Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00486/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 4th June 2013	**on 27th June 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

M R

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik instructed by Malik Law Chambers Solicitors.
For the Respondent: Mrs M Tanner Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal (hereinafter referred to as 'the Panel') who in a determination promulgated on the 21st February 2013 dismissed the appellants appeal against the order for his deportation from the United Kingdom made pursuant to section 32 UK Borders Act 2007.

2. The appellant was born on the 27th April 1972 and is a citizen of Bangladesh. He entered the United Kingdom on the 4th February 1996 as a spouse and on 3rd February 1997 was granted indefinite leave to remain (ILR).

3. On 25th January 2002 he was convicted at Leicester Crown Court of conspiring/obtaining property by deception and was sentenced to nine months imprisonment. On 15th January 2004 he was convicted at Reading Crown Court of obtaining property by deception and on 20th February 2004 he was sentenced to twelve months imprisonment.

4. On 7th April 2004 the appellant was served with a notice of liability to deportation. On 25th October 2005 he was issued with a warning letter advising him that he was not to be deported on this occasion but that if he came to adverse notice in the future, the Secretary of State would further consider whether he should be deported.

5. An application for naturalisation was refused on 13th December 2007 due to his criminal convictions.

6. On 28th June 2010 he was convicted of possession of a Class A drug and was sentenced to one day imprisonment and a £15 fine.

7. On 26th August 2012, at Snaresbrook Crown Court, he was convicted after trial of three counts of possession of a Class A drug with intent to supply and one count of possession of a Class A drug and sentenced to a total of six years imprisonment.

8. On 24th November 2010 the appellant was sent notice of liability to deportation and on 6th July 2012 made the subject of a signed deportation letter.

9. The Panel noted the presence of a wife and four daughters in the UK. The children were born in 1996, 1999, 2002 and 2005. They are all British citizens.

10. The findings of the Panel are set out at paragraphs 32 – 68 of the determination. The key findings can be summarised as follows:

    i. If the appellant is deported it must be accepted that the family will be fractured for the foreseeable future. [48]

    ii. The appellant's attitude to the crime for which he is serving a sentence is said to be "telling and inconsistent". The Panel were not satisfied that he recognises the serious nature of the offences and consider that his recent protestations of remorse are more likely to stem from his desire to avoid deportation rather than acceptance of guilt. The panel noted the OASys report recording that as recently as December 2012 the

appellant denied having drugs for supply, for which he was convicted. [49]

iii. The OASys report assessed the appellant as being a low risk of re- offending but does not say why this is so. [58]

iv. On 18th January 2012 UKBA requested a report from the London Borough of Tower Hamlets. The Panel summarised the conclusions of the report including noting that on 30th July 2007 an initial Child Protection Conference was convened and the children made the subject of a child protection plan under the category of neglect. At a subsequent conference on 23rd October 2008 the category was changed to emotional abuse following the return home of the appellant when he assumed responsibility for the basic care of the children. The report noted that the home was raided by the police on a number of occasions and that the children witnessed physical fights resulting in the police being called. It was also noted that the family were re-housed following a planning meeting in November 2008 following their experiencing anti-social behaviour. [59]

v. The report is unsatisfactory as it fails to address relevant issues but did reveal that the appellant has lived by deceit for a number of years. [60]

vi. The appellant's wife's health issues are revealed by a number of hospital appointments and letters from her GP. [63]

vii. There is no medical or social work reports supporting the claim the appellant's wife's ailments prevent her from caring for the children. The evidence does not support the appellant's claim that he has been the main carer for the children in the past; despite claims by family members to the contrary. [64]

viii. The appellant's children will be devastated if he was to be deported. The practical consequences of deportation may be that social services will have to assess the family needs for support services and counselling. Any deterioration in the performance of the children at school will no doubt result in referral to the local authority. [65]

ix. The Panel took into account that the welfare of the children is a primary consideration and the assessment of the appellant as presenting a low risk of re-offending. They weighed against this the appellant's deceit, his failure to recognise the seriousness of the offense, the fact he has known since 2005 that he is at risk of deportation if he committed further offences, and the finding his involvement in the day to day care of

the children is not as extensive as he attempted to portray. It was also found the appellant spent his formative years in Bangladesh and can re-establish himself back there. Bar immediate family he has established no ties with the community in the UK. Notwithstanding the distress his removal will cause to the children and the loss of advantage to them of their father's presence, the Panel found that his conduct is so contrary to the public interest as to make such separation proportionate and justified.

11. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Zucker, on the 22nd March 2013, in the following terms:

> 4. On one view the grounds do not point to any arguable error of law since pregnant in the grounds is the acceptance that the panel determined the appeal in accordance with domestic law. However the grounds do point to arguable errors of law if it can be established that the domestic law may be wrong in light of the Strasbourg jurisprudence. Whilst I have some reservations in granting leave I am of the view that the points may deserve an airing.

12. Before the Tribunal Mr Malik referred to the recently reported case of SS (Nigeria) [2013] EWCA Civ 550, including the fact that in that case the appellant had no leave to remain in the UK, and thereafter submitted that the Panel had erred in failing to undertake the necessary evaluation of the extent and welfare of the children. He submitted the Panel failed to consider the children's welfare and that as it was accepted that deportation will be devastating for the children the balance should have fallen in the appellants favour based upon SS.

13. In relation to the issue upon which permission to appeal was actually granted Mr Malik made no further submissions other than to reserve his position. He accepted that Mr Justice Burnett's decision meant it was unrealistic to expect me to depart from the judgment although Mr Malik clearly believes the courts position is wrong.

14. The application is opposed by the respondent.

Discussion

15. When drawing together the threads of their earlier discussions in SS (Nigeria) the Court of Appeal state, in paragraph 47, that in a child case the right in question (the child's best interests) is always a consideration of substantial importance. In paragraph 55 they state:

> 55. None of this, I apprehend, is inconsistent with established principle, and the approach I have outlined is well supported by the authorities concerning the decision-maker's margin of

discretion. The leading Supreme Court cases, *ZH* and *H(H)*, demonstrate that the interests of a child affected by a removal decision are a matter of substantial importance, and that the court must proceed on a proper understanding of the facts which illuminate those interests (though upon the latter point I would not with respect accept that the decision in *Tinizaray* should be regarded as establishing anything in the nature of general principle). At the same time *H(H)* shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals.

16. This in an appeal by an individual who was convicted of three counts of possession of a Class A drug with intent to supply and one count of possession of a Class A drug and sentenced to a total of six years imprisonment. He is also the subject of an order made by virtue of the provisions of the UK Borders Act, which is primary legislation. On 25th October 2005 he was issued with a warning letter advising him that he was not to be deported on that occasion but that if he came to adverse notice in the future the Secretary of State would further consider whether he should be deported. Despite this his offending escalated.

17. The Panel clearly considered the best interests of the children and accepted this was a primary consideration but found, on the evidence, this was outweighed by the countervailing factors referred to in the determination. I do not find it proved the Panel failed to consider all the available evidence with the degree of care required of them and they have given adequate reasons for finding as they did in the respondents favour. In SS (Nigeria) the Court of Appeal found that the case law shows the impact of a powerful public interest and what needs to be demonstrated for an Article 8 claim to prevail over it. This case involved the supply of drugs which destroy lives of individuals and threatens the fabric of society. There is a clear and powerful need to protect the public from the effect of drugs. The Panel found there was insufficient evidence produced to allow them to find in the appellant's favour. The weight they gave to the evidence is a matter for them: see SS (Sri Lanka) [2012] EWCA Civ 155. I find no legal error has been proved in relation to the finding the deportation is proportionate. This is in effect a disagreement with the findings made and weight given to the evidence by the Panel.

18. Permission to appeal was granted on the issue, stated to be of general importance in the grounds seeking permission to appeal, namely the apparent conflict between the domestic law and Strasbourg

jurisprudence concerning marriage based on Article 8 ECHR claims. The core element of this submission is that on the basis of the domestic authorities it was not open to the First-tier to conclude that the removal of the appellant in consequence of the immigration decision would be proportionate.

19. Mr Malik reserved his position in relation to this element of the grounds and made no further submissions but neither did he withdraw the ground, which is the only one on which permissions to appeal was granted.

20. The grounds refer to the case of R (Kotecha) [2011] EWHC 2070 (Admin). It is submitted that in that case before Burnett J, it was common ground that the domestic law had "parted company" with the approach of the Strasbourg Courts and that as a result the removal of people who are the partners of people present and settled in the United Kingdom has become almost impossible, at least in cases which do not involve those convicted of serous criminal offences.

21. The above refers to paragraph 3 of the judgement in which Burnett J records the views of the advocates appearing before him, one of which was Mr Malik. Having undertaken an extensive examination of the Strasbourg and domestic case law Burnett J states in paragraph 52 of the judgment:

> 52. From all this it follows that I do not accept the central submissions from both counsel that the House of Lords has developed the law on Article 8 in the United Kingdom in a way that has parted company with Strasbourg. Just as the proper approach to article 8 was once wrongly equated with the 'insurmountable difficulty' test so now it may be that another inappropriate substitute for the careful weighing of factors has been found in 'reasonable to remove', without an appreciation that such a test itself engages all the factors identified by Strasbourg. Similarly, whilst the expectation in cases involving removal of one spouse to enable an application to be made from abroad according to the rules is that comparatively rarely will it be a proportionate requirement, all depends on the facts.

22. In paragraph 57 Burnett, J stated:

> 57. I am also unable to accept Mr Malik's submissions that it is not longer a factor to be weighed that a marriage was contracted whilst an individual's immigration status was precarious. Such a submissions is inconsistent with the *Huang*, *EB (Kosovo)* and *Chikwamba.* The question in these cases, as in all article 8 cases, is whether the interference which will flow to the family life of the claimant and his or her family members from removal is in all the circumstances proportionate. I readily accept that the interests of children affected by any decision to remove, or any decision which will

require the separation of parents and children, is a primary consideration: *ZH (Tanzania).*

23. I do not find it proved there is any divergence in law between the UK's domestic case law and that of Strasbourg in relation to deportation appeals, which is the appeal being considered by the Tribunal in this case. SS (Nigeria) contains a valuable analysis of relevant authorities [paras 13 -31]. In deportation appeals, as in all Article 8 ECHR cases, if it is found protected rights exist, the issue is one of proportionality. This requires a fact sensitive analysis as Burnett J, the Court of Appeal, and others, have recognised on many occasions.

Decision

24. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

25. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 27th June 2013