Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00370/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 September 2013	**On 16 September 2013**
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Before

LORD BANNATYNE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE WARR

Between

FEI ZHANG

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Tan, Solicitor
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This matter came before us as an appeal from a determination of the First-tier Tribunal ("The Tribunal") promulgated on 3 July 2013 in terms of which it had

refused the appellant's appeal against the decision of the Secretary of State dated 11 February 2013 to the effect that Section 32(5) of the UK Borders Act applied to the appellant and that he was to be automatically deported from the United Kingdom as a foreign criminal, having been convicted on 14 May 2008 of offences of trafficking and prostitution and sentenced to eight years' imprisonment.

Background

2. The appellant is a national of the People's Republic of China and was born on 16 July 1968. He is said to have entered the United Kingdom in 1995 but, having entered illegally, the date and method of his entry is not clear. On 26 September 1995 he claimed asylum in the United Kingdom and on 6 August 2000 that claim was refused but he was granted leave to remain on an exceptional basis until 6 August 2004. On 25 September 2000 he married Sho Juan Zhang and on 29 January 2003, a daughter was born to the appellant and his wife. On 6 July 2004 the appellant, his wife and daughter applied for indefinite leave to remain and that was granted all three on 15 July 2005. In August 2006 the appellant's wife and daughter were naturalised as British citizens. In the meantime, the appellant's wife's son and daughter were granted entry clearance to join the family in the United Kingdom from China and they were granted indefinite leave to enter the United Kingdom on 15 August 2007. The wife's son and daughter are aged 18 and 22.

3. On 23 March 2007 the appellant was arrested and on 14 May 2008, at Worcester Crown Court, he was convicted of trafficking and controlling prostitution for gain. He was sentenced to a total of eight years' imprisonment. The appellant was notified on 27 June 2008 and again in December 2009 that he was liable for deportation under Section 3(5)(a) of the Immigration Act 1971. He responded to this, providing information about his circumstances. On 11 February 2013 he was served with a decision which included a deportation order and reasons for the deportation.

Submissions

4. Mr Tan abandoned his first ground of appeal which asserted that the Tribunal had had regard to the wrong legislation and as a result thereof had taken account of the wrong Immigration Rules. He accepted, after a short discussion on this issue, that there was no merit in this ground of appeal.

5. He did, however, maintain his second broad ground of appeal which in summary was this: the Tribunal had failed to take account of the rights of the appellant's child as a primary consideration, failed to have proper regard to the fact that the child was a British citizen and lastly failed to have regard to her best interests.

6. In development of this argument Mr Tan contended that when addressing the issue of the Article 8 claim of the appellant. The Tribunal ought to have taken into consideration the best interests of the child. He submitted that there was ample case law to show that it was not reasonable and not in the best interests of a British child

either to follow her parent to live abroad, or alternatively to expect her to live with just one parent in the United Kingdom (see: **Sanade & Others [2012] UKUT 00048 (IAC)**).

7. Moreover it was his position that in applying the relevant Immigration Rules the Tribunal had failed to take into consideration that "Rules are Rules", and that in **Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC)** and **MF (Article 8 – new rules) Nigeria [2012] 00393 (IAC)** clear concerns are expressed that the foregoing Rules do not reflect the law relating to the best interests of children. Thus he submitted that where the criteria set out in the Rules concerning minor children were not in accordance with the law, it was not lawful in the circumstances for the Tribunal to rule that deportation was in accordance with the Immigration Rules.

8. He went on to submit that the Tribunal had erred in law in that they had failed to put the interests of the appellant's daughter as a 10 year old British child as their primary consideration when assessing the proportionality issue.

9. He relied in support of his said argument on certain observations in **ZH (Tanzania) [2011] UKSC 4**. In particular he referred to the following observations:

> Lady Hale: "As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults."
>
> and
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> Lord Kerr: "The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent however, (and I think rightly so) that if a child is a British citizen, this is an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not inevitably a decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted."

10. On the basis of these observations he submitted that despite the evidence that the 10 year old British daughter of the appellant had spent all of her life in the United Kingdom, the Tribunal had unreasonably noted that:

> "There is simply insufficient evidence or detail to show that it is not reasonable for the daughter to leave the United Kingdom with her parents if necessary."

He also submitted that in relation to this the Tribunal had taken into account an irrelevant consideration as regards how this child had gained her nationality when it was noted at paragraph 31 that the "daughter's citizenship is recently acquired".

11. In conclusion it was his position that the Tribunal's investigation of a British child's best interests fell short of what was expected of a reasonable judicial process, and amounted to an error in law.

12. The third leg of Mr Tan's argument was this: the Tribunal had made unclear findings about parts of the evidence. It was his position that the Tribunal had failed to discharge its obligations as set out in **R v Immigration Appeals Tribunal, ex parte Amin [1992] Imm AR 367, QBD** where the following is said:

> "An Adjudicator should set out with some clarity what evidence was accepted, what rejected, on what evidence no conclusion could be reached and what evidence was irrelevant."

13. He then turned to look at what he contended were the specific failures of the Tribunal to meet that obligation.

14. He first contended that the Tribunal had failed to make clear what evidence it expected from the appellant when it observed in the determination:

> "There was nothing from her school that demonstrated that she is so established at the school, that she has the sort of ties there (either social or educational) that would render her removal unreasonable."

and the further observation:

> "There is simply insufficient evidence or detail to show that it is not reasonable for the daughter to leave the United Kingdom with her parents if necessary. "

Both of these observations were at paragraph 25.

15. It was, he submitted, also unclear what the Tribunal was seeking when it stated at paragraph 28:

> "We are not satisfied that the appellant has shown that he has established a family as defined under the Immigration Rules as argued…".

The Tribunal went on to observe in the following sentence that:

> "we are satisfied of the existence of the family life."

As we understood Mr Tan's position it was this: the two sentences were contradictory.

16. He further submitted that it was unclear what "real evidence of significant ties" the panel was expecting from the appellant when it stated in the determination: at paragraph 31:

> "We have no real evidence of significant ties that [she] has in the United Kingdom at all…".

17. He pointed to the fact that the determination itself confirmed that the child, who was now 10 years old, was born in the United Kingdom, had never been to China, her biological mother and father were in the United Kingdom, she had two stepsiblings growing up with her in the UK and she was in full-time school in this country.

18. He submitted that such procedural defects amounted to an unfair trial and were therefore an error in law.

19. What was described as the sixth issue in the appellant's skeleton argument was not insisted upon by Mr Tan in the course of his submissions to us.

Reply on behalf of the Secretary of State

20. Mr Walker began by broadly submitting that the Tribunal had carried out a proper proportionality assessment.

21. He reminded us that this was a case in which the appellant's wife had advised the Tribunal that if the appellant were removed from this country she intended to follow him with the child to China.

22. In a concise submission he argued that when the determination was looked at as a whole and in particular when regard was had to paragraphs 25 and 30 there was a proper consideration of the interests of the child by the Tribunal. He submitted that there was no material error of law.

Discussion

23. Before turning to comment in detail on the specific grounds of appeal we would generally observe that the Tribunal's determination is: detailed; well-constructed; has analysed the evidence before it fully and is well-reasoned.

24. It seems to us that in particular between paragraphs 30 and 32 of the determination the Tribunal carefully and fully considers the issue of proportionality which was the core matter before it. Its reasoning, when considering this issue, is clear and cogent. In the course of its consideration of proportionality the Tribunal considers all relevant factors and considers no irrelevant factors. It gives proper and adequate

reasons for the decision which it ultimately reaches. We believe that the decision is unimpeachable.

25. The Tribunal commences its consideration of the issue of proportionality by setting out the reasons why in the public interest the appellant's removal is required. In particular, the Tribunal highlights the nature and seriousness of the offence of which the appellant was convicted. It is clear from their findings that the offence was a very serious one and that moreover the appellant had shown no remorse or even acknowledgment of his involvement in the offence.

26. It is clear from the findings of the Tribunal that there was a pressing public interest for the removal of the appellant. In **SS Nigeria v SSHD [2013] EWCA Civ 550** Laws LJ at paragraph 54 makes certain observations regarding the Article 8 assessment and the approach of the decision maker:

> "I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgement only be justified by a very strong claim indeed."

It appears to us that although **SS (Nigeria)** is not expressly referred to by the Tribunal in the determination the considerations which it had in mind were those as set out by Laws LJ. It is clear from the determination that the Tribunal having held there is a strong and pressing public interest has then turned to consider whether there is such a very strong claim in terms of Article 8.

27. The Tribunal thereafter in their determination go on to consider in terms of the issue of proportionality the position of the appellant's child.

28. At paragraph 31, the Tribunal reminds itself of both Section 55 of the Borders, Citizenship and Immigration Act 2009 and **ZH (Tanzania) v SSHD**. Accordingly the Tribunal clearly had in mind the various observations which Mr Tan had argued it had failed to have regard. The Tribunal goes on in that paragraph to state that citizenship of itself was, however, not a trump card and in light of the authorities, both **ZH (Tanzania)** and **SS (Nigeria),** this was a view which the Tribunal was entitled to reach.

29. The Tribunal then considers the best interests of the child and in the course of that consideration has regard to the following factors:

    (a) The child's mother's position that she would return to China with the child if the appellant was removed (see: paragraph 19 of the determination).

(b) The child is able to speak and understand some Mandarin (see: paragraphs 17, 19 and 25 of the determination).

(c) The child has family in China, namely her grandparents. There are cultural ties with China (see paragraphs 25 and 29 of the determination).

(d) The Tribunal noted that there were no particular factors regarding her schooling that would mean that her having her British education ended would be a material factor weighing against the public interest. In that context the Tribunal observed that she was about to leave the school which she was presently attending (i.e. in 2014). They also pointed to there being no other evidence demonstrating particularly strong social or educational ties to her school.

(e) The Tribunal stated that there was no real evidence before it of significant ties that the child had to the United Kingdom.

(f) The Tribunal referred to **EA [2011] UKUT 00315** which emphasised that it was in the best interests of a child to live with, and be brought up with their parents.

30. All these factors to which the Tribunal had regard are in our opinion relevant factors to which it was entitled to have regard. We are not able to identify any factors to which it should have had regard and which it has failed to consider.

31. It has fully taken into account the question of the best interests of the child. It has treated this as a primary consideration. It has considered the nationality of the child. We believe that the substantial importance of the best interests of the child, which is affected by a removal decision has been put squarely into the equation by the Tribunal when considering the issue of proportionality.

32. Having had proper regard to the child's best interests the Tribunal has then weighed these up against what is clearly from their findings a powerful public interest case that the appellant should be deported. Having weighed all of these factors the Tribunal has come to the conclusion that the public interest prevails over the interests of the child and the whole Article 8 case put forward on behalf of the appellant.

33. In summary it is our view that the Tribunal was entitled to conclude as it did with respect to the issue of the assessment of proportionality and where the balance should be struck.

34. It was argued on behalf of the appellant that the Tribunal had not followed the guidance in **MF** and **Izuazu** and in particular had applied the Immigration Rules in circumstances where they did not reflect the law relating to the best interests of children. In our opinion the Tribunal has correctly approached this issue in light of the guidance given in **Izuazu** and **MF**. Those two cases direct that the decision

maker should first make a decision as to whether in a case of this type the applicant has fulfilled the Immigration Rules and thereafter should carry out a separate assessment in terms of Article 8. When we turn to look at paragraph 28 of the determination it is clear that that is the approach which the Tribunal has taken. We are unable to identify any error in law in the way that the Tribunal has approached these matters.

35. We believe that in looking at the whole circumstances of this case it has to be borne in mind that where an applicant's conduct is serious, as clearly the appellant's was in the instant case, interference with family life may be justified even if it involves the separation of the claimant from his family who reasonably wish to continue living in the United Kingdom (**Lee v SSHD [2011] EWCA Civ 348**) and **SS (Nigeria)**.

36. Turning to the appellant's second broad ground of appeal, criticism was made of certain of the Tribunal's findings at paragraph 25.

37. We regard the criticism made in relation to paragraph 25 as having no proper basis. It appears to us that when the whole evidence regarding her schooling is looked at it does not go beyond this: the child is attending a particular school. What the Tribunal, properly points out, is that there was nothing else in the evidence regarding her schooling such as: the child was just about to sit exams which were critical for her future and her no longer attending that school would disrupt this sitting of the exams or the school for some educational reason was particularly suited to the child. We believe that the Tribunal was entitled to have regard to that type of evidence being absent in this case.

38. As regards the two similar comments in paragraphs 25 and 31 which Mr Tan criticised again we think that the Tribunal was entitled to have regard to there being no evidence of significant ties that the child had to the United Kingdom. The Tribunal was aware and had observed that she was born in this country, that she was 10 years old and that she had two stepsiblings who had grown up with her in this country. It was also aware and had noted that she was at school in this country. All the Tribunal was doing was saying that other than that there were no other significant factors put forward. They were entitled to comment on this. The Tribunal took account of her citizenship, that she was brought up in this country and was at school here. However it found that this was not sufficient to outweigh the public interest. This was a view it was entitled to reach.

39. With respect to the criticism of the findings at paragraph 28 there is no contradiction in the findings as was asserted by Mr Tan. In the first sentence the Tribunal is looking at the matter in terms of the Immigration Rules and it then turns to consider the freestanding Article 8 position. As we have already said earlier in this determination that is the correct approach to take.

40. During the course of oral argument Mr Tan criticised the Tribunal's finding at paragraph 31 where it states:

"The daughter's citizenship is recently acquired."

41. He submitted that the reference to "recently" showed that proper regard to the child's citizenship had not been taken. The reference to the recent acquisition was an irrelevant consideration. We hold that this is not a fair construction of the Tribunal's decision when looked at as a whole. We do believe that the Tribunal has given full and proper consideration to the child's position and in particular to her citizenship for the reasons we give above.

42. One final matter to which we should refer is that Mr Tan argued that the Tribunal had failed to take into account a short passage of evidence in which the mother of the appellant had said that the child would not be able to get an education nor obtain medical or social benefits in China (see paragraph 13 of the determination). However, on looking to the determination it appears to us that at paragraph 26 the Tribunal hold that it did not accept that evidence.

43. For all of these reasons we find there to be no material error of law and dismiss the appeal.

Signed Date

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal