IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02157/2013

THE IMMIGRATION ACTS

Heard at The Victoria Law Courts, Birmingham On 19 January 2016	**Decision and Reasons Promulgated On 1 March 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Macdonald QC Counsel instructed by J M Wilson
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the

respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant is a citizen of India. A decision was made by the respondent on or about 11 October 2013 to make a deportation order against him under Section 32(5) of the UK Borders Act 2007, following his conviction on 4 September 2009 for an offence of conspiracy to supply cocaine, for which he received a sentence of nine years' imprisonment.

2. The appellant's appeal against the respondent's decision came before a panel of the First-tier Tribunal ("FtT/Tribunal") consisting of First-tier Tribunal Judge Pirotta and Mrs V. Street, a non-legal member. The FtT dismissed the appellant's appeal.

3. The further background to the appeal is that the appellant came to the UK on 1 February 1975, when he was 6 years of age. He came with his mother and sister and they have all been granted indefinite leave to remain.

4. In November 2002 the appellant was convicted of an offence of conspiracy to supply class A drugs and two offences of failing to surrender to custody. He received a sentence of seven years' imprisonment. As a result of that conviction a decision was made to make a deportation order against him. The appellant appealed against that decision and his appeal was allowed on human rights grounds after a hearing on 28 January 2008.

5. It appears that the appellant has other convictions, arising since 1987, for offences of theft, or other dishonesty offences, assault occasioning actual bodily harm and affray, he having apparently been convicted of the latter offence in 2007, receiving a suspended sentence.

The decision of the First-tier Tribunal

6. The FtT's decision can be summarised in the following way. The Tribunal rehearsed the appellant's account which was that he had worked as a police informant and had submitted documentary evidence to that effect. His claim was that he had not been able to participate fully in his own defence during his criminal trial because he did not want to reveal himself to the co-defendants as a police informant for fear of reprisals. His application for severance of the indictment had not been granted. The appellant did not answer any police questions during interview, did not file a defence case statement or give evidence at his trial. The trial judge however, did not direct the jury that they could draw adverse inferences against the appellant by reason of his silence. His application for permission to appeal to the Court of Appeal against his conviction was refused.

7. At [19] there is reference to the appellant having pleaded guilty to drugs offences on a different indictment, and was sentenced to two years' imprisonment to run concurrently with the sentence of nine years' imprisonment.

8. The Tribunal referred to various pieces of documentary evidence in relation to the appellant's involvement with the police in terms of the assistance that he gave to them, but including evidence to the effect that he was told that he was no longer authorised to work with the police as an informant. At [23] the FtT's decision states that the appellant was told that he would no longer be authorised to work with the police as an informant because he attempted to provide selective pieces of information in order to maintain an insurance policy against his own apparently disproportionate offending, which rendered his use no longer justified, necessary or proportionate.

9. At [32] it is stated that the appellant's offending had increased in gravity, culminating in the sentence of nine years' imprisonment. It was concluded at [34] that the appellant was using the police and his role as an informant for his own purposes, namely to try to succeed in fighting the deportation order against him, in which he was successful, to obtain bail, and to get revenge against other criminals whom he felt had let him down over debts he had incurred to family and friends in the operation of a nightclub business. In the same paragraph the Tribunal concluded that the appellant had always intended, and was active in, trying to make money on deals with criminals, to cheat, rob or defraud them of money, to obtain illicit drugs or other illicit commodities for onward sale, or to benefit himself by making connections between them for which he would be rewarded.

10. At [35] it is stated that the police did not pay him for information and would not provide him funds to stake a financial interest in the conspiracy to import drugs although the appellant had asked for those funds in order to gain credibility with the conspirators. The documentary records showed that the appellant was advised by the police on several occasions that he had overstepped the mark in participating as a conspirator rather than merely conveying information, which the appellant apparently acknowledged that he had done, and that he knew his actions amounted to conspiracy as he had been convicted of such offences before. A covert recording transcript shows that the appellant was actively inciting the conspiracy and his demands on the police reflect the active role he was taking, despite their advice and warnings to him.

11. At [36] the Tribunal found that it was evident that the police could not permit the appellant to become actively involved in the conspiracy; to become an *agent provocateur*. The Tribunal concluded that the appellant had not established to the lower standard of proof that his criminal activity was a cover for his informant activities. The Tribunal found that he took advantage of the police's need to have information and carried on offending mistakenly believing he was "untouchable" because the police were supporting him.

12. The phone records showed that the appellant continued contacting those involved in the conspiracy for 18 weeks after the police ceased to use him as an informant.

13. The Tribunal referred to the sentencing remarks of the trial judge, at [38], stating that those sentencing remarks showed that the appellant:

> "... was a drug dealer in his own right, running his own little enterprise in the North East, sourcing drugs from two of the co-defendants ... The basis of the sentence was his own drug dealing, the Judge being satisfied on the evidence that there was 'scant' evidence of any real involvement in the main conspiracy to import."

14. The Tribunal found that the evidence showed that the appellant had been involved in separate "deals" with other defendants for his own purposes, not on the basis of the "main" importation conspiracy because the evidence in that regard was scant.

15. At [40] the Tribunal concluded that the appellant's account was a device to attempt to "re-open his trial", without all the evidence being available (to the FtT), in order to demonstrate that his actions were innocent and that he was only involved because he was used by the police handlers who he claimed abandoned him when he was on trial, who did not support him against the prosecution or who encouraged him to offend in order to prove his probity with the other conspirators. The Tribunal found that it could not go behind the finding of guilt or the basis of sentence which clearly indicated that the evidence in the appellant's case was that he was involved with others in obtaining drugs for his own distribution, although not largely involved in the major conspiracy to buy drugs abroad.

16. The Tribunal concluded that the appellant had received a fair trial at which he had had the opportunity to pursue his defence as he wished. At [42] the FtT referred to the appellant having admitted in his statements that he was complicit in conspiracies to supply drugs, and using his criminal connections to make money. Furthermore, at [43] it was noted that the appellant had admitted the further offence of being involved in another offence of supply or distribution of drugs with another individual, for which he was sentenced to two years' imprisonment concurrent. He had also admitted having taken cocaine since the age of 20, having large debts which he could not repay, owing money to family and friends which he was trying to obtain in order that the club which was financed by loans raised against their homes would not be closed down and their homes repossessed. He had therefore admitted his motives, the criminal actions in which he was involved and the lengths to which he was prepared to go to protect or further his own and his family's interests as he saw them.

17. At [44] the Tribunal concluded that the appellant had been a police informer and may have provided information on several crimes and criminals. Nevertheless, the Tribunal stated that it had concerns about the appellant's own criminal activities and his continuing attitudes to crime.

18. It was concluded that the matters advanced by the appellant in relation to his trial, conviction and sentence did not amount to compelling reasons to outweigh the public interest in deportation.

19. Consideration was given to medical evidence in relation to the appellant's suffering from epilepsy. In summary, it was concluded that his health was not a basis upon which to allow the appeal under Article 3 of the ECHR.

20. In terms of his marriage, it was concluded at [53] that the appellant had not established that his relationship with his wife was a 'genuine, durable relationship'. The Tribunal found at [54] that the evidence showed that the appellant is prepared to use people to further his own purposes, referring to the appellant's previous claim to have been in a relationship with a different person in 2008 at a time when he was indebted to that woman's mother who had mortgaged her own home to provide the appellant with funds for his club. Although that relationship is said to have broken down in 2007, he still relied on his relationship with her as his fiancée in the 2008 (deportation) proceedings.

21. Reference was made to the length of time that the appellant had been in the UK; since he was a child. His wife was born in the UK and is a British citizen, having lived in the UK all her life. The appellant had been raised in a household where his parents spoke Punjabi and he had a life-long knowledge of the language. It was concluded that there was no reason why the appellant and his wife could not return to India together, the Tribunal referring to other aspects of their lives in the UK and balancing the public interest against their personal circumstances.

22. At [66] it was concluded that the appellant had not shown that there are "very compelling factors" beyond paragraphs 399 and 399A to outweigh the public interest in deportation.

The grounds and submissions

23. The grounds before me can be summarised as follows. It is asserted that the Tribunal made findings of fact which were not supported by the evidence in terms of the appellant having been involved in separate deals with other defendants for his own purposes and that he had been active in trying to make deals with other criminals, to cheat, rob or defraud them of money, obtain drugs or other commodities by making connections with those other criminals for which he would be rewarded.

24. It is also asserted that the Tribunal had failed to consider evidence before it in relation to the appellant not having been able to take any active part in his criminal trial without disclosing his role as an informant, and his fear of reprisals. As a result, the Tribunal had come to the perverse conclusion that by not answering questions in interview, providing no defence case statement and not giving evidence at his trial, he had achieved the objective of the prosecution not being able to show that he was largely involved in the main conspiracy, and he was not convicted on that basis.

25. Insofar as the Tribunal had speculated on matters in relation to which there was no evidence, those matters ought to have been put to the appellant in the interests of fairness.

26. So far as the human rights aspects of the appeal are concerned, it is asserted in the grounds that the Tribunal had failed to deal with the effect of the appellant's role as an informant on his criminality.

27. So far as his relationship with his wife is concerned, the Tribunal had failed to take into account the evidence that they had known each other nearly all their lives, but only became involved in the relationship in about 2006. Furthermore, the Tribunal had failed to deal with Article 8 of the ECHR in an appropriately structured way with reference to relevant authority. Similarly, it had failed to deal with the Article 8 claim appropriately, by first considering the Immigration Rules, and then moving on to Article 8 proper.

28. It was relevant that the appellant's wife was a British citizen, and it would not be reasonable to expect her to move to India. In addition, the appellant had been in the UK since the age of 6 and had spent all his formative years in the UK. The Tribunal had failed to take into account the decision in *Maslov v Austria* [2008] ECHR 546.

29. In submissions Mr Macdonald relied on those grounds but focused on the question of the appellant's role as an informant and the impact that that had in terms of the criminal trial.

30. It was submitted that the appellant had provided three witness statements exploring in considerable detail his role as an informant. To some extent that was corroborated by phone records and the FtT had not given appropriate consideration to relevant documentary evidence or the appellant's own account. It was submitted that at all material times the appellant had given his police handlers ongoing information with reference to the conspiracy for which he received a sentence of nine years' imprisonment. That involved a large quantity of cocaine which it was intended to parachute into fields in the UK from aeroplanes.

31. The appellant had provided information in relation to the existence of the conspiracy and various details, for example information about the change of vehicles by one of the co-conspirators. He had also provided phone numbers. His information had enabled the police to "bug" the vehicle.

32. The only evidence connecting the appellant to the conspiracy was in the transcript of a meeting held in the vehicle of one of the co-conspirators on 13 January 2011. I was referred to that transcript in detail, with Mr Macdonald highlighting various features of the transcript. The appellant's witness statement had given an account of that meeting in which the appellant said that he had spoken to the police handlers before the meeting and immediately before he arrived at it, as well as afterwards.

33. I was referred to a schedule of phone calls for the same date, of the meeting with and the various contacts between the police and the appellant. It was submitted that there is no reference in the Tribunal's decision to the appellant's evidence in relation to those phone calls or to the schedule of calls itself.

34. It was submitted that without the appellant's evidence it is at least arguable that the police would not have been able to take the action they did in relation to the conspiracy. It was also clear that the police subsequently decided that they no longer needed the appellant because they had managed to bug vehicles and obtain evidence by other means. He was effectively abandoned by the police. The appellant's

request for funds in order to maintain the confidence of the conspirators was refused by a senior police officer.

35. It was accepted on behalf of the appellant that it was not legitimate to go behind the sentence that the appellant received. His conviction would also have to be accepted. The appellant's defence solicitors in the criminal case had provided a number of pages of redacted documents. Although the sentence received by the appellant was the starting point, the Tribunal's conclusions should have been mitigated by reason of the appellant's involvement with the police. It has always been accepted that he was an informant. Notwithstanding what was said in the sentencing remarks, the Tribunal should have taken into account what the appellant had said in his witness statements. There was no evidence before the Tribunal that the appellant was involved as a drug dealer for his own ends. The Tribunal was wrong to refer to there having been a "main" conspiracy, there only having been one conspiracy.

36. In relation to the appellant's relationship with his wife, although the Tribunal had found that that relationship was not genuine and that it was a marriage of convenience, the prison visit schedule at page 22 of the bundle revealed that from January 2011 to January 2013 she had made 185 visits to the appellant. She was not able to visit him initially when he was in Birmingham Prison because she was a prison officer there. That evidence was not considered by the Tribunal.

37. Mr Mills in submissions relied on the decision in *Secretary of State for the Home Department v HK (Turkey)* [2010] EWCA Civ 583, in particular at [28] and [34] in terms of the significance of the sentencing remarks.

38. It was submitted that the question arises as to what the FtT was supposed to do. There was a conviction and sentence, and the appellant's appeal to the Court of Appeal was unsuccessful. Although it was apparently conceded on his behalf that it was not legitimate to go behind the conviction and sentence, the tenor of the submissions on his behalf was precisely that.

39. The Tribunal had found that there were no compelling circumstances with reference to the matters advanced in relation to the criminal trial. Insofar as it was suggested that matters were not taken into account, it was clear that the Tribunal had considered the appellant's claim that he was an informant. The Tribunal's conclusions were based on the sentencing remarks. It may be the case that the judge sentenced the appellant on the basis of information not known to the Tribunal, but the sentencing judge clearly took into account all the information before him.

40. At page 34 of the appellant's bundle is a copy of counsel's advice in relation to the appeal to the Court of Appeal against conviction. From [6] it is clear that the judge was aware of the basis on which the appellant was putting his case, that paragraph referring to a number of *ex parte* hearings before the trial judge.

41. In relation to the appellant's marriage, it is clear from [53] that the Tribunal did take into account the evidence of the prison visits. Despite that evidence, they were entitled to conclude that this was not a genuine relationship.

42. It is in any event hard to see how any error in that respect could be material. The appellant received a sentence well in excess of four years and therefore he is not able to rely on paragraphs 399(a) or (b). He would need to show very compelling circumstances over and above those paragraphs. It does not meet that threshold to say that he should not have been convicted.

43. As regards the complaint about the structure of the decision in relation to Article 8, the deportation Rules are a complete code. There was no need for a separate balancing exercise in relation to Article 8. There was no need for a 'second stage' consideration.

44. As regards reliance on the decision in *Maslov*, it was clear from *R (on the application of) Irfan Akpinar v Secretary of State for the Home Department* [2014] EWCA Civ 937, that there had perhaps previously been too much reliance on the decision in *Maslov*. Lengthy residence is simply one factor to be taken into account but does not involve an extra test that needs to be met. At [62] the Tribunal had acknowledged the length of time the appellant had been in the UK.

45. In reply Mr Macdonald reiterated and re-emphasised the arguments previously advanced.

My conclusions

46. In order to put into context the decision of the FtT and the arguments in relation to its decision, I start by quoting from the sentencing remarks as follows:

> "Your position is made undoubtedly worse, and more serious, by the fact that you have already amassed a prison sentence of seven years for conspiracy to supply Class A drugs. So there you are – seven years you got – you come out and you are at it again. Clearly that was not long enough to deter you.
>
> You are a drug dealer in your own right. It is quite [obvious] from the transcripts that you have your own little enterprise running up in the North East, and you were sourcing drugs from […]. There is plenty of evidence for that proposition, and I am quite satisfied that that is the basis of your conviction, because in my view there is scant evidence of any real involvement with the importation – so that is the basis on which I will sentence you.
>
> Obviously, if I thought that the jury had convicted you on the basis of an importation, it would be a lot higher. As I say, however, your position is made worse by the fact that the last prison sentence of seven years did not seem to deter you.
>
> Having regard to what I know of you, from what was heard on the transcripts that were played to the jury, it may well be you are not perhaps the most sophisticated of criminals, but at the end of the day, a lengthy custodial sentence has to be imposed in your case, but because you were – in my view – removed from the importation aspect, the sentence on you is nine years."

47. Although there is no reference in the judge's sentencing remarks to the appellant having been an informant, it is evident that this was information that was conveyed to the trial judge. As submitted on behalf of the appellant, it was never disputed but

that he was an informant. However, as the FtT pointed out, the documentary evidence showed that the police decided that he could no longer be used by them as an informant. Counsel's advice on the merits of an appeal to the Court of Appeal, disclosed in the appellant's bundle, reveals that the sentencing judge was fully informed of that situation.

48. The FtT referred to the lack of evidence of the appellant's involvement in the "main" conspiracy to import drugs. The Tribunal is criticised in the grounds of appeal on the basis that the indictment charged a conspiracy to import drugs, and that there was no "main" charge, only that charge. In fact, the trial record sheet in the respondent's bundle revealed that the appellant was convicted of conspiracy to supply a controlled drug. It is clear from the sentencing remarks that there was an importation element to the offence which the sentencing judge found that the appellant had not been involved with. The FtT was doing nothing more than reflecting the sentencing remarks which stated that "there is scant evidence of any real involvement with the importation" and that if he had been convicted on the basis of importation the judge said his sentence would be a lot higher. He repeated that the appellant was "removed from the importation aspect". It is evident that the FtT in that respect was reflecting the basis of sentence.

49. Furthermore, in describing the appellant at [38] as "running his own little enterprise in the North East", that is exactly what the sentencing judge said. Furthermore, it appears from [43] that the appellant had admitted a further offence of being involved in the supply or distribution of drugs on a subsequent occasion with another person.

50. The FtT referred in detail to the various aspects of the documentary evidence put before it, including the phone logs and covert recordings [34]. There is further reference to the phone records at [37]. The Tribunal made findings on the basis of the evidence before it, as disclosed in the documents to which detailed reference was made, as well as on the basis of the appellant's witness statements. I am satisfied that the Tribunal was entitled to take the view that it did in relation to the appellant's offending.

51. Even if, contrary to my view, it could be said that the Tribunal went beyond what was disclosed in the sentencing remarks or in the documentary evidence before it, the fact of the matter is that the appellant was convicted of a serious offence and received a lengthy term of imprisonment. What the Tribunal said at [40] about the appellant's arguments being "a device to attempt to re-open his trial" is entirely justified in my view. Indeed, it is evident that what the appellant sought to do before the FtT, and repeated in arguments before me, was to mitigate the consequences of his conviction and sentence, by seeking to minimise his involvement in the offence by relying on the information that he at one stage gave to the police, and the assertion that he was effectively abandoned by the police at or before the criminal trial.

52. I am satisfied that the FtT was entirely correct to reject that attempt by the appellant to 'go behind' the conviction and sentence, and its conclusions on the appellant's involvement so far as relevant to the issue of the public interest, were justified.

53. It is important to remember the terms of paragraph 398 of the Immigration Rules which states as follows:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A"

54. I do not accept that the Tribunal failed to take into account the appellant's role as an informant. It is plain from its decision that this was a significant matter that was given detailed consideration, as is clear from my summary of the FtT's decision. To reiterate, at [44] the Tribunal found that it was satisfied that the appellant was a police informant and may have provided information on several crimes and criminals, assisted the police by providing intelligence for the seizure of drugs and money, prosecuting other offenders for significant crimes including arson, the importation of counterfeit goods, and money laundering, and that he had even provided evidence against his co-defendants. Again, at [48] it was stated that the appellant had established that he was a police informant.

55. In summary, I am not satisfied that there is any merit in the criticism made of the FtT's decision in its assessment of the appellant's criminality, which assessment is substantially reflected in the judge's sentencing remarks and the documentary evidence before the FtT.

56. So far as the appellant's relationship with his wife is concerned, there was in my judgement a sustainable analysis of that relationship. The Tribunal pointed out between [50] and [54] that the appellant had previously attempted to use a

relationship with someone else in his previous deportation appeal. At [53] the Tribunal concluded that there was no credible evidence of a relationship between the appellant and his spouse before 2008, despite the claim that they had been together in a relationship since 2006. The Tribunal noted that the appellant had not named his spouse as his partner or fiancée in his 2008 appeal, and she had not appeared as a witness in that case.

57. Contrary to the submissions made to me, it is clear from [53] that the Tribunal took into account the visits to the appellant in prison after he had been moved from HMP Birmingham. However, it was also noted that there was no evidence of any other contact between them in any form and no reasons advanced as to why his wife did not leave her employment in order to be able to see the appellant if there was conflict with her prison work, albeit later she did transfer to another prison.

58. In any event, there was a reasoned and sustainable analysis of the extent to which the appellant and his wife could together live in India, with reference to language, employability and their ability to establish themselves in India, notwithstanding that the appellant's wife is a British citizen.

59. Furthermore, as was pointed out on behalf of the respondent before me, the appellant is not able to rely on paragraphs 399(a) or (b) in terms of a relationship with a child or partner because of his sentence of at least four years' imprisonment. Similarly, he is not able to rely on paragraph 399A for the same reason. He therefore would need to show that there were very compelling circumstances over and above those circumstances, to outweigh the public interest in deportation. The Tribunal concluded that the only other matter that could potentially be relevant in this respect is the argument in relation to his conviction and sentence, but it rejected the contention that those amounted to such very compelling circumstances.

60. It is similarly not the case that the Tribunal left out of account the length of time that the appellant had been in the UK. This was a matter that was expressly referred to on more than one occasion, including at [57] and [62].

61. Despite the reliance on *Maslov*, the appellant was not able to establish that he met any of the exceptions to deportation, regardless of the length of time that he had been in the UK. It is also important to bear in mind that his recent convictions for serious offences had occurred when he was an adult.

62. It may well be that the FtT's decision could have benefited from a more structured approach to consideration of the extent to which the appellant was able to establish an exemption to deportation, with reference to consideration of the Article 8 Rules first, but in the circumstances of this appeal any apparent lack of structure is in no sense material.

63. Accordingly, I am not satisfied that it has been established that there is any error of law in the decision of the First-tier Tribunal. Its decision to dismiss the appeal therefore stands.

Decision

64. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 24/02/16