Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00674/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 August 2013	**On 6 September 2013**
	……

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL RAUF KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T. Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr R. Ahmed, Counsel, instructed by Osmans Solicitors

DETERMINATION AND REASONS

Introduction

1. The claimant was born in Pakistan on 1 August 1970. He first arrived in the United Kingdom in August 2001, on a visit visa. He was granted further visit visas over the

ensuing years and in November 2008 applied for leave to remain as the spouse of a refugee from Pakistan, who subsequently was granted British citizenship. She and the claimant have three British citizen children, born in 2001, 2004 and 2006.

2. Where the claimant's 2008 application for leave to remain as a spouse was refused, it appears that he was granted discretionary leave to remain until 2 April 2012 on the basis of his wife's depressive illness and to enable him to care for the children.

The claimant's crimes

3. On 25 November 2011 the claimant was convicted, following a late "guilty" plea, at Oxford Crown Court of communicating false information with intent. He was sentenced to three years' imprisonment. This is what the sentencing judge said to the claimant:-

> "JUDGE KING: Stand up, please, Abdul Rauf Khan. Let me explain to you the gravity of what you have done. All this began because you had fallen out with some work colleagues. Thereafter you have sent seventy-three false letters, eleven of which contained clear threats that bombs would explode in different places. When the first letter that you sent to many different organisations did not have the desired effect, you increased the degree of fraudulence and threat behind those letters, culminating in the false bomb threats.
>
> This is the harm of what you have done. First of all, you accused some persons who were totally innocent of any kind of bomb threat in the most grave allegations. We all know that we are living in an age where there are genuine reasons to have concerns as to our security through terrorist action, and you must have known by the nature of the information you put in the letters that the finger would be firmly pointed to persons who had originally come from the Asian subcontinent, thereby wickedly maligning them and increasing the reason to have a false fear as to any form of bomb terrorist. You have involved the security services in a vast amount of work, in detecting, first of all, whether it was true or not, and, secondly, identifying and arresting you. Those scarce resources should have been properly directed to where the real threat was and not your fraudulent and threatening activities.
>
> You have also involved a number of organisations in having to increase the degree to which they are put to expense and effort in reducing the terrorist threat, and the public generally have been put in further fear for no good reason through your actions. You sent bomb threat letters to the American Embassy, to two Intercontinental Airlines and to a number of different police forces. People who do the kind of thing that you are doing must learn that they face grave consequences when detected, to deter others from the stupidity, folly and harm that they are doing, and to punish you for what you have done.
>
> I take into account to a minor degree the depressive illness from which you have suffered, I take into account that you are otherwise of good character and I give you credit for your guilty plea, but I should point out to you it was a guilty plea at a late stage, when you knew the strength of the evidence against you, you had

> put forward a false story that had already been detected and you were awaiting trial within the next seven days. Considering your case, therefore, in the light of other regrettably similar cases and apportioning the guilt that you are responsible for, the sentence upon you is a sentence of three years' imprisonment."

Deportation

4. On 15 March 2013 the Secretary of State made a deportation order in respect of the claimant, pursuant to section 32 of the UK Borders Act 2007. In the accompanying decision, the Secretary of State stated as follows in respect of the claimant's relationship with each of his children:-

> "It is noted that on your release from custody you returned to the family home and currently reside with [Child]. However you were incarcerated from November 2011 to March 2013, a period of approximately 16 months. During this time [Child] has had no contact with you, as you and your wife decided not to inform her of your circumstances. This has led to [Child] being cared for solely by her mother with no support from social services. It is therefore considered that whilst there may be some interference with your family life with your [Child] if you were deported to Pakistan, [Child] could remain under the sole care of her mother in the event of your deportation…. Such a course of action would allow [Child] to remain in the UK with her mother and cause no interference with her rights and privileges as a British citizen such as access to the National Health Service and the UK education system. Additionally, your wife could arrange for her and your children to visit you in Pakistan should she wish to do so."

The appeal to the First-tier Tribunal

5. The claimant appealed against the making of the deportation order and on 12 June 2013 his appeal was heard at Hatton Cross by First-tier Tribunal (Judge Eldridge and Mr S S Pursey). In a determination promulgated on 19 June 2013, the First-tier Tribunal allowed the claimant's appeal. The Secretary of State applied for permission to appeal to the Upper Tribunal against the determination and the application was granted by the First-tier Tribunal on 11 July 2013.

6. The First-tier Tribunal heard evidence from the claimant and his wife. The wife claimed to suffer from migraine, severe depression and memory loss as well as a heart condition: "she can undertake no hard work and had been told she needed to relax" [27]. She said that "she took medication both for her depression and migraine and showed us two different sorts of tablets". She had been given "medicine for her heart but now if she was in pain she was told to take paracetamol and to relax" [30]. Her evidence was that:-

> "She was unfit to work and her husband was not working. She was receiving housing benefit and employment support allowance because the doctor had said she was unfit. Her heart condition had not been diagnosed and they kept doing tests. Her family had a history of heart problems."

7. Despite all this:-

> "28. In cross-examination she said that her husband had lived here with them as permanently as his visa had allowed. When he was in detention she took the children to school but had not always done so. Now her husband did sometimes. A friend helps sometimes but mostly her husband did now he was home. She had managed with great difficulty when her husband was in prison."

8. At [48] the Tribunal found as follows:-

> "48. The appellant is not the sole carer of any of these three children but as we explain below we find he does play a prominent role in their care. We accept that he was spending as much time with them in this country as his visas would permit in the years before he gained discretionary leave to remain in 2008 and that since he gained that leave he has lived with them as an active father except when he has been in detention.
>
> 49. We can understand the issue taken by the respondent concerning the lack of up-to-date evidence of Mrs Khan's medical conditions. We note, however, that the Secretary of State must have been satisfied that her conditions were serious when she granted discretionary leave to the appellant for a period of four years to help look after her and more particularly the children. Neither she nor her husband was seriously challenged that her depressive illness continued and we saw no reason to doubt the assertion that her health had not significantly improved in recent years.
>
> 50. We accept, of course, that for a period of 12 months she has had to cope with the children alone, whilst her husband was in custody. Additionally, for the remaining six months of his detention, he has not been able to be present full-time in the house. Even in the latter months of his term of imprisonment it would seem that he was only spending six or seven nights each month at home on release.
>
> 51. There is relatively little in either bundle of documents that assist us with the progress and lives of the children. Towards the end of the appellant's bundle there are a number of reports from school but none of these covers the period after about June 2011. Up to that date they tend to show that the children reported upon were progressing satisfactorily at school and attending regularly.
>
> 52. There is a little about the health problems that Mrs Khan experiences and most of the documentation provided is at least four years old, save for documents from 2011 concerning investigations with the gastroenterology Unit.
>
> 53. A letter from Dr Raju, dated 12 January 2012 states, however, that she suffers from a number of medical conditions and was referred to hospital to see a consultant cardiologist as well as for gastroenterological problems. It also states that she has seen a neurologist and declares that she is unable to work. The doctor states that her husband (the appellant) 'works and looks after her and their children as well'. The same letter also refers to the desirability of him

remaining permanently in the country. A further letter from the same doctor, written on 16 April 2013, makes many of the same points and states 'I was informed that Fouiza could not do any house work at all and it is her husband… who works for the family, who does all the house work and is the one who looks after the children'. We have to say that the author is only repeating the assertions of Mrs Khan and we do not understand how the household was kept going whilst her husband was in detention if she could do no housework and could not care for the children.

54. We did not accept that Mrs Khan was incapable of looking after the children at all. She had managed to do so during the appellant's detention and have done so alone. Nevertheless, having regard to the previous decision taken by the Secretary of State, such medical evidence as was available to and the oral evidence given before us, we were of the opinion that, whilst it was not shown there were any positive issues as regards safeguarding, these three children would be better cared for on a day-to-day basis if their father is able to play the active role he has done since 2008, except when in detention, and did as often as he could before that. We consider that their lives may be materially easier if there is an income coming into the house from paid employment. This is highly unlikely to come from Mrs Khan, whether her husband is in the UK or not. We do not under-estimate that there are difficulties with the caring role he has to play but he has worked before and may well be able to do so again, around the responsibilities he has to the children. If he cannot, because he is removed, there is an increased burden on the State. We have no doubt that their best interests lie in his remaining in this country. With a mother who has significant health issues, their welfare would be promoted if their father is allowed to remain here."

9. At [59] the Tribunal noted some comments by the appellant's probation officer in the letter of 3 May 2013, concerning a visit made to the home of the claimant and his wife. The panel considered that the probation officer "re-affirms the account of the appellant having 'a huge responsibility for the care of the children as well as his wife'. She comments on the benefits for the children's mental and emotional wellbeing in the appellant being able to remain in the home".

10. The Secretary of State's case is, in essence, that the First-tier Tribunal failed to give adequate reasons for its decision to allow the claimant's appeal against deportation and that it also failed to have proper regard to the public interest in deportation. I have considered carefully the submissions of Mr Ahmed on behalf of the claimant. I have, however, concluded that the Secretary of State's criticisms of the determination are entirely justified and that the decision of the First-tier Tribunal should be set aside. My reasons are as follows.

The Tribunal's errors of law

11. The Tribunal's findings regarding the position of the mother are, I consider, deeply flawed. The Tribunal has failed to have any regard at all to the significant matter that the claimant's family life, including the birth of children, appears to have been forged when he was only intermittently present in the United Kingdom, as indicated

in the immigration history set out above and also at [48] of the Tribunal's determination. At [49] the Tribunal chose to speculate as to the precise reasons underlying the Secretary of State's decision to grant the applicant discretionary leave, based on the condition of the wife, when we do not know the details of what the Secretary of State was told at the time.

12. Overall, the importance attached by the Tribunal to the claimant's position as carer for the children sits badly with the Tribunal's own findings at [52] to [54], concerning the problematic nature of the evidence concerning the wife, as well as the striking evidence recorded at [28], which indicated that the wife was able to cope with the children, with what was plainly only modest outside assistance, whilst the claimant was in prison, for well over a year.

13. At [59] the Tribunal mischaracterised the evidence of the probation officer. The purpose of the probation officer's visit to the family was to decide whether, for the purposes of the claimant's release on licence, he should remain at home living with his family. It is plain from the short letter that the probation officer based her conclusion on what she was told by the claimant and his wife, as well as the letter from the GP (which the Tribunal at [53] rightly regarded as problematic). The probation officer's conclusions, that "there are valid reasons why Mr Khan should remain at home living with his family, mainly to support their mental and emotional wellbeing" is misinterpreted by the Tribunal at [59] as a comment entirely about the mental and emotional wellbeing of the children. Plainly, it was not.

14. The probation officer recorded the claimant's "focus" as being "to get back to work and to support his family". This chimes with the observations of the Tribunal at [54] of the determination; but I agree with Mr Wilding's submission that this paragraph of the determination is an instance of what he characterised as the Tribunal's search for reasons not to deport the appellant. The Tribunal was there speculating on the achievement of an idealised future, in which the claimant was, in some unspecified way, able to work, so as to support the family, whilst continuing to be the children's "principal carer".

15. The reference to "principal carer" occurs at [65] of the determination, where the Tribunal described the claimant's position in that regard as "relatively unusual circumstances. Seldom is the appellant a carer to the degree this appellant is…" For anyone with experience of this jurisdiction, that is a frankly remarkable conclusion, which is, in any event, unreasoned.

16. There are, thus, significant errors in the Tribunal's assessment of the Article 8 position of the claimant, his wife and the children. But, even had there not been such errors, the First-tier Tribunal also fell into legal error in mischaracterising the nature of the public interest, weighing in favour of deportation. At [61] of the determination we find this:-

> "We have given strong regard to the principles concerning the deterrence of the appellant and others from committing further offences and the issues of public condemnation and confidence stated (sic). We have set them against our finding that the appellant presents a low risk of re-offending or serious harm and that he has made good progress in prison and on release."

The Tribunal's balancing of public condemnation against risk of re-offending is unsanctioned by any legislation or case law. I consider that it led the Tribunal into serious error, in giving insufficient regard to the public policy of deporting foreign criminals, within the meaning of the 2007 Act, whether or not they pose significant risk of re-offending.

17. In so finding, I have had regard to the fact that Tribunal at [63] specifically noted the then recent judgment of the Court of Appeal in SS (Nigeria) v SSHD [2013] EWCA Civ 550 and that at [64] the Tribunal recognised "a strong interest in his removal", as a result of the campaign of bomb threats undertaken by the claimant. Nevertheless, the error at [61], together with the other problems I have identified, lead me to conclude that the Secretary of State's criticism of [64] of the determination is more than a disagreement as to outcome but, rather, identifies an error of approach.

18. Indeed, the First-tier Tribunal's referencing of SS (Nigeria) is exiguous. There is no consideration at all of Laws LJ's findings that, where foreign criminals under the 2007 Act rely on the best interests of a child having British citizenship:

> "48. … insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation to the policy of deporting foreign criminals. In *Sanade* the UT observed "[t]he more serious the offending the stronger is the case for deportation" (paragraph 48). With respect that is no doubt right; but it applies as readily to a case where the offender is not subject to automatic deportation under s.32 of 2007 Act and his removal is at the Secretary of State's discretion. In Strasbourg, within the *Uner/Maslov* criteria we find a comparable reference to "the nature and seriousness of the offence committed by the applicant".
>
> 49. These references say nothing about the policy's origin in primary legislation. The policy's source, however, is as we have seen one of the drivers of the breadth of the decision maker's margin of discretion when the proportionality of its application in the particular case has been considered…"

19. Having examined various observations in other cases, including AM [2012] EWCA Civ 1634, Laws LJ held :-

> "With great respect there is here no acknowledgment of the free-standing importance of the legislative source of the policy as a driver of the decision maker's margin of discretion when the proportionality of its application in the particular case has been considered" [51].

Also relevant is the following:-

"[53] ….. Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well-justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that ' in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases'.

[54] ….the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a *very strong claim indeed*." [my emphasis].

20. Accordingly, the First-tier Tribunal has, I find, erred in law, both in mischaracterising the nature of the factors weighing on the claimant's side of the balance and in misunderstanding and undervaluing those factors relating to the public interest in deportation, as articulated by Parliament in the 2007 Act. I therefore set aside the determination and re-make the decision in the appeal.

Re-making the decision in the claimant's appeal

21. When I canvassed with the representatives on 12 August the issue of re-making the decision, Mr Ahmed indicated that he saw no need to call fresh oral evidence. I have therefore approached the matter by reference to the oral evidence given to the First-tier Tribunal. I accept as an accurate record the description of that evidence in the determination. I have also had regard to the documentary materials in the bundle of written evidence that was before the First-tier Tribunal and which is also before me.

22. Whilst I accept that, at the present time, the claimant may well be playing a significant role as carer of the children, the unchallenged evidence indicates that, albeit with alleged difficulty, the claimant's wife coped alone, with some unspecified assistance from a friend, during the significant period of the claimant's imprisonment. The evidence does not disclose any deterioration in the wife's condition since the claimant's period of imprisonment, such as to suggest a risk that the wife may be unable to cope if the claimant were to be deported. In any event, I take judicial notice of the fact that, should the assistance of the local authority social services' department be required, appropriate support would be forthcoming.

23. I acknowledge, as did the First-tier Tribunal, that deportation of the claimant removes for the foreseeable future the prospect of the claimant's being able to support his family by means of employment undertaken in the United Kingdom. However, in enacting the 2007 Act, Parliament must be taken to have given primacy to the public policy in removing foreign criminals, such as the claimant, notwithstanding any consequent harm to the public purse. One looks in vain in that Act for any indication to the contrary.

24. I note that, besides the supposed role of the claimant as "principal carer", the Tribunal found that, on a more general level, the children's best interests would be served by having him remain with them in the United Kingdom. I fully accept that, as a matter of common sense, this is where their best interests lie, albeit that the matter finds no detailed evidential support (see my findings above regarding the letter from the probation officer). The best interests of the children are, I also accept, "a primary consideration", in the sense of being, in the words of Laws LJ, a consideration of "substantial importance". The children's interests are not, however, "the primary considerations for us", as the First-tier Tribunal thought [47].

25. Having established all this, one must return to the observations of the sentencing judge, set out above. The claimant's behaviour, over a significant period, was profoundly serious. This was so, not only because of the alarm that would have been caused to the actual recipients of the claimant's bomb threats but also by reason of his attempt to accuse others of the crimes he had committed. Of the highest importance was the "vast amount of work" occasioned to security services, in investigating and otherwise dealing with the threats. The resources of those services are plainly finite and what His Honour, Judge King had to say about them is, with respect, not only right but also a matter of great significance for the purposes of determining where the balance should be struck in the present appeal.

26. Having regard to all the relevant evidence and reiterating that I have given very significant weight to the best interests of the children, I conclude that the nature of the claimant's crimes is so great as to outweigh not only the best interests of the children but also the Article 8 interests of the claimant and his wife, such that the claimant's appeal against the deportation order must be dismissed. Family life, in the sense in which it is being currently conducted (albeit not as it has always been) will be effectively fractured by deportation. But that is, in all the circumstances, the only proportionate response. To find otherwise on these facts would, I consider, be to disregard Parliament's policy and the public interest, as articulated in the 2007 Act.

Decision

27. The determination of the First-tier Tribunal contains errors of law. I set that determination aside and substitute for it a decision dismissing the appellant's appeal.

Signed Date

Upper Tribunal Judge Peter Lane