Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10504/2016

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 13 September 2017	**On 19 September 2017**

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S P]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation

Appellant:	Mr T Wilding, Senior Home Office Presenting Officer
Respondent:	Ms S Iqbal, of counsel, instructed by Polpitiya & Co Solicitors

DECISION

Framework of this Appeal

1. The Secretary of State for the Home Department (the "Secretary of State") appeals, with permission, against the decision of the First-tier Tribunal (the "FtT") which allowed the appeal of [SP], whom I shall describe as "the Appellant". The scope of the appeal before the FtT is evident from [1] and [2] of the grounds of appeal:

> "*It is submitted that the Appellant's deportation and subsequent removal would be in breach of the UK's obligations under the Refugee Convention and/or the Appellant is entitled to humanitarian protection and/or deportation will give rise to a breach of Article 3 ….*
>
> *It is submitted further that the Appellant's deportation and subsequent removal would constitute an unlawful interference in his right to respect for his family and private life established in the UK contrary to Article 8 ECHR.*"

Thus the subject of the Appellant's challenge was twofold:

(i) The Secretary of State's deportation order dated 19 September 2016.

(ii) The Secretary of State's decision dated 20 September 2016 refusing the Appellant's protection and human right's claim.

(Hereinafter "the impugned measures")

2. It is not in dispute that in 1990 the Appellant, accompanied by his family members, fled Sri Lanka to India where they lived until 1994. There were then granted entry clearance to join his father in the United Kingdom. In April 2001 the Appellant applied for naturalisation as a British citizen. This application, in the wake and by reason of his convictions, was refused. The Appellant first claimed asylum in March 2016 in response to the "One Stop Notice" (Stage 1).

3. The impetus for each of the impugned measures appears from [17] of the decision letter:

> "*On 16 October 2002 at Central Crown Court you were convicted of four counts of wounding with intent to do grievous bodily harm and 1 count of murder. You were sentenced to ten years imprisonment concurrent and life, to serve a minimum of 17 years.*"

In sentencing the Appellant, the Judge recorded that he and others, having armed themselves with axes and swords, perpetrated a "*vicious and remorseless attack*" on five innocent young men who were mistakenly believed to have damaged the Appellant's brother's car.

Legal Framework

4. A brief outline of the legal framework within which the impugned measures were taken is appropriate at this stage. As is well known, the Refugee Convention (1951), an instrument of international law which forms part of the domestic law of the United Kingdom and has been ratified by 145 states, defines the term "*refugee*" and

establishes both the rights of those who satisfy this definition and the corresponding protection duties of states. Protection of the individual is secured by the core principle of *non-refoulement*. Article 33 is germane in the present context:

> "*1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*"

5. Section 72 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") provides:

> "*(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (Exclusion from Protection).*
>
> *(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –*
>
> *(a) Convicted in the United Kingdom of an offence; and*
>
> *(b) Sentenced to a period of imprisonment of at least 2 years.*"

Paragraph 334 of the Immigration Rules provides that an asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied (*inter alia*) that –

> "*(iv) he does not, having been convicted by a final judgment of a particularly serious crime, constitute danger to the community of the United Kingdom.*"

6. Accordingly, lying at the heart of the refusal of the Appellant's asylum claim is the twofold assessment of the Secretary of State, based on the (rebuttable) statutory presumption, that the Appellant's offending was of a "particularly serious" nature and in consequence he constitutes a danger to United Kingdom society.

7. Next it is necessary to consider the "automatic" deportation provisions of the UK Borders Act 2007. Section 32, under the rubric "Automatic Deportation" provides:

"*(1) In this section* "foreign criminal" *means a person–*

(a) who is not a British citizen,
(b) who is convicted in the United Kingdom of an offence, and
(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that–

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

Section 33 establishes certain exceptions to the Section 32 regime. One of these is, per subsection (2):

"*Exception 1 is where removal of the foreign criminal in pursuance of the Deportation Order would breach –*

(a) A person's Convention rights, or

(b) The United Kingdom's obligations under the Refugee Convention."

The "order" of the Secretary of State to which section 32(3)(a) refers is a Statutory Instrument, the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, which by Article 2 provides:

"*An offence of a description set out in any of Schedules 1 – 6 to this Order is hereby specified for the purposes of section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002.*"

The specified offences include, by Schedule 2, the generic category of "*Offences under the Common Law of England and Wales*" which, of course, encompass murder.

8. At this juncture it is convenient to consider those provisions of section 72 which are engaged when an appeal is brought against a decision of the aforementioned nature. Section 72(9), (10) and (10A) provide:

> "*(9) Subsection (10) applies where –*
>
> *(a) a person appeals under section 82 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and*
>
> *(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).*
>
> *(10) The Tribunal or Commission hearing the appeal –*
>
> *(a) must begin substantive deliberation on the appeal by considering the certificate, and*
>
> *(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).*
>
> *(10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.*"

SSHD Decision

9. The thrust of the Appellant's claim for asylum entailed assertions that his family home had been raided by the Sri Lankan Army when aged 9 years; the family fled to India the following day; his father is wanted by the Sri Lankan Army as the family supported the terrorist organisation LTTE; his grandfather was tortured upon returning to Sri Lanka in 1993/94; and the Appellant played football for a Tamil group in the United Kingdom. In essence, all of these claims were rejected by the Secretary of State's decision maker.

10. In a separate compartment of the decision letter it was determined that the Appellant had not rebutted the presumption that he had been convicted of a particularly serious offence, in these terms:

> "*Having considered the objective evidence it is not considered that you have rebutted the presumption that you have been convicted of a particularly serious offence …*
>
> *With regard to the danger that you pose to the community of the UK, for the purpose and application of section 72, there is no specific level of risk that needs to be satisfied ….*

It is therefore believed that section 72(2) should be applied ….

In light of your failure to rebut the presumptions that you have been convicted of a particularly serious offence or that your continued presence in the UK would constitute a danger to the community of the UK, it is concluded that section 72 of the [2002 Act] *is applicable to you ….*

In accordance with section 72(9)(b) of [2002 Act] *the Secretary of State hereby satisfies that the presumptions under section 72(2) apply to you.*"

The second of the two measures under challenge, the deportation order, is contained in a separate instrument.

FtT Decision

11. In allowing the appeal the FtT made the following principal conclusions:

    (i) The Appellant had rebutted the statutory presumption (*supra*).

    (ii) The public interest favouring the Appellant's deportation to Sri Lanka was outweighed by a combination of "*very strong mitigating factors*", which the Judge duly listed, giving rise to "*very compelling circumstances over and above those described in paragraphs 399 and 399A* [of the Immigration Rules]". Thus the appeal would succeed under Article 8 ECHR.

    (iii) The asylum appeal also succeeded in light of a real risk that by virtue of his serious criminal conviction and his association with LTTE the Appellant "*… would be arrested and detained and in all likelihood ill-treated and tortured under the Prevention of Terrorism Act upon his return as his name would be* [on] *a watch list*".

    (iv) The appeal also succeeded under Articles 2 and 3 ECHR.

12. The specific finding that the Appellant had rebutted the statutory presumption that he constitutes a danger to the community was based on three factors: the assessment in the OASYS Report that the risk of him re-offending was "*low*"; the positive assessments of the Appellant's progress in prison by both the Parole Board and in the NOMS report; and the Appellant's own evidence to the Tribunal.

This Appeal

13. There are, in substance, two grounds of appeal in the Secretary of State's formulation:

(i) Having regard to the assessment in the OASYS Report that the Appellant poses a high risk of serious harm to the public (in the event of the low risk of reoffending materialising) the FtT's finding that he has rebutted the presumption that he constitutes a danger to the community is irrational; or is not adequately measured; or is unsustainable by virtue of the Tribunal's failure to properly weigh all facts and factors bearing on this issue.

(ii) The FtT "*… failed to consider the requirements of the Immigration Rules*" (without particularisation) and failed to give effect to section 117C of the 2002 Act.

Permission to appeal was granted in the following somewhat cryptic terms:

> "*It is arguable that the Judge may have materially erred in the assessment of risk under the section 72 certificate and regarding the application of section 117 within Article 8.*"

Consideration and Conclusions

14. Properly analysed, there are three grounds of appeal.

15. The first ground of appeal relates to the FtT's approach to the assessment in the OASYS report which was twofold: first, that the Appellant posed a high risk of serious harm to the public and, second, that he presented a low risk of reoffending. The Tribunal concentrated solely on the latter to the exclusion of the former in its consideration of whether the statutory presumption had been rebutted. It did so to the extent that a key sentence in the determination namely the first in paragraph 83 suffers from a manifest lack of coherence and intelligibility. Figuratively, it pole vaulted over the first of the two assessments. In my judgement a clear error of law was thereby committed.

16. The essence of the second ground of appeal may be expressed in a number of ways. Fundamentally it resolves to a failure on the part of the FtT to give proper consideration and effect to paragraphs 399 and 399A of the Immigration Rules before proceeding to apply the test which I shall in shorthand describe as the "over and above" test. Logically this test cannot be applied unless and until proper consideration and effect has been given to paragraphs 399 and 399A: see Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC). This exercise entails the making of appropriate findings and evaluative assessments on the part of the Tribunal. There was an outright failure on the part of the FtT to carry out this exercise. It follows ineluctably that paragraph 106 and following of the determination are unsustainable in law.

17. The gist of the third ground of appeal is that the FtT failed to give effect to Section 117C of the 2002 Act. The Tribunal was obliged by statute to do so. There is no exception to that absolute duty. The FtT has failed to do so expressly. That is not automatically fatal since it was in principle open to the Tribunal to do so in

substance. However it failed to do so. The nature of the task required of the Tribunal under Part 5A of the 2002 Act has been considered extensively by this Tribunal in, amongst other cases, Deelah and Forman. There is nothing in the decision of the FtT which would warrant the conclusion that the absolute duty to give effect to Section 117C of the statute has been carried out by the judge. It follows that the third ground of appeal succeeds also.

18. As a result, I order that the decision of the FtT be set aside. In light of the legal infirmities in the decision which I have diagnosed remittal to the FtT is appropriate. Having heard both representatives on the issue, the Tribunal's findings in respect of Articles 2 and 3 ECHR are preserved. The appeal will be reheard by a different constitution of the FtT.

Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 13 September 2017