Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01850/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 8 April 2014	**On 9 May 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

HJS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Harrington instructed by Gloucester Law Centre
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the

appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Ecuador who was born on 19 March 1955.

3. The appellant first attempted to enter the United Kingdom on 13 January 1990 using the identity of "AS" who is his brother. On 20 September 1990, the appellant was refused leave to enter the UK and was removed the following day to Ecuador. On 8 February 1991, the appellant married "SL" in Ecuador. On 27 November 1992, he travelled to the United Kingdom using the identity of "AS" with a date of birth of 24 January 1964. He entered as the spouse of a British citizen, namely "SL" and was granted leave until 27 November 1993. On 11 March 1994, the appellant was granted indefinite leave to remain as the spouse of a British citizen.

4. On 7 March 1997, the appellant made an application for naturalisation as a British citizen under the identity of "AS". He was granted British citizenship on 7 January 1999.

5. In 2001, the appellant (using the identity "AS") changed his name by deed poll to "HJS" which is his real identity. On 21 January 2001, the appellant was issued with a British passport in the name of "HJS".

6. In 2004, the appellant was convicted of three criminal offences, namely theft of a motor vehicle, going equipped for theft and making off without payment. He received sentences of community punishment orders.

7. In September 2004, the appellant and his family left the UK and went to Costa Rica. At some point during 2004-2005, the appellant returned to Ecuador. Whilst in Ecuador, the appellant faked his own death in order that his wife could claim on his insurance policies in the United Kingdom. In December 2006, the appellant and his family went to live in Australia. He was subsequently located in Australia, where he was arrested and extradited to the United Kingdom on 14 March 2012.

8. On 12 April 2012, the appellant was convicted of a number of offences at the Oxford Crown Court, namely obtaining a money transfer by deception, attempting to obtain a money transfer by deception, securing the remission of liability by deception and attempting to secure remission of liability by deception. On 28 May 2012, the appellant was sentenced to a total of five years' imprisonment.

9. On 5 October 2012, the appellant was notified of his liability to automatic deportation under the UK Borders Act 2007. The appellant completed a questionnaire and on 5 November 2012, he claimed asylum.

10. On 13 February 2013, the Secretary of State notified the appellant that his certificate of naturalisation was null and void on the basis that it had been

obtained using a false identity. His passport was subsequently returned to the passport office.

11. On 29 August 2013, the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied. The Secretary of State rejected the appellant's claim for asylum and humanitarian protection and under Article 3 of the ECHR. The Secretary of State issued a certificate under s.72 of the Nationality, Immigration and Asylum Act 2002. In addition, the Secretary of State concluded that the appellant's deportation was in accordance with the Immigration Rules (HC 395 as amended), namely para 398 and that his deportation would not breach Article 8 of the ECHR.

12. The appellant appealed to the First-tier Tribunal. In a determination dated 6 December 2013, the First-tier Tribunal (Judge Britton and Mr G H Getlevog) dismissed the appellant's appeal. First, the First-tier Tribunal dismissed the appellant's appeal on asylum and humanitarian protection grounds and also under Article 3 of the ECHR. Further, the First-tier Tribunal concluded that the appellant's deportation would not breach Article 8.

13. The appellant sought permission to appeal to the Upper Tribunal. The grounds did not seek to challenge the First-tier Tribunal's decision to dismiss the appeal on asylum and humanitarian protection grounds and under Article 3 of the ECHR. Instead, the application focussed upon the First-tier Tribunal's decision to dismiss the appeal under Article 8 of the ECHR.

14. On 9 January 2014, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal. Thus, the appeal came before us.

The Submissions

15. Ms Harrington, who represented the appellant, relied upon the grounds of appeal which she developed in her oral submissions.

16. First, she submitted that the First-tier Tribunal had failed to make any or any adequate findings in respect of the impact of deportation upon the mental health of the appellant's four children, in particular of his younger daughter "NJ" and had failed to take into account the evidence relating to her attempt at suicide and the risk, therefore, of that reoccurring if the appellant was deported. She submitted that the First-tier Tribunal had failed to take into account the medical evidence at pages 43 and 44 of the appellant's bundle and also a letter from "NS's" GP dated 21 November 2013 which had been provided to the First-tier Tribunal at the hearing. In addition, she relied upon supporting evidence of counsellors at the children's school at pages 45-54 particularly in relation to the impact upon the appellant's younger daughter. She submitted that the evidence clearly raised issues above and beyond the ordinary issues of separation between a father and his children in a deportation case. She submitted that the Tribunal should have made a factual finding on what the impact

of the appellant's deportation would have on the children, in particular his youngest daughter which was relevant to the proportionality assessment. Ms Harrington submitted that it was not sufficient for the First-tier Tribunal to say, as it had at para 59, that it had taken all the evidence into consideration.

17. Secondly, Ms Harrington submitted that the First-tier Tribunal had failed to make any findings in respect of the "best interests" of the children.

18. Thirdly, she submitted that the First-tier Tribunal had erred in law in reaching its finding that family life could be continued by Skype and had failed to have regard to the impracticality of the children visiting their father in Ecuador given the costs.

19. Fourthly, Ms Harrington submitted that the First-tier Tribunal had failed to make any finding in relation to the OASys report and its conclusion that the risk of the appellant reoffending was low.

20. Finally, Ms Harrington submitted that the First-tier Tribunal had made a factual error (at para 34) in recording the evidence of the appellant's older daughter that she spoke fluent Spanish. Her evidence was that she had at one time spoken Spanish fluently but now only recalled a few words and phrases.

21. On behalf of the Secretary of State, Mr Richards relied upon the Rule 24 reply. He submitted that the First-tier Tribunal had considered all the evidence, including referring at para 29 to the fact that the appellant's younger daughter had attempted to commit suicide by taking an overdose of Paracetamol. At para 57, the First-tier Tribunal had referred to s.55 of the Borders, Citizenship and Immigration Act 2009 and, referring to SS (Nigeria) v SSHD [2013] EWCA Civ 550, had noted the importance of the best interests of the children. At para 59, Mr Richards submitted that the First-tier Tribunal had carried out the appropriate balancing exercise including taking into account "the appellant's criminal activity". Mr Richards submitted that the First-tier Tribunal had well in mind the particularly serious crime committed by the defendant. He submitted that the Tribunal properly concluded, given the seriousness of the appellant's offending, that the public interest outweighed the competing claims of his family and that the First-tier Tribunal's finding that his deportation was proportionate was properly open to the First-tier Tribunal.

Discussion

22. The First-tier Tribunal's consideration of Article 8 is at paras 55-61 as follows:

> "55. In relation to the appellant's deportation, the crime he committed was a very serious form of fraud. His sentence was over 4 year's imprisonment. Under paragraph 398 of the Immigration Rules only in exceptional circumstances will the public interest in deportation will be outweighed by other factors.

56. We have taken into consideration the lengthy 5 year prison sentence imposed on the appellant, the length of time he used a false name and that he had been removed from the United Kingdom in 1990, the appellant's children are British and are innocent victims of their parents' crime, he is now separated from his wife.

57. We take into consideration section 55 of the Borders, Citizenship & Immigration Act 2009 where it is the duty to safeguard the welfare of the children. The interest of the children must be a primary consideration in making this decision. The Court of Appeal in SS (Nigeria) v SSHD [2013] EWCA Civ 550 held that in previous cases in which potential deportees raised a claim under Article 8 which relied on the best interest of the child, insufficient attention had been paid to the weight attached to the policy of deporting foreign criminals by virtue of its origin in primary legislation. Law LJ said that "…I think with respect, that insufficient attention has been paid to the weight to be attached, by virtue of its origin in primary legislation, to the policy of deporting foreign criminals" and the reference to the 'decision maker's discretion'. The 'decision-maker' in the context clearly means the Secretary of State.

58. The appellant and his wife are separated and the children will continue to live with their mother and be educated in this country.

59. We take into consideration the evidence submitted by the appellant's children, the appellant's wife, the appellant's sister in law and the other evidence in relation to the children. The appellant spoke of his love for the children, and that is undeniable. However we have to balance the appellant's criminal activity with that of his family life. We find that the appellant can keep in touch with his children via skype and also they can visit him in Ecuador. The appellant has been apart from his family for sometime, he is separated from his wife. We accept the children have visited him in prison but they have got used to not having a father around on a daily basis. If the appellant returned to Ecuador the children can visit him there.

60. We have taken into consideration the appellant's OASys report and the testimonials produced. We have carried out a balancing exercise as to proportionality. We have also taken into consideration the criteria set out in Uner v The Netherlands [20-6] (App No 46410/99).

61. We find there is no breach of Article 8. The appellant will be returning to Ecuador where he was brought up and went to university. He has a brother and sister in Ecuador and we are satisfied he will easily adapt to live in Ecuador. We find that any interference with the appellant's family and private life is proportionate to the legitimate aims of applying the immigration policy of the United Kingdom."

23. Whilst we accept that the First-tier Tribunal stated that it had taken into account all the evidence submitted in relation to the appellant's children and family (at para 59), it is far from clear that the First-tier Tribunal in fact took into account the evidence concerning the best interests of the appellant's children, in particular that of his younger daughter, "NJ". It is not a matter of dispute that shortly before the hearing, "NJ" attempted to commit suicide by taking an overdose of Paracetamol tablets whilst at

school. The background to this is fully set out in a GP's letter dated 21 November 2013. That letter concludes as follows:

> "It seems to me highly likely that this dangerous overdose has been precipitated by the distress surrounding the events involving ["NJ's"] father, and particularly the looming threat of her being separated from him were he to be deported. In this regard, I support the argument that it would be in this child's best interest for her father to remain."

24. Further supporting evidence is found in the letter from the School Counsellor dated 19 November 2013 (at pages 50-51 of the appeal bundle). This refers to "NJ" as being "extremely anxious, depressed and vulnerable". It further relates the writer's view that the prospect of the appellant's deportation was having a distressing effect – "showing signs of separation anxiety" – upon "NJ".

25. We accept Ms Harrington's submission that the First-tier Tribunal cannot be said to have taken this evidence into account (or indeed the evidence concerning the other children) simply by stating that it has done so in para 59. No reference is made to this evidence and, so far as we were shown by the representatives, the only reference to "NJ" taking the overdose is to that simple fact in para 29. We cannot be confident that the First-tier Tribunal took this important evidence into account and, as it was required to do, grapple with it as part of its assessment of proportionality.

26. This is a case where the best interests of the appellant's children, in particular "NJ" are a significant part of the proportionality assessment. Despite the reference to s.55 of the 2009 Act and to SS (Nigeria) in para 57, the First-tier Tribunal did not make any findings as to the best interests of the appellant's children, in particular "NJ".

27. In failing to take into account the important evidence in relation to the children (in particular "NJ") and in failing to make relevant factual findings including as to the best interests of the children, the First-tier Tribunal erred in law.

28. Despite the seriousness of the appellant's offending, this is not a case in which we take the view that the First-tier Tribunal could only have reached one decision, namely that whatever the best interests of the children they were outweighed by the seriousness of the appellant's offending.

29. In our judgement, these errors fatally flaw the First-tier Tribunal's decision to dismiss the appeal under Article 8. It is not necessary, therefore, to express any view on the remaining submissions made by Ms Harrington. The First-tier Tribunal's decision cannot stand in relation to Article 8 and we set it aside.

Decision

30. For the above reasons, the First-tier Tribunal's decision to dismiss the appeal under Article 8 involved the making of an error of law and is set aside.

31. However, the First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under Article 3 of the ECHR stands.

32. Following discussion at the conclusion of the hearing at which we indicated our decision in respect of the error of law, we concluded it appropriate to retain the appeal in the Upper Tribunal in order to remake the decision in respect of Article 8.

33. It was agreed by both representatives that it would be appropriate for us to consider any updating evidence, in particular in relation to the appellant's children. We noted that a mental health assessment had been requested by "NJ's" consultant paediatrician (see letter of 18 November 2013) and that that evidence would assist us in reaching our decision in respect of Article 8.

Signed

A Grubb
Judge of the Upper Tribunal

Date: