Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01526/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 2 January 2014	**On 13 January 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R T
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms R Stickler, instructed by Gloucester Law Centre

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 that no report or other publication of these proceedings or any part or parts of them shall name or indirectly identify the respondent or his children. Reference to the respondent may be by use of his initials only. Failure by any person, body

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or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this order may lead to a contempt of court. This order shall continue in force until the Upper Tribunal (IAC) or an appropriate court lifts or varies it.

2. For convenience, in the remainder of this determination I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Fiji and is 34 years old. He arrived in the UK on 7 February 2000 and initially served in the army. He voluntarily left the army in January 2001 and in August 2002 was granted leave to remain until 21 August 2003. In 2005 he returned to Fiji and between October 2005 and March 2006 he worked in Iraq. On 13 February 2008, he was granted entry clearance as a spouse valid until 13 February 2010. On 15 March 2008, he entered the UK with his second wife (whom he had married in April 2006) and their daughter, "K" who was born in August 2007. On 26 April 2010, the Appellant was granted indefinite leave to remain.

4. On 8 June 2012, the appellant was convicted of a number of driving offences before the Gloucester Magistrates' Court: failing to stop a motor vehicle when required; using a vehicle without insurance; dangerous driving; and driving with excess alcohol. In addition, he was convicted of failing to surrender to bail. He was sentenced at the Gloucester Crown Court on 6 July 2012. He was sentenced to a total of eleven months' imprisonment for the driving offences and a further consecutive period of one month imprisonment for the failure to surrender to bail. The total sentence was, therefore, one of twelve months' imprisonment.

5. On 4 January 2013, the Secretary of State made a decision to deport the appellant on the basis that it was conducive to the public good. The automatic deportation provisions in the UK (Borders) Act 2007 did not apply because, although the appellant had been sentenced to a period of imprisonment of at least twelve months, that period was only made up by accumulating consecutive sentences (see s.83(1)(b)).

The First-tier Tribunal's Decision

6. The appellant appealed to the First-tier Tribunal. That appeal was heard on 11 September 2013 by Judge Troup and Mr F T Jamieson JP. In a determination promulgated on 24 September 2013, the First-tier Tribunal allowed the appellant's appeal under Art 8 of the ECHR. The First-tier Tribunal did so only on a limited basis. The appellant was involved in contact proceedings in relation to his daughter, K. Before the First-tier Tribunal there was an order of the Yeovil County Court dated 4 September 2013 in which the appellant was granted fortnightly indirect contact with his daughter. The order provided for a directions appointment on 4

November 2013 with a final hearing on the first open date after 11 November 2013.

7. In the light of these ongoing proceedings, the First-tier Tribunal was referred to the *Protocol on Communications between Judges of the Family Court and Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal* issued by the Senior President of Tribunals and the President of the Family Division on 19 July 2013. In particular, the First-tier Tribunal was referred to para 6 of that protocol which is in the following terms:

> "6. It is not the role of the judges in either jurisdiction to predict the outcome of the proceedings in the other jurisdiction. Where the decision in the Family Court is likely to be a weighty consideration in the immigration decision, it is anticipated that it will normally be necessary for the Tribunal to wait until the Family Court judge has reached a decision on the issue relevant to the immigration appeal. If so, either the appeal will be allowed by the Tribunal in anticipation of a short period of leave being granted or the hearing will be adjourned, depending on the anticipated timescale of the family proceedings."

8. At para 15 of the determination, the First-tier Tribunal notes that the then Presenting Officer initially invited the Tribunal to adjourn the deportation appeal pending a final order in the contact proceedings. Following a short adjournment, in order for the Presenting Officer to take further instructions, the Tribunal records at para 18 of its determination that the Presenting Officer then indicated that he would "resist any request for an adjournment despite having urged us earlier to do so."

9. The First-tier Tribunal then went on to consider the two options offered to it by para 6 of the *Protocol*, namely whether to adjourn the proceedings to await the outcome of the Family Court proceedings, or to allow the appeal to the limited extent that a short period of leave should be granted until those proceedings were resolved.

10. At para 33 of its determination, the First-tier Tribunal set out rule 21(4) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, dealing with the Tribunal's discretion to adjourn. At para 33, the First-tier Tribunal concluded that it was not appropriate to adjourn the hearing for the following reasons:

> "The final hearing in the Yeovil County Court is to be listed on the first open date after 11 November which will, in any event, be more than 28 days after the original hearing.
>
> Given that the only fortnightly indirect contact was ordered on 4 September, we have to suppose that any direct contact (if allowed) will be introduced in gradual stages necessitating further hearings. An adjournment in the deportation proceedings therefore, even in the exceptional circumstances of the contact proceedings, is not likely to be final and, in all probability, is likely to lead to further adjournments over an indeterminate period."

11. The First-tier Tribunal, therefore, decided instead to allow the appeal for the following reasons:

> "We concluded therefore that in the interests of justice, we should allow the appeal, inviting the Respondent to grant leave on a limited basis to allow for the contact proceedings to take their full course."

12. That latter conclusion relates back to para 19 of the Tribunal's determination where it stated as follows:

> "19. With reference to the Protocol, we allowed the appeal under Article 8 in anticipation that the Respondent would grant a short period of leave to coincide with the conclusion of the contact proceedings in the Yeovil County Court, and we recommend that that period will be for not less than four months."

The Secretary of State's Appeal

13. The Secretary of State sought permission to appeal the First-tier Tribunal's decision. On 15 October 2013, the First-tier Tribunal (Judge Pooler) granted the Secretary of State permission to appeal. The basis to that grant is set out in para 3 as follows:

> "It is arguable that the Tribunal erred in law in allowing the appeal so as to enable the grant of a period of leave during which the contact proceedings were to be concluded. The grounds refer also to a failure to hear evidence and/or submissions on the matters in issue (arguably a procedural error), a failure to make findings on matters in issue, in particular in relation to the relevant Immigration Rules, and a failure to follow the Protocol on Communications between Family Courts and the IAC. They raise arguable points."

14. Thus, the appeal came before me.

15. Mr Richards, who represented the Secretary of State, relied upon the grounds upon which permission to appeal was granted.

16. Ms Stickler, who represented the appellant, submitted a detailed skeleton argument in advance of the hearing. In that skeleton, Ms Stickler submitted that the Tribunal had correctly directed itself in law in applying the *Protocol* and the relevant case law, namely Mohan v SSHD [2012] EWCA Civ 1363, approving RS (Immigration and Family Court Proceedings) India [2012] UKUT 00218 (IAC). Further, the Tribunal had given adequate reasons why it would be disproportionate to remove the Appellant pending a final order in the contact proceedings which were ongoing.

Discussion

17. In my judgment, the First-tier Tribunal did not err in law in allowing the appellant's appeal on the limited basis that it would be disproportionate to remove him pending the outcome of the contact proceedings and in order that he could participate in those proceedings.

18. First, and as I have already pointed out, the Tribunal referred to para 6 of the *Protocol*. There it is noted that where a decision in the Family Court is likely to be "a weighty consideration" in the immigration decision, then it will normally be necessary for the Tribunal to wait for that decision either

by allowing the appeal so that a short period of leave is granted or to adjourn the hearing in order that the family proceedings can be completed. Those were, in essence, the two options open to the Tribunal unless the appellant's claim under Art 8 could not succeed on any basis or where the individual was bound to succeed regardless of the outcome of the family proceedings. Neither of those latter two courses was, in reality, appropriate in this appeal. Neither course seems to have been proposed by the Presenting Officer.

19. The Tribunal records (at para 15) that the Presenting Officer accepted that:

> "The nature of [the Appellant's] offences are not sufficient to dismiss the appeal. The contact proceedings are "core" to your decision."

20. The grounds argue that this was a misquotation of the respondent's position before the Tribunal. Mr Richards did not draw my attention to any material to contradict what is recorded in para 15 of the Tribunal's determination as a quotation from the Presenting Officer's submissions. In any event, even if, as the grounds argue, the Presenting Officer was merely stating that the Tribunal had to consider Art 8 separately from the Rules, the Tribunal clearly (at para 27) determined for itself that the nature of the appellant's offences, while serious, were not in themselves sufficient to determine the appeal against him regardless of a consideration of his relationship with his daughter. With that view, I entirely agree.

21. At para 14, the Tribunal referred to the Court of Appeal's decision in Mohan and set out paras 43-47 of the Upper Tribunal's decision in RS which had been approved by the Court of Appeal. The grounds argue that the Tribunal failed to make a finding and properly apply the Tribunal's guidance in RS, particularly at para 43(iv) and (iii). Paragraph 43 of RS is as follows:

> "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 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 interest 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 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?"

22. The Upper Tribunal continued at para 44 to identify what should then be decided having asked those questions as follows.

> "44. Having asked those questions, the judge will then have to decide:-
>
> i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?
>
> ii) If so should the appeal be allowed to a limited extent and a discretionary leave be directed?
>
> iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?
>
> iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?"

23. At paras 20-32 of its determination, the First-tier Tribunal set out its reasons for concluding that the appellant's removal would be disproportionate pending the resolution of the contact proceedings. At paras 31-32, the Tribunal directly addressed the questions posed in paras 43 and 44 of RS as follows:

> "31. Having regard to the questions posed in paragraph 43 of RS we find that:
>
> i) The outcome of the contact proceedings is likely to be material to the deportation decision;
>
> ii) There are no compelling public interest reasons to exclude the Appellant from the UK at this time irrespective of the outcome of the contact proceedings or the best interests of the child. We find that the Appellant has been at liberty for nine months and has observed the terms of his licence and is being and has been treated for the symptoms of alcohol abuse and PTSD, and
>
> iii) It has not been suggested to us that the contact proceedings were instituted to delay or frustrate removal and we find that they were not.
>
> 32. Having made those findings, we go onto find (following paragraph 44 i) and ii) of RS) that the Appellant has at least an Article 8 right to remain until the conclusion of the contact proceedings and, accordingly, the appeal is allowed to the limited extent identified in paragraph 19 above."

24. First, it is suggested in the grounds that the Tribunal failed to make any finding in relation to question (iv) in para 43 of RS and failed to give

adequate reasons for its findings in relation to question (iii) of RS. I do not agree.

25. As regards the former, the Tribunal did consider the circumstances surrounding the contact proceedings and the appellant's involvement with his daughter (see for example paras 7, 25, 29 and 30). As regards the latter, the Tribunal was entitled to conclude, as it did in para 31(iii), that there was no reason to believe that the proceedings had been instituted to delay or frustrate the appellant's removal. Contrary to what is said in the grounds, the Tribunal did make a finding on that matter and, on all the evidence before it, it was a finding that was properly open to the Tribunal. It needed to give no further reasons for that finding.

26. Consequently, as can clearly be seen on reading the determination as a whole, the Tribunal fully considered all the evidence and the relevant question posed in RS at para 43.

27. Secondly, the grounds argue that the Tribunal was wrong in law to find that the appellant's removal (at least temporarily) would be disproportionate warranting a grant of leave. There is no merit in this ground. The Tribunal carefully considered the appellant's circumstances including his offending. It was, as I have said, inevitable that the Tribunal would conclude that his offences alone could not justify his deportation without consideration of at least K's best interests. Whether or not the Presenting Officer submitted that the outcome of the contact proceedings were "core", that is precisely what they were, and the Tribunal was correct to conclude that any final decision in respect of Art 8 and the appellant's deportation required a consideration of K's best interests and that in turn drew in the highly relevant (or as the Tribunal put it, "weighty considerations") of the contact proceedings. This kind of circumstance is simply not contemplated in the Immigration Rule at paras 398-399A. That was, of course, according to the Secretary of State's grounds, the submission made by the Presenting Officer. As the case law makes plain, the Secretary of State's proposition that it would be "inappropriate to grant a period of leave to a person whose presence in the United Kingdom is not deemed to be conducive to the public good" is not sustainable (see, for example, RS and Mohan, both automatic deportation cases).

28. Each case must turn on its own facts and involve consideration, as the Tribunal did here, of the individual's offending.

29. The Tribunal was entitled to find that the appellant had "demonstrated his intention to settle in the UK". He had, of course, been granted indefinite leave to remain in April 2010. The Grounds' argument that the Tribunal placed "undue weight" on this is little more than a disagreement with the Tribunal's assessment. It cannot be said that the Tribunal placed an irrational weight upon it and therefore erred in law.

30. The main point is that, in the light of the *Protocol* and RS, the final resolution of whether the appellant could be deported without breaching

Art 8 could only be resolved in the light of the outcome of the pending contact proceedings. The only rational outcomes for this appeal were either that it was adjourned for those contact proceedings to be completed or the Tribunal allowed the appeal under Art 8 to the limited extent of directing that a short period of leave should be granted in order that the contact proceedings could be completed. The Presenting Officer initially argued for an adjournment but then resiled from that position. The Tribunal declined to adjourn the hearing and, entirely consistently with the *Protocol* and RS, concluded that the appeal should be allowed on the basis that the appellant's removal before the contact proceedings were completed would breach Art 8. That was a finding properly open to the Tribunal on the evidence. The Tribunal gave adequate and cogent reasons for its findings and conclusion. Nothing in the grounds of appeal persuades me that the Tribunal erred in law in allowing the appeal under Art 8 on the limited basis that it did.

31. For these reasons, the Secretary of State's appeal to the Upper Tribunal is dismissed.

32. It will, of course, be a matter for the Secretary of State if she wishes to re-consider the Appellant's position once the contact proceedings are resolved. The decision of the First-tier Tribunal only applies so long as those proceedings are pending and the issue of contact remains finally to be resolved.

Signed

A Grubb
Judge of the Upper Tribunal