IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02752/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 17 June 2015	**On 15 July 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER - ISTANBUL

Appellant

and

SA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Miss Brooksbank, agent Solicitor for YICS
For the Respondent: Mrs Pettersen, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SA, was born in 1996 and is a citizen of Iran. He sought to enter the United Kingdom for settlement as the child of his mother (hereafter referred to as the sponsor) who is a British citizen. His application was refused by the decision dated 26 November 2013 (reviewed by the Entry Clearance Manager on 8 September 2014). The appeal to the First-tier Tribunal (Judge Atkinson) which, in a decision promulgated on 21 January 2015, allowed the appeal under the Immigration Rules (paragraph 297(f)). The Entry Clearance Officer Istanbul now appeals, with permission, to the Upper Tribunal. I shall

hereafter refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal).

2. The sponsor was born in Iran and married in 1992. She had two children by that marriage. She and her husband divorced in 2002 and the appellant's father obtained custody of both children. The sponsor had contact with the children at lunch times between Thursday evening and Friday evening each week. The sponsor travelled to the United Kingdom in 2006 and claimed asylum. Her application was never considered by the respondent but she was eventually granted indefinite leave to remain under the "legacy" programme in October 2010. She became a British citizen in 2011. There is a Power of Attorney dated 4 January 2014 (registered 4 February 2014) together with a translation in the bundle of papers produced by the appellant. Judge Atkinson records that the "appellant's father granted the sponsor a right of guardianship and ancillary powers in relation to the appellant." The appellant is now aged 19 years.

3. The judge in the First-tier Tribunal found in favour of the appellant in respect of maintenance and accommodation. Those findings are not challenged by the Entry Clearance Officer. However, the judge found [23] that the sponsor, notwithstanding the guardianship agreement "via a Power of Attorney" had not exercised sole responsibility as regards the appellant's upbringing. Sole responsibility had remained in the hands of the husband. The appellant has not challenged that finding.

4. The judge went on to consider paragraph 297(i)(f) ("*… There are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care."*). He noted that the

> "… appellant had been placed in the custody of his father at the age of 6 following his parent's divorce albeit with some contact arrangements with his mother. He has been brought up within his father's household and has limited direct contact with the sponsor since she left Iran when he was age 10." [26]

The judge then went on to find as follows:

> "27. I shall take into account the sponsor's circumstances. The sponsor has experienced mental health difficulties arising from her enforced separation from her children, including difficulty relating to the thoughts of suicide. The appellant has been engaged in psychological therapies provided by the NHS with a view to enabling her to deal with the trauma arising from her circumstances and to manage her feeling of suicide. Granting of leave to the appellant is likely to have very significant positive psychological effects on both the appellant and the sponsor.
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> 28. In these circumstances I find there are serious compelling reasons showing why the appellant should not be excluded. This is because the appellant has effectively been forcibly deprived of the benefits of the true extent of the love and affection of his mother over a number of

> years and his mother has suffered significant psychological trauma as a result of her experiences."

5. There are two grounds of appeal. I find that the second ground has no merit. The ECO submits that "the Immigration Judge, after making findings on the sponsor's mental health, does reconcile a concern that it is in the best interests of the appellant to reside with a parent who has suicidal ideation." There is a letter from Greater Manchester West Mental Health NHS Foundation Trust based in Salford. Dr C Bashir, Chartered Clinical Psychologist has provided a report dated 22 October 2014. This notes that the sponsor's "own psychological wellbeing has significantly improved and she has learnt to manage difficult memories, thoughts and feelings since.(s*ic*)". The letter notes that the sponsor's suicidal feelings had "now diminished and she has come to terms with traumatic life events because she is now taking action to focus on re-uniting with her children." There is nothing in the letter (the only medical evidence which was before both the First-tier and Upper Tribunals) which would indicate that the child might be at risk in the care of a parent "with suicidal ideation." There is no evidence that the sponsor has suicidal ideation at the present time or at the date of the immigration decision. Further, there is no indication in any of the evidence that the appellant might be at risk in his mother's care. Judge Atkinson did not err in law by failing to deal with the matters raised in ground 2.

6. The first ground of appeal asserts that the judge was wrong to find that there had been a "forced deprivation of the appellant from the sponsor" (*sic*). The grounds record the "separation described was not forced but was the sponsor's choice. It is submitted therefore that the Immigration Judge has erred by making findings that were based on a misunderstood premise."

7. I find that this ground has more merit. First, it is clear from the psychologist's letter that, whilst being separated from her children was a major cause of the sponsor's mental disturbance, it was not the only cause. Secondly, I am not persuaded that the judge has engaged with the nature of the separation of the sponsor from the appellant. The suggestion that the separation had been of the sponsor's own making it does not occur for the first time in the grounds of appeal to the Upper Tribunal; the Entry Clearance Manager in her statement of 8 September 2014 noted that:

> "… the sponsor in the UK has had mental health issues and doctor's notices have stated that this is due to the separation of the sponsor and the appellant; however it was the sponsor's decision to leave Iran and more importantly to leave the appellant behind for such a protracted period of time."

That is the same point asserted in the grounds of appeal and the judge has failed to engage with it. The judge makes it clear at [28] that he has found that there are "serious and compelling reasons showing why the appellant should not be excluded" because the appellant has been "effectively … forcibly deprived of the benefits of the true extent of the

love and affection of his mother over a number of years." I not persuaded that that finding is justified on the face of the evidence or that it provides a "serious and compelling reason" justifying the appellant's admission to the United Kingdom. It is not clear to me why re-uniting a teenage child with his mother in the United Kingdom when he otherwise has no legal reason to reside here should in some way compensate the appellant for a separation from his mother whilst he was a child which was, at least in part, a consequence of his mother's own actions. Thirdly, I am concerned that the medical evidence does not justify the judge's finding that "the granting of leave to the appellant is likely to have very significant positive psychological effects on both the appellant and the sponsor." I do not know what effect it will have on the child at all; Dr Bashir's letter deals only with the mental health of the sponsor. Moreover, that letter records that the sponsor's psychological wellbeing has "significantly improved" even in the continuing absence of the appellant. Certainly, the psychologist concludes that "it is in the interests of both parent and child to be reunited and spend significant time together" but I am not sure that equates to the "very significant positive psychological effects on both appellant and sponsor" which Judge Atkinson found would occur if the child comes to live in the United Kingdom.

8. I also have concerns regarding parts of the sponsor's evidence. I raised these concerns with Miss Brooksbank, who appeared before the Upper Tribunal as agent's solicitor for the appellant's representative. In the sponsor's statement dated 12 November 2014, she records that she travelled to Istanbul and there assisted the appellant in making his visa application. She said that her ex-husband who was initially opposed to the child joining the sponsor in the United Kingdom and that it took "nearly two years of fighting and discussions for my ex-husband to finally agree to give me custody of our youngest son." Later in the same statement the sponsor says that, "the reason I could leave Iran legally with my son was because my ex-husband had given me sole custody of [him]. I lost this document however and I travelled to Iran and my ex-husband gave me a new document." The only document in the appellant's papers which remotely touches upon the custody of the appellant was a Power of Attorney which was certified on 2 October 2014. This Power lists at length the powers arising from the "right of guardianship bringing up of the child [the appellant]." It refers, *inter alia,* to "daily routine of … education sports requirements etc. signing educational commitments …" At the end of this list, the document indicates that the sponsor may take "every measure to the benefit of the ward in order to remove the necessity for the client's presence and signature." It concludes by providing that "the attorney's action and the signature in all matters stated above shall be of the same effect as those of the client [sponsor's husband] to the extent that the client's presence and signature shall not be required whatsoever." The document does not appear to have been issued by or registered in a family court. I am not persuaded that the document transfers custody of the appellant from the husband to the sponsor. The Power of Attorney simply grants the sponsor the right to take steps for and on behalf of the child without the requirement of the father's presence or signature. To

that extent, it is similar to parental responsibility in English family law. The sponsor's statement, on the other hand, speaks in terms of the transfer of custody from one parent to another. Such a transfer is not evidenced by the Power of Attorney document. There was no unequivocal evidence that the father has consented to the appellant leaving his custody and travelling to the United Kingdom for settlement. I am aware that paragraph 297 does not require the consent of the child's other parent but I am concerned that the sponsor has produced one document in evidence and has sought to pass it off as another and quite different document, namely a custody order. I make these observations being fully aware of the obvious differences between family law operating in Iran and England and Wales.

Conclusion

9. I find that Judge Atkinson has misstated the factual basis upon which he has based his finding that there are "serious and compelling reasons showing why the appellant should not be excluded." I accept (as did Judge Atkinson) the sponsor has had serious mental problems and I also find that these have "significantly improved." I did not accept that medical evidence supports the judge's findings that there will be "very significant positive psychological effects on both the appellant and the sponsor" if the appellant comes to the United Kingdom. I am not satisfied that the judge fully understood that the sponsor had not been forcibly separated from the appellant in the manner which she has claimed. Normally, I would be very reluctant to interfere with the judgment of a First-tier Judge in a matter of this kind but I am not satisfied that the judge has fully understood the true facts. In consequence, I find that his decision should be set aside and the decision remade. I refer again to the medical evidence and to the observations which I have made above concerning the sponsor's evidence. Viewing that evidence as a totality, I am not satisfied that there are "serious and compelling family or other considerations which make exclusion of the appellant undesirable." I note again that the sponsor's mental health has improved in the absence of the appellant albeit that the prospect of the appellant joining her may have assisted her recovery. She has, however, come to terms with other "traumatic life events" other than the separation from her children. I do not doubt Dr Bashir's conclusion that it would be "in the interest of both parent and child to be reunited and spend significant time together". The same must be true for virtually all parents who are reunited with children from whom they have chosen to separate. In my view, the appeal should be dismissed under the Immigration Rules. The grounds of appeal to the First-tier Tribunal did not mention human rights (Article 8 ECHR). There is, therefore, no appeal against the immigration decision on that ground.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 21 January 2015 is set aside. I have remade the decision. This appeal is dismissed under the Immigration Rules.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 July 2015

Upper Tribunal Judge Clive Lane