



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00896/2013

THE IMMIGRATION ACTS

Heard at Newport
On 22 November 2013

Determination Promulgated
On 16 December 2013
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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MWH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Price instructed by Mohammed & Co Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Afghanistan who was born on 27 June 1976. On 1 October 2009, he was convicted at the Cardiff Crown Court of conspiracy to supply a controlled drug and on 5 March 2010 was sentenced to a term of 5 years imprisonment. The appellant appealed against that conviction and sentence and on 2 November 2010 the Court of Appeal reduced the appellant's sentence to one of 3 years and 8 months.
3. On 4 November 2010 the appellant was served with liability to automatic deportation under the UK Border Act 2007. On 7 March 2011 the appellant claimed asylum. On 31 March 2011 the appellant was served with a notice indicating that s.72 of the Nationality, Immigration and Asylum Act 2002 applied, namely that he had been convicted of a particularly serious crime and there was a presumption that he was a danger to the community such that his deportation was justified even if he was a refugee. On 15 August 2012, the appellant underwent an asylum interview. On 16 February 2013, the appellant's application for asylum was refused. In a decision letter of that date, the Secretary of State rejected the appellant's account to be at risk from the Taliban and concluded that, in any event, he had not demonstrated an objectively well-founded fear of persecution in Afghanistan. Further, the Secretary of State concluded that the presumption in s.72(2) that the appellant had been convicted of a particularly serious crime and was a danger to the community had not been rebutted such that his deportation would not breach the Refugee Convention. The Secretary of State issued a certificate under s.72(9) that the presumption in s.72(2) applied. Finally, the Secretary of State concluded that the appellant's deportation did not breach Article 8 of the ECHR.
4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 18 June 2013, the First-tier Tribunal (Judge A Cresswell and Mr M E Olszewski JP) dismissed the appellant's appeal on all grounds. First, the Tribunal concluded that the appellant had not rebutted the presumption under s.72(2) and so dismissed his appeal under the Refugee Convention. Secondly, the Tribunal concluded that the appellant was not entitled to humanitarian protection under Article 15(c) of the Qualification Directive (Council Directive 2004/83/EC) or under Articles 2 and 3 of the ECHR. Finally, the Tribunal concluded that the appellant's deportation would be a proportionate interference with the family life established between himself and his wife and step-children and step-grandson. Consequently, he had not established a breach of Article 8 of the ECHR.
5. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds. Permission to appeal was initially refused by the First-tier Tribunal but on 14 August 2013 Upper Tribunal Judge Kebede granted the appellant permission to appeal. Thus, the appeal came before me.

The Submissions

6. On behalf of the appellant, Mr Price focussed his submissions upon ground 1 and ground 4. He placed no reliance upon ground 2 (a challenge to the credibility of the

appellant and other witnesses); ground 3 (reliance upon the Immigration Rules) and ground 5 (the Tribunal's citation of case law).

7. First, Mr Price submitted that the Tribunal had failed properly to assess the risk of the appellant reoffending in the future. He submitted that the Tribunal was required to take into account the appellant's post-release history (see *Masih (Deportation – Public Interest – Basic Principles) Pakistan* [2012] UKUT 0046 (IAC)). Mr Price submitted that the Tribunal had failed properly to take into account and give adequate weight to the fact that since the appellant's release from immigration detention in June 2011 he had been living in the community for 2 years (by the date of the hearing) without offending. Mr Price submitted that the Tribunal had been wrong in para 26(xii) of its determination to note that, although the appellant had been out of trouble since his release from prison on licence, for most of the period he had been under the supervision of the Probation Service.
8. Mr Price submitted that the failure to properly consider the risk of the appellant reoffending both vitiated the Tribunal's assessment of proportionality and its conclusion that the presumption under s.72(2) of the 2002 Act had not been rebutted.
9. Secondly, in relation to ground 4, Mr Price submitted that the Tribunal had failed to take into account that the appellant had been granted indefinite leave to remain in March 2005. Mr Price submitted that not only immigration law breaches but also a clean immigration history should be taken into account and he referred me to a decision of the Strasbourg Court in *Omoregie and Others v Norway* (Application No 265/07) [2009] Imm AR 170. He submitted that the fact that the appellant had been granted indefinite leave to remain was relevant in the proportionality assessment as it demonstrated solidarity and the nature of his family ties in the UK which is a relevant criterion when assessing proportionality. He relied upon the Strasbourg Court's decision in *Üner v Netherlands* (Application No 46410/99) [2007] Imm AR 303.
10. Mr Price pointed out that the Tribunal had itself considered that the question of proportionality was "quite finely balanced" (see para 55 of the determination). He submitted that if the Tribunal had taken into account that the appellant had ILR and had been free from offending for two years, these factors might well have made a difference to its assessment of proportionality.
11. On behalf of the Secretary of State, Mr Richards submitted that the Tribunal had conducted a thorough review of the relevant evidence and had carried out properly the balancing exercise inherent in proportionality.
12. As regards the risk of reoffending, Mr Richards acknowledged that the Tribunal was in some difficulty in the absence of an OaSys Report or any other report dealing with the appellant's risk of reoffending. Nonetheless, Mr Richards submitted that the panel was required to make its own finding. He pointed out that in paragraph 55 of its determination, the Tribunal had concluded that the "likelihood of repetition is difficult to determine" but had noted that the appellant's offence of conspiracy had

been carried out over a year and he had made no real efforts to mend his ways. Mr Richards pointed out that the Tribunal noted that the appellant's offence was a "very serious offence". He submitted that the seriousness of the offence and the public interest in deterring the commission of such serious offences was taken into account by the Tribunal and it was a matter for the Tribunal as to what "weight" it gave that factor and the other relevant factors taken into account.

13. As regards the appellant's immigration status, Mr Richards submitted that, given the nature of his offending, that he had ILR was a fairly neutral factor and, even if that had not been taken into account, it was not conceivable that the Tribunal would have come to a different conclusion if it had taken that factor into account.

Discussion

14. I deal first with ground 1.
15. The appellant came to the UK in 1999. He claimed asylum but that was refused and he was granted leave to remain until 22 March 2005. On 12 December 2002, he married a British citizen (Mrs "H"). On 17 March 2005 he was granted indefinite leave to remain. In April 2008 the appellant and Mrs H divorced. On 15 October 2009, the appellant remarried Mrs H. The evidence before the Tribunal was that Mrs H had four children, two of whom lived with the appellant and Mrs H. One of Mrs H's children also had a son.
16. The Judge dealt with the relationship between the appellant and Mrs H and her children at para 26(xiii)-(xiv) as follows:

"26. (xiii) Mrs H described a violent marriage to her previous husband and told us that her children had had no contact with her previous husband for the past 10 years. She told us that after she had become divorced from the Appellant, he had moved out of the family home for some weeks before she felt that she had made the wrong decision. Here again it was clear that we were not being told the truth because the Appellant had in his witness statement for the hearing made no mention of an absence of weeks only and said: "*We therefore got divorced on the 8 April 2008 but after this we still kept in touch and our relationship was able to rekindle. I still loved my wife and children and as a result we remarried on 15 October 2009*". It did seem somewhat suspicious to us that the couple would remarry on 15 October 2009 some 14 days after he was convicted of a very serious offence and facing a substantial prison sentence and probable deportation proceedings notwithstanding Mrs H's evidence to the effect that the couple had always intended to remarry in May 2009. Certainly the remarriage took place when the Appellant was subject to the automatic deportation provisions by reason of the sentence he received and his situation could at its very best be described as precarious. The rosy picture that has been painted of family life may have some of its origin in rose-tinted spectacles because it is clear from the evidence we heard that Mr and Mrs H had argued such that they became divorced; the Appellant remained at home during this period of disharmony and then the Appellant was absent from the matrimonial home following the divorce and then he was absent

again whilst on remand from February 2009 until his release on licence on 30 June 2011. It is clear that the one constant and reliable source of parenting for all of the children throughout their lives has been Mrs H.

- (xiv) It is very clear to us that the Appellant is loved by his UK family and that he is very attached to the family. The Appellant currently lives with Mrs H, L and M. The Appellant has a step-daughter and 3 step-sons. K's son R, was born on 16 February 2012. We saw evidence of disturbed schooling in the case of M in 2010. M told us that the Appellant had always been his dad, this being the case since he first came into his life when M was 2 years old. M told us that he was very close to the Appellant. He told us that he would be devastated if his father was returned to Afghanistan, echoing the evidence of Mrs H and K and what we read from other family members. M told us that he is now 16 and had finished school, but that arrangements had been made for him to undertake a vocational course in mechanics from September, preparing him for anticipated work as a motor mechanic. He is on the cusp of adulthood. We have obviously had to pay close attention to the impact of any decision upon each member of the Appellant's UK family."

17. At para 51, the Tribunal accepted that:

"51. ...the Appellant does enjoy family life with his three step-sons and step-daughter and with his wife and step-grandson."

18. At para 52, the Tribunal considered the "best interests" of the children. The Tribunal noted that the,

"52. ...children have lived entirely blameless existences and they cannot be held in any way responsible for the behaviour of the Appellant".

19. The Tribunal continued:

"52. ...Whilst we have concluded that it is not in the best interests of the children to have the role model of a person such as the Appellant, involved in the large scale distribution of Class A drugs and "living a lie" so far as his family is concerned or to be influenced by the Appellant's behaviour, we have concluded that it would be in M's best interests to see and have regular access to the Appellant. As we explained above, we do not find this Appellant to be a sound role model. He has for the most part led an unemployed existence supported by his wife and we were not presented with a truthful account of his present efforts, or lack of them, to find work and were wholly unsatisfied, by his evidence, that he had made any real efforts to change his ways."

20. At para 53, the Tribunal noted that both Mrs H and the children were British citizens and that her son M was still in education and that it would not be reasonable to expect Mrs H and the children to relocate to Afghanistan. As a result, the Tribunal stated that:

"53. We have approached our decision, therefore, upon the basis that the family will be fractured in the event of the Appellant being deported and that M in

particular (and Mrs H and the other children too) will be very upset by the removal of their step-father and that the behaviour of M could be affected. We recognise too that modern forms of communication will be of little assuagement and that visits to Afghanistan would be costly and unlikely.”

21. At paragraph 54, the Tribunal again returned to the interests of Mrs H and the children, in particular M as follows:

“54. We then move on to assess the best interests of the child in the context of the overall question of proportionality. Clearly, the best interests of M form a very important and weighty factor. Weighty too is the interest of Mrs H and the other children to whom the Appellant is their father. We also need to have proper regard to the impact that the removal of the Appellant will have upon his own private life, as he had been in the UK now for a period of some 14 years, in the context of the lives of others who hold him in regard.”

22. The Tribunal dealt with the appellant’s offending as part of the proportionality exercise at para 55 of its determination as follows:

“55. In the event, we have found that the question of proportionality has been quite finely balanced. We have concluded, however, that the balance weighs more in favour of the Appellant’s deportation. We recognise that his offending was at a very serious level for a year and we must have regard to deterrence and the other factors detailed in **N (Kenya)**. Whether or not there is a likelihood of repetition is difficult to determine; on the one hand, there is only one conviction, but on the other hand, the Appellant admitted to us that his offending had carried on over a year and he provided scant evidence that he was making real efforts to mend his ways constructively. In the end, only one person has brought about the Appellant’s deportation and the sadness that that will bring to him, his family and friends, and that is the Appellant himself. He has committed a very serious offence and appears to have taken no real steps to demonstrate that there will be no repetition. He committed a serious offence for which he received a substantial sentence of imprisonment. Those involved in the supply of Class A drugs contribute to illness, death and financial loss for many citizens. The public, quite rightly, expects the UK authorities to seek to deter those involved in such serious offences; this is particularly so in the case of those who are provided with an opportunity to remain here even when they have presented a dishonest claim for asylum and then abuse that opportunity, as this Appellant has done, even repeating his falsehoods in his fresh asylum claim and being dishonest at the hearing. As Sedley LJ indicated in **Lee v SSHD (2011) EWCA**, on different facts, sometimes the bad behaviour of a father can lead to the tragic consequences of the break-up of a family; with some sadness, we have found that such is the case here. We are strengthened in that view by the guidance in **SS (Nigeria)**.”

23. That passage has to be seen in the context of the Tribunal’s earlier consideration and assessment of the evidence. The Tribunal’s reference to the fact that the appellant had provided “scant evidence” of efforts to mend his ways and had taken “no real steps” to demonstrate that there would not be a repetition, is a reference back to the Tribunal’s assessment of the appellant’s evidence in relation to what, if any, courses he had undertaken in prison and his knowledge about his licence and bail conditions following release which are at para 26(viii)-(ix) as follows:

- “26. (viii) In the refusal letter, the Respondent had commented upon the Appellant’s representations in relation to Section 72 and found that he had failed to rebut the presumptions. He had argued that the offence was a first offence, that he had taken steps to address his offending behaviour and that he no longer associated with the individuals with whom he had committed the offence. The Respondent pointed out that he had not given specific details and pointed out that the burden lay upon him to rebut the presumptions. Not surprisingly, Ms Williams explored this issue during the hearing. The Appellant appeared to be remarkably unconcerned. He was unable to provide any clarity as to courses he may have taken whilst in prison to address his offending behaviour and could only point to one course, a drugs course, which he told us he “had to do” on the instructions of his personal officer. This appeared to have been a course targeted at drug use rather than drug supply and the Appellant had not bothered to produce the certificate of the course and did not even appear to know precisely where it was.
- (ix) The Appellant’s knowledge of the controls which had been in place since his release from prison was also scant and concerning. It was only after endeavours on the part of his wife, who after giving evidence went and rang the Appellant’s probation officer, that the Tribunal received the clarity that the Appellant’s licence had been completed towards the end of last year. Mr Davies was unable to find confirmation of the appellant’s current bail conditions. Worryingly, the Appellant had little knowledge of what his bail conditions actually were and did not appear to know when giving his oral evidence that the bail conditions had been imposed by the Tribunal rather than arising from his licence. He believed that he was still under licence and did not know when his licence expired, although he did know that he had finished with his probation officer.”

24. Finally, at para 26(xi)-(xii) the Tribunal said this:

- “26. (xi) We note and take account of the fact that the Appellant has been in the UK since 1999 and has been convicted once only.
- (xii) We note that the Appellant has been out of trouble since his release from prison on licence, but that this was in the context of most of the period of the supervision of the probation service under his licence.”

25. In reaching its decision the Tribunal did not, as it noted at para 6(i) have the benefit of an OaSys or other report concerning the appellant’s offending although the transcript of the Judge’s sentencing remarks was before the Tribunal. Even in the absence of such reports, the Tribunal was required in assessing the public interest (flowing from the legitimate aim of the prevention of disorder or crime) to deal with the risk, if any, of the appellant re-offending on the evidence before it. As is well known, the public interest has three important “facets” which were summarised by Wilson LJ in OH (Serbia) v SSHD [2009] INLR 109 at [15] namely: (1) the risk of re-offending by the person concerned; (2) the need to deter foreign nationals from committing serious crimes by leading them to understand that whatever the other circumstances, one consequence of them may well be deportation; and (3) the role of

deportation as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes. Those three facets of the public interest are engaged in automatic deportation cases such as the present case (see RU (Bangladesh) v SSHD [2011] EWCA Civ 651 and EH (Jamaica) v SSHD [2012] EWCA Civ 1736).

26. As will be clear from these passages in the Tribunal's determination, which must be read as a whole, the Tribunal clearly had in mind the seriousness of the appellant's offending. He had been convicted of a very serious offence, namely conspiracy to supply Class A drugs over a 12 month period and had been apprehended in possession of ½ kilogram of pure heroin with a street value of around £225,000. The appellant was engaged in a "purely commercial enterprise" as the sentencing Judge remarked. There is no doubt that the seriousness of this offence marked it out as one which required the facet of the public interest categorised as "deterrent" to have a substantial and significant weight in the proportionality assessment.
27. I do not accept Mr Price's submission that the Tribunal failed to take into account the fact that the appellant had not committed any offences since June 2011 when released from immigration detention. They were clearly alive to that fact at para 26(xii). Likewise, they were alive to the fact that the appellant had only been convicted of one such offence and so, at least as regards serious offending, had committed no offences between 1999 and 2009 (see para 26(xi)).
28. In my judgement, the Tribunal cannot be criticised for its comment in para 26(xii) that the appellant's "clean record" since his release has been achieved during a period for most of which he was under the supervision of the probation service. Rehabilitation and reducing an offender's risk of reoffending is part and parcel of why the probation service is involved when an offender is released from prison. The Tribunal was entitled to take into account that the appellant had little knowledge of any courses he had attended in prison and of the control imposed on him whilst on licence or whilst on bail. The Tribunal had the opportunity to assess the appellant's evidence and reach the view that he "appeared to be remarkably unconcerned" when he was giving evidence on these issues.
29. In relation to the question of whether the appellant had rebutted the presumption under s.72(2), the Tribunal said this at para 30 of its determination.

"30. We find that the Appellant has not rebutted the presumption. We have had regard to the guidance of the Court of Appeal in EN in so concluding. We find that he was convicted of a particularly serious crime, which has been detailed above. He was clearly a player in a cleverly organised, sophisticated conspiracy involving a network of offenders, which involved substantial sums and which had the propensity to cause severe damage to the country's economy and the well-being of citizens of the UK. We find that he does constitute a danger to the community. He was described by the sentencing Judge thus: "*Mr H, Mr N and Mr H were collectors or couriers of heroin, each of you being arrested in possession of it*". On 27 January last year you, H, were found in possession of just short of a kilogram of powder at between 10 and 14% purity and that translates as a weight at 100% purity of something in the order of half a kilogram of pure heroin and the total street value of those drugs in the order of

£225,000." *"There is no suggestion that any of you were addicted to Class A drugs and performed roles within the conspiracy to obtain drugs to feed a drug habit. This was a purely commercial enterprise entered into for the purpose of making money from those addicted to heroin of whom you were all taking advantage".* The Appellant appears to have become involved at a moderately high level in a very serious crime where he was trusted by his fellow conspirators to be in possession of a huge quantity of drugs of a significantly high value. Such things do not happen by accident; they are planned, and the Appellant admitted to us that he had been involved for a whole year. It was suggested to us that the Appellant had shown his better side since being in prison, but we noted that he had not been wholly honest with his wife about his involvement in the offences. We also noted, for reasons which we have explained, that the Appellant was still practising deception at the hearing. His knowledge of and attitude to his licence and bail conditions was worrying. We reminded ourselves that Section 72 creates a presumption that the Appellant constitutes a danger to the community, which may be rebutted, but concluded that when all of the evidence on this issue was considered, the Appellant had been unable to rebut that presumption."

30. In my judgement, the Tribunal was entitled to reach the conclusions that it did first, in relation to the weight to be given to the public interest (para 55) and secondly, to conclude that the appellant had failed to rebut the presumption that he was a danger to the community (para 30).
31. Turning to ground 4, I am not persuaded that the Tribunal did not have in mind that the appellant had been granted ILR in March 2005. Although the Tribunal made no specific reference to it in its findings at paras 51-57, it is specifically mentioned in para 23(i) of the determination. In any event, the relevance of the appellant having ILR was, as Mr Price submitted, relevant to the criterion set out in [58] of Üner when assessing proportionality namely:
- "The solidarity of social, cultural and family ties with the host country and with the country of destination."
32. The Tribunal fully dealt with this issue. The Tribunal accepted that the appellant had family life with his wife, step-children and step-grandson. The Tribunal also accepted that the appellant had acted as a parent for his step-children for the last 14 years (see para 52). The Tribunal further found that it was "in the best interests" of M to see and have regular access to the appellant" (para 52). There is no doubt that the Tribunal took into account the "solidarity" of the appellant's life in the UK in assessing the disruption to his "family life" that would be caused by his deportation. The Tribunal accepted that the family life would be "fractured" if the appellant were deported (para 53). In itself, given the seriousness of the appellant's offending that the appellant had ILR added little weight to his claim to remain in the UK.
33. Although Mr Price relied on the Strasbourg Court's decision in Omoregie and Others, he did not refer me to any specific passage in the judgement. That was, in any event, a "removal" case rather than a deportation case. In my judgement, the Tribunal in this appeal took into account the substance of the appellant's connections with the UK but concluded that the public interest outweighed any interference with his family life. The Tribunal recognised that the question of proportionality was

“quite finely balanced”. That was, no doubt, because the effect of the appellant’s deportation would be to “fracture” his family life with his wife and step-family. In finding the appellant’s deportation to be proportionate, the Tribunal considered all relevant matters. The weight to be attached to the public interest represented by the appellant’s offending was primarily a matter for the Tribunal. Its assessment and the weight given to the public interest cannot be characterised as perverse or irrational.

34. Likewise, the Tribunal was entitled to find, having considered all the evidence, that the appellant had not rebutted the presumption under s.72(2) of the 2002 Act and as a result his deportation would not breach the Refugee Convention. As I have already indicated, Mr Price did not seek to challenge the Tribunal’s decision to dismiss the appellant’s appeal on any other ground.

Decision

35. For these reasons, the First-tier Tribunal’s decision to dismiss the appellant’s appeal did not involve the making of an error of law. Its decision stands.
36. The appellant’s appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: