Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01171/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th September 2013	**On 9th October 2013**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR
UPPER TRIBUNAL JUDGE REEDS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS T H

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Ms D Adler, Counsel, instructed by Hereward & Foster Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Buckwell and Mrs A F Cross De Chavannes made following a hearing at Taylor House on 14th March 2013.

Background

2. The claimant is a citizen of Bangladesh born on 25th December 1983. She came to the UK on a spouse visa on 5th September 2007. On 9th July 2009 she was sentenced to imprisonment for a five year term following her plea of guilty to the single count of attempted murder on 10th June 2009 of her daughter A. On 28th November 2012 an order was made for her deportation in accordance with Section 32(5) of the UK Borders Act 2007.

3. On 25th July 2011 Mr Justice Mostyn in the Family Division of the High Court made an Order that the child remain a ward of court in the care and control of her father and that there be supervised contact between the child and her mother three times per annum for a period of one hour.

4. The claimant appealed against the deportation decision, and her appeal was allowed. The panel heard oral evidence from the claimant and from the cousin with whom she lived. They had a transcript of Mr Justice Mostyn's judgement, and the psychiatric reports which were prepared for the Crown Court in 2009 and documents from CAFCASS dated January 2013.

5. The panel recorded the evidence and the submissions and set out the legal framework which governed their decision. The confirmed that they had taken all of the evidence into account and recorded that they were mindful of the views expressed by the Upper Tribunal in MF (Nigeria) [2012] UKUT 00393 when it was stated that there was a requirement for a two stage approach in the consideration of appeals which include grounds relating to Article 8 of the ECHR.

6. The panel stated that there were a number of factors which they had taken into account in reaching their conclusion that removal would not be proportionate. They stated that the relevant authorities and agencies which had been involved in the relationship and contact between the claimant and her daughter played a significant part in their conclusions. They carefully noted the relevant case law and the sentencing remarks of the judge. They also took account of the decision made by Mr Justice Mostyn with respect to the issue of wardship and contact which in turn took into account the views and professional opinions expressed in reports before the court which had also been made available to the Tribunal.

7. They wrote as follows:

> "In consideration of Section 55 of the 2009 Act, of the terms of Article 3 of the United Nations Convention on the Rights of the Child 1989 and all other factors, it is the view of this Tribunal that the Appellant should be permitted to continue to have contact with her daughter in this country. It is entirely appreciated that it is on a very limited basis at the present time, but in our view it is overwhelmingly significant that contact has been permitted and endorsed by the courts. As to what might happen in the future, the Appellant would be at liberty to

make further applications for a variation of contact. This Tribunal does not believe that the Appellant poses any risk to society in terms of re-offending. It is significant that the Probation Service has been content to endorse her residence in a home where there are two young children and no problems have been encountered in that regard. It is also significant that contact already exists and this Tribunal considers that it would be a very cruel decision indeed effectively to end such contact for both the Appellant and Ameera. That would be the situation if the Appellant were deported."

8. The Tribunal stated that if deportation were not contrary to the provisions of the Human Rights Act 1998 they would in any event find, with reference to paragraph 397 of HC 395 that the circumstances before them were exceptional and that accordingly the public interest in deportation was outweighed.

9. On that basis they allowed the appeal.

The Grounds of Application

10. The Secretary of State sought permission to appeal essentially on 2 grounds.

11. Ground 1 states, in summary, that the Tribunal made a material misdirection of law in applying a two stage test in the Article 8 assessment. Their approach derived from MS and was based upon the view that the Immigration Rules do not fully reflect the Maslov/Boultif principles. However this is a view based upon a misinterpretation of the Rules. The Tribunal should not have regarded the Rules as a starting point before moving on to a second freestanding Article 8 assessment.

12. If the Tribunal considered factors not addressed in paragraph 399 or 399A merited allowing a deportation appeal it should have considered them when looking at whether there were any exceptional circumstances under paragraph 397 or 398 of the Rules.

13. The Rules are now a clear expression of the public interest and the weight attached to it as set out by the Secretary of State and endorsed by Parliament. The Tribunal must have regard to the nature and weight of that public interest and the reflection of the public interest contained in the Rules must be given significant weight in the assessment.

14. Secondly, the Secretary of State argued that the Tribunal had failed to give adequate reasons for findings on material matters. The claimant has only limited contact with her daughter and the Tribunal had failed to provide adequate reasons as to why it could not be maintained from abroad. Her daughter does not even fully recognise who she is and since 2010 she has only seen her mother on seven occasions. There was no evidence of how the deportation would negatively affect the daughter given the limited contact which she has with her. The daughter may not

even want to know the claimant when she is older and knows what has happened. The appropriate authorities have determined that she should only have limited contact which is evidence that they do not think that the claimant should be heavily involved in the daughter's life. It suggests that she has damaged her daughter emotionally and psychologically and further contact would cause her daughter harm.

15. Finally, the Tribunal had failed to provide adequate reasons as to why the daughter's best interests outweighed the public interest in deporting the claimant. They found that the claimant was of low risk of re-offending but failed to make any findings in regard to the claimant's risk of harm. She is still perceived as posing a significant risk to her daughter.

16. Permission to appeal was initially refused by Designated Judge Zucker on 7th May 2013. He stated that the findings cannot be said to be perverse and the reasoning was adequate.

17. The Secretary of State renewed the application and, on 17th June 2013 Upper Tribunal Judge Latter granted permission and stated that all of the grounds may be argued.

Submissions

18. Ms Everett relied on her grounds and submitted that the Tribunal had failed to grapple with the significant public interest in deporting this claimant. It had not considered what the claimant's absence would mean for the welfare of her daughter. She said that the claimant did not fall into any of the exceptions set out in the Immigration Rules and the Tribunal had not been explicit about what they were.

19. Too much weight had been put upon the judgment in the family court. The Tribunal had not properly considered the impact on Ameera's welfare if the claimant was not there. She accepted that there would be difficulties in maintaining contact if the claimant were deported to Bangladesh but the Tribunal should have dealt with the fact that some form of contact could continue.

20. Ms Adler submitted that this was a detailed and carefully considered determination. The Tribunal had accepted that the claimant could not meet the requirements of the new Rules and therefore was entitled to make its own decision on proportionality. It was open to the Tribunal to find that the facts were indeed exceptional.

21. She accepted that the Tribunal had placed significant weight on the wardship proceedings but said that it would have been very strange if they had not. Mr Justice Mostyn had made a very detailed judgment. There were many reasons why contact in Bangladesh would not be appropriate, for example there would be a lack of ability to control what was said to the child on the telephone. In face to face contact the psychiatrist could evaluate what was being said.

22. She accepted that the rights of the child were not absolute but neither was the public interest. There would be a stronger public interest in deportation if a person was deemed to continue to be at risk, and it was not an error for the Tribunal to bear in mind that the sentencing judge had accepted that the claimant was not considered to be dangerous.

23. The Tribunal found the claimant and her uncle to be credible witnesses. There was a moving description of contact with the daughter and it was accepted that the daughter did know who her mother was. The experts all agreed that contact with the mother was appropriate in person, albeit supervised.

24. By way of reply Ms Everett repeated that it was not clear where the consideration of the public interest was. She said that she was not making a perversity challenge to this determination but repeated her view that the reasoning was not adequate.

Findings and Conclusions

The factual background

25. In June 2009, the date of the offence, the claimant was 25. She had been in the UK for two years following her wedding in Bangladesh with her cousin and on her arrival she moved in with his family. The marriage was unhappy. On 2nd March 2009 her husband purchased an airline ticket to Bangladesh for the claimant to fly out the following day. He also obtained an interim injunction forbidding her from removing the child from the jurisdiction. He returned home and gave her the ticket together with some luggage and later that evening she was served with it. At around 11 o'clock that evening the claimant was left alone with the baby for a short while. When her husband returned he realised that she had a knife in her hand and he saw her push the knife into the baby's stomach. Paramedics arrived and the baby was found to have a four centimetre incised wound to the left upper abdomen with some bowel protruding through the wound, which was caused by a single stab movement. The knife had penetrated the abdominal wall but hit the rib cage which prevented it from penetrating further and causing deeper injury. Very fortunately, the baby recovered well.

26. The claimant was reported to have said that she told her husband that if she could not have her baby then he could not. If she could not have her baby then no one would and that is why she cut her. There was no evidence that she had a serious depressive illness at the time.

27. The sentencing judge accepted that the injunction and the one way ticket came out of the blue and it was a cruel act which left her no room to take advice about her situation. He accepted that the claimant was in an overpowering situation and that the events of the preceding day or the same day led to a huge emotional turmoil and said there was some

evidence that she intended not only to take the life of her child but also her own life as well.

28. He took into account the fact that the claimant felt genuine remorse and pleaded guilty to a most serious charge at the first opportunity. He also said that the sooner she was able to return to Bangladesh the better.

29. On her release from prison on 2nd December 2011 the claimant moved in to live with her uncle M A and his family.

30. In the meantime, on 25th July 2011 Mr Justice Mostyn made a supervised contact order allowing the child and the claimant contact three times per annum for a period of one hour. Indirect contact was also allowed, namely monthly cards/letters, the father being directed to provide a written report on the child's progress at four monthly intervals and an annual video.

31. In the transcript of the judgment Mr Justice Mostyn stated:

> "I am quite clear in my mind that it is positively in the interests of this little girl for her to see her mother at the frequency and in the environment suggested by the psychiatrist, Dr Olsen, and endorsed by the guardian. I think that it almost goes beyond a question of mere identity because, as I pointed out to Counsel during argument, identity could be dealt with by reports and photographs. I think it is positively necessary for this little girl not only to know that her mother exists but to have a relationship with her, even if it is of the highly attenuated nature that has been proposed. From these small beginnings it may well be that, as time progresses, something more meaningful can be built up, although that will inevitably be a difficult process given the nature of the crime which was committed by the mother.
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> So I am clearly of the view that the contact in this country that has been proposed is in the interests of this little girl. The alternative, which is annual contact in Bangladesh, which has been mentioned by Dr Olsen should the immigration authorities deport this mother, is replete with problems which are almost too obvious to spell out. It would be a highly unfamiliar environment for this little girl even if it could be organised, which must be doubtful given the obvious pitfalls which lie ahead and the fact that Bangladesh is not a Convention country. So I am perfectly clear that the alternative is not really in the same category of benefit as the contact in this jurisdiction which has been mentioned by Dr Olsen."

Decision.

32. Under paragraph 397 a deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations it will only be in

exceptional circumstances that the public interest in deportation is outweighed.

33. Under paragraph 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 because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years;

    (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months; or

    (c) the deportation of the person from the UK is conducive to the public good 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

34. The claimant's conviction is one which falls under paragraph 398A of the Immigration Rules. Ms Everett submitted that it was incumbent on the Tribunal to set out what the exceptional circumstances were which permitted the Tribunal to find, at paragraph 50 such that the appeal ought to be allowed with respect to paragraph 397, given that the claimant's case does not fall within the requirements of paragraph 399 or 399A since she was given a sentence of imprisonment for more than four years. However we consider the facts of this case, as found by the FTT to be self evidently exceptional. Deportation would in practice mark the end of the relationship between a mother and her young child.

35. We consider it unarguable that the Tribunal erred in law in applying the two stage test in the Article 8 assessment and following the approach set out by the Upper Tribunal in MF. In doing so the panel were following the guidance set out by the President of the Upper Tribunal, guidance which has been endorsed in the higher courts. The fact that the Immigration Rules at paragraph 397 and 398 permit exceptional circumstances to be taken account in deciding whether the public interest in deportation should be outweighed does not relieve the Tribunal of its obligation to consider whether there would be a breach of the UK's obligations with respect to Article 8 by reference to the Razgar principles.

36. We also consider that, when read as a whole, the Tribunal does give adequate reasons for its decision with respect to the Rules, in the context of its reasoning under Article 8.

37. Ms Everett also submitted that it was not clear from the decision what the Tribunal's reasoning was with respect to the public interest, particularly since MF stated that the new Rules have "enhanced judicial understanding of the public interest. She submitted that the reflection of the public interest contained in the Rules must be given significant weight.

38. The Tribunal recorded that they took particular account of the terms of the Respondent's deportation decision letter setting out the reasons for making the deportation order. They also stated that they took note of the terms of the decision of the Upper Tribunal in Masih (Pakistan) [2012] UKUT 46 which set out basic principles concerning the issue of the public interest in relation to the deportation of foreign criminals, namely inter alia:

> "(a) In a case of automatic deportation full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.
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> (b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.
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> (c) The starting point for assessing the facts of the offence of which an individual has been committed and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge."

39. We accept that the First-tier Tribunal could have been a little clearer in setting out in terms the very strong public interest in deporting a person who has been convicted of such a serious offence, but we do not consider however that the Secretary of State has established that the panel did not properly take it into account. The panel recorded in detail the submissions of the Presenting Officer, in particular the fact that the offence was committed against an 8 month old child and the fact that the claimant had been poorly treated by her husband should not obscure the significance and seriousness of the offence committed.

40. We conclude that the grounds amount to a disagreement with the decision. The weight which the Tribunal put upon the judgment of Mr Justice Mostyn was a matter for them. Ms Everett submitted that the Tribunal had not grappled with the impact on the child's welfare if the mother was not there. However the Tribunal quoted from the judgment of Mr Justice Mostyn who concluded that it was positively necessary for the child to have a relationship with her mother. Mr Justice Mostyn also set out why he considered that contact in Bangladesh would not be appropriate. Of course Mr Justice Mostyn was, in the family proceedings, applying the test of paramountcy of the best interests of the child rather

than primacy, and his conclusions were not determinative of the outcome of deportation proceedings. However we do not consider that the Tribunal considered them to be so.

41. The Tribunal recognised that contact at the present time was limited but rightly also placed emphasis on the fact that, if the claimant was allowed to remain in the UK, it was likely that the relationship between the claimant and her daughter would develop over time. The alternative, if the claimant was removed to Bangladesh would be the complete severance of the parent/child relationship.

42. We note that it has not been submitted by the Secretary of State that the decision made was one which was not open to the Tribunal. This is a reasons challenge and we find that it has not been made out.

43. We consider that whilst another panel might have resolved the appeal differently, appeal to the Upper Tribunal is on a point of law only, and an appellate Tribunal should always be careful not to second guess a decision of the FTT, which has had the benefit of hearing the oral evidence. We remind ourselves of the observation by the Supreme Court in B (a child) re [2013] UKSC 33:

44. "Into its review of a trial judge's determination of a child case an appellate court needs to factor the advantages which the judge had over it in appraising the case. In Piglowska v Piglowska [1999] 1 WLR 1360 Lord Hoffman said, at p1372:

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well-understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen inc v Medeva Plc [1997] RPC1, 45:
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> > 'The need for appellate caution in reversing the child judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation'."

45. Furthermore in Mukarkar v SSHD [2006] EWCA Civ 1045 Carnwath LJ as he then was said:

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of

> the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

46. We note that this was a very experienced Tribunal. Both the judge and the lay member have many many years of experience in sitting on deportation appeals. They were clearly very impressed by the evidence of the claimant and of her uncle. . This was an appallingly difficult case; the decision was generous but do not find any legal error.

Decision

47. The original decision will stand. The Secretary of State's appeal is dismissed.

Signed Date 9th October 2013

Upper Tribunal Judge Taylor