Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00312/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 August 2013

Determination Promulgated
On 4 September 2013

Before

UPPER TRIBUNAL JUDGE WARR

Between

RG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Clarke, Counsel, instructed by Fadiga & Co
For the Respondent: Miss E Martin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Thailand born on 9 October 1971. She arrived in this country on 17 March 1995 on a spouse visa. She was granted indefinite leave to

remain on 25 April 1996. She had four children with her husband. They range in age from 16 to 6. She and her husband are now separated and the appellant is in a relationship with a Slovakian national. They had started living together at the end of September 2009.

2. On 7 November 2011 the appellant was convicted of committing arson recklessly and on 19 December 2011 she was sentenced to one year and six months' imprisonment. The appellant has no previous convictions although on 6 June 2005 she was cautioned for common assault.

3. In the light of the appellant's conviction the Secretary of State decided to deport her under Section 32(5) of the UK Borders Act 2007 as the appellant had been sentenced to a term of imprisonment for at least twelve months.

4. The appellant appealed against the decision and her appeal came before a panel on 11 June 2013. The appellant was represented then as she is now by Mr Clarke.

5. The panel heard evidence from the appellant and her partner and her landlord and a friend.

6. It was accepted before the panel that although the appellant's partner was an EEA national there was no appeal under the EEA Regulations and under the Immigration Rules, paragraph 399B, the appellant could not succeed because although the appellant was in a genuine relationship with her partner, it was not accepted that there would be insurmountable obstacles to family life with that partner continuing outside the UK.

7. The panel then went on to consider Article 8 in the light of MF (Nigeria) [2012] UKUT 00393.

8. The panel found that Article 8 was engaged on private life grounds. Article 8 was not engaged in respect of family life "because the appellant has no contact with her ex-husband or any of her children and has not done so since 2010, three years ago".

9. The panel noted that she was not living with her partner and had not lived with him since she had been arrested for the offence of arson. On release from prison she resided with her landlord.

10. The panel considered that the respondent's decision was lawful and necessary in a democratic society.

11. The appellant's arson offence involved her partner. Both she and her partner had been drinking and he had indicated an intention to leave her and she had set fire to the sheets on his bed.

12. In weighing up the issues the panel noted that the appellant's partner had forgiven her and had visited her in prison every two or three weeks.

13. The panel noted that the appellant had been resident in the UK for seventeen years and was in a relationship with her partner but lived at her surety's address due to her bail conditions. Her partner had been trying to assist the appellant in finding out where her former husband lived in order that they might put in a contact application but they had not been able to identify her husband's whereabouts or that of her children.

14. The panel noted that the appellant had attended an alcohol and intervention service course while in prison and had been a model prisoner.

15. In relation to Section 45 of the Borders, Citizenship and Immigration Act 2009 the panel reminded itself of the need to consider the interests of the appellant's children as a primary consideration. However, the panel found that the appellant had not seen her children since 2010. They were all British citizens and living with their father, also a British citizen. She had had no contact with them since 2010. There had been an order made in the Croydon County Court on 19 August 2008 directing that she should leave her husband's address and not approach within 50 metres of it.

16. In paragraph 18 of the determination the panel stated as follows:

> "The respondent's representative drew the appellant's attention to the fact that she had been cautioned by the Metropolitan Police on 6 June 2005 for common assault. In oral evidence the appellant told the court she said she said she remembered the incident and she was very busy in the kitchen and her son marched into the kitchen and she pushed him away. Her husband saw and it might have been her husband who reported her to the police who arrested her. She was accused of banging her child's head against the wall and she explained to the police that she did not do this. She only pushed him away and she was released. The police had asked her all sorts of questions but let her go home. She was not really violent. Her husband made people believe she was. However, the facts of the matter are that she accepted a caution for common assault, that she has not had any contact, direct or indirect with her children since 2010, and a court order required her to vacate and not approach the home of her husband and children. There are no contact applications being made, or any indication, that without knowledge of her children's whereabouts, or which school they attend, it would be possible to launch such proceedings. Under these circumstances there is no evidence that it would be inimical to her children's best interests for her to be deported to Thailand."

17. The panel then considered the sentencing remarks made on 18 December 2012. The judge stated:

> "... you have pleaded guilty to a single count of causing arson with intent with reckless as to whether life was endangered, an offence which approaches the very top of the criminal calendar. At the time you were 40, you were in a relationship, you had both been drinking and he had indicated at that stage an intention to leave you. Your reaction when he was asleep in bed was to set fire to the bedding that covered him. I accept that he woke, the fire was put out almost immediately and any injury he actually suffered was very minor indeed. However, given the fact you were both drunk and he was asleep the potential for this in fact to have turned out to be catastrophic are obvious to everyone.
>
> Sadly, arson in such circumstances is all too common. I accept and sentence you as a woman of good character. You pleaded at the first opportunity available to you on this count and cooperated fully with the police, indeed you made the 999 call.
>
> Well, offences of this sort inevitably attract prison and often prison of some length. Given your good character and cooperation the least sentence I can pass is one of eighteen months. You will serve half of that sentence before you are eligible for release on licence, subject to the decisions of others as to your status in this country.
>
> I give you full credit for the 178 days you have served or such other amount as is found to be accurate, to be altered administratively."

18. The panel observed:

> "It is very apparent to us that the appellant committed while drunk an extremely serious offence of arson which could, as the judge stated have been catastrophic as her partner was asleep in the bed when she set fire to the sheets."

19. The panel found that the appellant had spent her childhood and early life in Thailand and had returned there on two occasions, on one occasion for several weeks. She had worked in a Thai restaurant as a chef and the panel did not believe she had lost contact with Thailand and she had acquired skills that would be of use to her on return. She also had family in Thailand – her mother, stepfather and a younger brother and sister were still living there.

20. The panel found that the appellant and her partner did not enjoy family life together but did have a private life together. While he might have forgiven her that did not alter the fact that she had set fire to his bedclothes after an argument while he was asleep. The appellant told the panel that she had not given up alcohol completely and drank a glass or half a glass socially. The relationship with her partner was not of itself sufficient to render the decision to deport the appellant disproportionate.

21. In paragraph 22 of the determination the panel concluded as follows:

"We find that any interference with the appellant's private life would be proportionate to the need for immigration control based on the seriousness of the offence, the fact that she has not lost contact with her country of origin, its language and indeed, it would appear from her job, its cuisine. She has visited her family during her sojourn in the UK. She does not enjoy a family life with her current partner or her children and has no contact with them. We also bear in mind the case of Richards [2013] EWCA Civ 244 in which Lord Justice Laws stated, at paragraph 21,

> "What in my judgment needs emphasis is that the strong public interest in deporting foreign criminals is now not merely the policy of the Secretary of State but the judgment of Parliament. That gives it special weight, which the courts ought to recognise, as no doubt the Strasbourg Court will. This approach sits with the well-established approach to proportionality questions in European Union law were acts of the primary legislator enjoy a wider margin of discretion …"

The Court of Appeal also quoted from Gurung [2012] EWCA Civ 62 which stated, "The Borders Act by s.32 decides that the nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation unless an exception recognised by the Act itself applies." We have already found that none of the exceptions apply to this appellant. As in the case of Richards we find that there are no Article 8 considerations sufficient to displace Parliament's judgment. This appeal fails on Article 8 grounds. We make a direction for anonymity in the interests of the appellant's children, who have been named in this determination."

22. The appellant applied for permission to appeal pointing out that family life between mother and child would continue even in the event that the matter ends in cohabitation and contact ceases absent exceptional circumstances. Reliance was placed on Gül v Switzerland [1996] 22EHRR 93. There were no exceptional circumstances as the appellant had taken steps to restore contact with her children. Reference was made to MH (Morocco) [2010] UKUT 439. Even if there was no family life the attempts to establish contact would be of relevance when considering the appellant's private life. The efforts to resume contact had not been considered in the proportionality exercise. The same mistake vitiated the panel's approach to Section 55. The court order did not in its terms prevent the appellant contacting her children and the order expired on 19 August 2009. Were the appellant to be deported it would be practically impossible for the appellant ever to re-establish contact with the children, which was a material consideration under Article 8. The respondent filed a notice on 25 July 2013 submitting that neither ground had any merit and the panel had found there was no contact between the appellant and her children since 2010 and she did not know where the children lived. She had not been legally pursuing a contact order.

23. At the hearing before me Counsel submitted that there was new evidence about the steps to establish contact and the solicitors instructed in those proceedings had written to the appellant's husband on 20 August 2013 proposing contact on a Saturday. Counsel referred to his skeleton argument and paragraph 23 where he had referred to the presumption of family life continuing between mother and child where the child had been born in a genuine marriage. The Court of Appeal in Odawey v Entry Clearance Officer [2011] EWCA Civ 840 had found that Gül remained the leading Strasbourg authority. Counsel submitted that the panel had considered the efforts of the witnesses to re-establish contact. The appellant had only been guilty of one offence and had been sentenced to eighteen months' imprisonment and there was substantial mitigation. The appellant plainly intended to re-establish contact in the future – see Ahmadi [2005] EWCA Civ 1721. The state should not inhibit the development of a real family life in the future "that is not to say that, where there has been no pre-existing family life and there exists only a future intention, that will be sufficient to engage Article 8. There is a world of difference between interfering with a long established family life and merely preventing or inhibiting an opportunity in the future to develop such a family relationship." per Moses J. This was a case where one brother had declared an intention to support his other brother.

24. Although the appellant had a son in Thailand, he was now an adult. The appellant had left him when he was 3 years old. At paragraph 40 of MH (Morocco) the Tribunal had noted that the Immigration Judge had made no reference to the appellant's attempts to establish contact with his children when considering the appellant's private are life and such a factor was fundamental to the consideration of private life. The approach where there were contact proceedings was set out in RS (India) [2012] UKUT 00218 (IAC). New solicitors had been engaged and the appellant's husband had been located. This was plainly relevant evidence and the appeal should be allowed or adjourned to await the outcome of the contact proceedings.

25. Miss Martin distinguished the case of Gül and noted that there had been no contact whatsoever between the appellant and her children since 2010. The relationship had ceased in these exceptional circumstances. The panel had made clear findings that there was no family life and no contact. In the case of Gül there was still contact. Efforts had been made at the eleventh hour and indeed after the eleventh hour to initiate contact proceedings. The appellant had been released from prison on 19 December 2011 and the First-tier hearing had been in June 2013 and attempts had been made with a private investigator after that date. Of course the First-tier Tribunal could not be in error in failing to consider evidence that had not arisen until after the date of the determination. This was an eleventh hour attempt to frustrate removal. The panel had told her exactly what she had needed to do in effect – the panel had noted there were no concrete attempts to establish contact.

26. The panel had heard oral evidence and there was no precise identification of the attempts to establish contact between December 2011 and June 2013. Since 2010 there

had been no contact. Exceptional circumstances had been made out and there was no family life.

27. The appellant had a child in Thailand and other family members and there was no reason why family life in the UK should trump family life in Thailand. When considering all interests in the balance the panel had been entitled to conclude as it had done. The appellant's criminal offence had been very serious. Both sides had been drinking and her partner had been asleep and the consequences had been potentially catastrophic. The appellant's Article 8 interests were outweighed in the circumstances. The appellant was living with her landlord and not her partner. The further evidence had not been considered previously and indeed she had not seen it prior to the hearing and it was not clear whether it had been copied to the Home Office. The panel had considered the best interests of the children who were living with their father. The panel was aware that the court order had expired and had not misdirected itself. There had been no face to face contact since the expiry of the court order.

28. In reply Counsel submitted that face to face contact had continued albeit not after 2010. He was not arguing that the new evidence indicated a material error of law. If there was a material error of law the new evidence was relevant, however. The panel had erred in finding that because there was no contact Article 8 was not engaged. The panel had accepted there had been efforts to restore contact.

29. At the conclusion of the submissions I reserved my decision. I can, as Counsel acknowledges, only interfere with the decision on a point of law.

30. The deportation decision arose following the appellant's conviction for arson. Although there are mitigating factors, this is undoubtedly a very serious offence. The sentencing judge observed that arson in such circumstances is all too common and the potential could have been catastrophic as indeed the panel note in paragraph 19 of its decision. There is no evidence that the panel erred in overlooking any aspect of the mitigation and indeed that the appellant's partner had forgiven her. By way of background the panel also considered the court order and the caution in paragraphs 17 and 18 of its decision. I see no evidence that the panel misunderstood the impact of the order made by the County Court or its length and duration.

31. The panel found, and in my view were entitled to find, that the appellant had had no contact with her ex-husband or any of her children since 2010. In paragraph 18 the panel noted that the appellant had accepted a caution for assault – the appellant said she had been busy in the kitchen and she had pushed her son away and she was not really violent. The panel did not give disproportionate emphasis to either the court order made in 2008 or the caution and in the absence of any contact applications I do not find that the panel misdirected itself in finding that there was no evidence that would be inimical to the children's best interests for her to be deported.

32. Counsel criticises the judge for failing to find that family life was made out on the basis that family life continued absent exceptional circumstances, applying Gül.

33. It is true that the panel made no express reference to Gül but it is implicit in the determination that the panel considered that exceptional circumstances were made out. In relation to the evidence about contact, the panel found there were no contact applications being made "or any indication, that without knowledge of her children's' whereabouts, or which school they attend, it would be possible to launch such proceedings".

34. As Miss Martin observes, the appellant had been at liberty for some time and she submits that it was only the Tribunal's remarks which had spurred the appellant to take the action, as she puts it, after the eleventh hour.

35. It was open to the panel to find in the light of the evidence before it that family life had not been made out.

36. In the alternative in the respondent's reply it was submitted that there was no material error of law since the result would inevitably have been the same. On this basis the bonds between mother and child were weakened by her behaviour and the absence of contact and the other matters referred to by the panel. The appellant has family including a son in Thailand. The panel refer to these matters in paragraph 20 of the determination. The appellant is not living with her partner and he was of course the victim in the arson attack.

37. The panel did note that the arson attack was committed when she and her partner had been drinking and she had not given up alcohol completely.

38. Given the very serious nature of the offence, despite the mitigation, and the other factors alluded to by the panel, I do not find that the panel erred in law in finding that the respondent's decision was not disproportionate.

39. The new evidence does not assist, as Counsel acknowledges in identifying whether the panel materially erred in law. As I have not found that the panel materially erred in law, it is not necessary to consider it in detail but I consider there is some substance in Miss Martin's observation that the activity evidenced by the material was very much after the eleventh hour. Counsel submits that the panel accepted the evidence about the efforts to establish contact but it is not clear that the panel was overly impressed by such efforts as had been made – see the penultimate sentence of paragraph 18 for example. Counsel says that the links that the appellant has or does not have with her son in Thailand do not diminish the links that she has with her children in the United Kingdom.

40. In paragraph 7 of the determination where the panel summarises the appellant's case it is noted that the appellant left her son when he was 3 years old and only saw him again in 2008 when he was 16: "they are like strangers". This might be said to

indicate that the appellant has not always been assiduous in maintaining links with her children and may give support to Miss Martin's submission that the last minute activism may have been tactical rather than born out of concern to maintain links. As I have said, I have not considered the new evidence in detail though I note that the letter from the representatives instructed in the contact proceedings dated 7 August 2013 somewhat glosses over the appellant's history since the appellant's departure from the family home in the penultimate sentence: "since that time you have had some bad luck, including being in prison for some time". The appellant pleaded guilty to a serious offence of arson and I cannot see by any stretch of imagination that this could be described as bad luck.

41. I do not find that the new evidence indicates that the panel erred in law and indeed Counsel does not argue that it does. The panel did not materially misdirect itself and I find that this challenge fails. Accordingly the appeal is dismissed.

Appeal dismissed

Anonymity Order

The anonymity order made by the First-tier Tribunal in the interests of the children continues.

Signed Date 3 September 2013

Upper Tribunal Judge Warr