Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00245/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 September 2013	**On 5 December 2013**

Before

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

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABIMBOLA TAWA QUADRI

Respondent

Representation:

For the Appellant: Mr Bramble, Senior HOPO
For the Respondent: Ms Bond, Counsel

DETERMINATION AND REASONS

Introduction

1. This matter came before us as an appeal on behalf of the Secretary of State against a decision of the First-tier Tribunal ("the tribunal") promulgated on 31 May 2013. In terms of its determination the tribunal dismissed an appeal against a deportation order under the immigration rules but allowed the appeal on human rights grounds (Article 8). It was against that latter decision which the Secretary of State appealed.

Background

2. The respondent is a citizen of Nigeria born on 16 December 1962.

3. The respondent arrived in the UK with leave as a visitor on 4 February 1988. That leave was subsequently extended until 4 August 1988.

4. The respondent thereafter became an overstayer although she made an application for further leave to remain both as a spouse and as a student in 1989. Both of these applications were refused by the appellant in a letter dated 26 March 1990. The respondent had no right of appeal and was informed she should leave the UK immediately.

5. The respondent thereafter failed to regularise her status and continued to remain in the UK without leave. She made a further application for leave as the spouse of a different British citizen in February 1994, which did not appear to have elicited a response from the appellant.

6. While living in the UK the respondent gave birth to two daughters. The first of these was born on 19 April 1988 and the second on 11 October 1991.

7. On 21 May 1999 the respondent sought indefinite leave to remain as a result of her long residence and the fact that her children had been living continuously in the UK since their birth. The respondent was granted indefinite leave to remain by the appellant on 12 June 2000 and her two daughters were registered as British citizens on 20 December 1999 and 19 September 2000. The respondent had a third child, born after she had been granted indefinite leave to remain. This child, a son, was born on 10 October 2000 and is a British citizen.

8. On 28 November 2003 the respondent was convicted of conspiracy to supply Class A drugs at Snaresbrook Crown Court. No less than 12 kilograms of high quality cocaine was found in her home. She was sentenced to 15 years imprisonment and her application to naturalise as a British citizen was refused by the appellant as a result on 27 April 2004.

9. On 8 November 2008 the respondent was informed of her liability to automatic deportation.

10. On 28 June 2012 the appellant made a deportation order against the respondent in terms of section 32 of the UK Borders Act 2007 and set out her reasons for doing so in a letter.

Submissions on behalf of the Secretary of State

11. The submissions on behalf of the Secretary of State broke down in to two discrete chapters.

12. The first chapter challenged the findings of the tribunal at paragraphs 80 and 81 of its determination to the effect that: the youngest child of the respondent ("the child") (a citizen of the UK and EU) could not be required to relocate to the USA and be cared for there in that a citizen of the EU could not be required to locate outwith the EU. In so finding the tribunal relied on the guidance in **Sanade and others (British children – Zambrano-Dereci)** [2012] UKUT 00048.

13. The background to this finding by the tribunal was that the child had been cared for by members of the respondent's family for a substantial period of time in the USA while the respondent was in prison.

14. Mr Bramble contended that this finding was an error of law. In elaboration of that point he relied on certain submissions which were made on behalf of the Secretary of State in **Izuazu (Article 8 – new rules)** [2013] UKUT 45 (IAC). These submissions were in the following terms:

> "It is the Secretary of State's position that the proposition in Zambrano cannot sensibly be read as imposing a complete bar to the deportation or removal of the primary carer of an EU citizen in circumstances in which that decision would force the EU citizen to leave the EU. Such a proposition would suggest that irrespective of the severity of the threat to public policy posed by such a person, the Member State in question would be powerless to take any action to remove or deport them. This is not a proposition which the Secretary of State accepts and is difficult to reconcile with the fact that even the rights conferred directly by the treaties are subject to limitation on public policy grounds.
>
> The Secretary of State therefore submits that Member States must be entitled to refuse to recognise Zambrano rights in cases where the primary carer in question can be deported under the domestic law of the relevant Member State. In such cases there would therefore also be the prospect of an EU citizen being required to leave the EU. This position is now reflected in the Immigration (European Economic Area) Regulations 2006 following their amendment by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012."

15. It was his position that in light of the foregoing submissions the tribunal should not have made its findings at paragraph 80 and 81 and that in the circumstances of this case where the best interests of the child were a primary consideration in the proportionality assessment this amounted to a material error of law.

16. The second broad branch of the argument advanced by Mr Bramble was this: the tribunal had failed to have proper regard to the guidance of the court in **SS (Nigeria)** [2013] EWCA Civ 550. The deportation of a foreign criminal under the 2007 Act following her conviction for supplying crack cocaine as a street dealer was not, having regard to the guidance in **SS (Nigeria)**, disproportionate with her rights under the European Convention of Human Rights 1950, Article 8. While the best interests of the child were a primary consideration, there was no evidence establishing a right under Article 8 sufficiently strong to prevail over the extremely pressing public interest in her deportation.

17. Mr Bramble reminded us that before the tribunal the Secretary of State had relied on **AD Lee v SSHD** [2011] EWCA Civ 348 which supported the view that deportation can be proportionate even if it caused parent and child to be separated.

18. He went on to say this: the supply or potential supply of Class A drugs and the respondent's involvement in such crime was reflected in a very lengthy sentence of 15 years. The tribunal, he submitted, had failed to adequately weigh the public interest and the public's right to be protected from those who committed crimes of such severity against the best interests of the said child.

19. In summary he submitted that in terms of each of these arguments there was a material error of law and that the decision of the tribunal should be set aside.

Reply on behalf of the respondent

20. With respect to the first ground argued on behalf of the Secretary of State Ms Bond took a preliminary point: what had been argued formed no part of the Secretary of State's grounds of appeal and accordingly it was not open to the Secretary of State to put forward this line of argument.

21. It was her position that if we were not with her in relation to her primary submission that the Secretary of State was barred from arguing this ground then her reply to the Secretary of State's position was this: the argument ran counter to the decision in the case of **Sanade** and that was the end of the matter.

22. Ms Bond put forward an equally concise reply to the second ground of appeal. Her position was that the tribunal in a careful determination had carried out a proper Article 8 assessment. She submitted that it had fully considered and given proper weight to the public interest. It had then proceeded to properly consider the best interests of the child. Its approach in carrying out the balancing exercise contained no error of law. The place where it had decided to strike the balance could not be

described as being perverse. It was her position that the decision which the tribunal ultimately came to was one which it was entitled to reach.

23. For the foregoing reasons she submitted that the appeal of the Secretary of State should be refused. She submitted that there were no errors of law contained in the determination of the tribunal.

Discussion

24. With respect to the first branch of the argument on behalf of the Secretary of State it is not foreshadowed in the Secretary of State's grounds of appeal and in those circumstances we are of the view that the Secretary of State was not entitled to put forward this argument. Further, and in any event, we believe there is no merit in the argument advanced in terms of this branch of the appeal. It, in our clear view, runs counter to the law as explained in **Sanade**. If, as the Secretary of State put forward, the child, on the removal of the respondent, should reside in the US then the child would be denied the genuine enjoyment of the substance of the right conferred on him by virtue of his status as a citizen of the European Union and that is unlawful. For these reasons it seems to us that as a matter of law the tribunal's findings at paragraphs 80 and 81 are unimpeachable.

25. Turning to the second branch of the appeal and to the contention that the tribunal failed to have regard to the guidance in **SS (Nigeria)**. There is no express reference to that case in the determination. That is perhaps not surprising since the decision in **SS (Nigeria)** was not promulgated until after the hearing before the tribunal and only days before the determination was promulgated.

26. At paragraphs 54 and 55 of **SS (Nigeria)** Laws LJ summarises the principles which the decision-maker must have in mind when considering an Article 8 claim in the context of the deportation of a foreign criminal in terms of the 2007 Act. He says this first at paragraph 54:

> "The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration that the public interest is injured if the criminal's deportation is not effected. Such a result could … only be justified by a very strong claim indeed."

He moves on to say this at paragraph 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."

27. The broad contention of Mr Bramble was that the tribunal did not, having regard to the foregoing guidance, have appropriate regard to the impact of the powerful public interest in the instant case. For the following reasons we do not believe that there is any merit in this submission:

(a) The tribunal's consideration of proportionality commences at paragraph 58. Between paragraphs 68 and 75 the tribunal deals with the issue of public interest. It accordingly in some detail sets out and seeks to deal with the issue of the public interest.

(b) It commences that consideration by reminding itself at paragraph 68 as follows:

> "The welfare of the child is not a trump card and we now go on to consider the other matters relevant to assessing the proportionality of the appellant's deportation."

It accordingly takes as its starting point a proper understanding of **ZH (Tanzania)** [2011] UKSC 4 as viewed through the observations in **SS (Nigeria)**.

(c) At paragraph 69 the tribunal then says this:

> "Of very weighty significance indeed is the fact of the appellant's conviction and sentence and we must and do give due and proper weight to the various facets of the public interest which the respondent has taken into account in this matter."

The tribunal accordingly had at the forefront of its mind the points made in **SS (Nigeria)** about the importance of the public interest.

(d) The tribunal then refers at paragraph 70 to the following cases:

> "We have had particular regard to the guidance in **RU (Bangladesh)** [2011] EWCA Civ 651 to the effect that the facets of the public interest in cases such as **N (Kenya)** and **OH (Serbia)** [2009] INLR 109 continue to be highly relevant when conducting the proportionality balance in an Article 8 case such as this."

(e) The above cases do not stress the importance of the policy source (Parliament) and its nature when considering the Article 8 assessment which has been emphasised in **SS (Nigeria)**. Nevertheless these are cases in which the nature and extent of the public interest are set out and the importance of the various facets of the public interest in the proportionality exercise are emphasised.

(f) The tribunal list the facets of public interest to which it has had regard at paragraph 71. As far as we can identify no facet has been omitted from its consideration.

(g) The tribunal then proceeds between paragraphs 72 and 74 to carefully and fully analyse these factors.

(h) The tribunal in its consideration of the public interest concludes by referring to **AD Lee v SSHD** the case in which it was observed that even where deportation would result in separation from a child such a result may be proportionate in cases where criminality is serious, as of course it was in the instant case.

28. It seems to us that, having regard to the above, the tribunal has fully and carefully set out and assessed the public interest which it required to have in mind when making its Article 8 assessment.

29. It appears to us that looking to these paragraphs of their determination and to the determination as a whole the tribunal has clearly considered and attached the appropriate weight to the public interest. At all stages in its Article 8 assessment the tribunal has attached very significant weight to the public interest.

30. The other matter which the tribunal considers in the course of its proportionality assessment is the best interests of the child of the respondent.

31. The tribunal, in the course of its determination, we believe, has referred to and had proper regard to the relevant case law when considering the interests of the child in the context of its Article 8 assessment.

32. The tribunal concludes in light of these authorities and having regard to the child's right as a British citizen and as a citizen of the European Union that it would not be reasonable or proportionate for the child to be sent to the USA. We have earlier stated that we can find no fault in that decision having regard to **Sanade**. Moreover, the tribunal reaches the conclusion for reasons it sets out between paragraphs 83 and 91 that it would not be possible, if the respondent were deported, for the child to be cared for in the UK by any relative and that the child would therefore have to be cared for by the local authority. This was, in our view, a conclusion that the tribunal was entitled to reach on the evidence before it and in those paragraphs it gives adequate reasons for reaching that conclusion.

33. The tribunal, at paragraphs 91 and 92, then seeks to strike a balance between the public interest and the private interest of the respondent and the child. It is implicit in the decision of the tribunal that its decision was a very finely balanced one. We can easily see that many other differently constituted panels may have reached a different conclusion as to where the balance should be struck and have decided that deportation was proportionate. However, that is not the test for us. We must

consider whether in reaching that decision the tribunal has erred in law. It appears to us that it has not done so.

34. In summary: in its assessment of Article 8 the tribunal has had regard to the relevant law and attached the appropriate weight to the public interest. It appears to us that **SS (Nigeria)** has not significantly increased the extent to which regard has to be given to the public interest, beyond that to which the tribunal had regard, and its failure therefore to have specific regard to that case does not amount to a material error of law. The tribunal has properly analysed the issue of the best interests of the child having regard to all of the relevant factors and it has carefully considered against that background where the balance should be struck (between the public interest and the private interest of the child and respondent) and given adequate reasons for where it decides that balance should be struck. It has given adequate reasons for the view to which it has come. It is a decision the tribunal was entitled to reach. Overall this is a carefully written determination which properly analyses the relevant law and comes to a decision in which we can identify no error of law.

Decision

35. For the foregoing reasons we hold that the tribunal has not made any material error of law and we accordingly refuse the appeal. The determination of the First-tier Tribunal shall stand.

36. No anonymity order has been requested or made.

3 October 2013