Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00991/2012

THE IMMIGRATION ACTS

Heard at : Sheldon Court	**Determination Promulgated**
On : 13th June 2013	**On : 19th June 2013**

Before

Upper Tribunal Judge McKee

Between

TAHIRA FAWAD

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Emma Rutherford, instructed by Thaliwal Bridge Solicitors
For the Respondent: Mr Neville Smart of the Specialist Appeals Team

DETERMINATION AND REASONS

1. On 11th October 2005 Mrs Fawad landed at Manchester Airport on an Emirates flight, having been issued with a Pakistani passport earlier that year in Peshawar, and having subsequently obtained a six-month visitor's visa. She was accompanied by her two children, Hamas and Yoshua. Different dates of birth have been given for the

boys at different times: 24/4/01, 1/1/02 and 24/4/02 for Hamas, and 2/1/03, 13/1/03 and 1/11/03 for Yoshua. Mrs Fawad's husband, Muhammad Saeed Khan, had come to England as a student the previous year, but Mrs Fawad had evidently not applied for entry clearance as the dependant of a student. What she did do, early in February 2006, was apply for asylum, on the basis that she had arrived in the United Kingdom with her two children clandestinely on 1st February 2006, having travelled from Afghanistan on various lorries, the journey having been arranged at the cost of $9,000 by a friend of her husband's. The husband of "Fawad Bibi" was said to be a commander in the Hizb-e Islami, Said Ullah Jan, who had been arrested by government soldiers, but had escaped. The soldiers came back to the family home in Kunar province, looking for the commander, and threatened to kill Mrs Fawad and her children if she did not tell them where her husband was hiding. It was no longer safe to remain in Afghanistan, so she came here, with an Afghan ID card to establish her identity.

2. The asylum claim was refused in March 2006, but Mrs Fawad was granted discretionary leave to remain for three years on the strength of her story, and with it came access to welfare benefits. Two more children were born to Mrs Fawad, in March 2007 and October 2008. There is no uncertainty about their dates of birth, since birth certificates were issued, with the name of the father – unsurprisingly – left blank. There does not seem to be any doubt that the father was Muhammad Saeed Khan. It was certainly not Said Ullah Jan.

3. In 2009 Mrs Fawad's deception came to light. She was remanded in custody in September 2009, charged with eight counts of knowingly possessing a false ID document, of obtaining leave to remain by deception, and of obtaining property (*viz* welfare benefits) by deception. Having been convicted on 17th December, she was sentenced on 24th February 2010 to five terms of twelve months' imprisonment and three terms of six months' imprisonment, all to run concurrently. In his sentencing remarks, Mr Recorder Kushner noted that "*multiple fraud*" was employed to obtain different benefits, amounting to £46,000 in all, and that the asylum claim which underlay it was "*wrong, without any substance, without any foundation*."

4. On completion of the custodial part of her sentence, Mrs Fawad continued in detention at HMP Eastwood Park under Immigration Act powers, before being released on bail on 16th April 2010. In the meantime, the Border Agency had notified her of her liability to deportation under section 32 of the UK Borders Act 2007, and on 22nd April her representative at the Immigration Advisory Service wrote to the Criminal Casework Directorate with reasons why it would be unsafe for Mrs Fawad to return to Pakistan. She would be at real risk of an 'honour killing', so great was the shame which her imprisonment had brought on her family. If her husband refused to "*personally uphold this social obligation and take action himself*", then her family members would be obliged to take action "*against her and her husband*." It was also pointed out that "*it would not be in the interest of the childrens (*sic*) for their lives to be interrupted by being removed from the UK*." In particular, the youngest of the four had "*a health condition that requires that he attends outpatient treatment at hospital every month*."

5. In February 2011 Mrs Fawad's new representatives, Thaliwal Bridge Solicitors, chased up this 'fresh claim', and on 25th March they sent off a statement from their

client to the UKBA's Asylum Team Midlands at Solihull. In this, Mrs Fawad describes the dreadful time she had living with her husband's family while he was studying in England. This included being raped by a servant of her father-in-law. To escape this treatment she came to the UK with her children, but her husband took little interest in her, absenting himself from the house without any explanation. Possibly, he was having an affair, but she dared not tell him what had happened to her while in the care of his parents. Thus it was that she heeded the advice of some Pakistani women, who had befriended her in the park, to do as they had done and pretend to be an Afghan. After all, they spoke Pashtu, and who was to tell that they were not from Afghanistan?

6. Mr Khan was so uninterested in his wife that he did not even bother to ask her what the basis was for her asylum claim. But her time in prison coincided with a visit to the UK by her mother-in-law, who was scandalised by the shame brought upon the family. This could only be blotted out by an 'honour killing'. It was no use expecting Mr Khan to protect her if they went back to Pakistan. He was very much under the thumb of his family, and would never stand up for his wife.

7. The asylum claim was not rejected until 15th October 2012, at the same time as a deportation order was made under the 2007 Act. An appeal to the First-tier Tribunal came before Judge Forrester and Mr Sheward on 11th February 2013 and was dismissed, but permission to appeal to the Upper Tribunal was granted by Judge Davey, who was concerned that the best interests of the four children had not been taken properly into account. When the matter came before me today, I agreed with Miss Rutherford that there was indeed a material error of law in the First-tier determination, requiring me to re-make the decision on the appeal.

8. There are one or two odd mistakes in the determination. The period which the appellant spent in custody, from September 2009 to April 2010, is calculated as 14 months. The children's best interests are said to be "*a paramount consideration*." And as Mr Smart points out, the relevant date for the purposes of the appeal is said to be the date of decision (when the two older boys had been in the United Kingdom for just a few days more than seven years), rather than the date of the hearing. Another unfortunate feature of the determination is that more than half of it consists of a lengthy extract from Lord Justice Richards' judgment in *JO (Uganda) & JT (Ivory Coast)* [2010] EWCA Civ 10. His Lordship surveys the case law, both Strasbourg and domestic, on Article 8 very fully, but there was no need to 'cut and paste' it into the determination. It is the application of the principles to the case in hand that is crucial, and in this the determination falls down.

9. The panel do correctly follow the 'two stage' approach of *MF (Nigeria)*, and look first at whether the appellant can succeed under the Immigration Rules. They correctly identify paragraph 399(a)(ii)(a) as the only one under which the appellant might succeed, on the basis that two of her children have lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision, and it would not be reasonable to expect the children to leave the UK. In finding that it <u>would</u> be reasonable to expect the children to leave the UK, the panel consider only their ability to adapt to a different environment, where they would still be part of a complete family unit. The rule does not say that "*it would not be in the best interests*

of the child to leave the UK", and it may be that this should not be equated with whether it would be reasonable to expect the child to leave the UK.

10. But the best interests of the child must certainly be a primary consideration in performing the Article 8 balancing exercise outside the Immigration Rules, and when the panel get to the 'second stage', after the nine-page quotation from *JO (Uganda)* and a further long paragraph setting out Article 8 and the five questions posed in *Razgar*, they do not consider the best interests of the children in the present case – despite ascribing to *ZH (Tanzania)* the proposition that those interests are "*a paramount consideration*." All they say is that the family were only ever here on a short term basis, with no legitimate expectation that they would be granted permanent residence. There is no specific mention of the two younger children at all.

11. With a view to re-making the decision on the appeal, I heard oral evidence from the appellant and her husband, given in Urdu through the court interpreter. Mrs Fawad emphasized how well the older boys are doing at school, and explained that the youngest boy, who still goes to nursery, has to see the doctor every three months for a scan, following an operation to remove one of his kidneys. Miss Rutherford was able to obtain from her instructing solicitors a faxed copy of the Nursing Discharge Summary, which shows that Muhammad Khan was admitted to the Birmingham Children's Hospital on 5th July 2012 for a left laparoscopic nephrectomy, being discharged the next day without needing to be given any drugs. Mrs Fawad added that the boy gets infections from time to time. In cross-examination, she confirmed that the three older boys attend the mosque, but could speak little or no Urdu or Pushtu.

12. Mr Khan explained that, after getting leave to enter as a student in 2004, he obtained further leave in stages until, in 2008, he applied for leave to remain under the International Graduate Scheme. This was supported by a document from London International College confirming that he had completed the course. But it was not a qualification. He had not given full attendance, and he needed to take a further test and pay the fees. He assured Mr Smart that the document which he submitted in support of his application for leave to remain was supplied to him by the College *gratis*, and was not a forgery. Like his wife, Mr Khan insisted that the children could speak little or no Pushtu or Urdu.

13. In his closing submissions, Mr Smart doubted whether the children were as ignorant of the languages spoken by their parents as had been alleged. He noted that Mrs Fawad had not pursued the asylum claim which she raised in 2010, and asked me to reject Mr Khan's insistence that he had not gained admission to the International Graduates Scheme by deception. He must also have been aware of his wife's deception in claiming asylum and gaining access to benefits. This, contended Mr Smart, put added weight into the public interest side of the Article 8 balance, which in a deportation case was already weighted heavily in favour of enforcing the deportation order. He prayed in aid *SS (Nigeria)* [2013] EWCA Civ 550 for the importance, hitherto overlooked, of the fact that Parliament has legislated to the effect that the deportation of foreign criminals <u>is</u> conducive to the public good.

14. For her part, Miss Rutherford reminded me that the asylum claim had not been conceded before the First-tier Tribunal, albeit not vigorously pursued. Her focus was

on the best interests of the children, two of whom were now of an age when their private lives lay increasingly outside the confines of their immediate family and in the wider society, at school and with their friends. The disruption which removal to Pakistan would cause to those private lives had been assessed by the consultant child psychiatrist, Dr Sarah Newth, whose expert report was part of the Appellant's Bundle. The younger two boys had not developed outside ties to such an extent, but they had been born here and their main language was English. The youngest had medical problems, which would be best monitored in this country. Miss Rutherford also drew attention to the fact that Mrs Fawad had not re-offended since her release in April 2010, and to the respondent's long delay between notifying her of her liability to deportation and actually making a deportation order.

15. Adopting the same two-stage approach as the First-tier Tribunal, I come to the same conclusion as regards Part 13 of the Immigration Rules. It seems to me that a child can be reasonably expected to leave the United Kingdom when both his parents and his other siblings will be leaving too, even if it can be argued it is not in his best interests for the family to be removed. But the best interests of the child must be a primary consideration when it comes to the Article 8 balancing exercise outside the Immigration Rules. In the instant case, the first four questions posed by Lord Bingham in *Razgar* can all be answered in the affirmative. It is the final question, whether it is proportionate to deport the appellant and (as is permitted under section 3(5)(b) of the Immigration Act 1971, although no decision has been made yet) the members of her family, which is crucial to the outcome of this appeal.

16. As Miss Rutherford very sensibly recognizes, if it were not for the children ~ who should not, as she says, be punished for the wrongdoing of their parents ~ the Article 8 claim would be very weak indeed. The two younger boys are now aged 6 and 4 respectively. One of them has not yet started school, and the other has not been at school very long. They are of an age when their home and their parents are very much the centre of their lives. They will not yet have formed such strong ties with the wider society that moving to another country with their parents and siblings can be said to breach their right to respect for their private lives. Muhammad underwent a successful kidney operation last summer. There are no sequelae of that operation. He requires no medication, just the occasional check-up. That can be done in Pakistan, where treatment for the infections about which Mrs Fawad complains can also be readily obtained.

17. With the two older boys it is different. Hamas is now 11 years old (possibly 12) and Yoshua is 10. They have lived in this country for over 7½ years, and are old enough to have formed significant ties at school and in the wider society. Moving to Pakistan would have a significant impact on their private lives. Indeed, this was the thrust of Dr Newth's psychiatric report. The boys are doing well at school, and it will be a real wrench for them to be parted from their circle of friends. But as well as their ties to the United Kingdom, they are also familiar with important aspects of Pakistani culture. They, along with Hamad, regularly attend the mosque, and according to a letter from the management, they attend the Jamia Tul Salam five days a week after school, from 4 to 6 p.m. Like Mr Smart, I do not accept that the Urdu and Pashto tongues are rarely used by their parents and their circle of friends and acquaintances, and it is common knowledge that children of that age can attain fluency in another language very quickly.

18. It must be borne in mind that millions of people migrate to another country every year, bringing their children with them, even though this means taking the children away from their school and their friends. They are not prevented from doing so on the ground that this violates the children's human rights. Of course, the parents are usually hoping that migration will result in a better life for the family, with more money and better opportunities. That may not be the case in moving from the United Kingdom to Pakistan, but this family do not seem to have been particularly badly off in Pakistan. Mr Khan was able to demonstrate sufficient resources to be granted a student visa in 2004, while Mrs Fawad was able to demonstrate sufficient resources to be granted visitor's visas for herself and two children in 2005. The children will not be facing a life of penury or destitution in Pakistan, the country of their nationality.

19. Insofar as it can be said that the best interests of the children would be served by letting them continue their education in this country, with perhaps a better standard of living, it must be remembered that the best interests of the children are not a trump card. See on this the remarks of Lord Justice Davis in *LH & HH (Nigeria)* [2013] EWCA Civ 26. Even under the old 'seven-year concession', when indefinite leave would normally be granted to families with a child who had been living here for seven years, this could be withheld if there were countervailing factors such as criminal behaviour. Such factors obtrude in the present case. If the parents had done nothing worse than overstay their leave, an Article 8 claim based on the interests of the children would be much stronger. But the conduct of the parents has greatly strengthened the public interest side of the proportionality balance.

20. Mr Khan told the First-tier Tribunal that he had received no response to his application in 2009 for leave to remain as a Tier 1 (Post-Study Work) Migrant. That is not true. Mr Smart has handed up a copy of a letter dated 2nd November 2009 from the Border Agency to Mr Khan, who had been living in Southall, well away from his wife and children in Birmingham – a wise precaution, when Mrs Fawad was masquerading as an Afghan refugee whose husband was still in Afghanistan. It appears from the letter that Mr Khan spent the academic year 2007-2008 in full-time employment with JD Sports, rather than studying at the London International College, which indeed informed the Border Agency that he had not attended their programme of studies or paid their fees. What Mr Khan told us today about receiving confirmation from the college that he had completed the course, but without obtaining a qualification, is not to be believed. Besides, Mr Khan would have needed to demonstrate that he <u>had</u> obtained a qualification in order to gain admission to the International Graduate Scheme. He clearly did submit a Postgraduate Diploma in Management Studies which was not genuine.

21. So Mr Khan both breached the conditions of his leave and practised deception in order to obtain further leave. But these infractions of our immigration law are dwarfed by the deliberate fraud and falsehood perpetrated by Mrs Fawad over a three-year period. It is very much in the public interest that public confidence in our system of international protection be maintained. A blatantly false claim, such as that propounded by Mrs Fawad, damages the integrity of that system, to the detriment not only of those who administer it but of those people genuinely fleeing persecution. A case like this can only add to the public perception that many asylum claims are bogus. Such behaviour should be deterred, and a long line of cases from *N (Kenya)*

onwards has emphasized the importance of deterrence as a relevant factor to be weighed on the public interest side of the Article 8 balance.

22. Miss Rutherford contends that the delay between the first intimation that her client was being considered for deportation and the making of a deportation order reduces the weight of the public interest side of the balance. But much of that delay was due to Mrs Fawad putting forward another unfounded asylum claim, which was not advanced before the First-tier Tribunal, and on which no reliance is placed now. All of this must be considered in the light of the latest guidance from the Court of Appeal in *SS (Nigeria)*, in which Lord Justice Laws explains that in respect of children 'a primary consideration' means a consideration of substantial importance, but that, it having been laid down in primary legislation that deportation of a foreign criminal is conducive to the public good, the public interest side of the proportionality balance can only be outweighed by a very strong claim indeed. In the present case, even according substantial weight to the best interests of the children, the public interest side of the balance has manifestly not been outweighed.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

18th June 2013