IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00057/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25 September 2014	**On 18 November 2014**

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
UPPER TRIBUNAL JUDGE MARTIN

Between

WZ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Mold (instructed by Everich Lawyers Limited)
For the Respondent: Mr P Duffy,(Home Office Presenting Officer)

DECISION AND REASONS

1. By determination promulgated on 15 July 2014 the First Tier Tribunal (FTT) comprising Judge S Taylor and Mr P Bompas allowed an appeal against the decision of the Secretary of State dated 31 December 2013 to deport the appellant. The Secretary of State now appeals against that decision.

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2. We will refer to the appellant in these proceedings as the Secretary of State and the respondent as the appellant as he was in the proceedings before the FTT.

3. The appellant is a 31 year old citizen of China. He is married with two children now aged seven and five. His partner originates from China but is a naturalised UK citizen. The children are also now British citizens. The appellant has been in this country since March 1998. He originally claimed asylum but that was refused. An appeal against that decision was dismissed on 10 August 1999. In 2010 he was granted Indefinite Leave to Remain exceptionally outside the Rules along with his partner and two children born un the UK.

4. On 25 May 2012 the appellant was convicted at Taunton Crown Court of being involved in the production of cannabis, a class B drug, and was sentenced to two years imprisonment. He was released on 23 May 2013.

5. In terms of section 32 of the UK Borders Act 2007 the Secretary of State is required to make a deportation order unless one of the exceptions in section 33 apply. The appellant relies on Exception 1 – that his deportation would be in breach of his convention rights and specifically article 8. The circumstances which apply to this appellant fall within the provisions of paragraph 398(b) of the Immigration Rules. Accordingly paragraphs 399 and 399A apply to the determination. (It should be noted that since the Secretary of State's decision and the First Tier Tribunal's determination there has been a change in the Immigration Rules in consequence of the bringing into force of the Immigration Act 2014. In dealing with the question as to whether or not there has been a material error of law we are concerned with the rules in operation at the time of the FTT's determination.)

6. The FTT concluded at paragraph 20 of its determination that the appellant cannot meet the requirements of the rules. It noted that although the appellant's partner had struggled while he was in prison she could care for the children. The appellant had not been in the UK with leave for 15 years. The FTT accepted that there might be difficulties returning to China after such a long time away and that there was the added difficulty of China's one child policy. However both the appellant and his partner are from China and speak Chinese as their first language. The FTT concluded "while we acknowledge the difficulties we find no insurmountable obstacles to the parties retuning to China".

7. The FTT then went on to consider the proportionality test outside the rules as provided for in MF(Nigeria) [2013] EWCA Civ 1192 The starting point they said was the Razgar (Razgar [2004] UKHL 27) test. The FTT found that article 8 was engaged but that the appellant's removal was in accordance with the law and for a legitimate purpose. They considered that the Zambrano principle (Zambrano v Office of

National de l'emploi – C-34/09) applied and that the appellant was a persistent offender nor involved in the implication of significant quantities of class A drugs. The case of ZH (Tanzania) [2011] UKSC applied "as required by section 55 of the 2009 Act". This, the FTT said, underlined that it is in a child's interest to be brought up by both parties. The FTT noted that this was a first offence and that the OASys report assessed the appellant as low risk. It further noted positive references from prison officers. The FTT concluded "the Tribunal is satisfied that the family could not be expected to return to China and to remove the appellant alone would not be in the best interests of the children. Finally they concluded at paragraph 22 that it would be disproportionate to the needs of the public interest to remove the appellant. The FTT allowed the appeal.

Submissions for Secretary of State

8. Mr Duffy, the Home Office Presenting Officer relied on the grounds of appeal. He submitted that having concluded at paragraph 20 that there were no insurmountable difficulties to the appellant's return to China the FTT could not then go on to effectively reach a different conclusion by stepping outside the rules. The appellant had to demonstrate that there was something above and beyond the circumstances enumerated in the rules that made his case exceptional. The FTT had failed to identify why the appellant's circumstances are exceptional. Any separation was as a result of his own actions and choices made by the family. The Zambrano principle did not apply since there was another family member able to care for the child in the UK; there was no derivative right of residence. The FTT had failed to give adequate consideration to the Secretary of State's public interest policies. Even if the appellant was a low risk the Secretary of State was entitled to say in appropriate circumstances that the removal of an offender from the country was in the public interest.

Submissions for appellant

9. Mr Mold for the appellant submitted that all that this appeal was about was simply a disagreement with the findings of the FTT. The FTT had correctly applied the test under reference to MF (Nigeria) and the Immigration Rules. They considered the best interests of the children as they were required to do. The appellant was a first offender and the judge in his sentencing remarks had accepted that he did not have the leading role. He was a low risk. Mr Mold referred to SS (Nigeria) [2013] EWCA Civ 550 in which Laws LJ had affirmed that ZH (Tanzania) demonstrated that the interests of a child affected by a removal decision are a matter of substantial public interest.

Decision on appeal

10. The FTT found that there were no insurmountable obstacles to the parties returning to China yet then found that the family could not be expected to return to China and to remove the appellant alone would not be in the best interests of the children. In our view these seemingly contradictory findings have not been explained or reasoned by the FTT. We agree with the submissions of the Secretary of State that in considering whether there are exceptional circumstances it is necessary to look beyond the factors set out in paragraphs 399 and 399A. Section 55 of the 2009 Act and ZH (Tanzania) are cited for the proposition that it is in the best interests of the child to be brought up by both parents. No attempt has been made however to apply this to the facts of this case or consider it against the considerable public interest in the deportation of foreign criminals. We are satisfied that the FTT's failure to properly analyse and give reasons for its decision constitute a material error of law. We therefore allow the appeal.

New decision

11. The decision falls to be remade. Mr Mold submitted that we should appoint the case to a re-hearing either before the FTT or the UT. He submitted that the decision would require to be made under reference to the changes brought about by the Immigration Act 2014. However Mr Mold was unable to advise us as to what further evidence he might wish to lead. Accordingly we decided that we should proceed to re-determine the appeal by the appellant against the decision of the Secretary of State.

12. In reaching our decision we have had the same bundle that was before the FTT, their decision which incorporates their summary of the evidence led at the FTT as well as the submission of counsel.

13. The appellant is 42 years old. As noted above he is a citizen of China and has been in the UK since 1998. The immigration history is more fully set out in the Secretary of State's decision letter of 31 December 2013. The appellant has been in a relationship with his present partner, DL, since 2006. They were married in a Chinese wedding ceremony in 2007. They have two children, a boy L who is now aged seven and a girl S who is four. Both children are British citizens. DL was naturalised as a UK citizen on 19 October 2011.

14. The appellant worked as a chef for ten years but has not recently been in full time work. His wife works as a waitress. Her hours are 11am to 11pm with a break. The job is low paid. The family are in receipt of benefits. Since his release from prison the appellant has been looking after the children taking them to school, preparing meals and putting them to bed as well as doing the general housework.

Submissions for Secretary of State

15. Mr Duffy relied on the reasons given by the Secretary of State in her refusal letter of 31 December 2013. It was clear that the appellant did not meet the requirements of the rules. These constituted a complete code; MF (Nigeria). Unless the appellant could point to exceptional features he must fail. There were no exceptional features and accordingly the appeal should be dismissed.

16. If however we consider that we should consider proportionality we would need to follow the Razgar test. The first four points were met. The remaining fifth test was whether the interference was proportionate to the legitimate public end sought to be achieved. In determining that issue we required to follow the provisions of section 19 of the Immigration Act 2014. There was a qualifying child but it could not be said that the effect of a deportation on them would be unduly harsh. The appellant had committed a crime for which he was sentenced to two years imprisonment. The statute said that he had to be deported and in SS (Nigeria) the Court of Appeal said that must be heavily against him. While the risk of reoffending was said to be low public revulsion and the requirement for a deterrent against foreign criminals were important public interest considerations which had to be given full effect.

Submissions for appellant

17. Mr Mold submitted that the starting point were the Immigration Rules. In considering whether the effects on the qualifying children would be unduly harsh it was right to consider whether a family member could care for the children. It was accepted that the mother could look after the children but the question was the level of care. At paragraph 20 of its determination the FTT found that the appellant's partner had struggled while he was in prison. She worked long hours and had two children to care for. Were the appellant to be deported this would be a long term struggle. He continued that if we were not with him on this matter we required to look at the public interest. While section 32 of the Act required the Secretary of State to make a deportation order unless one the exceptions in section 33 was made out the public interest in this case was diminished by the level of offending and outweighed by the interest of the children.

18. Mr Mold submitted that the judge had said in his sentencing remarks that the appellant had not gained financially and did not have a leading role in what was happening. The offence was the cultivation of a class B drug and not class A. He was a first offender. While it was accepted that there was an interest in a deterrent effect he was not a persistent offender. Accordingly the public interest was lower than what might be thought. The appellant had been in this country for 16 years. He was a full time carer for his children allowing his partner to work long hours. His

wife and children were now UK citizens. The eldest child had been here for seven years – all his life. There would be difficulties if the children had to go back to China. They are in education in this country. If the appellant went back leaving his wife and children here she would have to give up work and rely on benefits. Accordingly there was an economic benefit to the appellant remaining in this country. The test in section 117C of the 2002 Act was met.

Decision

19. The decision falls to be remade in the light of the new rules following the passing of the UK Immigration Act 2014. Since the appellant was sentenced to a period less than four years but more than 12 months the provisions of paragraph 399 apply:

> "(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."

No submission was made to us that paragraph (b) was engaged. The appellant's wife is a UK citizen. However the relationship was formed at a time when the appellant was not in the UK lawfully; his appeal against his asylum claim was

refused in 1999. Moreover he absconded from his reporting requirements between 2006 and 2009.

20. Turning to (a) there is a genuine and subsisting relationship with a child who is a British citizen. Both the children are British. Accordingly the issue is whether it would be unduly harsh for either of the children to live in China or for the children to remain in the UK without the appellant.

21. The test in the rules is "unduly harsh". In our opinion this recognises that such decisions may have inherently harsh consequences. However the decision maker is required to look beyond these consequences to the particular facts of the case and ask whether there may be factors which go beyond those that might ordinarily be expected as a result of a decision to deport and which impact in a particularly harsh manner on the qualifying person.

22. The decision maker must also find that it would be unduly harsh for the children to live in the country to which the deportee is deported <u>and</u> it would be unduly harsh for the child to remain in the UK without the deportee. Accordingly if it were found that it was unduly harsh for the child to remain in the UK without the deportee that would not be sufficient unless it was also harsh for the child to live in the country to which the person was deported.

23. A decision that obliges children to move with their parents to a foreign country may be seen as harsh although many people migrate for a variety of reasons taking their children with them. More importantly unless the separation is in the interests of the child an enforced separation of a child from one of their parents may be regarded as harsh. In this context however it is well to remember that interests of public policy may well require decisions to be taken that have harsh consequences on others. The most obvious and pertinent example is imprisonment which separates the prisoner from his family for a period of time.

24. In carrying out an assessment the decision maker must also look to the provisions of section 55 of the Borders Citizenship and Immigration Act 2009 and to the leading case of <u>ZH (Tanzania)</u>. The children's interests are a primary consideration.

25. The children are British. They were born here and have spent all their lives here. They are in education although S will still be in nursery. If the children were to go to China they would require to enter a new educational system. The language of instruction would be Chinese and not English. They would be in a new social and cultural environment. They would lose old friends and require to find new ones.

26. On the other hand they are both relatively young. They come from a Chinese background. Although their mother is a UK citizen she is Chinese by origin. Her

English language skills are such that she required to give evidence to the FTT through an interpreter as did the appellant. It is assumed that the children speak Chinese at home. If the children were to go to China with the appellant they would have the support of both their parents in integrating into a new environment.

27. The FTT considered the possible impact of the one child policy. They did not consider that that was an important factor in their decision and while it may have implications for the parents it is difficult to see how it would impact on the children themselves.

28. Taking account of all these matters we see no reason to depart from the conclusion reached by the FTT, who had the advantage of seeing the appellant and his wife and assessing their evidence, that there are no insurmountable obstacles to the parties returning to China. Accordingly we cannot say that it would be unduly harsh for the children to live in China.

29. If the appellant were to be deported and the children remained in the UK then they would be deprived of the society and guidance of the appellant and all the other natural features that might be expected from a father. Moreover the family is not wealthy. Visits to China to see their father may be difficult and attempting to sustain a parental relationship by electronic means has obvious limitations. The reality is that the children may face permanent separation and loss of contact with their father. We can also accept that while the appellant's wife coped with the children on their own during his time in prison it is a more difficult proposition on a long term basis.

30. We can accept that the circumstances may be seen as particularly harsh. Given that we have found that it would not be unduly harsh to expect the family to move with the appellant to China we do not need to decide whether it would be unduly harsh in terms of the rules for the children to remain in this country after the appellant is deported.

31. In terms of rule 398 if the rules 399 and 399A do not apply the public interest in deportation will only be outweighed by other factors where there are very compelling reasons over and above those described in paragraphs 399 and 399A.

32. In MF (Nigeria) the Court of Appeal described the rules as a complete code. The rules have changed a little since then. In particular the words that appeared at that time in rule 398 were "exceptional circumstances". These have now been replaced by "very compelling circumstances". We do not consider that much turns on the new language; we note that the court said (at paragraph 43) that where rule 399 and 399A do not apply very compelling reasons will be required to outweigh the public interest in deportation.

33. There is another alteration to the effect that the compelling circumstances are over and above those described in rule 399 and 399A. We simply take this to mean that having failed to succeed on the rules the appellant cannot then succeed on the second part of the test on the same facts.

34. In our opinion there are no factors outwith the rules which would entitle us to conduct a separate and free assessment of the appellant's article 8 claim. We noted that the FTT in their assessment of proportionality referred to the fact that this was a first offence, that the appellant was assessed as low risk and that there were positive references from prison officers. That is all no doubt true but we do not consider that these factors outweigh the strong public interest in the deportation of what Parliament has classed as foreign criminals.

35. The Secretary of State's appeal to the Upper Tribunal is allowed such that the appellant's appeal against the Secretary of State's decision to deport him is dismissed.

36. As children are involved we shall make an anonymity order.

LORD BOYD OF DUNCANSBY
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: **14 November 2014**