Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02541/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 17th July 2014	**On 14th August 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

W M

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Miss R Frantzis, Counsel, instructed by Howells Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Kelly and Mrs Hussain JP who allowed the claimant's appeal against the decision of 28th November 2013 to deport him from the UK.

Background

2. The claimant is a citizen of Afghanistan. He arrived in the UK on 21st January 2002 and claimed asylum, was refused but granted twelve months exceptional leave to remain. He applied for further leave to remain which was refused on 23rd February 2004. He subsequently made an out of time application for leave to remain as the unmarried partner of a British citizen which was refused on 18th February 2005 with no right of appeal. He returned to Afghanistan on 14th February 2006 and was granted entry clearance to come to the UK as a fiancé on 9th March 2006. He married L M on 22nd September 2006 and they have two children.

3. The claimant has committed two offences of sexual assault, one upon a minor on 13th August 2005 and the second on an adult on 24th December 2006. On 8th February 2008 he was sentenced to a total of 22 months imprisonment. A deportation decision was made on 5th September 2008 and his subsequent appeal against that decision was dismissed on 8th December 2009. The claimant appealed to the Court of Appeal and on 17th March 2011 the Secretary of State undertook to withdraw her decision and to reconsider the Article 8 claim in the light of current circumstances.

4. The claimant was released on immigration bail in around March 2009 and he was not allowed contact with his children for a period of about six months thereafter. His contact with the family was phased until May 2011 when he was finally permitted to return to the family home with unrestricted and unsupervised access to his children.

5. The judge set out the circumstances of both offences and noted the remarks of the sentencing judge and the OASys Report. The panel found the claimant's wife to be a truthful witness and noted that she had significant medical problems, as do the two children.

6. It was conceded that it would be unreasonable to expect the children to leave the UK and, as it would appear that their mother is the only family member who would potentially be available to provide them with care, there must necessarily be insurmountable obstacles to her settling with her husband in Afghanistan.

7. The judge was however satisfied that she would be able, in spite of her medical problems, to provide an adequate level of daily care for them in the claimant's absence.

8. The judge recorded that it was significant that some seven years and four months have now elapsed since the claimant committed his most recent offence, and he had been at liberty for all save for thirteen months of that period. This was not, however, a factor which appears to have been considered by the person who made the current decision to deport. When invited to address the issue the Presenting Officer urged that it did not outweigh the public interest in deporting the claimant.

9. The judge wrote as follows:

> "The time that has elapsed since the offences and the good use to which the Appellant has put it serves both to diminish the risk that he continues to pose to the general public and reduce the overall proportionality of deportation in furtherance of the public interest in preventing crime. We have however also had regard to the inevitable public revulsion at offences of the time committed by this Appellant; a revulsion which we fully share. We have also taken account of the fact that the deportation of foreign criminals serves to deter other foreign nationals who aspire to settle in the UK, from following their example. Indeed it is at least arguable that the greater the hardship caused to an individual by his deportation, the more likely it is to act as a deterrent to others. Relevant also is the seriousness of the Appellant's criminal conduct; more particularly the risk that he will repeat it. That risk is only partly offset by the Appellant's track record over the past 88 months and consequent enhanced likelihood that he will not reoffend. This is because, as Dr Patel acknowledges, the nature of the offences means that the risk of repetition will never be considered to be a low one.
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> Whilst the inevitable degree of hardship that would be faced by the LM and the children in consequence of the Appellant's deportation does not of itself amount to an exceptional circumstance, we nevertheless consider it relevant (together with all the other circumstances of the Appellant's case) to the proportionality exercise that it becomes necessary to undertake once it has identified circumstances that do not fall within the contemplation of paragraphs 398 to 399A of the Immigration Rules. We have therefore considered the issue of proportionality in a holistic manner and have concluded that the decision to deport the Appellant does not strike a fair balance between the rights and interests of the Appellant and his family members on the one hand and those of the public on the other. We therefore find that the decision is disproportionate in furtherance of the legitimate aim of preventing crime, and that it is thus unlawful by virtue of Section 6 of the Human Rights Act 1998."

The Grounds of Application

10. The Secretary of State sought permission to appeal on the grounds that the judge had made a material misdirection in law. It was submitted that there was no provision for a deportation appeal to be allowed on Article 8 grounds outside the Rules. It is either allowed under paragraph 399 or 399A or it is allowed under "exceptional circumstances" which is under the Rules at paragraph 398 and is a complete code as upheld by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192.

11. Second, the Tribunal erred by failing to give genuine and proper regard to the government's view on what are exceptional circumstances. In order to succeed it has to be more than unreasonable to expect the children to leave and then not being another family member to care for the chid. In this case the Tribunal failed to identify why the circumstances are exceptional and failed to provide adequate

reasons why family life outweighs the public interest. The wife can adequately care for the children and they can remain in touch via modern methods of communication.

12. The Secretary of State argued that the circumstances are not exceptional and any separation has been caused by the actions of the claimant. There are no factors which set it apart from an ordinary family life claim. Whilst it may be 88 months since the claimant's offence he has been aware throughout that he may be deported and would have been on his best behaviour. There is still a strong public interest in favour of his deportation given that, should he reoffend, he would cause significant harm to women and children.

13. The grounds then cite a number of cases supporting the contention that deportation has the effect not only of removing the risk of reoffending by the deportee himself but also of deterring other foreign nationals.

14. Permission to appeal was granted by Designated Judge French who said that the determination was a clear and articulate document but nevertheless there was merit in the grounds.

15. The claimant served a Rule 24 response, arguing that the grounds were filed late and in any event misconceived. They ignored the fact that the judge adopted the exact analysis contended for by the Secretary of State when she said that the claimant needed to demonstrate that his circumstances were exceptional. The judge had found that there had been significant time elapsed since the offences had taken place and was right to consider the hardships which his wife would suffer by his deportation as a relevant consideration.

16. Both Mr Diwnycz and Miss Frantzis relied on their grounds and response.

Findings and Conclusions

17. The application for permission to appeal was made one day out of time but admitted by the Designated Judge who had sight of evidence that the Tribunal's fax machine was not functioning properly at the relevant time. I showed Miss Frantzis the faxes which demonstrate that the Secretary of State did attempt to put in her grounds within time. On that basis she properly did not pursue any argument as to timeliness.

18. There is no error of law in this determination. The suggestion in the grounds that the judge misdirected himself as to the law is wrong. In fact both Miss Frantzis and Mr Diwnycz, from the Presenting Officer's notes, confirmed that it was agreed at the hearing that the correct legal framework was that set out from paragraphs 13 to 17 of the determination when the judge set out in full paragraphs 398 and 399, 399A and 399B of the Immigration Rules.

19. In MF (Nigeria) the Court of Appeal considered the word "exceptional" and wrote as follows:

> "The word exceptional is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the exceptional circumstances.
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> We would therefore hold that the new Rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision maker is not mandated or directed to take all the relevant Article 8 criteria into account.
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> Even if we were wrong about that it would be necessary to apply a proportionality test outside the new Rules as was done by the UT. Either way the result should be the same. In these circumstances it is a sterile question whether this is required by the new Rules or is a requirement of the general law. What matters is that it is required to be carried out if paragraphs 399 or 399A do not apply.
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> There has been debate as to whether there is a one-stage or two-stage test. If the claimant succeeds on an application of the new Rules at the first hurdle i.e. he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one-stage test. But if he does not it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two-stage approach which, for the reasons we have given, is required by the new Rules. The UT concluded that it is required because the new Rules do not fully reflect Strasbourg jurisprudence. But either way it is necessary to carry out a two-stage process."

20. At paragraph 42 of the determination the judge reminded himself that Part 13 of the Immigration Rules provides a complete code for the assessment of Article 8 claims by persons who are liable to be deported. The Secretary of State, in assessing the 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. Exceptional circumstances can only refer to circumstances not already within the contemplation of the Rules. The fact that over seven years have elapsed since the claimant committed his most recent offence was not a factor considered by the person who made the decision to deport.

21. The judge clearly identified the considerable time which has elapsed since the offences took place as a significant factor both in diminishing the risk that he personally posed and as a reduction in the overall proportionality of deportation in furtherance of the public interest in preventing crime.

22. It cannot be said that the judge did not properly weigh in the balancing exercise that public interest. He said in terms that the panel fully shared the public revulsion at the offences of the type committed by the claimant.

23. The approach of this judge to the determination of the appeal is impeccable. Having firstly considered whether the claimant could bring himself within the contemplation of paragraph 398 to 399A of the Immigration Rules he considered whether there was any other issue which was relevant and not contemplated by them. Having identified the considerable period of time elapsed as a significant factor he was then entitled to take that into account in considering the issue of proportionality in a holistic manner. Assessment of proportionality is a matter for the judge who heard the evidence, and will not be lightly interfered with by an appellate tribunal which has not.

24. The grounds amount to a disagreement with the decision and nothing more.

Decision

25. The judge did not err in law and his decision stands.

Signed Date

Upper Tribunal Judge Taylor