Upper Tribunal
(Immigration and Asylum Chamber)

RS (immigration/family court liaison: outcome) [2013] UKUT 00082(IAC)

THE IMMIGRATION ACTS

Originally heard at Field House	**Promulgated**
On 23 May 2012	
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Before

THE PRESIDENT, MR JUSTICE BLAKE

LORD JUSTICE McFARLANE

UPPER TRIBUNAL JUDGE MARTIN

Between

RS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(1) This case provides an example of the importance of co-operation and communication between the two jurisdictions, family and immigration, where two sets of parallel proceedings, closely dependent upon each other are ongoing.

(2) Following the Ruling of the Upper Tribunal in RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC) , the appellant's Article 8 case against deportation fell to be determined in the light of the judgment of the family court regarding the best interests of the appellant's child, H. The family court held that H's best interests did not lie with her parents but by being placed in long-term foster care in the United Kingdom. The family court regarded it as acceptable for contact with H's parents to be face-to-face annually (by H's visiting them in India, at public expense) and monthly by means of Skype.

(3) Since those arrangements satisfied H's best interests in the family proceedings, where those interests were the paramount concern, it followed that the Tribunal could be satisfied, when considering H's best interests as a primary consideration in the deportation proceedings, that the appellant's deportation did not interfere with H's best interests.

(4) The arrangements identified by the family court as meeting H's best interests provided for the likelihood of the appellant's deportation. The family court took into account [53] of the Tribunal's Ruling in [2012] UKUT 00218.

(5) The appellant's deportation was, accordingly, not unlawful on human rights grounds.

We direct that in any report of these proceedings the identity of the child H and her parents shall not be revealed.

DETERMINATION

Introduction

1.
We issued a Ruling and Directions dated 18th June 2012 in this appeal under reference RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC) in which we adjourned the deportation appeal to await the decision of the family court. We note that the Court of Appeal has since endorsed our ruling in Mohan v SSHD [2012] EWCA Civ 1363 albeit at [32] stressing the need for caution in anticipating the immigration consequences of a decision in family proceedings that was yet to be taken. We directed either party to make written representations within 20 days of disposal by the family court, on receipt of which we would further consider the appeal and proceed to a final determination without further oral hearing. This determination should be read in conjunction with that Ruling.

2.
We indicated in paragraph 53 of that Ruling that if the family court concluded that H should be permanently removed from the care of her parents then we did not consider that the deportation of the appellant would be unlawful as a disproportionate interference with the right to respect to the family life he enjoys with his wife and H or his private life derived from his residence here. Our reasons for so finding are contained in that paragraph. Alternatively we indicated in paragraph 54 that if the family court concluded that H's welfare required her to be reintroduced to the care of her parents, then the appellant's deportation would be disproportionate and in breach of the human rights of each member of the family.

3.
The family court has now finally concluded the proceedings before it by the making of a Final Care Order. We have been provided with a copy of District Judge Wilding's judgment of 18 th October 2012 and the Final Care order, a copy of the Agreed Final Threshold Document and a copy of the Final Care Plan of Luton Borough Council dated 17th October 2012.

4.
This appeal has provided an example of the importance of co-operation and communication between the two jurisdictions, family and immigration, where two sets of parallel proceedings, closely dependent upon each other are ongoing. The judges in each jurisdiction recognised the importance of their decision-making to what takes place in the other and for that reason there has been close co-operation and sharing of information in this case; that is how Judge Wilding was able to quote from our Ruling in his judgement and we from his in ours. In this case, we conclude that given an indication of the immigration outcome when the family proceedings were concluded has enabled the family court to shape the Care Plan to address the immigration issues.

5.
The Tribunal has now received written submissions from both parties.

The written submissions

6.

On behalf of the Secretary of State we received a fairly brief submission relying upon Judge Wilding's paragraphs 72 to 74 which, it is said clearly envisages that the appellant will be removed, that his wife intends to go with him and that suitable contact arrangements have been made in that event. The Tribunal is asked to determine the appeal without a further hearing and dismiss it.

7.
The appellant’s representative has, unsurprisingly, provided a more lengthy submission that summarises the Care Order as follows:-

"District Judge Wilding, sitting at Luton County Court, ordered on 16 October 2012 there be a final care order to Luton Borough Council in respect of H. However, the Appellant and his wife, Mrs K, have an opportunity to discharge the care order, in the future, if they are deemed fit to care for H. The care plan envisaged H would continue to have contact with the Appellant and Mrs K. However the frequency and duration of the contact would be reviewed as the care plan evolves."

The decision of the family court

8.
So far as that summary is concerned, we consider that it does not paint an entirely accurate picture of what was decided. Judge Wilding's judgement is a 20 page, 75 paragraph document. It explains at paragraph 31 that:-

“The Local Authority’s Final Care Plan had changed between hearings and the latest was dated 9th July 2012 and provided for long-term fostering of H as a protracted trawl of the adoption register have found no matches for H”.

9.
It is clear therefore that the reason that H is to be in long-term foster care is because of the inability of the local authority to identify suitable adoptive parents for her. It is not because there is any future plan for her to be rehabilitated to her parents; that is clear in the Final Care Plan. (Paragraph 4.5 – “There are no plans for reunification”).

10.
Whilst Mr Khan submits that the door is open for the appellant and his wife to seek to discharge the Care order in the future, that course is clearly not envisaged by Judge Wilding, the Local Authority or H’s Guardian within the care proceedings who clearly view her foster placement as a permanent one. It is with that in mind that the contact is to be reduced to once per month only. Throughout the care proceedings contact was three times per week. It is clearly being reduced to a level to maintain the relationship only.

11.
Judge Wilding then goes on to explain how the 9th July 2012 Final Care Plan was deficient because it did not allow or deal with the possibility of father's deportation and mother leaving the country with him, or alternatively choosing to remain in England. There was therefore another Final Care Plan of 15th October which did provide for contact in the event that father is removed; by Skype once a month and by the Local Authority funding annual visits by H to India for face-to-face contact.

12.
All this paints a rather different picture than that contained in paragraph 2 of Mr Khan's submission that “whilst H has been place into care, she has not been permanently removed from her parents and it should be noted that she has not been put up for adoption but instead placed in long-term foster

care", suggesting that this was a deliberate choice with a view to the future. Clearly that is incorrect; long-term foster care was the only possible permanent placement for her, as no adoptive parents were identified.

13.
The submission goes on to suggest that the Care Plan recognised that the appellant and Mrs K have attended parenting courses with a view to improving their parenting skills but recognises that the Care Plan concluded it would not be in the best interests of H to return to the care of her parents because they have been unable to implement what they have learned in practice. It is then suggested that the Care Plan therefore indicates that if they are able to improve their parenting abilities and implement what they have learnt H can be returned to the care.

14.
Reading the Final Care Plan and Judge Wilding's judgement, that is not our understanding. It seems clear that no one envisages H's return to the care of her parents. The care proceedings in this case have taken a very long time. H has been in care since February 2010. Unusually, there were considerable delays in order to afford the parents every opportunity to attend classes and therapies so that they could demonstrate that they were capable of providing adequate care for H. They were unable to do so. The judge eventually concluded that H could wait no longer.

15.
The appellant also suggests that because the parents will maintain some contact with H and because Social Services will ensure that they continue to do so, the parents will continue to have influence over H's care and again this demonstrates that H has not been permanently removed from their care. Again, we find that this is putting a gloss upon the judgement and final care plan which is simply not there. Paragraph 5.5 of the Care Plan reads:-

" **During the court process** (our emphasis) the Department's intention will be to actively involve Mrs K and Mr S in the decision making process where appropriate"

16.
At paragraph 4.9 of the Final Care Plan -

"It is expected that Mrs K and Mr S will attend all contact sessions at the times and dates to be specified and will be consulted when and where appropriate about the welfare of H. In addition it is expected that Mrs K and Mr S will attend the Looked After Children Reviews so that they are kept up to date with H's progress."

17.
This does not suggest that the appellant and his wife are involved in any meaningful way in her day to day care; rather they are to be kept informed once the Final Care Order is made.

18.
Perhaps the best submission made on the appellant's behalf is that if he is removed to India then it will be impossible for H to be returned to the parents' care. Due to Mrs K's mental health problems she is entirely reliant upon the appellant and cannot look after H on her own. In summary, in order to have any prospect of having H returned to them, they need to be in the UK. They will be unable to show that they are fit to care for her if the appellant is in India and will be prevented thereby from making application to set aside the care order.

19.

However, reading the documents as a whole, there is clearly no expectation that H will return to their care in the future. The longer H is placed in a stable foster home the less likely that becomes.

20.
The appellant goes on to submit that the Care Plan seeks to include him and Mrs K in H's life rather than exclude them. It proposes that contact should continue and that the frequency and level will be reviewed; it is submitted that this indicates the level of contact can increase over time if it is deemed to be positive. We consider that such an outcome is speculative. The Care Plan and judgement report that there are real concerns over contact. It cannot therefore be assumed that contact would increase.

21.
The appellant notes that the Care Plan articulates H's view that she wishes to return to her parents but realises it may not be possible and that she enjoys the contact sessions.

22.
The Care Plan and Judge Wilding's judgement however record that H is eight and said to be settled and well integrated in her foster carer's family. They also describe concerns over contact that has taken place thus far and in particular the interactions between the Appellant and his wife in the presence of H.

23.
The Care Plan makes clear that what is proposed is the parents being kept informed rather than being consulted. The decisions will primarily be made by the foster carers subject to the approval of the Local Authority. The Care Plan clearly envisages H's long term future as being a fully integrated member of the foster family. The Care Plan clearly reflects H's best interests.

Discussion

24.
We noted in the previous Ruling that this Tribunal has inadequate powers and resources available to it to support its task of determining the best interests of a child; although there is no doubt that those best interests have to be taken as a primary consideration in immigration decision making: see ZH (Tanzania) [2011] UKSC 4. It is how the Tribunal reaches such an assessment that is made complicated by the lack of resources.

25.
The Tribunal does not have the benefit of separate representation on behalf of the child. It does not have highly qualified and independent Guardians to represent the child's best interests and put forward their views and nor does it have the availability of social workers who alongside the Guardian interview all persons and professionals concerned in the child's life to come to a view as to where the child's best interests lie.

26.
Before undertaking any balancing exercise in assessing the Article 8 case, what must first be identified is where H's best interests lie. By deferring the immigration decision until the family court reached its conclusions we have had available to us the authoritative assessment of the Final Care Plan and more importantly Judge Wilding's judgement.

27.
It is clear that H's best interests do not lie with her parents but by being placed in what is clearly viewed by the Local Authority, the Guardian and the Judge as a permanent placement, away from her

parents, in long-term foster care. She is described as being well integrated into that family which is culturally appropriate. She is now doing much better at school and her attendance has improved enormously since she has been away from the care of her parents. She has some difficulties with social interaction with her peers but this is being addressed by the school. It was clearly envisaged by the Local Authority that adoption would have been in her best interests but that route was blocked by the unavailability of prospective adopters. As it is the plan is long-term foster care. It is abundantly clear that nobody envisages a return to the care of her parents. Judge Wilding makes clear that there have been numerous psychiatric and psychological assessments of the mother and that the appellant has undergone a variety of therapies. Despite this they have been unable to demonstrate not just that it would be in H's best interest to return to their care but that it would even be safe for her to do so.

28.
Judge Wilding's judgement and the Final Care Plan indicate that the Local Authority, the Judge and the Guardian all took into account and provide for the likelihood of the appellant's deportation once the family court proceedings were concluded. It is for that reason that provision was put in place for contact by Skype and for annual visits by H to India to meet with her parents at local authority expense. The family court therefore clearly contemplated that the consequence of its decision represented an indefinite separation taking into account paragraph 53 of our Ruling, i.e. in anticipation of the appellant's deportation.

29.
It is argued strenuously on the appellant's behalf that it does not represent a permanent separation. Whilst it is correct that the terms of the Final Care Order, not being adoption, do not permanently sever relations between H and her parents, the Local Authority and the family court proceeded on the basis that it meant a permanent removal of H from her parents' care.

30.
At the time we made our Ruling, Mr Khan's submission envisaged the alternatives were adoption/long-term fostering or a return to the parents either immediately or on a phased return. We anticipated that if the family court ordered any kind of return of H to the care of her parents that deportation would be disproportionate.

31.
Even though the result is not adoption, we are satisfied that what has been decided represents a permanent removal of H from the appellant and Mrs K; this has been decided by a court far better placed than we are to determine where H's best interests lie. H's best interests are of course the paramount consideration in the family court. The family court is satisfied that those best interests are served by H remaining in the UK with her foster carers and that it is acceptable for contact with her parents to be face-to-face annually and by Skype monthly. If the family court is satisfied as to that arrangement when her best interests are the paramount consideration then it follows that we are satisfied when considering her best interests as a primary consideration that deportation does not interfere with her best interests.

Conclusions

32.
In the previous Ruling we have explained our reasoning with respect to the balance between competing interests apart from the unresolved issue of where H's best interests lie. We now have an authoritative ruling on what H's best interests are and how they impact on the appellant's removal.

Apart from the information provided by the family court no new evidence has come to light or new issue emerged.

33.
We are conscious that during the period of the adjournment of the decision while we awaited the family court's decision, from 9 July 2012 new Immigration Rules have come into force explaining in some detail the Secretary of State's new approach in Article 8 cases. It has not been suggested to us that those rules afford the appellant a new argument against the decision to deport. Indeed, the new rules are generally more strict than the legal principles we applied in reaching our Ruling: see Izuazu v SSHD [2013] UKUT 00045 (IAC).

34.
We, therefore, conclude that there is no reason for us either to reconvene for a further oral hearing, or to conclude that the appellant's deportation would be unlawful, as a disproportionate interference with the family life enjoyed between H and her parents. We take into account the family court's findings and reasons and the provision made therein for such residual contact with H as that court considered appropriate in the circumstances we had envisaged at paragraph 53 of our ruling. We do not consider the difference between face-to-face contact and contact via Skype three hours per month to be sufficient to outweigh the public interest in deporting this appellant.

35.
The appellant's deportation is not unlawful on human rights grounds We accordingly re-make this appeal by dismissing it.

36.
All members of this panel have contributed to this decision.

Signed

Date 31 January 2013

Upper Tribunal Judge Martin