Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00253/2012

THE IMMIGRATION ACTS

Determined On The Papers at Field House	**Determination Promulgated**
On 28 August 2013	**On 18 September 2013**
	.....

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ANAND KUMAR JAIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant is a citizen of India, born on 8th May 1965. On 12th April 2012 a deportation order was made by virtue of Section 32(5) of the UK Borders Act 2007.

2. The appellant seeks to appeal against that decision contending that his removal from the United Kingdom would be in breach of his fundamental human rights.

3. His appeal came before First-tier Tribunal Judge Paul and Mrs Holt (non-legal member) for hearing on 30 July 2012.

4. The appellant had first arrived in the United Kingdom on 9 June 1999 with entry clearance as a work permit holder. On 24 February 2004 he applied for indefinite leave to remain for himself, his wife and two children. That was granted.

5. On 3 April 2006 application was made by the Indian authorities for his extradition to India.

6. On 22 April 2008 the appellant was convicted at Southwark Crown Court for conspiracy to defraud and sentenced to eight years and six months' imprisonment and disqualified from being a company director for ten years. His application for leave to appeal against conviction and sentence was refused by the Court of Appeal on 21 May 2012.

7. It was this offence which brought into operation the automatic provisions of deportation.

8. In the course of the hearing before the First-tier Tribunal the appellant relied heavily upon his family and private life in the United Kingdom and members of the family gave evidence in the course of the hearing. The Tribunal concluded that it was not disproportionate to remove the appellant from the jurisdiction.

9. Grounds of appeal were submitted essentially taking issue with the approach of the panel to Article 8 of the ECHR. Leave to appeal was granted by a Judge of the First-tier Tribunal on 9 November 2012

10. Thus the matter came before me on 18 March 2013.

11. Two matters of significant concern were highlighted at that hearing. The first matter of concern was to understand clearly what the Tribunal was seeking to say as the relationship between the Immigration Rules as now amended and the application of the principles under Article 8 of the ECHR. The panel did not seem to adopt the two stage process as set out in the decision of **MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)**. It is far from clear as to whether the exceptionality test to be applied under the Immigration Rules was applied by the panel to its consideration of Article 8 of the ECHR. Also a matter of concern was whether the best interests of the appellant's son and daughter had been fully and properly considered in the analysis that was conducted.

12. There was a third although perhaps less central matter which arose, namely the criminal proceedings in India and the fact that a warrant for his arrest had been issued. That was perhaps a relevant consideration in the exercise of proportionality.

13. It was not suggested by either party that the appellant would succeed under the Immigration Rules but it was argued that he might succeed in respect of Article 8 of the ECHR.

14. In the circumstances, therefore, I indicated that the decision of the panel in respect of the Immigration Rules should stand but that the decision in respect of Article 8 of the ECHR should be set aside. I gave directions for a rehearing on that aspect.

15. One feature to be raised was whether or not that rehearing should be by way of an oral hearing or whether the decision could be made upon the papers.

16. In the event it was agreed that I should decide the issue of Article 8 ECHR on the papers, in the light of the evidence that had been presented before the Tribunal and allowing the opportunity for any additional evidence to be presented. That opportunity now having been given I proceed to determine the relevant issues in the appeal upon the papers.

17. I bear in mind the very detailed bundle of documentation that has been presented before the panel on the previous occasions which extends to 167 folios. I also note the chronology together with a very helpful skeleton argument submitted by Mr Paul Richmond of Counsel dated 10 May 2013. In addition to the witness statements that were before the Tribunal I note a further witness statement of Simon Barker producing an exhibit, namely the judgment of Senior District Judge Howard Riddle dated 20 January 2012 in the extradition proceedings. There are also a number medical letters relating to Miss Tanu Jain.

18. A helpful starting point may well be to set out briefly the evidence which was presented before the First-tier Tribunal. It is to be noted that at that the appellant, his wife and two children gave evidence. I bear in mind the nature of that evidence taken together with the written statements which they had prepared.

19. The appellant married his wife in 1990 and they have two children, Tanu, a girl, born on 13 July 1991 and a son, Tanmay born on 5 May 1995. They came to the United Kingdom in June 1999 at a time when his children were aged 8 and 4 respectively. His wife and children are British citizens.

20. During his life in the United Kingdom the appellant was always employed. He worked for a company which went into liquidation and was the subject of investigation by the Serious Fraud Office. The family purchased a property in North London which was sold when he went into custody and the family currently live in rented property. The children had been brought up essentially as English children. Tanu has recently graduated with a first-class degree in business administration and Tanmay attends a prominent public school.

21. The appellant was the eldest of three brothers, being brought up in India. His father worked as a company secretary although now retired. The appellant enjoyed a successful career in business in India prior to coming to London. The appellant's wife spoke of the difficulties in the family coping in the absence of the appellant while he served his prison sentence and stressed how difficult it would be for her and the children to move to India. She was working and had established an independent life in England which would be more difficult for her in India. Tanu explained that she had ambitions to do an MBA and had career ambitions in finance or education. Tanmay explained that he was hoping to go on and do medicine. Both children emphasised the difficulties that they had encountered in the absence of their father and the supportive role that he played since coming home.

22. The grounds of appeal cite **Sanade and Others (British children) Zambrano – Dereci) [2012] UKUT 0048 (IAC)** and **Rios Zambrano (European citizenship) [2011] EUECJ Case C-34/09 OJ**. It was said that it would be unreasonable and/or unlawful to expect the children to relocate to India or indeed to expect the appellant's wife to do likewise.

23. It seems to me, looking as the case as a whole that it would not be reasonable or proper to decide this case on the basis that they could reasonably be expected to return to India with the appellant.

24. This is clearly a case where there would be a significant interference with private and family life if the appellant were removed. It is necessary to determine the nature and quality of that private and family, life balancing it with the public interest in removing the appellant from the jurisdiction. In essence it is necessary to consider the principles as set out in the case of **Razgar [2004] UKHL 27.** Essentially in this case it is clearly obvious that removal would be an interference having such consequences of gravity as potentially to engage the operation of Article 8. The real issue in this case is whether such interference is necessary and whether such interference is proportionate to the legitimate public end sought to be achieved.

25. In assessing that family and private life it is perhaps of some considerable importance to note the nature of the offending behaviour which led to the making of the deportation order itself. In that connection I consider the sentencing remarks of His Honour Judge Wadsworth QC of 5 June 2008. The appellant was sentenced as one of three convicted of a conspiracy to defraud banks, both in the United States and in the UK. That conspiracy ran from the opening of the business in London in 1996 throughout the liquidation of companies in May 2002, a period of some six years. Over that period there was a collusion between offices in New York and London to obtain money from banks by an entirely fraudulent system of metal trading. Over those years there were created companies whose prime purpose was to deceive banks. There were well over 200 of such companies which the appellant together with others masterminded along

with his brother in America. Banks were induced by falsehoods to advance billions of dollars with effectively no security because most of the trades did not exist in any real sense and insurance policies were vitiated by fraud. The appellant and others set up a very impressive front in the UK and in New York which fooled the banks resulting in a loss to the banks of the order of $538,000.

26. In that regard it was noted that throughout the trial the appellant and the other two defendants denied any responsibility for the loss, putting the Crown to the burden of proving its case. The Judge noted that right up to the moment of verdict the appellant had shown no shadow of regret or remorse or repentance for the crime committed or for the damage which was done. Indeed the appellant sought to minimise his involvement and his responsibility.

27. The appellant relied of course upon his good character but, as the judge made reference in the sentencing remarks, that good character had been used in order to mislead banks and perpetrate fraud. There were years of calculated dishonesty and the damage to his family was done by him and not by his conviction.

28. There was clear abuse of trust which in itself was an aggravating feature together with the time and cost which had been expended on the investigation.

29. In support of the contention as to private life I have been asked to consider the good immigration history of the appellant. Although that may be so it is obviously to be seen within the context that he used his position since arriving in the United Kingdom for the purposes of perpetrating fraud.

30. In assessing the nature and quality of the private and family life it is of course important to note that from 13 December 2007 until 16 March 2012 the appellant was in custody, with all the limitations that that brings both to the enjoyment of private life and also to the maintenance and development of family life.

31. During that period the appellant's family were able to cope without him. It is perhaps a tribute to all family members that they were able to continue to develop their private and family life in difficult circumstances. His wife started working as a full-time teaching assistant at Goldbeaters Primary School since 2008, supporting herself and the two children while the appellant was in prison, such included paying for private rented accommodation.

32. Both children proceeded well in their full-time education. Tanu has completed a third year of a degree course in business administration obtaining a first-class honours degree. Tanmay is in a second year of A level studies at Haberdashers Asks Boys School having obtained excellent

grades in eleven subjects at GCSE level in May 2011. In all likelihood he will be going to university which may or may not entail living away from home during term time.

33. All family members have shown themselves resilient and resourceful in the difficult circumstances of their separation from the appellant. little has been presented to show that they would not be able to be as resilient were he to be removed from the jurisdiction. It is to be noted that Tanu, although still living at home, is now an adult and no doubt it would be reasonably likely that she would soon be making her own way in the world.

34. In respect of Tanu, I bear in mind the case of **Kugathas** and can detect from the papers no dependency over and above the normal relationship between father and daughter.

35. In that connection I note her witness statement of 18 July 2012. She speaks of the fact that since he has been home the appellant has been of great help to her sharing some of the burden of family life. She said that her mother needs the support of the appellant both financially and because she is not in good health. Tanu visited India for a month in 2011.

36. Much of the statement is directed to showing why it would not be reasonable to expect her and her mother to return to India. As I have indicated, that is not reasonably to be expected in the circumstances of this case.

37. I note also a statement from Tanmay dated 18 July 2012 which speaks of the active role that he plays at school and how he has completed his bronze and silver Duke of Edinburgh Award. He had a paper round.

38. Once again the statement was more focused upon why it would not be possible for Tanmay to return to India, which is not the issue in this case. It indicates that it is his intention to study medicine at a top UK university. It speaks of the activities that he enjoys with the appellant now that the appellant has been released from prison. The two have recently been on a holiday in India.

39. I note also a statement from the appellant's wife dated 19 July 2012. She speaks of having to sell the matrimonial home at the time when the appellant went into prison. She speaks of the fact of the time when the appellant was in prison was a difficult one for the family and she is fearful that she would not able to cope alone were he to be removed from the jurisdiction. She indicated that she has health issues such as panic attacks, anxiety and sciatica and would find it difficult to cope on her own.

40. Once again her statement is very much geared towards the issue of her removal from the United Kingdom, which is not being suggested. She went on to indicate that while her husband was in prison both children

suffered mentally and were quite withdrawn and would not go out. It took an effort to motivate them.

41. I would simply add that that description of events would not seem to be reflective of what the children themselves had to say.

42. Finally, in relation to private and family life, I have regard to the more recent evidence that has been submitted concerning the health of Tanu which speaks of her suffering severe chronic migraines since 2009. Medication has been proposed and the history of those headaches was set out in the report from the London Free Hospital NHS arising from an examination by Dr Athwal, consultant neurologist, on 3 January 2013.

43. The report sets out that as a teenager there were intermittent mild headaches occurring about once a week, sometimes triggered by fatigue or watching TV. These headaches became more severe around 2009 and a neurological examination was unremarkable. There were earlier medical reports in connection with that condition. The first in time being 18 August 2010 from the Barnet and Chase Farm Hospital, the next one being 24 February 2011 from the same hospital. There the headaches had improved. The cause of such headaches is not stated but it is to be recognised in common sense that stress and anxiety are likely to be the triggers for such matters.

44. To be balanced against the family and private life of the appellant and his family members is the nature of the offending. He is to be judged not by the nature of the offence itself and the length of sentence awarded for what is an extremely serious offence. I have had regard to the pre sentence report that was before the Criminal court, particularly to the fact that the appellant continued to deny knowledge of the transactions and throughout has sought to minimise his involvement. His actions are said to have displayed deception and manipulation. In the light of the lack of the acceptance as to his responsibility any rehabilitation work would have very limited impact.

45. The appellant has been assessed as posing a low risk of harm to the general public and a low risk of reconviction. The report stated, however, that the risks of reconviction could be significantly reduced if he were to engage in rehabilitation work to address his offending behaviour.

46. I have regard also to the OASys Report of 18 July 2012 prepared whilst the appellant was still in prison.

47. It is significant from that report that the appellant continues to deny knowledge of the fraudulent transactions and to minimise his involvement.

48. It is to be noted that in prison the appellant had a positive attitude to employment and had been making good use of his time to develop skills.

49. The author of the report identified certain behavioural issues as being relevant to the offending behaviour and to the risk of offending and harm. The risk posed in communities has been assessed as low.

50. The skeleton argument invites me to consider that the criminal offence was committed in 2002 and the appellant has not committed any offences thereafter. The nature of the offence of course was a conspiracy over a period of time. It is difficult to assess risk given the refusal of the appellant to accept that he has done anything wrong. Nevertheless there is no reason to go behind the professional assessment as to low risk.

51. However, the issue of risk is not the sole factor to be considered. I bear in mind in particular what is said by the Court of Appeal in **SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550**.

52. The judgment stresses the importance of giving due weight to the policy of deporting foreign criminals, particularly as it is represented by primary legislation and is reflective of the balance which Parliament would consider appropriate to be made. The present nature of the public interest is vividly informed by Parliament's express declaration that the public interest is injured if the criminal's deportation is not effected.

53. Lord Justice Laws perhaps summarised the decision in paragraph 55 of the judgment in this way:

> "None of these I apprehend, is inconsistent with established principle, and the approach I have outlined is well supported by the authorities considering the decision maker's mind in discretion. The leading supreme cases, **ZH** and **H(H)** demonstrate that the interests of a child affected by the removal decision are a matter of substantial importance, and that the court must proceed on a proper understanding of the facts which illuminate these interests (though the latter point there would not be with respect that the principle in **Tinizaray** should be regarded as establishing anything in the nature of general principle). At the same time **H(H)** shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of any 'exceptionality' rule, and the naming of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policy's source and the policy's nature, and in particular to the greater weight which the 2007 Act attributes to the deportation of foreign criminals."

54. At paragraph 58 Mr Justice Laws concluded:

> "I would not wish for a moment to sideline the importance of Section 55 of the 2009 Act, or the guidance issued under it ('Every child matters – change for children') or the statements of a higher authority

to the effect that the child's best interests must be properly gone into. But in the circumstances of this case it is my judgment wholly unrealistic to suppose that any further evidence, let alone enquiries (whether of the child himself or anyone else) undertaken on the initiative of the FTT, or the UT, might offer the least possibility of establishing a case under Article 8 sufficiently strong to prevail over the extremely pressing public interest in the appellant's deportation."

55. As was recognised in the case of **MF**, there is the two-fold process for the judicial consideration of Article 8. The first being the new Rules themselves which for offences over four years of length imports the concept of exceptionality. It is common ground that the appellant will not meet the Rules.

56. Thereafter judicial decision makers need to consider Article 8 being, however, duly informed as to where the public interest is considered by Parliament to lie.

57. As was recognised in the case of **Huang**, that for those who fail to succeed under the Rules it will be a small minority who would succeed under Article 8.

58. Indeed, it is to be recognised that many of those convicted of serious crimes will have their own family and children. Were such to serve to prevent removal simply in those terms there would be little purpose in legislation relating to deportation.

59. It seems to me that, in applying the principles derived from many authorities prior to SS , the crime of which the appellant stands convicted is a particularly serious one such as to entitle the authorities to express disapproval and to deter others from committing the same. Although the element of risk is one factor to be considered, it is not the sole factor to be considered. In many ways the families of those who were convicted of serious crime would have similar family difficulties to those faced by the appellant and his family, namely to cope whilst in custody and to rebuild family life upon release.

60. I do not find, in the situation and circumstances of the appellant and his family, that there is such an interdependency or emotional need that it would be disproportionate to remove the appellant from the jurisdiction. I do not find that the health needs of his wife and daughter are such to require his continuing presence in the United Kingdom. I bear in mind of course the best interests of his son and the importance of making that a primary consideration, but note that generally speaking he has been able to cope well in father's absence. I reject the evidence of his mother that he has been de motivated or withdrawn. His progress at school and the wide range of challenging pursuits and interests present a picture of someone who has responded creatively in the absence of his father and there is little to suggest that he will be unable to follow his sister into further

achievements with or without the support of the appellant. Some continuing contact can be made with the appellant through internet, Skype and visits.

61. There is one additional feature in this case prayed in aid in support of the contention that it would be disproportionate to remove the appellant and that is the extradition proceedings which he faced and which were discharged by order of Senior District Judge Riddell on 20 January 2012. It was said that to effect deportation of the appellant would, in the circumstances, circumvent those proceedings. That is to misunderstand the nature of those proceedings. It was for the Indian government to show a prima facie case against the appellant upon those offences upon which extradition could apply. It was the finding of Judge Riddell that the evidential burden had not been met.

62. The judge was satisfied that the paperwork was in order; that the person appearing before him was the person whose extradition was requested and that the offence was one which could constitute an extradition offence. The judge, however, was not satisfied as to the quality of the documentation, particularly that of an unauthenticated document.

63. The test was that set out in the Criminal Procedure Rules whether the prosecution evidence was sufficient for any reasonable court properly to convict. That was not found to be the situation.

64. The decision of the High Court in Madras, 30 August 2007 was also considered as it related to co-defendants in the same case. The appellant was only severed from that case because he was in custody in London at the time. It was noted that the High Court in Madras quashed certain of the proceedings such that certain offences no longer capable of being brought. Only the Section 132 charges remain against the defendant in India and they were not extradition offences. The Judge was at pains to indicate that he made the assumption of good faith on behalf of the Indian authorities.

65. It is significant that the Judge was not seeking to make adverse comments against the due proceedings in India but rather whether the evidence placed before him was such as to comply with the extradition requirements. There is nothing to indicate that were the appellant to return to India that he would not receive a fair hearing upon such offences are as properly to be lodged against him. His deportation is quite distinct from his extradition.

66. It is argued that were he to be arrested upon the warrant in India he may be in custody which would further restrict his ability to be in contact with his family. That may well be the case, but that difficulty would have arisen because of his conduct in India. In the absence of any suggestion of ill-will or abuse of process by the Indian authorities I see little reason why the

administration of justice in a sovereign state should not be undertaken in a lawful and proper manner.

67. I have looked at all material including the nature and extent of private and family life and the nature and extent of the offending behaviour, realising as I do that there will of course be difficulty and strains placed upon the family if separation comes to be implemented. This family is not a stranger to such separation, though clearly there may be a difference of quality between custody in the UK and custody in India, should that event arise.

68. Overall, however, I find that it would not be disproportionate to remove the appellant from the jurisdiction. The interests of the public in his removal in this case far outweigh the interests of his family in having him remain.

69. The appeal against deportation is dismissed. His appeal under the relevant Immigration Rule is dismissed. His appeal in respect of human rights is also dismissed.

Signed Date

Upper Tribunal Judge King TD