**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00169/2014

**THE IMMIGRATION ACTS**

| **Heard at Columbus House, Newport** | **Determination Promulgated** |
|---|---|
| **On 7 October 2014** | **On 16 October 2014** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**J O**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms T Mumtaz of Crown Solicitors

**DECISION AND REMITTAL**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

## Introduction

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Holder and Ms V S Street) allowing JO's appeal against a decision taken on 14 January 2014 that s.32(5) of the UK Borders Act 2007 applied and that JO was subject to the automatic deportation provisions of the 2007 Act.

3. For convenience, although this is an appeal by the Secretary of State, I will refer to the parties as they appeared before the First-tier Tribunal.

## Background

4. The appellant is a citizen of Kenya who was born on 23 September 1978. He arrived in the UK sometime in 1998 and claimed asylum on 7 December 1998. On 27 March 2001, the Secretary of State refused his asylum claim and the appellant appealed. On 4 December 2011, an Adjudicator (Mrs D Witts) allowed the appellant's appeal on the basis that he was at a refugee at risk of persecution for a Convention reason and also serious ill-treatment contrary to Art 3 of the ECHR if he returned to Kenya. The Adjudicator accepted the appellant's account that his parents had been murdered by the Kenyan police because of their politics. As a result of that appeal, on 7 February 2012 the appellant was granted indefinite leave to remain and refugee status.

5. Thereafter, between 16 August 2000 and 19 April 2005 the appellant was convicted of a number of criminal offences including the use of disorderly behaviour or threatening, abusive, insulting words likely to cause harassment, alarm or distress, attempted robbery and theft. Only in relation to two of those offences did the appellant receive a custodial sentence following convictions on 6 December 2004 and 3 January 2005 at the North West Hampshire Magistrates' Court for which he was sentences respectively to 84 days and 28 days imprisonment.

6. On 9 November 2005 the appellant was convicted at the Winchester Crown Court of rape and he was sentenced on 2 December 2005 to eight years' imprisonment. He unsuccessfully appealed against his conviction and sentence.

7. On 2 April 2009, the appellant was served with a notice informing him of his liability to automatic deportation under the UK Borders Act 2007. On 24 September 2009, the appellant was served with a notice informing him of his liability to have s.72 of the Nationality, Immigration and Asylum Act 2002 applied to his case on the basis that he had committed a particularly serious crime and was a continuing risk to the community. On 16 August 2010, the appellant was served with a notice of intention to revoke his refugee status to which his then legal representatives responded on 26 August 2010. On 24 September 2010, the appellant again was informed of his liability to have s.72 of the 2002 Act applied to him.

8. On 26 May 2011, a PAROM 1 report was prepared by the appellant's Offender Manager based, in part, upon interviews with the appellant. As a result of that report, on 12 July 2011 the appellant was interviewed by an Immigration Officer in relation to his original asylum claim as there were considered to be discrepancies between his account that led to his appeal being allowed in 2001 and what was now said to his Offender Manager.

9. On 11 October 2011, the appellant was issued with a notice of an intention to cancel his refugee status. On 3 July 2013, the appellant's refugee status was cancelled in a decision letter of that date under para 339A(iii) of the Immigration Rules (HC 395 as amended) on the basis that the appellant had misrepresented facts and used deception in order to obtain refugee status. The decision relies upon discrepancies between the appellant's original account of how his parents died and, in particular, what he told his Offender Manager as recorded in the PAROM 1 report and also in his interview with an Immigration Officer following that report on 12 July 2011.

10. On 10 May 2013, the Secretary of State made a deportation order and on 14 January 2014 made a decision that s.32(5) of the UK Borders Act 2007 applied. The appellant appealed that latter decision to the First-tier Tribunal.

## The First-tier Tribunal's Decision

11. Before the First-tier Tribunal, the appellant argued that his deportation was unlawful as he was a refugee and the cancellation of his status was not in accordance with para 399A(viii) which provides that:

> "a person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that: ....
>
> (viii) his misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of asylum; ..."

12. The First-tier Tribunal accepted the appellant's case in respect of the cancellation of his asylum status. First, the First-tier Tribunal rejected the Secretary of State's reliance upon the interview of 12 July 2011 by an Immigration Officer as not being reliable. At paras 30-31 the Tribunal said this:

> "30. The Respondent relies on an interview with the Appellant conducted by an Immigration Officer on 12th July 201[1]. This was whilst the Appellant was in prison and unrepresented.
>
> She also relies on an interview dated 26th May 2011 with his Offender Manager as part of a Parole Assessment Report.
>
> 31. We find that the 12th July interview was of 45 minutes duration yet only produced five pages of questions and answers. The interview was not taped. We find, given extent of the notes of interview relative to the duration of the interview, that it is reasonably likely that the documented questions and answers were not a verbatim account of the

whole of that interview. We would have expected more notes for an interview of 45 minutes.

We also find that the Appellant was unrepresented at that interview. There is no record of whether he was asked if he wanted to be represented.

It is clear to us from reading the questions and answers that the Appellant was unsure whether he should be answering questions about his asylum claim. He was to say that he had told everything in his original claim and that he found it too emotional to go over again. He informed the Immigration Officer at the interview of 12th July, 2011 but he was still undergoing therapy in prison for post traumatic stress disorder.

Given the cumulative effect of the above, we do not find that the interview of 12th July, 2011 is reliable."

13. Secondly, the Tribunal rejected the Secretary of State's reliance upon the Offender Manager's report based upon, in part, an interview on 26 May 2011 which the appellant disputed. At para 32 the Tribunal said this:

> "32. We have been provided with a copy of the interview with the Appellant's Probation Offender Manager on 26th May, 2011. We are mindful from the Appellant's former solicitors and the UNHCR letters that the Respondent was fully aware that the Appellant disputed what is allegedly reported by the Offender Manager regarding the past asylum claim. There is no statement from the Offender Manager dealing with that dispute nor did he attend the hearing to assist us. This is not a criticism but there is little evidence from either side to assist the Tribunal in resolving matters concerned with that dispute."

14. Thirdly, in any event, the Tribunal concluded that the discrepancies relied upon by the Secretary of State in the appellant's various accounts did not exist and, if they did, were not misrepresentations falling within para 399A(viii). At paras 33-34 the Tribunal said this:

> "33. In any event, we do not find that we can infer from what is stated in paragraph 7.1 of the Offender Manager's Report that the Appellant and his sister were in their parent's house at the time of the fire. The Offender Manager simply states at 7.1 that 'Mr [O] and his sister are reported to have survived the fire'. The Respondent does not say in her letter of 14th January why she concludes that this information is at variance with that supplied with the Appellant's original asylum application.
>
> We have considered the asylum interview and find that the gist of the interview is not at any significant variance with paragraph 7.1 of the Offender Manager's Report.
>
> 34. In any event, we do not find that a discrepancy as to age undermines the core of his claim (which included medical evidence) or his overall credibility when considering the determination of Adjudicator Mrs D. Witts promulgated on 4th December, 2001.
>
> In those circumstances, we do not find that it has been shown evidentially that those discrepancies exist or, if they do, that they can be found to be ones that can safely be termed misrepresentations."

15. Having reached those conclusions, the Tribunal found that the appellant's asylum status should not have been revoked under para 399A(iii) (see para 36). Further, the Adjudicator's findings in the appellant's favour regarding his refugee claim and in respect of Art 3 of the ECHR, therefore, stood (see para 37).

## The Secretary of State's Grounds

16. In her grounds of appeal to the Upper Tribunal, the Secretary of State sought to challenge the Tribunal's decision on two bases. First, it was submitted that the Tribunal had erred in law by making no findings in relation to the Secretary of State's decision under s.72 of the 2002 Act that the appellant had been convicted of a particularly serious crime and that his presence in the UK constituted a danger to the community of the UK. Secondly, it was argued that the Tribunal had failed to provide adequate reasons for reaching its conclusion that the revocation of the appellant's refugee status was unlawful.

17. On 16 June 2014, the First-tier Tribunal (DJ Zucker) granted the Secretary of State permission to appeal to the Upper Tribunal on both grounds.

18. Thus, the appeal came before me.

## The Submissions

19. Mr Richards, on behalf of the Secretary of State did not pursue ground 1 before me. He accepted that the Secretary of State had not relied on s.72 of the 2002 Act in her decision of 14 January 2014. He accepted that he could not, therefore, pursue the ground that the Tribunal had erred in law by failing to consider whether s.72 applied.

20. In my judgment, that concession is entirely appropriate. Section 72 of the 2002 Act was not relied upon in the Secretary of State's decision even though the appellant had earlier been informed that it was the Secretary of State's intention to rely on that provision. Likewise, there is no suggestion in the determination that the Presenting Officer relied upon s.72 at the hearing before the Tribunal.

21. Instead, Mr Richards focused and relied upon the Secretary of State's second ground.

22. First, Mr Richards submitted that there were significant discrepancies in the appellant's accounts which the Tribunal had simply "glossed over". He submitted that the Tribunal was wrong to conclude that para 7.1 of the Offender Manager's report of what was said by the appellant to the Offender Manager was not inconsistent with his original asylum account. The appellant's original account was that he and his sister were not

present when the family home was set on fire. The appellant told the Offender Manager that they had "survived the fire" and Mr Richards submitted that that was only consistent with them having been present at the fire.

23. Mr Richards submitted that there were clear discrepancies in the appellant's account of how his parents had died. In his original account, the appellant had said that the police came to the family home and the appellant, thinking they were thieves, escaped through a window. When he returned home, he found that his parents had died and saw that both had had their necks cut open. In his 2011 interview, the appellant had said that his parents were shot, and the Offender Manager's report related that the appellant had said that his parents had been killed in a fire at his family home.

24. Mr Richards submitted that the Tribunal had simply failed to deal with these discrepancies in reaching its conclusion at para 34 that there were no discrepancies. In any event, the Tribunal's conclusion that they could not be "safely termed misrepresentations" was irrational and not open to the Tribunal.

25. Secondly, Mr Richards submitted that there was nothing unreliable in the record of interview with the Immigration Officer on 12 July 2011 simply because a 45 minute interview had only produced five pages of questions and answers.

26. On behalf of the appellant, Ms Mumtaz directed my attention to a medical report of Dr Michael Seear dated 12 November 2001 which identified that the appellant suffered from PTSD. Ms Mumtaz relied upon this to explain any discrepancies. In any event, she submitted that the appellant's account was consistent, namely that he had witnessed his parents being murdered. Further, she relied upon the Tribunal's reasoning that the 2011 interview was not reliable given that only a five page record of a 45 minute interview existed.

27. In response to Ms Mumtaz's submission in respect of the appellant's mental health, Mr Richards submitted that it might have been open to the First-tier Tribunal to take into account the appellant's mental health to explain the discrepancies but, he submitted, they had not done so; they had simply stated that there were no discrepancies and that was not properly open to them.

## Discussion

28. The Secretary of State's decision letter in relation to the cancellation of the appellant's refugee status relies upon a number of claimed discrepancies or differences in the appellant's evidence including (but not restricted to) differences in his account of how his parents died in Kenya, his claimed ethnicity and his date of birth. Mr Richards focused in his

submissions upon the alleged discrepancies in the appellant's account of the attack on his family home and the death of his parents.

29. First, it was not open to the Tribunal to regard the interview on 12 July 2011 as unreliable simply because it was only 5 pages of handwritten notes for a 45 minute interview. It is pure speculation that it is not an accurate account of what the appellant said. The fact that the appellant was unrepresented and was not sure that he should be answering questions is not, in my judgment, justification to disregard the content of the interview as actually recorded unless there is good reason to doubt the answers given. There is, so far as I can see, no such reason. As I will shortly come to, the medical evidence did not explain obvious and plain contradictions in the appellant's evidence over time.

30. Secondly, there are, in my judgment, clear discrepancies in the evidence as to how his parents died. The Tribunal was wrong to conclude there were none. It is simply not consistent to say that, on the one hand, they were shot and, on the other hand, to say that their necks were cut open. Equally, it is not consistent to say that they died in the fire. There is also a potential inconsistency in the appellant's evidence as to whether he and his sister were at the house when his parents died and the house was set on fire or they were not. In my judgment, these inconsistencies are not necessarily resolved by the medical evidence concerning the appellant's PTSD. Dr Seear says, for example, in his report that PTSD survivors produce "various fragments of memory ... from time to time". He then continues:

> "It is only towards the end of a therapy that a person regains a full integrated sequential understanding of what happened to them according to a normal logical timescale. At that stage of retrieving the full memories in an intact manner is it possible to then heal the memories and then move on in life."

31. The Tribunal did not rely upon this evidence to explain any discrepancies in the appellant's accounts. In fact the Tribunal noted that "[h]is PTSD has now resolved. He does not need therapy at present" (para 14). The primary conclusion of the Tribunal was that there were no discrepancies. There clearly were discrepancies. It may well be that the medical evidence whilst explaining a "fragmented" recall, may not assist to explain wholly inconsistent accounts of how the appellant's parents were killed. I do not express a concluded view on that as that will be a matter for a future Tribunal.

32. In my judgment, the Tribunal has not sufficiently grappled with the evidence and the differences in the appellant's accounts given over time in reaching its finding that there were no discrepancies. Unfortunately, the Tribunal offers little or any reasoning for that conclusion at para 34 of its determination. It was incumbent upon the Tribunal to both grapple with the evidence and provide a stratum of reasoning to explain its conclusion. In my judgment, the Tribunal failed to consider, and provide adequate reasons for rejecting, the factual issues concerning the differences in the appellant's accounts set out in the decision letter of 14

January 2014, in particular his account of his parents' death and whether he and his sister were present. Its failure to do so, in my judgment, amounted to a material error of law in reaching its finding that para 399A(viii) did not apply so that the cancellation of the appellant's refugee status was unlawful and that, therefore, the adjudicator's finding in the appellant's favour that he was a refugee and that his return to Kenya would breach Art 3 stood so that he could not be deported pursuant to the automatic deportation provisions of the 2007 Act.

## Decision

33. The decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

34. There are substantial issues of fact to be determined. Taking into account para 7.2 of the Senior President's Practice Statement and the nature and extent of the fact-finding required, it is appropriate to remit this appeal to the First-tier Tribunal. That hearing will be *de novo*.

35. The Secretary of State does not rely on s.72 of the 2002 Act. The issues for the First-tier Tribunal will be whether the cancellation of the appellant's refugee status was in accordance with para 399A(viii) and whether, in the light of that decision, the appellant falls within one of the exceptions set out in s.33 of the UK Borders Act 2007.

36. The appeal is remitted to the First-tier Tribunal for a rehearing on that basis; the Tribunal not to include Judge Holder or Ms V S Street JP.

Signed

A Grubb
Judge of the Upper Tribunal