Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04695/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 5th April 2019	**On 29th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

G N S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Nadeem (LR), City Law Immigration Limited
For the Respondent: Mr D Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Place, promulgated on 20th October 2017, following a hearing at Nottingham on 9th October 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, and was born on 1st January 1991. He appealed against the decision of the Respondent dated 10th August 2015, refusing his application for leave to remain in the UK on the basis of his private and family life.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is in a genuine and subsisting relationship with a UK partner, who is a British citizen, and is of English origin, and that they had been living together for more than two years. They now have a British citizen child, and have access to that child, secured through the court, whereby they are allowed to visit the child six times a year. The decision to remove the Appellant would impact upon the Appellant's human rights by severing his link with his child, and forcing his partner to either go to Pakistan, or to remain in the UK, in which event the relationship will also be impacted upon in a manner that infringes his human rights.

The Judge's Findings

4. In a careful, and detailed determination, the judge observed how the Appellant maintains that he and his wife were Islamicly married on 30th March 2012, and have lived together since. They have a child together and that child is subject of a guardianship order until she is 18 years of age. The Appellant served time in prison, and that was the only period of time when the Appellant and his wife lived separately. Thereafter, they had been living together and there are utility bills to prove this. The period spent separately was four months when the Appellant was in prison at the end of 2013. However, during this time the Appellant's wife maintained contact with him by email (see paragraph 21).

5. A feature of this family between the Appellant and his wife is that there were concerns, leading up to the making of the guardianship order, expressed by both the local authority and the guardian herself, about the nature of the relationship between the Appellant and his wife, and whether his wife "is being exploited by the Appellant" (paragraph 24). Nevertheless, the judge was satisfied that there was a genuine and subsisting relationship between the two of them.

6. The Appellant maintains that he has sometimes seen his child up to eight or ten times a year. The judge found there to be no documentary evidence to support this. Although the Appellant and his wife have attempted to increase the number of times when they can visit their child, a Cafcass letter of June 2016 recommends to the court that the visits remain at six time a year and that the Social Services' assessment describes (at page 69 of bundle 2) that under a special guardianship order, the Appellant and his wife would need the leave of the court to vary the order, and that such a request would only be granted, if it was the case

that arose from "where the parent's lifestyle changes were significant and have proved to be sustainable" (paragraph 27).

7. The judge was of the view that in the three years since that report on June 2016, between the Social Services assessment and the Cafcass letter, "such changes were not thought to have occurred" (paragraph 27). Another feature of this appeal was that the Appellant sought to rely upon a letter from the guardian (at page 24 of bundle one) supporting the Appellant in his attempts to gain further access to the child. The judge rejected this because "there is nothing to confirm that it comes from the guardian – it does not even appear to bear her name; it is not dated and, now the guardian apparently offers her support, she has not come to the hearing …" (paragraph 28).

8. In the circumstances, it was also the case that "all decision making relating to [the child's] day-to-day care rests firmly with the guardian and that should the Appellant and [his wife] wish to contest any such decision making, they would have to do so through the courts" (paragraph 29). The judge then went on to deal with Article 8 separately and observed that the decision would be no different. Whereas the Appellant's wife would have a "understandable reluctance to move with the Appellant to Afghanistan" there were no insurmountable obstacles to her doing so (paragraph 37).

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge was wrong to have concluded that the Appellant did not have a genuine and subsisting relationship as a parent with a qualifying child (paragraph 31). This is because in the opinion of Sonia Strachan (an independent social worker), "it is highly beneficial for child S to have contact with her birth parents" (quoted at paragraph 38 of the judge's decision).

11. On 30th April 2018, permission to appeal was granted by the Tribunal on the basis that, against the background of the grounds of application, it was likely the case that Section 117B(6)(a) of the Immigration Act 2014 was satisfied. Second, the private life under Article 8 of the Appellant's British citizen partner would be damaged and infringed were the Appellant to be removed. The judge's treatment of this on the basis that it was "understandable" that there would be reluctance on the wife's part to move to Afghanistan (paragraph 27) did not adequately carry out the assessment required. In fact, the judge did not anywhere in the decision refer to the wife's British nationality, her lifelong residence in the UK, and her substantial private life under Article 8 in this country.

Submissions

12. At the hearing before me on 5th April 2019, Mr Nadeem, appearing on behalf of the Appellant, relied upon the extensive grounds of application. He submitted that there was no Rule 24 response. The grounds of application make it clear that the existing Cafcass report was dated 2013, and there was no updated Cafcass report that addressed the position currently of the Appellant and his wife as parents. He also referred to the recent decision of **SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334**, which is to the effect that in considering Section 117B(6) the act does not necessarily require a consideration of whether the child will in fact or practise leave the UK. The question that disposed is "would it be reasonable 'to expect' the child to leave the UK?". He submitted that the facts here were similar to the reported decision in **SR**. The Appellant was married to an English lady who had never been to Afghanistan and this aspect had not been properly considered by the judge.

13. For his part, Mr Mills submitted that the facts of the instant appeal was rather different from that case of **SR**. There was in the instant case a Cafcass report. It is known that the Appellant has a child with a British citizen lady. However, that lady was considered to be an unsuitable parent, and the child was at a very young age, in January 2013, in the first six months of the birth, removed to a guardian, and this was five years before this hearing. The child has been living away from both parents. It is the guardian who has the day-to-day care of the child. The concerns of the authorities in relation to the bad influence of the Appellant are also manifest in the documentation. The court made a special guardianship order to give the child contact with her natural parents six times a year, but by way of supervised visits. The Appellant is stating that he has sought to increase that. However, there was no evidence to this effect before the court.

14. In any event, the Cafcass 2016 information is to the effect that the court has not been amenable to this. The grant of permission was misconceived. In **SR** there was no Family Court decision taking the child away from the father. The mother was deemed unsuitable because she conceived following a number of miscarriages that arose from pregnancies with different men, until she fell pregnant with the current child at the age of 17. As for her accompanying the Appellant to Afghanistan, the mother only expressed "reluctance to move with the Appellant to Afghanistan" (paragraph 37) and there is nothing to suggest that there was the requisite insurmountable obstacles in her way to doing so. The reliance upon **Agyarko** did not help the Appellant because that case makes it clear that "insurmountable obstacles" is a "high threshold".

15. Finally, the Appellant's wife had converted to Islam. She wore the hijab. There would be no problem of her relocating to a Muslim country.

16. In reply, Mr Nadeem submitted that the parties were in a genuine relationship. They had a genuine parental relationship with their child. There were three aspects to this appeal. The first aspect concerned the

Appellant having met his wife when they were both very young. He was 18 and she was 14. The second aspect concerns their having had a child, but devoid of the parental skills needed at that young age to look after the child, in a manner that is confirmed by the Cafcass report. The third aspect concerns the fact that in 2016 they did go to court to ask for further contact. The report relied upon was the 2013 Cafcass report, and there was no new Cafcass opinion as to the current state of the parents' ability to look after their child. What is also unmistakable was that they have had the minimum of six visits of supervised access to see their child per year. In addition to this, they made contact by telephone. The evidence shows that after 2013 the mother became stable. She did not have continuing mental health problems. However, Cafcass did not produce an updated report.

Error of Law

17. I am not satisfied that the decision of the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007). My reasons are as follows. First, this is a case where the Appellant's wife has gone into a relationship with the Appellant, as recognised by the judge, in circumstances where she was aware of his immigration situation. It is a case where the local authority has had concerns about the nature of the relationship and of the Appellant's wife "being exploited by the Appellant" (paragraph 24).

18. Second, insofar as the child is concerned, shortly after the birth of the child, there was a guardianship order, that placed the child in more stable surroundings, and that position is to remain until the child is 18 years of age.

19. Third, the judge has regard to all of the evidence that has been presented before her, and does not err as a factual matter in this respect. It is said that the Appellant and his wife had sought to increase their contact with the child but the judge observes that "there is no documentary evidence before me of any application to the courts" (paragraph 30). It is moreover, also observed that there may "hope one day to have more contact with her but the documents show that the purpose of the special guardianship order is to provide child S with stability and continuity" and the submission made by Mr Nadeem at the time before the judge that allowing the Appellant to remain in this country "would greatly increase their chances of regaining custody of child S is unsubstantiated (paragraph 30). There is, of course, nothing stopping the Appellant from making that application now.

20. Fourth, it is important that the letter that was purportedly from the guardian, was rejected by the judge, as not even bearing her name, not being dated, and not being supported by her attendance at the court to support the claims made by the Appellant.

21. Fifth, the Appellant's wife has only expressed a "understandable reluctance to move with the Appellant to Afghanistan" but the test, as the judge made clear, is one of "insurmountable obstacles", and the decision in **Agyarko** makes it clear that unless there are "unjustifiably harsh consequences", an adverse decision would not be disproportionate. It also makes clear that appropriate weight needs to be given to the Secretary of State's policy and the public interest in immigration control, and the threshold is a high one to surmount.

22. It is of course the case that the Appellant's wife has not been to Afghanistan, but the judge deals with this by observing that "she was aware of the Appellant's lack of immigration status when she entered into a relationship with him" (paragraph 37), and is now a convert to his faith, and "no evidence was put to me, other than the relationship with child S, as to why the Appellant, and [his wife] could not go to Afghanistan" (paragraph 37). Ultimately, the judge could only have decided the appeal on the basis of evidence. If the evidence was not put to that effect, the judge could not have taken it into account.

23. Finally, the decision by the judge that the social worker's opinions that it would be highly beneficial for the child to have contact with her birth parents has to be construed in the context that nothing should interrupt or undermine the placement with the guardian (paragraph 38). Accordingly, the decision by the judge was not an irrational one and there is no error of law.

Notice of Decision

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

An anonymity order is made.

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

Deputy Upper Tribunal Judge Juss 25th April 2019