very little to Bosnia

47. Permission was refused and much of the renewed grounds of appeal to the Upper Tribunal were the same but, in combination with the additional point of insufficient consideration of the children's rights to grow up with both of their parents, the ground as a whole were found to be arguable.

Discussion

48. I did not find that the First-tier Tribunal erred in refusing to adjourn to obtain an addendum report from a forensic psychologist. The panel gave reasons for refusing to adjourn at [3]. That decision was clearly open to them as they had a report on the point already, the need for an addendum was not raised at the Case Management Review some two months earlier and nothing mentioned on the matter until the day of the hearing. There had been adequate time to provide such a report and it was unclear why an addendum would not be ready for a further 6 weeks.

49. It is my view that the remainder of the grounds amount only to a disagreement with the decision of the First-tier Tribunal and an attempt to reargue the appeal without disclosing any error of law.

50. The panel set out the appellant's case at [14] to [18]. It set out the view of the independent social worker in some detail at [26] to [34]. It set out the view of the independent forensic psychologist at [35] to [38]. Those reports contained the evidence in support of the appellant's case at its highest, setting out the issues relating to the family as a whole and the children in particular and the appellant's risk of reoffending that the grounds assert that the panel did not deal with adequately. The First-tier Tribunal clearly considered all that was put forward in support of the appeal as they were required to do. Having done so, it was clearly open to them to find that deportation was proportionate given the seriousness of the offence and the family having managed relatively well without the appellant for some years whilst he was in prison.

51. When conducting the Article 8 assessment, the panel established the best interests of the children first at [54] to [57] and weighed them as a primary factor. It noted at [55] that the respondent accepted that the best interests of the children were for the appellant not to be deported to Bosnia. It indicated at [61] that: "[o]f particular concern to us is the plight of the children" if separated from their father and that "[w]hatever his sins, they are not the fault of the children." There is no merit in the argument that the First-tier Tribunal did not address the best interests of the children adequately.

52. The panel set out the Boultif factors at [61] and proceeded to assess those factors that were relevant in the subsequent paragraphs, the seriousness of the offence, length of residence, ties to Bosnia and so on.

53. As above, they rejected the appellant's claim to be stately and addressed the difficulties in returning the appellant to Bosnia at [62] and did not find this sufficient to show that he was stateless or unreturnable such that his deportation could be shown to be disproportionate.

54. The panel set out the evidence as to the intentions of the appellant's wife accurately at [56] and did not err in finding at [61] that she did not intend to return to Bosnia. The wife's evidence varied. It was not categorically that she intended to return to Bosnia with the appellant and take the children there. In her witness statement she requests at [12] that she and the children be allowed to remain in the UK independently of the deportation proceedings against her husband. The social worker report was equivocal as to her intentions, stating at [34] of the addendum report that this "may or may not" be the wife's choice if the appellant was deported. As pointed out by Mr Mills, the record of proceedings records her as stating that she did not want to go to Bosnia but also did not want the appellant to go back.

55. The appellant seeks to argue that the failure of the respondent to contact the OCC should have led the First-tier Tribunal to find the respondent's decision unlawful or made the Article 8 assessment inadequate to the extent that the appeal should be allowed. I do not agree. The panel noted at [55] that it appeared that the respondent had not contacted the OCC. Mr Mills conceded before me that this was the case at the time of the hearing before the First-tier Tribunal. There was no application made for the appeal to be adjourned in order for that reference to be made, however, and it does not appear to have been a matter on which the panel were asked to place significant weight.

56. In any event, the respondent is not obliged to follow the comments of the OCC even if an opinion is obtained. Nor is the Tribunal. As above, the First-tier Tribunal had two detailed social work reports before them which they took into account and found the children's best interests weighed as a primary factor against the appellant being deported, expressing "particular concern" about the children. It is difficult to see what more a reference to the OCC could have added.

57. For all of these reasons, I did not find that it had been shown that the First-tier Tribunal erred in law when dismissing the appeal.

Decision

58. The determination of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

59. The application dated 5 August 2013 for the appellant's three British children to be joined as interested parties under Rule 9 of the Procedure Rules is refused for the reasons set out at [26] and [30].

Anonymity

I continue the anonymity order made by the First-tier Tribunal in order to avoid the likelihood of serious harm arising to the appellant's children as a result of the matters covered in this determination.

Signed: 

Upper Tribunal Judge Pitt Dated: 23 September 2013