Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA010132015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 17 May 2016	**23 May 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr O James, instructed by Asylum Justice

DECISION AND REASONS

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) to protect the identity of the appellant's child. This order prohibits the disclosure directly or indirectly (including by the parties) of

the identity of the appellant. Any disclosure in breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

Introduction

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge M M Thomas) allowing the appeal of JA (hereafter "the claimant") under Art 8 of the ECHR.

3. The claimant is a citizen of Afghanistan who was born on [ ] 1995. He came to the UK on 18 May 2011 and claimed asylum two days later. On 12 October 2011 his application for asylum was refused but he was granted discretionary leave until 9 January 2013 when he reached the age of 17½ years.

4. On 28 December 2012, the claimant applied for further leave. That was refused in a decision dated 2 January 2015. On 6 January 2015, as a consequence, the Secretary of State refused to vary the claimant's leave. The claimant appealed that decision to the First-tier Tribunal.

5. The judge dismissed the appeal on asylum and humanitarian protection grounds. The judge did not accept that he would be at risk on return to Afghanistan as a result of his father's political activity. Likewise, the judge concluded that the claimant could not succeed under Art 15(c) of the Qualification Directive. Those decisions are not challenged.

6. However, the Judge allowed the claimant's appeal under Art 8 on a limited basis. That basis was that the claimant's child ("K") was the subject of care proceedings in the family court and that, in the judge's view, merited a grant of a short period of discretionary leave to JA until the care proceedings, in which he was involved, were determined.

7. On 25 November 2015, the First-tier Tribunal (Judge Adio) granted the Secretary of State permission to appeal to the Upper Tribunal against Judge Thomas' decision to allow the appeal under Art 8 on the ground that the judge had failed to follow the guidance in RS (Immigration and family court proceedings) India [2012] UKUT 00218 (IAC).

8. In response, the claimant filed a detailed rule 24 response seeking to uphold the judge's decision on the basis that it was in line with the guidance in RS at [43].

9. Thus, the appeal came before me.

The Judge's Decision

10. In respect of the claimant's case under Art 8, the judge was not satisfied that the claimant could succeed on the basis of his private life in the UK under para 276ADE(1).

11. However, the judge went on to consider Art 8 and the position of the claimant in respect of his son, K. The evidence before the judge was that there were ongoing care proceedings in relation to K who was in foster care.

12. The evidence concerning the claimant's continued involvement with K is set out in para 52 of the determination as follows:

> "52. The supplemental Refusal letter confirms that [K] has been in foster care since 19 March 2015. It further advises that care proceedings are ongoing but arrangements have been made for the Appellant to have supervised contact with his son once a week. The letter states that to date that contact has been '*sporadic*'. The letter also raises an issue with potential paternity however, that issue is still outstanding according to the supplemental Refusal letter. I also refer to the email from Rachel Edmunds, social worker dated 6 October 2015 (document A1) which very much repeats what is set out within the supplemental Refusal letter however that email also indicates that the Appellant has attended '*approximately half of the contact sessions offered to date*'. Further she advises that in relation to the care proceedings that a parenting and psychological assessment has been directed and that the final decision in relation to the care proceedings would not be before the end of February 2016."

13. The judge accepted that the claimant's contact with K was "sporadic".

14. The judge went on to consider Art 8 and whether there were any "compelling reasons" based, principally, upon the fact that there were ongoing care proceedings involving the claimant in respect of K. The judge sought to apply the Upper Tribunal decision in MH (pending family proceedings – discretionary leave) Morocco [2010] UKUT 00439 (IAC) which recognises that a short grant of discretionary leave in order to permit a parent to take part in ongoing family proceedings may be appropriate under Art 8. The judge dealt with this at paras 61-63 as follows:

> "61. In **MH** the Upper Tribunal confirmed the earlier Court of Appeal decision of **MS (Ivory Coast) v Secretary of State for the Home Department [2007] EWCA Civ 133** and held that '*a decision to remove an applicant in the process of seeking a contact order may violate Article 8 ECHR, in particular on the basis that removal of a parent/applicant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and, more importantly, denied the applicant all possibility of any further meaningful involvement in the proceedings which may breach Article 6 ECHR'*. I would accept that the Appellant should be afforded the opportunity to engage in the care proceedings.
>
> 62. Further in accordance with the dictum of **MH** where there are ongoing family proceedings involving children, an immigrant, as in the Appellant in this appeal should be granted a period of discretionary leave. Once the outcome of the family proceedings is determined then the Appellant is able to apply under the relevant provision of the Rules as a parent if that application is justified on the basis of the outcome of the family case. I refer to guidance note 4 of the **MH** decision:-
>
> *'Where such a case arises before the Tribunal it is usual for the appeal to be allowed pursuant to Article 8 ECHR, rather than for the proceedings to remain within the Tribunal system to be adjourned, perhaps more than once. The Respondent will normally then grant a short period of discretionary leave bearing in mind any relevant facts found by, or observations of an Immigration Judge. It is for the Respondent to decide on the period of leave in each case'.*

> 63. It follows from the above having considered all the circumstances of this case and the public interest requirements of section 117B that the Appellant does have an Article 8 claim outside of the Rules. Consequently, the public interest in the Appellant's removal would not outweigh the interference with his private and family life in the circumstances because of the pending care proceedings and such interference would not be proportionate. However, in accordance with the guidance in **MH** any grant of discretionary leave should be limited to the period required to complete the care proceedings. I have been advised by Ms Bayoumi that the care proceedings are due to be completed by the end of February 2016. This is confirmed in the previously mentioned email 6 October 2015 (document A1). In the circumstances, I allow this appeal pursuant to Article 8 however solely on the basis of a recommendation of a grant of discretionary leave until the care proceedings have been determined."

The Grounds of Appeal

15. The Secretary of State's grounds of appeal are, in essence, that the judge failed to apply the guidance in RS (Immigration and family court proceedings) India [2012] UKUT 00218 (IAC). At [43], the Upper Tribunal set out a series of questions that a judge should take into account in determining whether, in circumstances such as in this case, a short grant of discretionary leave might be justified under Art 8 until the conclusion of family proceedings:

> "43. In our judgment, when a judge sitting in an immigration appeal has to consider whether a person with a criminal record or adverse immigration history should be removed or deported when there are family proceedings contemplated by the judge should consider the following questions:
>
> (i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
>
> (ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child?
>
> (iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?
>
> (iv) In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of the contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?"

16. The Secretary of State argues in her grounds that the judge failed to follow the guidance in RS in particular failing to consider: "Whether or not the care proceedings had been instituted in order to frustrate or delay removal or, in any event, not to promote the child's welfare."

17. Further, the grounds argue that the claimant could not succeed under the Rules and, having regard to the public interest considerations set out in s.117B of the Nationality, Immigration and Asylum Act 2002:

> "If [the appellant does not have a genuine and subsisting relationship with his child] …, it is submitted that ongoing care proceedings cannot on their own outweigh the public interest."

Discussion

18. In my judgment, the judge's decision does not fail properly to take into account the guidance in RS at [43] which was subsequently approved by the Court of Appeal in Mohan v SSHD [2012] EWCA Civ 1363.

19. First, the outcome of the family proceedings was likely to be material to the immigration decision as part of the claimant's case was based upon a continuing relationship (at least through contact) with K. This was the case even though the judge found, as a result of K being in foster care, that the claimant did not have a "genuine and subsisting parental relationship" with K. Even if the appellant's "contact" could not be equated with such a relationship, continuing "contact" would be relevant in assessing both the appellant's and K's Art 8 rights.

20. Secondly, there were no compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the child's best interests. This was a removal case. The claimant had been in the UK since 2011 when he was 15 years old and had been granted discretionary leave since his application for asylum was refused on 12 October 2011. There was no suggestion of criminality or other public policy reasons (apart from immigration control) which were of a compelling nature such as might arise in a deportation case.

21. Thirdly, there was no reason to believe that the care proceedings had been instituted to delay or frustrate the claimant's removal or not to promote K's welfare. In the case of private family law proceedings, it will be the parties who initiate the proceedings. In the public family law context of care proceedings, it will be the local social services department who initiate the proceedings. In any event, there was no evidence before the judge that the claimant had instituted or become involved in the care proceedings in order to frustrate his removal or in an attempt to act contrary to K's interests.

22. Fourthly, the evidence before the judge was that the claimant retained a close interest in the life of K. He had the benefit of supervised contact with K once a week. Even though he had only attended approximately half of the sessions, he had nevertheless maintained contact and there is no reason to doubt that he hoped to retain contact with K (if he remained in the UK) after the care proceedings concluded.

23. The evidence before the judge was that the care proceedings were likely to conclude not before the end of February 2016. The hearing before the judge was in October 2015 and therefore a short grant of discretionary leave, perhaps of six months would suffice.

24. Consequently, I see nothing inconsistent with the judge's decision contrary to a proper application of the guidance in [43] of RS. That disposes of the Secretary of State's first ground.

25. Turning to the second ground, by virtue of s.117B(1) of the NIA Act 2002 the maintenance effect of immigration control was in the public interest as the claimant could not succeed under the Immigration Rules. Nevertheless, as the case law of the Upper Tribunal (RS) approved by the Court of Appeal (Mohan) recognises, the public interest may be outweighed by an individual's circumstances where he or she is engaged in family proceedings concerning their child where the issue of the "best interests" of the child and continued contact with the individual are raised. As I have said, there was nothing in the claimant's background that was sufficiently compelling to exclude him from the UK irrespective of consideration of K's best interests which were at the heart of the care proceedings. There was nothing irrational or otherwise unlawful in the judge's finding in para 63 that the public interest was outweighed by the claimant's circumstances to the extent of justifying a grant of discretionary leave for a short period until the care proceedings were determined.

26. For those reasons, the First-tier Tribunal did not err in law in allowing the claimant's appeal under Art 8 on this basis.

27. Following a short adjournment at the conclusion of submissions, Mr James, having sought instructions, informed me that the care proceedings had now been completed and the outcome was that the claimant would not be able to see K until he reached the age of 18. That, of course, is not relevant to the challenge to the judge's decision which was simply that leave should be granted until the care proceedings were concluded. Its relevance lies, if at all, in the Secretary of State's response now to the First-tier Tribunal's decision in the light of it being upheld by the Upper Tribunal.

Decision

28. The First-tier Tribunal's decision to allow the appeal under Art 8 on the limited basis I have indicated, did not involve the making of an error of law. The decision stands.

29. Accordingly, the Secretary of State's appeal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal
Date 23 May 2016

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal
Date 23 May 2016