Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/06419/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 18 March 2015	**On 13 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

ASADUZZAMAN RONEE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Yeo counsel instructed by Henry Hyams & Co
For the Respondent: Mr M Shilliday Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Cox promulgated on 10 December 2014 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 19 January 1990 and is a national of Bangladesh.

4. On 10 February 2014 the Appellant applied for asylum.

5. On 11 August 2014 the Secretary of State refused the Appellant's application and made directions for his removal. The refusal letter gave a number of reasons:

   (a) The Respondent did not find that the Appellant's account to be at risk on return arising out of a land and financial dispute to be credible.

   (b) The App's claim that the decision would breach his right to family and private life was considered under Appendix FM and paragraph 276ADE.

   (c) The Appellant's estranged wife was pregnant but the Appellant had failed to establish that he had a genuine and subsisting relationship with the unborn child or had access rights and therefore could not meet the requirements of the Parent route of Appendix FM.

   (d) There were no exceptional circumstances to warrant a grant of leave outside the Rules.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Cox ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :

   (a) He did not find the facts underpinning his asylum claim to be credible.

   (b) In relation to Article 8 the Appellant had not made a formal application under the Rules or paid a fee. He had raised the issue at a late stage and had not given the Respondent an opportunity to consider the documents in support of that part of his claim.

   (c) The was a paucity of evidence to show that contact with the Appellant was in th best interests of the child. There was no evidence that family court proceedings had been instigated relying on Mohamed (Family Court Proceedings-outcome) [2014] UKUT 00419. The Appellant could reasonably be expected to lodge a formal application under the rules and therefore the decision to remove was proportionate.

7. Grounds of appeal were lodged on the basis that the Judge had wrongly suggested that the Article 8 claim had been raised at a late stage and therefore failed to engage with the fact that this claim was raised as the result of the service of a s 120 Notice with the Refusal Letter and that the Judge had failed to properly engage with the ratio of Mohammed and Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363.

8. On 12 January 2015 First-tier Tribunal Judge Landes gave permission to appeal on both grounds.

9. At the hearing I heard submissions from Mr Yeo on behalf of the Appellant that:

   a. Having discussed the matter with Mr Shilliday he had conceded that there was an error of law in that the Appellant had given good notice of his Article 8 claim.

   b. He argued that the error was material. The child was born in July 2014 and there was evidence before the Judge of the acrimonious nature of the breakdown of the relationship. The Appellant had tried to establish contact with his newborn child and received a harassment warning from the police. Paternity was no longer an issue and there was evidence of that in the bundle.

   c. If the family proceedings were successful or there was an agreement out of court the Appellant could have applied for leave as the parent of a United Kingdom child and there was no reason to think that application would not be successful as there was no reason to believe that contact with his father was not in the childs best interests.

   d. The court of appeal said in Mohad that the immigration courts should let the family court make the decision in relation to the childs welfare.

   e. This Appellant's case was stronger than both Mohad and Mohammed in that they both related to deportation appeals were there was a strong public interest in favour of removal and in the Appellant's case there had only been a short delay between the child's birth in July and the pursuit of a case in October.

   f. The Judge had failed to engage with the issue and should have allowed the appeal on human rights grounds directing that the Appellant be granted a short period of discretionary leave to pursue the ongoing family proceedings.

10. On behalf of the Respondent Mr Shilliday submitted that:

   a. While he referred to the Rule 24 notice he conceded that there were errors of law in the Judges approach and there was force in what Mr Yeo had said.

   b. He accepted that it would appear that paternity was not in dispute it was simply that the mother had failed to engage with the process of contact.

   c. He accepted that while the motive in initiating such proceedings as evidenced by delay may be relevant as suggested in RS (Immigration and Family Court) India [2012] UKUT 00218 (IAC) he accepted that given that the child was born in July and the process began in October it was not a strong argument in this case.

11. In reply Mr Yeo on behalf of the Appellant submitted:

   a. In relation to paternity while the Appellant had been told that his name was not on the birth certificate that did not mean that paternity was in issue. The child's maternal grandparents had sent the Appellant photographs of the child which did not suggest that there was any dispute as to paternity.

   b. In relation to any potential delay or motive this was not argued before the first tier and was not referenced in the decision.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

13. This is an appeal against the Article 8 assessment only of the decision of Judge Cox in dismissing the Appellant's claim for asylum.

14. The first ground argues that the Judge erred in paragraph 48 of the decision in treating the Article 8 claim as one made 'at a late stage' and not one supported by a 'formal application under the rules' (paragraph 49). I am satisfied that Mr Shilliday rightly conceded that there was an error of law in viewing the Article 8 claim in this way. The factual matrix underpinning the claim, the fact that he had married a United Kingdom citizen who was pregnant with his child, was raised and considered in the refusal letter at paragraphs 59-60 .Thereafter the Appellant was served with a section 120 notice and again set out the additional grounds relating to the birth of his child on 22 July 2014 in the appeal grounds dated 2 September 2014. The rule 24 also notice further properly conceded that Appendix FM Gen1.9 (a) (i) provides that the requirement to make a valid application will not apply when the Article 8 claim is raised as part of an asylum claim or as part of a further submission in person after an asylum claim has been refused.

15. I am satisfied that this was a material error since it clearly prevented the Judge from making an assessment of the Appellant's Article 8 claim.

16. I am also satisfied tht Mr Shilliday was right to concede that the First-tier Tribunal Judge failed to address and determine the guidance set out in Mohammed and Mohan .The Judge was obliged to consider whether there was a realistic prospect of the family court making a decision that would have a material impact on the relationship between the child born as a result of his relationship with his British citizen spouse. At the time of the hearing the Judge had evidence before him that the Appellant had engaged in mediation with his estranged partner with a view to establishing contact. There was a letter corroborating that dated 17 October 2014 as part of the court papers. I am satisfied that the Judge was obliged to assess the current stage of the Appellant's case and the absence of proceedings before the family court was not fatal to the Appellant's case as the Judge concluded particularly given that the provisions of the Children and Families Act 2014 reflects a preference for resolution of such issues outside the court system and therefore efforts at mediation are required before an application can be made to the court.

17. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. Mr Yeo and Mr Shilliday both indicated that they were content for the decision to be remade.

18. Mr Yeo made an application by way of Rule 15 (2A) of the Tribunal procedure (Upper Tribunal) Rules 2008 to admit the additional evidence that forms part of the bundle numbered 1-90 that was not before the First-tier Tribunal and I was content to admit the evidence.

19. Mr Yeo indicated that on the basis of the additional documentation which was now before this court he would seek a period of discretionary leave of 1 year be directed

by the Tribunal as the Appellant's estranged wife was not co operating with the family court and this was likely to drag the proceedings out.

20. Mr Shilliday agreed that a period of 1 year was appropriate.

Remaking the Decision

21. In this case the Tribunal is being asked to consider allowing the appeal under Article 8 outside the Rules and directing that a period of discretionary leave be granted in accordance with the guidelines in Mohammed and Mohan to allow the Appellant to pursue the proceedings before the family court and establish contact with his son.

22. I am satisfied that the provisions of Appendix FM are not a complete code in relation to family life. This Appellant's circumstances were not addressed by the Rules in that at the time of his application the Appellant was aware that his wife was pregnant and although the child was a month old at the time of the decision the Appellant could not meet the eligibility requirements of the Rules as he had at that time no access rights to the child.

23. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27.

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

24. I am satisfied that the Appellant has a right to establish a relationship with the child born out of his relationship with Jannah Begum.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

25. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

26. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

27. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

28. In making the assessment I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *"in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

29. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".* Lady Hale stated that *"any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)".* Although she noted that national authorities were expected to treat the best interests of a child as "*a primary consideration",* she added *"Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".*

30. I am satisfied that it is in the best interests of the child in this case to establish a relationship and contact with his father even if the estrangement of his parents means that he cannot be brought up by them all living together in one household.

31. I am satisfied that the Appellant's child was born on 22 July 2014. Mr Shilliday did not seek to argue before me that paternity was in issue. I accept that informal efforts were made by the Appellant to establish contact after the child's birth with his mother Jannah Begum but these were unsuccessful. This led to the Appellant consulting solicitors who wrote to ms begum on 17 October 2014 in an effort to arrange contact without court proceedings through mediation via the West Yorkshire Family Mediation service. There is a letter from the West Yorkshire Family Mediation dated 1 December 2014 indicating that they had attempted to arrange mediation with Ms Begum and had been unsuccessful.

32. I accept that pages 6-29 of the new bundle indicates that an application has now been submitted to Leeds County Court in order to pursue his attempt to make contact.

33. I am also obliged if making a 'free standing' Article 8 assessment that from 28 July 2014 section 19 of the Immigration Act 2014 is brought into force: article 3 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. These statutory provisions apply to *all* appeals heard on or after 28 July 2014 *irrespective* of when the application or immigration decision was made.I therefore take into account in assessing the public interest that the maintenance if immigration control is in the public interest. I take into account that the Appellant

cannot apparently speak English. I take into that at the time the child was born the Appellant's status in the UK was precarious.

34. I am satisfied that the Appellant could not realistically pursue his application if he was removed from the United Kingdom. I am satisfied that these proceedings were not initiated in order to frustrate his removal: the child was born in July 2014 and the Appellant has sought to establish contact since his birth but given the acrimonious nature of the marital breakdown this has proved impossible although he has received photographs of the child. There is nothing about the Appellant to suggest that a court would conclude that it was not in the best interests of the child to have contact with the Appellant.

35. I am satisfied that there is a realistic prospect of the family court making a decision that would have a material impact on the relationship between the Appellant and his child .Therefore taking into account the guidance in the various authorities before me I am satisfied that it would be disproportionate to consider the removal of the Appellant until the conclusion of the family proceedings that he has initiated in what I accept is a genuine attempt to establish contact with his UK citizen child.

CONCLUSION

36. **I therefore found that errors of law have been established in relation to the Judges assessment of Article 8 and that the Judge's determination should be set aside**

DECISION

37. **I remake the appeal.**

38. **I allow the appeal under Article 8 of the ECHR to the limited extent that the Appellant should be granted 1 years discretionary leave in order to pursue contact through the family court proceedings.**

Signed Date 2.4.2015

Deputy Upper Tribunal Judge Birrell