Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01850/2013

THE IMMIGRATION ACTS

Heard at:	**Columbus House, Newport**	**Determination Promulgated**
On:	**10 December 2014**	**14 January 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

HUGO JOSE SANCHEZ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Harrington, Counsel instructed by Gloucester Law Centre
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is the continuation of an appeal by the Appellant, a citizen of Ecuador, against the decision of the First-tier Tribunal (Judge Britton and Mr G H Getlevog) dismissing his appeal against a decision made on 29 August 2013 by the Respondent that section 32(5) of the UK Borders Act 2007 applied and that the Appellant's deportation was in accordance with the Immigration Rules and would not breach Article 8 of the ECHR.

2. Following a hearing on 8 April 2014 we decided that the decision of the First-tier Tribunal to dismiss the appeal under Article 8 involved the making of an error of law and we set that decision aside. In making this decision we found no error of law in the First-tier Tribunal's decision to dismiss the Appellant's appeal on asylum, humanitarian protection and Article 3 ECHR grounds. We noted (paragraph 33 of our decision) that it was agreed by both representatives that it would be appropriate for us to consider any updating evidence, in particular in relation to the Appellant's children, and that a mental health consultant's assessment had been requested by the consultant paediatrician dealing with the child 'NJ' and that this evidence would assist us in reaching our decision.

3. At the hearing before us on 10 December 2014 the Appellant was again represented by Ms Harrington and Mr Richards again appeared for the Respondent. Ms Harrington submitted a written skeleton argument and confirmed that there were no updated witness statements and no mental health consultant's assessment in respect of 'NJ'. The only additional documentary evidence was to be three documents referred to in a letter from the Appellant's representatives being letters in respect of the minor children 'CJ' and 'NJ' and from the Appellant's Probation Officer. Ms Harrington confirmed that at the date of the hearing the Appellant's children were aged 20, 18, 16 and 14. 'OJ' is now a student at the University of Plymouth. 'JJ' has joined the army. 'NJ' is doing 'A' levels and 'CJ' is doing GCSEs.

Oral evidence

4. The Appellant gave oral evidence in English and answering questions from Ms Harrington confirmed his identity and said that since being granted bail on 28 May 2014 he has been living with his children, bonding with them and coaching and helping them with their school work. He has been trying to make up for lost time. He is especially close to 'CJ'. He spent a lot of time with 'JJ' before he joined the army. As an artist the Appellant is able to help out his eldest child 'OJ' who is studying fashion design. He reads a lot of books with his children. He has written a further three books himself. The fear of separation makes his relationship with his children more special.

5. The Appellant and his family still get support from the family who used to help look after the children when they were in Australia. One member of this family has travelled from Australia and is present in Court.
6. The Appellant said that he reports as required by his immigration bail and also reports to his probation officer under the terms of his licence. He is involved with 'Changing Times' and composes music and plays the guitar. He is making a contribution to society.

7. Asked about 'NJ' the Appellant said that she has been happier since he came out of prison although she has a lot of sad and dark moments. He needs to reassure her and to care for her and love her. She is happy with him around. The question

is what will happen when he goes. The problem is with 'NJ' and 'CJ' mostly. 'NJ' was very sick yesterday, he keeps an eye on her and he sleeps next to her. The Appellant said that he gets depressed and anxious too and they help each other.

8. Cross-examined by Mr Richards the Appellant said that it was about 7 or 8 months between the time when his wife was arrested whilst on a visit to the UK and him coming here. He did not come to the UK immediately when his wife was arrested because they had a house in Australia and the children were in school. He spoke to a solicitor in Australia. The prosecution wanted £116,000 and the only asset was the house. He needed to sell it for this purpose and also to raise money for the children to travel. It took a long time.

9. The Appellant said that the children found the separation from their mother difficult. He had to do everything for them. The Elich family were close friends and helped out a lot. Christine Elich is here today.

10. The Appellant said that he and his wife have a friendly relationship but are not living together as husband and wife. They care for their children. Asked if there was any reason why the children could not live in Ecuador the Appellant said that their mother and her parents are here. The children have been raised in English culture. His wife is totally against removing them. They do not speak the language or know the culture of Ecuador.

11. Mr Richards suggested to the Appellant that when he committed the offences for which he was imprisoned he must have known that if detected this is what he would face. The Appellant said that he did not think of the scope. It is very complicated. He has made mistakes. The children are the most important thing. He has learned from his mistakes.

12. Asked about 'NJ' and her depression the Appellant said that she was in counselling but not now. He is her medicine.

13. 'NJ' gave evidence and answering questions from Ms Harrington confirmed her date of birth (15 January 1998) and agreed that the content of her letter (page 24 of the Appellant's bundle) was true. 'NJ' said that she is in college studying photography, maths, human health and sports science. Her long term plans are to study psychology and human biology and to help children with mental illnesses. She agreed that she received counselling during the two and a half years she spent in high school. Now she is not getting any counselling. She did get some from college but could not find the time. 'NJ' said that she is coping better than last year. Asked what the effect would be if her father was deported 'NJ' said when he was in prison she sank into her deepest depression. Since he has been out she has been better. If he was taken away it would destroy everything, she would not cope. 'NJ' agreed that she has been involved with the Community Adolescent Mental Health Scheme (CAMS). This lasted about 6 weeks with one counsellor and then 6 weeks with another.

14. Cross-examined by Mr Richards 'NJ' said that she last received counselling in September 2014. She said that her depression started when her mother left and then got worse when her father left.

SUBMISSIONS

15. For the Respondent Mr Richards said that the Immigration Act 2014 applied. It should be kept in mind that the public interest is not the same as public opinion but public opinion would be outraged if someone guilty of a serious crime, who had to be dragged back to this country using extradition now says that having been dragged back he is not going to leave. He adopted what Ms Harrington said in her skeleton argument that very compelling circumstances over and above the exceptions referred to in section 117C(3) to (6) Nationality immigration and Asylum Act 2002 and paragraph 399 and 399A of the Immigration Rules have to be demonstrated. The public interest is so significant it will almost always outweigh family and private life issues. Deportation is almost always proportionate. In this case there are family life considerations. The Appellant currently spends time with his children but, said Mr Richards, we should be cautious about the rosy picture painted by the Appellant. We should look at 'NJs' evidence and be conscious of her vulnerability. Her problems were triggered by having two criminals as parents. There is no recent report from any professional medical practitioner. The evidence is that 'NJ' is coping better. There is no doubt she will be affected by her father's deportation as will other members of the family, that is what deportation does. The seriousness of the crime needs to be balanced against the rights of the individuals. This is a man who did not want to come here to face justice. The public interest in this case outweighs everything else.

16. For the Appellant Ms Harrington referred to her skeleton argument. There is no need to be cautious in accepting the Appellant's word. Each child has given a statement or letter. The children's experience in this case is unusual in context of the children of criminals. They have been dragged around the world and uprooted from their home. The circumstances are a consequence of their parents' decisions but these are particularly vulnerable children. We were asked to look at the updated information in respect of 'CJ' and 'NJ'. 'NJ' does not know what the future holds but her improvement is down to her father coming back. Referring to the 2014 Act Mr Harrington said that the Appellant is a low risk of reoffending. He is living in the community and he is not a danger. Referred by us to the Appellant's wife's statement Ms Harrington agreed that the Appellant was living with his wife and family because he needed a bail address. This is likely to be a temporary arrangement and it is likely that the children would live with their mother in the longer term.

17. We reserved our decision.

Discussion

18. This is an appeal against a decision of the First-tier Tribunal dismissing the Appellant's appeal against a decision made by the Respondent on 29 August 2013. The Respondent's decision followed the Appellant's conviction and sentence to five years imprisonment for 12 offences of fraud involving the sum of £847,575. The nature and seriousness of the Appellant's offences is clear from the Trial Judge's sentencing remarks quoted in the decision of the First-tier Tribunal. In summary this was a series of insurance frauds involving the Appellant faking his own death to make claims on insurance policies. The claims were made in the United Kingdom, the Appellant was said to have died in Ecuador and the proceeds of the crime were used by the Appellant and his wife to establish themselves in Australia. The Appellant's wife was detained when she returned to the United Kingdom for a family wedding in 2010 and, on conviction for her part in the crime she was sentenced to two years imprisonment. The Appellant returned voluntarily following the issue of a warrant of extradition. The Appellant's four children, all British citizens, have settled in the United Kingdom as a result of their parents' imprisonment here.

19. This appeal is restricted to a consideration of Article 8 of the ECHR the decision of the First-tier Tribunal having been upheld in all other respects. In undertaking this consideration we firstly have regard to the decision of the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544 holding as it does that the Immigration Rules provide a complete code for dealing with Article 8 issues in deportation cases and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. In considering Article 8 we therefore do so within the terms of the Immigration Rules. Further our decision is made after the implementation of part 5A of the Nationality Immigration and Asylum Act 2002 and as such we are required to have regard to the considerations listed in section 117C when considering whether any interference with the Appellant's right to private and family life is justified under Article 8(2). It is accepted by Ms Harrington that the Appellant is a 'foreign criminal' as defined by the Act who has been sentenced to a period of more than 4 years imprisonment. Section 117C provides

> (1) The deportation of foreign criminals is in the public interest.
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
> (4) Exception 1 applies where—
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
> (b) C is socially and culturally integrated in the United Kingdom, and
> (c) there would be very significant obstacles to C's integration into

> the country to which C is proposed to be deported.
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

20. The effect of the above is that we are considering Article 8 by reference to the Immigration Rules and section 117C above. The relevant rules, taking into account the Court of Appeal decision in YM (Uganda) [2014] EWCA Civ 1292, are those currently prevailing and are as follows

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, **if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.**
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
> (i) the child is a British Citizen; or
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

21. Although we have quoted the relevant rules in their entirety the situation for the Appellant, being a person sentenced to more than 4 years imprisonment does not allow for the application of paragraph 399 and we have therefore highlighted the very compelling circumstances provision being the means through which we consider Article 8. Section 117C makes it clear, and this is accepted by Ms Harrington in her skeleton argument, that to succeed in his appeal the Appellant needs to demonstrate very compelling circumstances over and above those described in Exceptions 1 and 2.

22. Against this background we turn to the Appellant's situation. His criminality has been referred to above. It is serious criminality that resulted in a prison sentence of 5 years. The starting point in considering the public interest question is that the public interest requires his deportation unless very compelling circumstances over and above Exceptions 1 and 2 apply. Exception 1 does not apply; there is no suggestion that the Appellant has been lawfully resident in the United Kingdom for most of his life. The first part of Exception 2 does not apply. The Appellant does not have a relationship with a qualifying partner his marriage having broken down. The second part of Exception 2 has potential application because the Appellant has two qualifying children, 'NJ' and 'CJ'. We therefore go on to consider whether the effect of his deportation on one or both of those children would be unduly harsh to that child.

23. In examining the children's situation there is no chronology detailing significant dates so it is necessary to look at the various letters and statements. All of the Appellant's children were born in the United Kingdom in the period from 1994 to 2000 and the family lived together in the United Kingdom during this period apart from about 6 months sometime after the birth of 'NJ' when the Appellant was working in the United States. The family left the United Kingdom to live in Costa Rica in September 2004 and remained there until December 2006 (Appellant's wife's letter of 10 July 2013). The longest period of settled family life with all four children appears to have been in Australia between December 2006 and September 2010 when the Appellant's wife returned to the United Kingdom for her sister's wedding but was arrested on arrival. Thereafter the children lived in Australia with the Appellant until November 2011 when they returned to the United Kingdom. The eldest child 'OJ' remained in Australia where she was studying. The Appellant was extradited from Australia to the United Kingdom in March 2012. The younger children appear to have lived with their mother in the United Kingdom in relative stability since November 2011. 'OJ' returned to the United Kingdom in November 2012. The Appellant lived separately from the

children from November 2011 until his release on bail after the end of his custodial sentence in May 2014.

24. What is abundantly clear is that the main cause of disruption to the children's lives has been due to the choices made by their parents. Firstly in leaving the United Kingdom to set up home in Costa Rica. Secondly by leaving Costa Rica to set up home in Australia. Thirdly and most fundamentally by engaging in premeditated and continuing joint and serious criminal activity. We have no hesitation in concluding that their criminal activity was premeditated because it involved firstly the obtaining of insurance and pension policies, secondly the faking of the Appellant's death and the documentation to establish that death and thirdly the making of claims under those policies. We are satisfied that it was joint not only because both parents were separately convicted by the same Court but also because with the basis of the fraud being the Appellant's death it was his wife who needed to make the fraudulent claims. It may well have been their parents' criminality that helped the family establish their settled family home in Australia and it was certainly the consequences of that criminality that blew apart that settled period of their lives. The eldest child 'OJ' speaks with clear nostalgia for this period no doubt failing to understand that the basis of this period was her parents' criminality. Indeed it is difficult not to agree with Mr Richards' submission that the children's problems stem from having criminals as parents.

25. So far as the two minor children are concerned we have carefully read both of their letters and have heard oral evidence from 'NJ'. It is impossible not to be moved by this evidence and we have no doubt that both children are devoted to their father and that they have already been deeply traumatised by their parents' imprisonment and the loss of their home in Australia. This trauma is the direct effect of their parents' criminality. We have considered the effect on these two children of their father's deportation and have no doubt that this will come as a further blow to both children. In this respect we have considered the letters from Julie Fitzhenry concerning both 'NJ' and 'CJ' and the letter from Jennie Hamilton concerning 'NJ'. We have also taken particular note of 'NJs' overdose. There is no separate mental health assessment concerning either child. The oral evidence suggests that both, 'NJ' in particular, are causing less concern than they were a year ago although this may well be because the Appellant has been at home with them since his release on bail in May.

26. The absence of professional mental health assessments inevitably means that a consideration of the effect of the Appellant's deportation upon his children has to be, at least to some extent, speculative. The children's vulnerability appears to have a number of sources. These sources start with the movement of the family from the United Kingdom to Costa Rica ('OJ' refers in her statement to the difficulties caused in moving to a different school, language and culture); they continue with the move to Australia; they are compounded by the sudden absence of their mother; they are compounded further by the detention of their father in Australia; added to all this is the loss of the home in Australia, the move to the

United Kingdom and the re-establishment of their family here. For the last three years the children have had a settled home with their mother and the intention, their parents' relationship having broken down, is that for the remainder of their childhood they will remain living with their mother and have liberal access to the Appellant. The current situation, the Appellant living with them in the family home, is intended to be temporary in any event.

27. In our judgement the effect of the Appellant's deportation on the children would not be unduly harsh. The Appellant is a foreign criminal who returned to the United Kingdom subject to extradition proceedings to face the consequences of his crime and his deportation at the end of his criminal sentence is the final part of the process. There is no doubt that the consequences of their parents' criminality have already been harsh so far as the children are concerned but it is difficult to single out the final stage of those consequences as being unduly harsh. The elder children are no longer minors; both are living away from the family home as expected when children reach adulthood. The younger children are now aged 16 and 14 and are moving towards adulthood. They are of an age where they understand what is happening and why it is happening and will be able to make their own choices about their communication with their father after his deportation and will, if they wish, be able to travel to visit him. Deportation does not mean that the children will lose contact with their father. Their contact with him has been limited by the events of the past 4 years and his deportation is a continuation of that limitation following from the lawful consequences of his own actions.

28. In our judgement the Appellant does not fall within Exceptions 1 or 2 and it must therefore follow that we do not consider there to be very compelling circumstances over and above the circumstances described in those exceptions. Ms Harrington submits (paragraph 10 of her skeleton) that this requirement should be interpreted consistently with the Strasbourg jurisprudence and in doing so does not seek to identify any very compelling circumstances over and above the deportation having an unduly harsh effect on the Appellant's minor children. The Respondent's guidance does indeed suggest that all relevant factors should be taken into account (Immigration Directorate Instructions – Chapter 13 – criminality guidance in Article 8 ECHR cases – Version 5.0 - 28 July 2014)

> 6.6 When considering whether or not there are very compelling circumstances decision-makers must consider all relevant factors that the foreign criminal raises. Examples of relevant factors include
> • the best interests of any children who will be affected by the foreign criminal's deportation;
> • the nationalities and immigration status of the foreign criminal and his family members;
> • the nature and strength of the foreign criminal's relationships with family members;
> • the seriousness of the difficulties (if any) the foreign criminal's partner and/or child would be likely to face in the country to which the foreign criminal is to be deported;

> • the European Court of Justice judgment in Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09;
> • how long the foreign criminal has lived in the UK, and the strength of his social, cultural and family ties to the UK;
> • the strength of the foreign criminal's ties to the country to which he will be deported and his ability to integrate into society there;
> • whether there are any factors which might increase the public interest in deportation – see section 2.3;
> • cumulative factors, e.g. where the foreign criminal has family members in the UK but his family life does not provide a basis for stay and he has a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are very compelling circumstances, both private and family life must be taken into account

The guidance does however make it clear that the more serious the offence the greater the public interest in deportation and that previous use of deception to obtain leave to remain is capable of adding weight to the public interest (paragraph 2.3). Further the impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected (paragraph 2.5). Further

> 6.6 A foreign criminal sentenced to at least four years' imprisonment must be able to show that there are very compelling circumstances over and above the circumstances described in the exceptions to deportation. This is because Parliament has expressly excluded those sentenced to at least four years' imprisonment from the exceptions to deportation. Missing out on the exceptions by a small margin, or a series of near misses taken cumulatively, will not itself be compelling enough to outweigh the public interest in deportation. The best interests of any child in the UK who will be affected by the decision are a, but not the, primary consideration and must be not only compelling, but very compelling, to outweigh the public interest.

29. In balancing the Appellant's family life with his children and his private life in the United Kingdom against the public interest in deportation it is almost beyond peradventure that the best interests of the Appellant's minor children are for the Appellant to be allowed to remain in the United Kingdom. There is no suggestion that the children will leave the country to live with the Appellant. However it is also in the best interests of the children to live with their mother who is their primary carer and has held this role for the last three years. Their mother's statement makes it very clear that this role will be maintained whether or not the Appellant remains in the country.

30. In assessing the various factors put forward by Ms Harrington in her skeleton the Appellant has committed a serious offence and whereas it was one of dishonesty rather than violence, drugs or an offence of a sexual nature it was in our view, and in the view of the Trial Judge, at the very serious end of the dishonesty scale. Further this is an Appellant who used a false identity to not only obtain indefinite leave to remain in the United Kingdom but also to obtain British nationality. The Appellant resided in the United Kingdom from 1992 to 2004 but he did so

unlawfully because the basis of his stay was through the adoption of a false identity. He has been residing in the community since May 2014 without committing further offences and remains subject to licence conditions and the risk of re-offending is low. However the Appellant is only living in the United Kingdom because he was subject to extradition proceedings to this country to stand trial. Up to that point he had settled and made his home by choice in Australia. The Appellant does not, and has never had, any lawful status in the United Kingdom. His relationship with his wife has broken down so, even without his previous deception and his criminality, he would have no basis for remaining in the United Kingdom in accordance with the Immigration Rules.

31. Taking all of the above into account it is our finding that public interest in deportation far outweighs the family and private life that the Appellant has established in the United Kingdom. For this reason this appeal is dismissed.

Conclusion

32. The decision of the First-tier Tribunal involved the making of an error of law and has been set aside.

33. We remake the decision. This appeal is dismissed by virtue of Article 8 ECHR.

Signed: **Date: 12/01/2015**

J F W Phillips
Deputy Judge of the Upper Tribunal