Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: DA/00805/2013
DA/00853/2013
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THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 September 2014	**On 6 October 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between
BS
FS
NS
JS
(ANONYMITY DIRECTION MAINTAINED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss S Jegarajah, Counsel, instructed by Vision Solicitors Limited
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination has been prepared following a resumed hearing in the Upper Tribunal at Field House. By a decision dated 28 May 2014, Upper Tribunal Judge Clive Lane found that the determination of the First-tier Tribunal dated 27 March 2014 should be set aside. The text of his decision and directions is set out below:

2. The first appellant, BS, was born on 24 July 1981 and is a female citizen of India. The second, third and fourth appellants are the children of the first appellant. I shall refer to the first appellant as "the appellant" throughout this determination.

3. The appellant was convicted on 15 May 2012 and sentenced to fifteen months' imprisonment for three offences relating to dealing with criminal property and the third offence for possessing an article for use in fraud. Her co-defendant in the criminal proceedings, her husband, was sentenced to ten years' imprisonment for five offences concerning fraud.

4. The appellant had first entered the United Kingdom in July 2003 and all of her children (except for the second appellant) were born in this country. On 15 April 2013, a decision was made to make a deportation order against the appellant under Section 5(1) of the Immigration Act 1971. Decisions were also made under Section 3(5)(b) of the Immigration Act 1971 in respect of the three dependent children. The appellants appealed against those decisions to the First-tier Tribunal (Judge Pullig; Mrs L Schmitt JP) which, in a determination promulgated on 31 March 2014, dismissed the appeals. The appellants now appeal, with permission, granted by Judge Shimmin on 22 April 2014, to the Upper Tribunal.

5. At the Upper Tribunal initial hearing, the appellants were represented by Miss Jegarajah of Counsel who had also drafted the grounds of appeal. The first challenge to the Tribunal's determination concerns the appellant's assertion that she was denied a fair hearing. The appellant had appeared without professional representatives before the First-tier Tribunal. She had, however, engaged in a lengthy correspondence with the Tribunal and the Presenting Officers' Unit concerning the documentary evidence upon which she understood the respondent intended to rely, but which she had not seen. Judge Pullig (who conducted the Case Management Review) helpfully prepared a note of that review dated 10 June 2013 in which he gives details of the problems which the appellant had experienced up to that date. However, the respondent continued to file evidence in connection with the appeal. In its determination at [49], the Tribunal wrote:

   The respondent's supplementary bundle had been submitted some time before the hearing. This [the appellant] has since, in January 2014, complained about, saying it had been served on her one hour before the hearing. We return to this later but note now that no complaint was raised about it at the time. Irrespective of the appellant's lack of knowledge of the Procedure Rules, the appellant did not mention at the hearing that she had been served late with any documents that left her unprepared or at any disadvantage. We believe she had this in good time. What was served later was a respondent's second supplementary bundle and, as will be seen below, there was nothing in that bundle that would not have already been known to her.

6. The judge goes on to give details of the contents of the second supplementary bundle at [50]:

In this bundle, there is a twelve page summary prepared by Metropolitan Police officers, from SCD9 Operation Swale tasked with combating organised immigration crime. This sets out further details of the cases against the appellant and her husband leading to their convictions. This sets out much of the detail of the cases against the couple, albeit principally Mr S.

7. The bundle also contained a case summary identifying the appellant as the account holder of several personal bank accounts, together with statements from a DC Curry and a Ms Rajshakha, a financial investigator with the National Crime Agency. The grounds of appeal [12] assert that "the bundle comprised materials that sought to incriminate the appellant by implying that the appellant was currently or had benefit from the proceeds of crime and that she paid a far greater role than that for which she was originally convicted." As the Tribunal acknowledged [22], the confiscation proceedings had led [in September 2013] to the making of a nominal order against the appellant. Whilst an order was made against her husband for £799,227.67 to be paid within six months. Miss Jegarajah submitted that the papers submitted late by the respondent sought, in effect, to go behind that order by attributing to the appellant a greater degree of criminal responsibility in the money laundering and other fraud offences for which she and her husband had been convicted. Miss Jegarajah submitted that a larger bundle of papers, upon which the respondent had relied before the First-tier Tribunal and which is referred to in the determination, had, in fact, never been sent to the appellant at all and she had not seen it until May 2014. Miss Jegarajah submitted that the unusual nature of this appeal raised complex and difficult matters (she admitted herself that she had received assistance from colleagues who had explained to her the various terms used in the documents relating to the criminal confiscation proceedings) and that it was unfair for the judge to have proceeded with the hearing without giving the unrepresented appellant the opportunity to consider all the papers.

8. Mr Saunders, for the respondent, acknowledged that the Tribunal had considered all the documentary evidence, including those papers submitted by the respondent immediately before the hearing; indeed, he submitted that the Tribunal had been obliged to set out particulars of all the evidence and had duly done so. However, he submitted that the Tribunal had restricted its determination of the appeal to the evidence concerning the appellant's own offending, including the judge's sentencing remarks and to evidence concerning the likelihood of her reoffending. Any prejudicial evidence had not, therefore, "infected" the ratio of the Tribunal's decision.

9. Evidence of an appellant's conduct may be adduced in proceedings for removal, including deportation, whilst the Tribunal is not restricted to considering evidence relating only to the index offence which has given rise to the deportation decision. However, the Tribunal has a duty to ensure that a fair hearing takes place, adjourning proceedings where necessary, to give an party sufficient time to study documents and to respond. These matters were addressed by the Upper Tribunal in *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC). In that case, the Secretary of State had sought to rely upon evidence of the appellant's conduct which had not resulted in criminal conviction. Much of the evidence was contained in CRIS reports (Crime Recording Information System). In the present appeal, the respondent has filed at the Tribunal and served upon the appellant written evidence (including the statements of witnesses who were then tendered for cross-examination at the hearing) of investigations peripheral to the appellant's conviction. DC Curry had given evidence, as the Tribunal noted, regarding "the criminal aspects" of the case, in particular the criminal offending of the appellant's husband. The financial investigator, Ms Rajshakha, had given detailed evidence regarding the application for confiscation orders. I am satisfied,

notwithstanding the Tribunal's comments at [49] that the appellant did not receive "in good time" all the written evidence upon which the respondent sought to rely. I am satisfied that the larger bundle of papers upon which the respondent relied had not, for whatever reason (it appears the appellant changed address during the course of the proceedings), ever been seen by her prior to the First-tier Tribunal hearing. I have considered those observations in the light of the conclusions of the Tribunal in *Farquharson* as [88-93]:

88. We regret the passage of sixteen months between the UKBA decision and the final determination of this appeal by the Tribunal, as the appellant has been in immigration detention throughout this time. We hope that there may be some lessons to be learned from this case that will make effective and fair decision making possible in the future within a significantly shortened time scale.

89. First, the UKBA must consider carefully what allegations of conduct it wishes to rely on in the absence of a conviction or other authoritative finding of fact. In our judgement the agency should not allege conduct that it is not prepared to prove to the appropriate civil standard. The decision in Bah demonstrates that conduct based on intelligence and crime reports can be relied on in immigration appeals provided that there is some decree of transparency about how the material is accumulated and what it consists of. If intelligence is so sensitive that a sufficient gist of it cannot be disclosed, then it should not be raised in the appeal. Mere assertion will not be enough.

90. Second, where deportation or removal proceedings are based on information derived from police sources, a police witness statement should be made available enclosing the relevant documentary material. That material must fairly reflect the strengths and weaknesses of any assessment and should not be cherry picked to present one side only if there is material that exculpates as well as inculpates. The witness statement should reveal that this exercise has been undertaken to obviate the need for third party disclosure requests under the Upper Tribunal Rules. The judge must ensure that the hearing is fair.

91. Third, material is likely to be considered the more cogent, the greater the extent to which it is supported by other relevant documents. In the present case we have searched for data relating to the incidents independent of the complainant's narrative. The CRIS extracts might have been supported by witness statements made by forensic medical examiners or eye-witnesses. This will not always be necessary, and the Tribunal is not conducting a re-trial, but it may well prove helpful. We anticipate that the CPS should be able to assist the UKBA and indeed the Tribunal and, where material is sensitive, appropriate directions as to its return and use can be made if requested in advance.

92. Fourth, the material relied on should be served on an appellant in good time so he can read it, understand it and prepare such response to it as is considered appropriate. Thus, service of the witness statement of DC Mahmood on the day of the adjourned First-tier hearing was far too late to give such a fair opportunity. Further as the grounds of appeal stated and we agree, this statement was in any event insufficient to enable the judge to reach independent conclusions without the supporting documentary material. The first tranche of such material was only served on the appellant at the adjourned date of the hearing before the Upper Tribunal; again that was far too late for this appellant to be able to absorb and respond to although he had been aware of DC Mahmood's witness statement for nearly a year. If there has been a significant shift in the way a case is put from the original decision

letter, a brief skeleton argument identifying the real issues would be helpful to the Tribunal and opposing party.

93. Fifth, it is important that legal representation should be available in such cases. The appellant told us that his reading ability is not great. He was able to read back parts of his statement to us to our satisfaction, but absorbing the detail in the CRIS reports would undoubtedly have been a challenge without professional assistance. The appellant will also have been disadvantaged by a long period of pre-appeal detention. We hope that legal aid is granted readily in such cases whatever the apparent weight of the case against him. Without it there is a very real risk that his common law right to a fair hearing will be undermined.

10. I am not satisfied, to adopt the expression used by the Tribunal in *Farquharson* that the material relied upon by the respondent was "served on the appellant in good time [so that she could] read it, understand it and prepare such a response to it as is considered appropriate." I considered the appellant's problems are compounded by the fact that she did not have a professional representative; indeed, had she been represented it is likely an application for an adjournment would have been made so the documents might be considered.

11. In the circumstances, I find that the decision of the First-tier Tribunal should be set aside. However, the onward progress of this appeal presents a number of problems. Miss Jegarajah's second ground of appeal raises the question as to whether the documents in the respondent's supplementary and second supplementary bundles should be considered by the Tribunal in any event. She relies on an unreported decision (*AG (Ivory Coast)* C5/2012/1442) in which permission to appeal was granted by Sir Stephen Sedley in December 2012:

> It is cogently arguable that the introduction of highly prejudicial police intelligence reports was procedurally and substantively impermissible. … In the present case where the *Maslov* question was critical, the reports are capable of having tipped the balance.

12. Miss Jegarajah submitted that the inclusion of the case summary exhibits and the admission of the two witnesses for the respondent raise a similar issue. Her grounds at [32] state:

> The entire case against the appellant in *these* [her emphasis] proceedings related to whether the appellant was telling the truth about whether she has benefited from criminal acts and to what extent. But that has nothing to do with the case as advanced by the respondent in writing.

13. I am satisfied that the decision should be remade in the Upper Tribunal. Mr Saunders told me that he would appreciate time to prepare his arguments in respect of this second limb of the appellant's grounds of appeal. In the circumstances, I direct that the appeal should be adjourned to a resumed hearing following which the Tribunal will remake the decision but at which the Tribunal will first consider further argument from both parties as to (a) the evidence which it should consider in remaking the decision and; (b) which findings of fact of the First-tier Tribunal (if any) shall stand.

14. I therefore direct as follows:

(i) The determination of the First-tier Tribunal dated 27 March 2014 is set aside. The Upper Tribunal shall remake the decision following a resumed hearing.

(ii) The parties shall file at the Tribunal and serve upon each other skeleton arguments which shall, inter alia, deal with:

(a) the evidence the Upper Tribunal shall consider in the appeal; and

(b) which findings of fact of the First-tier Tribunal (if any) shall stand.

Skeleton arguments shall be filed and served no later than five working days prior to the resumed hearing.

15. At the resumed hearing at Field House on 10 September 2014, Miss Jegarajah of Counsel appeared for the appellants and Mr K Norton, a Senior Home Office Presenting Officer, appeared for the respondent.

16. Both parties had, belatedly, complied with the direction to file and serve skeleton arguments. We have had regard to those written skeleton arguments and also to the oral submissions made to us. We have remade the decision and dismissed the appeal of the appellants under the Immigration Rules and human rights grounds. Our reasons for doing so are as follows:

17. At the outset of the resumed hearing, we stressed to the representatives that an error of law had been found in the First-tier Tribunal determination only in relation to the procedural matter. Having regard to the fact that the first appellant had been not represented by professional advisers before the First-tier Tribunal, the Upper Tribunal had found that a large volume of new material had been provided by the Secretary of State to the appellant but the appellant had not been given adequate time to consider that material. The Tribunal had not found an error of law in relation to the other grounds which the Tribunal had made clear by directions issued to the parties should be considered at the resumed hearing. As we explained to the advocates, we considered that the purpose of that resumed hearing was to determine whether (i) that the findings of fact of the First-tier Tribunal should stand; (ii) whether the Tribunal had regard to prejudicial evidence which it should have excluded in consideration in reaching its determination; (iii) whether the Tribunal based its findings and conclusions upon that material and (iv) if it did not do so, whether the presence of that material before it "infected" the Tribunal's reasoning in a manner which is unfair to the appellant.

18. The First-tier Tribunal considered at length the oral and written evidence of DC Curry and Mrs Rajshakha. DC Curry was formerly of the Immigration Crime Team and had been involved in investigating the criminal activities of the appellant and her husband. Mrs Rajshakha is a financial investigator with the National Crime Agency in London and had been involved in investigating the whereabouts of funds obtained by fraud. Miss Jegarajah submitted that the evidence of DC Curry and Miss Rajshakha should have been excluded entirely by the First-tier Tribunal. The Tribunal should have confined itself to consideration of the known facts, namely the

appellant's conviction at Isleworth Crown Court in May 2012 for three offences relating to dealing with criminal property and possessing an article for use in fraud for which she had received a term of imprisonment of fifteen months. Her husband had been sentenced to ten years' imprisonment for five offences of fraud. Miss Jegarajah submitted that it was legitimate for the First-tier Tribunal to have considered the judge's sentencing remarks but had, in effect, treated the evidence of DC Curry and Miss Rajshakha as established facts when there was nothing to suggest that the Criminal Court had accepted all that evidence as true. Likewise, the evidence of Miss Rajshakha which had been used in the compensation proceedings was prejudicial to the appellant, given that she had ultimately been ordered to repay only a nominal sum of £1. Miss Jegarajah submitted that it had not been open to the Tribunal to conclude that the appellant had lied to it by claiming not to know whether the sum of £460,000 illegally obtained by her husband had been spent or laundered.

19. We reject Miss Jegarajah's submission. The Tribunal has set out at length the evidence of the witnesses (including the appellant) but we reject the submission that by doing so it has in some way elevated that evidence to the level of accepted fact. The appellant and her husband's criminal offending lies at the very heart of this appeal and it was entirely proper for the Tribunal to consider evidence, from both parties, as to the whereabouts of missing fraudulently-obtained funds; the Tribunal had no idea as to the details of the agreement subject to which the confiscation proceedings had been settled and there was no reason at all for the Tribunal to have refrained from considering the whereabouts of the missing funds simply because the appellant had been ordered to make a nominal payment. Evidence as to the appellant's life style and her conduct was relevant in enabling the Tribunal to test whether her claim that she did not know what had happened to the missing funds was truthful. Indeed, as the Tribunal noted at [112] neither the appellant nor her husband had argued "about the confiscation of proceeds".

20. Furthermore, it is important to look at the actual findings of fact of the Tribunal rather than at its account of the evidence it heard. At [138 – 144] the Tribunal dealt with the appellant's credibility. The Tribunal did not accept the appellant's claim that she had only limited knowledge of her husband's business and criminal offending or that she did not know where the sum of £466,000 "had gone or what it had been spent or how much is left". The First-tier Tribunal did not accept [141] that the appellant was telling the truth when she claimed that her house had been purchased "by way of a loan from 40 or 50 people and that the £466,000 had been used or at least part of it had been used to repay them". The respondent had adduced evidence on these matters as had the appellant and the Tribunal reached the legitimate finding, supported by cogent reasons, that the appellant had not been telling the truth. We find that there is no suggestion that the Tribunal has simply accepted each and every part of the respondent's evidence as true; it has quite properly made findings on matters which were in dispute. Indeed, the appellant herself had asserted that she had been telling the truth regarding these matters and no doubt sought to advance her case before the Tribunal by doing so. These were all

matters which formed part of the appellant's circumstances to which the Tribunal properly had regard when considering Article 8 ECHR.

21. Significantly, the remaining paragraphs of the determination concerning the appellant's credibility deal with the appellant's claims that she and the children would suffer language and other problems upon return to India (which the Tribunal rejected) and the claim that she might be at risk from those individuals whom her husband had defrauded. The Tribunal rejected that claim also. Those were both matters upon which the disputed evidence adduced by the respondent had little if any bearing whatever.

22. In summary, Miss Jegarajah has failed to persuade us that the First-tier Tribunal should have excluded the evidence of DC Curry and Miss Rajshakha or that the Tribunal has in any way conducted its analysis of the evidence by accepting the evidence of those witnesses as fact; that the findings as to the appellant's lack of credibility were reached by anything other than a proper and even-handed analysis of all the relevant evidence.

23. We also rejected Miss Jegarajah's submission that the Tribunal has allowed the evidence of the appellant's husband's offending unfairly to influence its assessment of the appellant's own circumstances. We find that the Tribunal was well aware of the possible pitfalls of permitting the husband's criminal offending to taint its analysis; at [187] the Tribunal noted that;

> the appellant's conviction cannot be viewed in isolation from that of her husband. Whilst we do not impute any of his guilt to her, we do note that of which the appellant was convicted was ancillary to a fraudulent scheme specifically designed go circumvent the immigration control. Public interest is significant for that reason even though her offence is no greater than the sentence tells us.

We consider that to be an entirely correct approach. The Tribunal also correctly observed [188] that the appellant's own immigration status had been obtained for her by her husband by fraud. These observations appear in a part of the determination headed "The Public Interest"; there is no mention made whatsoever in that section of the determination to the disputed evidence upon which the respondent relied.

24. Miss Jegarajah also submitted that the Tribunal had been "left in the dark as to the nature and extent of the CPS/National Crime Agency/Police involvement and engagement with the immigration process". She noted that this was an "Operation Nexus" case involving joint operations between the police and the immigration services. She complained that the exact nature of that process had not been made clear to the appellant. Whatever the merits of Miss Jegarajah's argument, we do not see how it touches upon the legality of the Tribunal's decision. As we have stated, the Tribunal was entitled to consider the evidence of DC Curry and Miss Rajshakha and we do not accept that it should have excluded the evidence because it had not been given details of Operation Nexus or of any interaction between the immigration services and the police. Miss Jegarajah also relied upon the letter written by Lloyds PR Solicitors to the appellant which is dated 7 June 2013 and deals with an

application to vary the terms of a restraint order at Isleworth Crown Court. Recalling what had been said in court, the letter states that

> the prosecution Counsel said that the Crown hoped to effectively force the defendant to leave the UK and return to India where the Crown could monitor her to see if she spent any of the hidden assets which had allegedly been sent to India. He said that the deportation order made by the Home Office was separate and ought to be allowed to take its course.

25. Miss Jegarajah submitted that the deportation proceedings had been employed by the Secretary of State for an improper purpose, namely to held other statutory bodies in the United Kingdom to "flush out" funds which the appellant and/or her husband had hidden abroad". We do not accept that submission. It may well assist those United Kingdom enforcement authorities seeking confiscation of the appellant or her husband's illegally-gained funds if the appellant is returned to India but we do not see how that undermines or renders unlawful the Secretary of State's decision to remove the appellant under the provisions of Section 3(5) of the Immigration Act 1971. The First-tier Tribunal accepted that the appellant's deportation would be conducive to the public good; it matters not, in our opinion, whether her deportation might also happen to promote the legitimate work of crime enforcement agencies.

26. For the reasons we have given above, we find that there is no reason to revisit the findings of fact of the First-tier Tribunal. Whilst the Tribunal erred by not giving an unrepresented appellant adequate time to consider evidence adduced by the respondent at very short notice, that evidence was properly accepted as admissible by the First-tier Tribunal. Now that the appellant and her advisers have had the opportunity of considering the evidence, they have submitted nothing which would lead us to conclude that the First-tier Tribunal's analysis and its decision should be reversed.

27. In the circumstances, therefore, we have remade the decision. We find that the appeal should be dismissed under both the Immigration Rules and on human rights grounds.

DECISION

28. This appeal is dismissed under the Immigration Rules.

29. This appeal is dismissed on human rights grounds.

Signed Date 28 September 2014

Upper Tribunal Judge Clive Lane