Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/21855/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On 14 November 2017	**On 15 December 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRIYA RADIA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, a Senior Home Office Presenting Officer
For the Respondent: Ms C Fletcher instructed by Marks & Marks Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against deportation to India, of which she is a citizen. The claimant has a British citizen husband and a 1-year-old child from her that marriage who is also a British citizen.

2. The claimant has previously been convicted of entering into a sham marriage (not to her the current husband, but her first husband) and was sentenced to 16 months' imprisonment for that offence, triggering the automatic deportation provisions of the UK Borders Act 2007 at sections 32 and 33.

Background

3. The claimant arrived in the United Kingdom in February 2010 as a student. At some point shortly thereafter, she entered into a sham marriage with her first husband, who has learning difficulties. The sham marriage was discovered, her husband gave evidence against the claimant, and she was convicted at Isleworth Crown Court on 6 August 2013. The sentencing guidelines for an offence of this type suggests a sentence of 6-12 months but the claimant received a sentence of 16 months, engaging the automatic deportation provisions in the 2007 Act, by reason of what the sentencing judge described as a 'deliberate and dishonest scheme' to undermine immigration control. The claimant had not pleaded guilty and the judge took a very serious view of her actions.

4. On 4 September 2013 the claimant was served with notice of liability for deportation and on 13 November 2013 a deportation order was made, against which she had a full right of appeal and was appeal rights exhausted on 23 June 2014. The claimant did not embark. Less than a week later, on 29 June 2014, the claimant applied for leave to remain outside the Rules. The claimant made a similar application on 16 September 2014.

5. On 27 October 2014, the claimant met the man who is now her second husband. On 6 May 2015 she made a family and private life application and on 27 July 2015 she married her present husband.

6. The Secretary of State served the claimant with a Section 120 notice on 26 May 2016 and 11 July 2016. On 17 July 2016, the claimant gave birth to a daughter who by reason of her husband's citizenship is a British citizen. The starting point, applying the decision of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, is that it is not reasonable for that child to be expected to leave the United Kingdom as she has the right to grow up in the United Kingdom because she is a British citizen.

7. On 14 September 2016, the Secretary of State refused the claimant's human rights claim and maintained her deportation decision. That is the decision under challenge in these proceedings.

First-tier Tribunal proceedings

8. The evidence before the First-tier Tribunal was that her second husband was always aware of the deportation order, both at the time of the marriage and before their child was born. However, at the date of hearing the claimant's child was just 1 year old.

9. The First-tier Tribunal set out the relevant tests although it did not engage expressly with section 117C(5) of Part 5A of the Nationality, Immigration

and Asylum Act 2002 (as amended). Section 117C sets out the regime for the deportation of foreign criminals. Where a person has been sentenced upon conviction to more than 12 months' imprisonment, section 117C provides two Exceptions, Exception 2 being one where there is a genuine and subsisting relationship with a qualifying partner or a qualifying child such that the effect of the claimant's deportation on the partner or child would be unduly harsh.

10. It is not suggested that the claimant can rely on her relationship with her partner in this context. The claimant relies on the effect on her 1-year-old daughter, who as a British citizen, is a qualifying child under section 117D. The claimant says that it would be unreasonably harsh for the child to go to India with her mother, or to remain in the United Kingdom without her. Similar considerations apply in paragraph 399A of the Immigration Rules.

11. The First-tier Tribunal Judge allowed the appeal for the reasons set out at [55]-[59] in his decision, finding as a fact that for the child to live in India would be unduly harsh because she would not have the benefit of the British education system and health service, and would be separated from and deprived of close contact with her father, who has lived in the United Kingdom all his life and who has elderly parents here who are unwell, and need him to help them attend hospital appointments. The father has two jobs in the United Kingdom, has never lived or worked in India, and has no family or property there.

12. The First-tier Tribunal Judge also accepted that the claimant had been disowned by her family in India, because of her illegal first marriage, and could not look to them for help with bringing up her child alone. The claimant and the child would be alone and isolated in India, which 'would place them in a potentially perilous situation'.

13. The Judge considered it unduly harsh for the child to remain in the United Kingdom without her mother at the age of 1. Her mother is her primary carer and he had regard to the child's section 55 best interests, which lay in having her mother with her. The child's father would have to keep working and his parents were too old and ill to provide any meaningful assistance to him in bringing her up. He held that although the claimant was a 'foreign criminal', her sentence was less than 4 years and she was not required to show 'very compelling circumstances' in order to resist deportation. The claimant was highly unlikely to repeat her offence, being now in a happy and genuine second marriage.

Discussion

14. I have been referred to the guidance given by Lord Justice Laws in *MM (Uganda) & Anor v Secretary of State for the Home Department* [2016] EWCA Civ 617 and in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550. Beginning with *MM* (Uganda), at [23]-[24] Laws LJ, with whom Lord Justice Vos and Lord Justice Hamblen agreed, said this:

> "23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in *MAB* ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in Section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):
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> > 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'
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> 24. This steers the Tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the 'unduly harsh' provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term 'unduly' is mistaken for 'excessive' which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history."

15. In *SS* (*Nigeria*), at [43], Laws LJ, with whom Lady Justice Black and Mr Justice Mann agreed, stated that the interests of the child or children are a primary consideration and that there was no Rule of exceptionality. Having summarised the relevant national and international authorities, at paragraph 47 Laws LJ drew together his general considerations:

> "47. It is worth drawing these general considerations together:
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> (1) The principle of minimal interference is the essence of proportionality: it ensures that the ECHR right in question is never treated as a token or a ritual, and thus guarantees its force.
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> (2) In a child case the right in question (the child's best interests) is always a consideration of substantial importance.
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> (3) Article 8 contains no Rule of 'exceptionality', but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail.
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> (4) Upon the question whether the principle of minimal interference is fulfilled, the primary decision maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation. This approach strikes two balances: the balance between public interest and private right, the search for which 'is inherent in the whole of the [ECHR] …' … and the constitutional balance between judicial power and the power of elected government, and in particular the power of the legislature."

16. Laws LJ then went on to consider at [48]-[55] the principles concerning the deportation of foreign criminals, concluding at [54]-[55], as follows:

> "54. I would draw particular attention to the provision contained in Section 33(7): 'Section 32(4) applies despite the application of Exception 1...', that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no Rule of exceptionality for Article 8, they also clearly show that 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.
>
> *3) SUMMARY*
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> 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. … 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."

17. The judgment then moves on to deal with the particular case, which was that of a father convicted of serious offences of dealing in class A drugs who continued to have the potential to present a real risk to members of the public and society in general and but who had a 5-year-old British citizen son who would not need to move to Nigeria, because he would be able to remain in the United Kingdom with his mother.

18. The facts in this appeal invert that analysis. The claimant's child in this appeal was the 1-year-old daughter of a non-British citizen who would in practice have been obliged to leave the United Kingdom if her mother were removed, as she is too young to be separated from her mother, her primary carer. The judge found as a fact that the child's father could not successfully bring her up at that young age without the assistance of the mother and it is not suggested by the Secretary of State that he erred in concluding that the husband's parents could not provide any assistance available in the United Kingdom to help him, should he attempt to do so.

19. The Secretary of State's challenge in the grounds of appeal is that the First-Tier Tribunal did not have proper regard to the claimant's criminal

and immigration history, which was related to her offending, when determining that the deportation would be unduly harsh for the child. I am not satisfied on the basis of the reasoning in the decision of the First-tier Tribunal that such a submission is arguable here. The judge was aware of the provisions of the statute and the Rules and set out matters which were sufficient to enable him to reach the conclusion he did. The grounds of appeal are unarguable and I dismiss the Secretary of State's appeal.

20. The decision of the First-tier Tribunal therefore stands.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Signed: Judith A J C Gleeson Date: 14 December 2017

Upper Tribunal Judge Gleeson