Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/00702/2018**

HU/00698/2018

THE IMMIGRATION ACTS

Heard at: Bradford	**Decision Promulgated**
On: 26th September 2018	**On: 11th October 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

JM
MT
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Williams, Andrew Williams Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are both nationals of India. They are respectively a husband and wife, who appeal against the decision of the First-tier Tribunal (Judge O'Hanlon) to dismiss their linked human rights appeals.

Anonymity Order

2. This case concerns minors who are subject to a Care Order by the Family Court. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make

an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Matters in Issue

3. The basis of the Appellants' linked human rights appeals was that they have a family life in the United Kingdom with their two children, C1 born in 2000, and C2 born in 2006. Both of these children have been under the care of the local authority since 2013 when they were removed from the family home after their mother was convicted of assaulting them. At the date of the hearing before the First-tier Tribunal the Appellants' evidence was that they enjoy direct contact with their daughters once a month, with the children being permitted unsupervised overnight stay at their home.

4. The First-tier Tribunal proceeded to assess the linked human rights appeals of the Appellants on the basis that the children would be remaining in the United Kingdom. The determination notes at paragraph 35 that the children are subject a Care Order, and finds at paragraph 36 that it would be in their best interests to remain in this country. Although the Tribunal appears to accept (at end of paragraph 35) that the Appellants have a subsisting parental relationship with their daughters, it did not accept that it would be disproportionate to remove them from the jurisdiction and return them to India. Contact could be continued via 'modern means of communication' such as telephone. On that basis the appeals are dismissed.

5. The Appellants now challenge that decision on three related grounds:

   i) At the date of the hearing before the First-tier Tribunal the Respondent was actively considering whether to grant the children leave to remain. The Appellants had applied for an adjournment, arguing that the Tribunal would not be able to make a reasoned Article 8 decision in respect of the parents if the fate of the children was unknown. It is submitted that the Tribunal erred in failing to grant that adjournment: reliance is placed on the decision in RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC)

   ii) The Judge erred in failing to have regard to the terms of the Care Order which states that the children should

have some direct contact[1] with the Appellants. The Family Court had decided that this amount of direct contact was in the girls' best interests, and the First-tier Tribunal failed in having regard to that;

iii) The First-tier Tribunal erred in failing to have regard to the procedural rights inherent in Article 8, ie the right to meaningfully participate in care proceedings. The argument had been put to the First-tier Tribunal and it is not addressed at all in the determination.

Discussion and Findings

Ground (i) : the application to adjourn

6. Before me Mr Williams suggested a number reasons why it had been in the interests of justice for the First-tier Tribunal to adjourn. He began with this. The background to his application had been that the Appellants and their children had originally applied to the Home Office for leave to remain together. Leave had been refused at the same time and appeals lodged; the appeals were proceeding before the First-tier Tribunal when the Respondent had withdrawn the decision in respect of the children. The position at the date of the appeal before Judge O'Hanlon was that the fresh decisions in respect of the children were outstanding. With this in mind Mr Williams had submitted that it would be sensible – and fair – to await the outcome of the Respondent's review until proceeding to consider the position of the children. Mr Williams placed reliance on the decision in RS (immigration/family court liason: outcome) [2013] UKUT 00082 (IAC).

7. Judge O'Hanlon refused the adjournment for reasons set out at paragraphs 14-18 of the determination. In essence, Judge O'Hanlon considered that there was sufficient information before the Tribunal to justly determine the appeal. In making its findings the Tribunal proceeded on the basis that the children would be remaining in the United Kingdom.

8. I am unable to understand why the approach of the Tribunal prejudiced the Appellants. Had the Tribunal proceeded on the assumption that the children would be removed with their parents the prejudice would be immediately obvious, and the error in such speculation clear. But here the Judge has assumed the most favourable outcome for the Appellants, and it was an assumption that has proven well-founded, since I am told the children have since been granted leave to remain. I can find no support for the Appellants' position in RS. The court in RS were concerned not with adjourning proceedings awaiting a decision by the *Respondent*, but with ensuring that there has been a final judgement by the *family court* before proceeding to make decisions about the parents' immigration status.

[1] For reasons set out at paragraph 10 below, I do not set out the specifics of the Order

9. That brings me to Mr Williams' second submission regarding the adjournment request. That was that the refusal was unfair for the following reason: once the Respondent had made a decision, social services and/or the family court would have revisited their decisions about the children, raising the possibility that contact with the Appellants would be increased. Mr Williams was quite unable to identify any evidential support for this submission. There was nothing before the First-tier Tribunal, or indeed this Tribunal, that suggested that the decision of the Respondent would prompt further assessment by social services or further hearing by the family court. An adjournment on these grounds could potentially have been indefinite, and since there has, apparently, been no further movement in the position of the family court since the Respondent took his decision, it would seem that the Appellants' hopes in this regard were entirely speculative.

Ground (ii): the children's best interests

10. There was before the First-tier Tribunal a large number of documents relating to the family court proceedings. I am unable to find in the file any indication that the Family Court Protocol (*Protocol on communications between judges of the Family Court and Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal*) was adhered to, to enable these documents to be lawfully disclosed to Judge O'Hanlon. The Protocol stipulates that in accordance with the Family Procedure Rules (12.73 and 12.75) such documents may only be disclosed with the express consent of the Family Court. Since I do not know whether such consent was given in this case I do not replicate any of the content of the materials here.

11. The Appellants' evidence was that they see their daughters once per month, for one night. It is their submission before me that this evidence was not weighed in the balance when the Tribunal considered where the best interests of their daughters lay. Again, Mr Williams relied on the decision in RS. Again, I find that reliance to be misplaced.

12. The point in RS was that if a family court has determined that it is in the best interests of a child to have no contact with their birth parents, that matter can be treated as determinative in the immigration context. That would also be true of the converse situation. If for instance the family court had ordered that a parent have weekly visits with his or her child, an immigration judge would be entitled to treat that as determinative of the questions of whether there is a genuine and subsisting parental relationship, and where the best interests lie. In this case that is exactly what the First-tier Tribunal does. It accepts that it will normally be in the best interests of children to be with their parents, and it accepts that the parental relationship subsists, notwithstanding the fact that the children have been placed in care. At paragraphs 35-36, and again at 38-39, the

Tribunal expressly considers the evidence about the contact arrangements. The Tribunal does not ignore or marginalise that evidence. It places it at the heart of its determination. What it finds, however, is that best interests are not a 'trump card'; it directs itself to the guidance in EV (Philippines) [2014] EWCA Civ 874; it cites G (Ghana) [2017] EWCA Civ 1126 in support of the proposition that an order by the family court does not prevent the Secretary of State from effecting removal or deportation. Having had regard to the very limited nature of the contact it finds, in all the circumstances, that the decision is proportionate. I can find no error in that approach.

Ground (iii): procedural fairness

13. The third ground fails for the same reason as the first. It is contended that in upholding the Respondent's decision the First-tier Tribunal has denied the Appellants the opportunity to continue to participate in the care proceedings relating to their children. That denial, it is submitted, is a breach of the procedural rights guaranteed by Article 8. Attractive as this argument is, it fails for want of evidence. There was nothing on the face of the materials arising from the family proceedings which indicated that proceedings were ongoing, or would be in the future. I would observe that had the Protocol been followed this omission in the evidence if indeed that it what it is, may have been remedied.

Coda

14. For the foregoing reasons I can find no error of law in the approach taken by the First-tier Tribunal (save the failure to adhere to the Protocol, a matter not raised before me).

15. The position today is that the children are now 'qualifying' in that they have spent a continuous period of over 7 years in the United Kingdom. That was not the position at the date of the appeal before the First-tier Tribunal. That change in their position has significant repercussions for the Appellants. That is because in any future assessment of Article 8 the Appellants would be able to rely on the terms of s117B(6) of the Nationality, Immigration and Asylum Act 2002 which stipulates that it will not be in the public interest to remove a parent of a qualifying child where it would not be reasonable to expect that child to leave the United Kingdom. The terms of the care settlement are such that it would plainly not be reasonable to expect these children to leave. The First-tier Tribunal accepted that the Appellants have a subsisting parental relationship; there does not appear to be any factual basis for disputing that it is 'genuine'. Those are matters that the Respondent will no doubt take into account, should any further application be made.

Decisions

16. The determination of the First-tier Tribunal does not contain any

material error of law and it is upheld.

17. There is an order for anonymity.

Upper Tribunal Judge Bruce
4th October 2018