Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22033/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2019	**On 05 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

JM
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Mr T Lindsay of the Specialist Appeals Team
For the Respondent: Ms N Bustani of Counsel instructed by M&K Solicitors

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 his 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.

ERROR OF LAW DECISION AND REASONS

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The Respondent

1. The Respondent is a citizen of Bangladesh born on 7 July 1983. For convenience, I shall refer to him as "the Appellant". On 24 January 2015 he arrived with leave to enter as the spouse of a woman who had two children from a previous relationship. On 12 February 2017 a child was born to them: the child is a British citizen. The marriage ran into difficulties and on 28 July 2017 the Appellant assaulted his wife and was made the subject of a restraining order until 8 February 2019 and a Community Order until 8 May 2020 providing for a rehabilitation programme for the Appellant.

2. Some 5 weeks later on 30 August 2017 he applied to the Secretary of State for the Home Department to whom I shall refer as "the SSHD" for further leave to remain on the basis of his family life with his wife, their child and his two step-children.

3. On 28 November 2018 the Luton Family Court magistrates made a Child Arrangements Order under s.8 Children Act 1989 providing for weekly supervised contact between the father and his child.

The Secretary of State's Decision

4. On 14 October 2018 the SSHD refused the application for further leave. The Appellant did not meet the Eligibility Relationship requirement of Appendix FM paragraph E-LTRP 1.7 because he was no longer living with his wife and consequently could not meet the requirements of Section EX1(b) of Appendix FM. He did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to his integration on return to Bangladesh. He had no parental responsibilities for his wife's other two children. His child was only two years old and there were no exceptional circumstances warranting a grant of leave outside the Immigration Rules.

Proceedings in the First-tier Tribunal

5. On 26 October 2018 the Appellant lodged notice of appeal and by a decision promulgated on 23 May 2019 Judge of the First-tier Tribunal Bristow allowed the appeal on human rights grounds and made a direction regarding anonymity.

6. On 26 June 2019 Designated Judge of the First-tier Tribunal McClure granted the SSHD permission to appeal because it was arguable the Judge had erred in law by failing properly to assess the nature of the parental relationship between the Appellant and his child, particularly in the light that since the British citizen child was living with the mother the child

would not be required to leave the United Kingdom. He granted permission on all the grounds pleaded by the SSHD.

Hearing in the Upper Tribunal

7. The Appellant's solicitors lodged a response under Procedure Rule 24 which included a draft of an order made by the Family Court at Luton on 10 July 2019 varying the terms of the previous child arrangement order so as to increase on a graduated scale the authorised contact between the Appellant and his child and an amended copy of the skeleton argument submitted to the First-tier Tribunal.

8. The Appellant attended but other than to confirm his address took no active part in the proceedings.

Submissions for the SSHD

9. Mr Lindsay submitted that the first ground for appeal was based on the proposition that the Family Court had not given permission for the documentation referred to by the Judge to be disclosed. There had been no application to the Family Court and no order made by the Family Court. He referred to the Protocol on communications between judges of the Family Court and Immigration and Asylum Chambers and in particular paragraph 15 of the Protocol which required the Family Court to indicate the conditions on the use of the material disclosed by the Family Court which may be necessary in the circumstances. I noted the Child Arrangements order of 16 April 2019 made by the Family Court at Luton to be found at pages 168-170 of the Appellant's bundle (AB) states in the last recital at the top of the second page:-

> "The applicant father …… is GRANTED permission to disclose the Family Court Orders to the Immigration and Asylum Office, Home Office in relation to his appeal against the decision to refuse his application for leave to remain in the UK, which is listed for an Appeal hearing on the 15th May 2019."

and that the draft of the order made on 10 July 2019 attached to the Rule 24 response states towards the foot of page 4:-

> "The court grants permission to the parties to share a copy of this order with the Home Office (and any other statutory bodies) as required."

I noted the proceedings were before the magistrates and took the view that the reference to the Immigration and Asylum Office in the April 2019 order was a simple error in nomenclature for the Immigration and Asylum Chamber. The Tribunals are creatures of statute and so are statutory bodies. Both orders specified for what purpose the Family Court orders

could be disclosed. Having regard to the overriding objective identified in Procedure Rule 2 and taking a pragmatic view of the circumstances of this particular case I consider that the Family Court's statement of the purpose for which disclosure was authorised effectively set the limitations on disclosure. At that stage of the hearing I indicated that this ground disclosed no arguable error of law.

10. The second ground for appeal was that the Judge had failed to give adequate reasons why he was satisfied contact had taken place pursuant to the April 2019 Family Court order. Mr Lindsay noted that at paragraph 13 of his decision the Judge had identified the issues in dispute and submitted that the finding at paragraph 13 that the Appellant had a genuine and subsisting parental relationship with his child was insufficiently supported by any reasoning. The issue of a Child Arrangements order was not conclusive that a parental relationship subsisted. He referred me to paragraphs 106 and 109 of the lead and unanimous judgment of Singh LJ in *SSHD v AB and AO [2019] EWCA Civ.661* of which the relevant parts are recited in the SSHD's permission application. Whether there was a genuine and subsisting parental relationship would depend upon an assessment of the facts in each particular case. The Judge had not made any finding or assessment of the facts in the Appellant's case, such as the detailed contact and care arrangements. Paragraph 89 of *AB and AO* had made the point that an assessment of the circumstances would include the role the individual played in caring for and making decisions in relation to the child which was identified as a "most significant factor". The April 2019 order provided for only supervised contact and the Judge needed to have considered whether that was sufficient to establish a genuine and substantial parental relationship. The Judge had misdirected himself in relation to the relevant case law. Mr Lindsay submitted this amounted to a material error of law.

11. The last ground for appeal was based on the Judge's refusal to grant an adjournment requested by the SSHD in the light of the Family Court hearing set for 11 June 2019, less than 4 weeks after the First-tier Tribunal hearing on 15 May. The Presenting Officer had argued that such an adjournment was appropriate and necessary for reasons of fairness because of the possible impact a subsequent Family Court order on the appeal. Mr Lindsay quite properly accepted that this was not a strong point for the SSHD.

Submissions for the Appellant

12. I reminded Ms Bustani that I had already expressed my view on the SSHD's first ground for appeal and that she need not address me on it.

13. With reference to the second ground Ms Bustani accepted that at paragraph 30 the Judge had referred baldly to the two Family Court orders but at paragraph 7 he had referred to the relevant documentary evidence

contained in the substantial AB. On the evidence the Judge been entitled to reach his conclusions. The AB contained records of 4 months of contact sessions between the Appellant and his child at pages 172ff and the Appellant had referred in his statement to the contact. The second bundle submitted by the Appellant (AB2) at p.17ff contained evidence of his financial contributions to his child's maintenance and at AB p.191ff there were photographs of the Appellant with his child including at contact sessions.

14. At paragraph 12(h) of the decision that Judge had noted the parties agreed it was not reasonable to expect the Appellant's child to leave the United Kingdom. At paragraph 102 of *AB and AO* the Court of Appeal had noted that it:-

> "… should not lightly interfere with the conclusion of a lower court or tribunal on what is essentially a mixed question of law and fact, as it involved the application of the statutory language to the facts of this case."

The Upper Tribunal should exercise similar restraint.

15. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 as amended stipulated that the public interest did not require removal where there is a genuine and subsisting parental relationship. The Judge had looked at the evidence and found it was sufficient to establish a genuine and subsisting parental relationship between the Appellant and his child. He had been justified in refusing an adjournment and indeed the validity of that refusal had been subsequently supported by the terms of the draft Family Court order of 10 July 2019. The decision contained no material error of law and should be upheld.

Response for the SSHD

16. Mr Lindsay submitted that the submissions for the Appellant were in line with the skeleton argument submitted to the Judge and now amended for the Upper Tribunal. They started from the premise that the evidence was undisputed and was sufficient to justify the Judge's conclusions. The SSHD did not seek to challenge the documentary evidence but did challenge the lack of reasons given by the Judge why he accepted the evidence and why he found it supported his conclusions. Crucially, as the Court of Appeal had made clear in *AB and AO* referring to other authorities and decisions, each case turned on its own particular facts and merits and the Judge had not given adequate reasons to support his conclusions. The Judge could have decided the appeal either way and needed to give adequate reasons to support his conclusions.

Findings and Consideration

17. The Judge referred at paragraph 7 of his decision generically to the "Appellant's bundle of 3 to 5 pages" and "… supplementary bundle of 25 pages". He expressly identified the Child Arrangements order of 28 November 2018. The broad provisions of the 28 November 2018 order of the Family Court are mentioned at paragraph 16 and at paragraph 17 he referred to the conviction of the Appellant for assaulting his wife. There is no other reference to or finding on any of the oral or written evidence submitted to show whether the Appellant had a genuine and subsisting parental relationship with his child. The Child Arrangements orders put in place a structure and mechanism for the future conduct of the relationship between the Appellant and his child but in themselves are not evidence of a subsisting relationship. The Appellant had supplied evidence to support his claim of a genuine and subsisting relationship with his child and it was for the Judge to assess and make findings on the evidence with a view to forming part of the reasons for his conclusions. He did not do so and consequently his decision contains a material error of law. It did not explain to the SSHD, as the losing party, why he lost.

18. After discussion with the advocates, I have concluded that the appropriate course is to set aside the First-tier Tribunal's decision in its entirety and to remit the appeal for hearing afresh before a different judge in the First-tier Tribunal. I do so because of the need for an extensive fact-finding exercise and at the date of the Upper Tribunal hearing the latest order of the Family Court has not been perfected. In the time before the appeal is listed for re-hearing the Appellant will be able to obtain a copy of the perfected Family Court order and evidence how in the light of the varied provisions for contact with his child, their relationship has developed.

Anonymity

19. The anonymity direction previously made by the First-tier Tribunal is continued.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained an error of law such that it should be set aside.

Anonymity direction continued.

Signed/Official Crest Date 26. vii. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal