Upper Tribunal
Immigration and Asylum Chamber **Appeal No: HU/00561/2015**

THE IMMIGRATION ACTS

Heard at: Royal Courts of Justice	**Decision Promulgated**
On: 18 July 2016	**On: 20 July 2016**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

CSC
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms Elliott-Kelly, Counsel instructed by McKenzie, Beute & Pope

DETERMINATION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or otherwise 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. I make this order in order to prevent a risk of serious harm arising to the appellant's minor child.

2. This appeal is against the decision promulgated on 14 January 2016 of First-tier Tribunal Judge Hollingworth which allowed the respondent's appeal against a decision dated 21 May 2015 refusing a human rights application.

3. For the purposes of this decision I refer to the Secretary of State as the respondent and to Mr C as the appellant, reflecting their positions before the First-tier Tribunal.

4. Mr C was born in 1960 and is a citizen of a Commonwealth country. He maintains that he came to the UK in 1972 and was present in the UK on 1 January 1973. He argues that he is therefore exempt from deportation by operation of s. 7(1) of the Immigration Act 1971 and s.33(1)(b) of the UK Borders Act 2007. I return to this disputed matter below.

5. What is common ground is that Mr C committed a wide variety of offences between 1981 and 2007. Those offences included robbery, burglary, forgery, handling, possession of offensive weapon in public, possession of controlled drug, cultivating cannabis, and dishonestly obtaining electricity.

6. On 25 June 2013 he was convicted of the offence of supply of Class A drugs and on 24 July 2013 received a sentence of 42 months. As a result of the respondent made a deportation order against him on 26 November 2014.

7. The appellant made submissions under Article 8 ECHR concerning his family and private life. In a decision dated 21 May 2015 the refused the appellant's human rights claim.

8. The appellant's appeal against that decision came before First-tier Tribunal Hollingworth on 1 October 2015 and 14 December 2015. The dispute as to when the appellant arrived in the UK and his attempts to obtain his full file from the Home Office in order to support that part of his case appears to have been a prominent feature of the litigation. The appellant maintained that serious formal attempts had been made to obtain his full Home Office file (and those of close relatives) in order to establish that he came to the UK in 1972. It appears that the hearing on 1 October 2015 was adjourned until 14 December 2015 in order for the appellant's full file to be provided but that did not happen.

9. Judge Hollingworth commented thus at [68]-[72]:

> "68. I find that it is clear that insufficient attention has been paid to the

range of potential material available and to actual material namely in the fourth file not available to the Home Office Presenting Officer before me. My conclusion is that the deportation decision taken by the Respondent in the first place has been taken in the absence of all the potentially available for available material capable of shedding light on the date of the first arrival of the Appellant in the United Kingdom.

69. The issue is of central importance to the case in deciding whether the Appellant can be the subject of automatic deportation or not. I have set out the evidence given at the hearing before in October above. Witnesses on the Appellant's behalf have given clear evidence that he arrived before 1st January 1973. The gap in time between that date and the first available documentary evidence is a short one. The Home Office would clearly have wanted to know when the Appellant's brother [RC] arrived in the United Kingdom before taking any steps in relation to him becoming a British citizen. The Respondent would have had an interest in finding out when he first arrived in the United Kingdom.

70. The Respondent has not only failed to gather all the relevant information in the first instance before making the deportation decision but has failed to answer the Subject Access Requests made by those on behalf of the Appellant which have been designed for fairness to be achieved in this case.

71. I find that the Respondent has failed to act in accordance with the law by failing to seek all the relevant information before making the deportation decision in the first place. I find that this failure to act in accordance with the law has established a theme to which the Respondent has adhered, given the failure to act within the statutory timescale in response to the Subject Access Requests which have been made. Further material under a covering letter dated the 24th December 2015 is attached to the file.

72. I allow the appeal on the basis that the Respondent has not acted in accordance with the law in the making of the deportation decision."

10. The "Notice of Decision" then states "Appeal allowed to the extent indicated above".

11. The respondent's challenge to those paragraphs is that the First-tier Tribunal did not have jurisdiction to allow the appeal in those terms. The changes to the appellate system brought in by the Immigration Act 2014 meant that the appellant could only appeal on human rights grounds and the Tribunal could only allow or dismiss a human rights appeal. The appeal was not against the making of the

deportation order. There was no jurisdiction for a "not in accordance with the law" decision or remittal to the respondent for a new decision. The judge should have made a decision on the Article 8 claim.

12. Ms Elliott-Kelly did not dispute the lack of statutory jurisdiction for allowing the appeal on a "not otherwise in accordance with the law" basis, that option having been removed from the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014.

13. She maintained that as the First-tier Tribunal was undoubtedly seized of an Article 8 appeal, it was open to Judge Hollingworth to apply the five "Razgar questions" from R (ex parte Razgar) v SSHD [2004] UKHL 27. This is what he did, answering the third question as to whether the interference with the appellant's rights was "in accordance with the law" in the appellant's favour.

14. The "Razgar questions" are set out at [17] of the decision of the House of Lords as follows:

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

15. It is not possible to read the determination of Judge Hollingworth as asking and answering any of those questions. There is no reference to or substantive consideration at all of the "Razgar questions". There is no application of any legal matrix relevant to the Article 8 ECHR appeal before him in the material parts of his decision set out above.

16. The appeal was allowed as the First-tier Tribunal purported to exercise a jurisdiction no longer open to it, finding that the respondent acted unlawfully in failing to obtain proper information on when the appellant came to the UK before making a deportation order and in failing to provide that information when formally requested to do so by the appellant and the Tribunal. There was no

statutory jurisdiction for allowing an appeal on that basis and in doing so the First-tier Tribunal fell into legal error.

17. For these reasons I set aside the decision in order for it to be re-made.

18. The parties submitted that in the event of an error of law being found, the appeal should be remitted to the First-tier Tribunal as no substantive findings of fact at all were made on the appellant's Article 8 claim. That appears to me also to be the correct course of action. Notwithstanding what is said at [68] of the decision of Judge Hollingworth, there is no extant finding on when the appellant came to the UK. A finding in favour of the appellant on this point is likely to have a highly material impact on an Article 8 decision given the submission made by Ms Elliott-Kelly on the relevance of the third "Razgar question" and, independent to that point, any consideration of the provisions of paragraphs 398-399A of the Immigration Rules and s.117 of the Nationality, Immigration and Asylum Act 2002.

Decision

19. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.

20. The appeal will be re-made in the First-tier Tribunal

Signed:

Date: 19 July 2016

Upper Tribunal Judge Pitt