



**Upper Tribunal
(Immigration and Asylum Chamber)**

Mohammed (Family Court proceedings-outcome) [2014] UKUT 00419 (IAC)

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice

On 21 July 2014

**Determination
Promulgated**

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Before

**UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PERKINS**

Between

CHALACHEW MOHAMMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Sesay, Solicitor, Duncan Lewis & Co Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Whilst it may be that in the Family Court jurisdiction prior to the coming into force on 22 April 2014 of the Children and Families Act 2014 there was always the possibility of a parent making a fresh application relating to contact, there is nothing in the guidance given in RS (Immigration and Family Court) India [2012] UKUT 00218 (IAC) (which was approved by the Court of Appeal in Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363)

that supports the notion that the mere possibility of such an application being made (or pursued) is a relevant criterion in the case of an immigration appeal when deciding whether to adjourn an appeal or to direct a grant of discretionary leave in order for such proceedings to be pursued. The guidance is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as deportation.

DETERMINATION AND REASONS

1. The appellant is a national of Ethiopia. He appeals with permission against a decision of a First-tier Tribunal (FtT) panel (Judge Hembrough sitting with Dr Barros) sent on 29 May 2014 dismissing his appeal against a decision made by the respondent to make an order to deport him as a foreign criminal pursuant to s.32(5) of the UK Borders Act 2007. In this determination we have anonymised details of the appellant's partner and his child, but see no reason to do in respect of the appellant.

2. The appellant came to the UK in April 2005 and claimed asylum in May the same year. His claim was rejected and his appeal against the rejection was dismissed by an Immigration Judge in November 2005. He then remained in the UK unlawfully. On 30 November 2008 he made further representations based on human rights grounds. By that time he had begun to commit a series of criminal offences, totalling 22, between July 2008 and June 2011, including several convictions for violence and one for the supply of drugs including Class A. On 17 April 2012 he had been sentenced to 30 months' imprisonment after he pleaded guilty to an offence of burglary of a dwelling house. On 30 April 2012 he was notified of his liability to deportation and then on 6 December 2012 of the decision ordering his deportation.

3. In its determination the FtT recorded that the appellant had requested an adjournment. The appellant referred to the history of Family Court proceedings relating to his daughter K and the fact that the last order made by that court (the Belfast Family Proceedings Court) was on 11 December 2013 when it ordered that the appellant be given indirect contact with K. The appellant said he wished to obtain further up-to-date information about K's situation. The panel concluded that it had sufficient information about K's situation to proceed.

4. At paras 51-58 the panel found:

"51. We accept the evidence that despite the difficulty of his relationship with Ms S and his intermittent incarceration the appellant has endeavoured to build a relationship with K. We have noted that he first initiated contact proceedings against Ms S in 2010 and that his subsequent intervention in the care proceedings resulted in an order that he be allowed indirect contact.

52. However the evidence is that K is the subject of a Full Care Order and for so long as it remains extant parental responsibility is vested in Belfast Health and Social Care Trust (the Trust). The appellant has never lived with K as part of a family unit and in his evidence he accepted that it was unlikely that he would do so in the future. The more so as it has been deemed to be in her best interests that she should live with her sister J with whom the appellant has no relationship whatsoever. The appellant's long term aspiration was that he should be given direct contact with K when he had sorted his life out and proved himself.
53. That the appellant only has indirect contact with K we find to indicate that both the Trust and the Family Court do not consider that the absence of direct contact to be prejudicial to her welfare. We also note that as recently as July 2013 K's care plan was adoption. This would indicate that the Trust, which is charged with her welfare, is of the view that her best interests would be served by terminating her parental relationship with the appellant altogether.
54. Since he was sent to prison in April 2012 the appellant has been a peripheral figure in K's life and the reality we find is that he is likely to remain so. We are satisfied that his deportation to Ethiopia will not prevent him from maintaining indirect contact with K via the use of modern communication media such as Skype and Facebook should the trust and the Family Court deem it appropriate. As we have already noted, it would appear that he maintains contact with friends in Ethiopia in like manner.
55. Although we accept that the appellant's deportation will effectively put paid to the prospect of direct contact in the future, on the evidence before us we have not been satisfied to the required standard that this would be prejudicial to K's welfare or development in the short, medium or long term.
56. Ultimately we have to balance the interference in the appellant's relationship with his child against the public interest in his removal. Although we did not have the benefit of a pre-sentence or OASys Report the judge's sentencing remarks record that the appellant was assessed as having a high likelihood of further offending and has failed to understand the impact of his behaviour on others. Given that he has several convictions for violence and the supply of drugs including Class A, we conclude that the risk to the public as being at least medium.
57. We also note that even whilst pursuing contact proceedings through the courts in 2010 he continued to commit a range of offences including violence and the possession of drugs. Indeed given the range of offences of which he was convicted we find his explanation of his offending behaviour that he was forced to sell goods on the street and did not appreciate that some of them were stolen to be indicative of a failure to come to terms with his offending behaviour. It would seem that he is still some way from sorting his life out and proving himself.
58. Looking at all the evidence before us in the round and giving appropriate weight to the will of Parliament that foreign criminals should be deported and noting that the sentence imposed for the index offence was 2.5 times the threshold for expulsion we have not been satisfied that the deportation of this appellant would place the United Kingdom in breach of its obligations

under Article 8 ECHR or section 55 of the Borders, Citizenship and Immigration Act 2009.”

5. Earlier, at para 12 the panel had noted that:

“... on the appeal file there was an email dated 8 July 2013 from Lawrence O’Kane who is a social worker involved in the care proceedings which stated that K was the subject of a Full Care Order and that her care plan was adoption. In response to our enquiry as to whether she was going to be the subject of an adoption order Ms Gunomai [who represented the appellant] said she had no information.”

6. The grounds of appeal were essentially three-fold. The first alleged procedural unfairness. It is stated that an adjournment was requested at the hearing on the basis that the appellant's representatives had not had sight of this email from Mr O’Kane and that this was something about which they needed time to obtain further instructions. Given that the panel did not have the care plan before then, it was said that it was impossible for it to make a fair or rational decision about the appellant's plan in respect of his daughter:

“T[he] representatives were not afforded the adjournment to be able to take full instructions and obtain full documents from the family solicitor. The representatives that handled the appellant's immigration [case] previously were in Belfast and the present representatives were not sent the respondent's bundle of papers handed to them in court. The panel were aware of this as well.”

7. At the end of the hearing we said we would check the file to locate the email from the social worker and send it to the parties for any comments. We return to this matter below.

8. Second, it was submitted that the panel erred in not analysing the appellant's evidence in relation to his contact application and Article 8 and in failing to explain sufficiently why it had concluded that the best interests of the appellant's daughter lay in her remaining with her sister. “The panel had not explained sufficiently why her father [with] whom she has contact should not be in her life”. Following RS (Immigration and Family Court) India [2012] UKUT 00218 (IAC), the panel should have allowed the Article 8 appeal and directed a grant of Discretionary Leave pending the resolution of the appellant's contact matter. Contact proceedings were initiated to promote the child’s welfare; her mother had not challenged that contact; it was envisaged that ultimately the court would grant full contact with his daughter if he was allowed to remain in the UK. It was envisaged that this contact matter would take seven to eight months to resolve. The appellant wanted full custody of his child.

9. Finally it was contended that the panel erred in finding that the appellant's crime was a particularly serious one and that the appellant constituted a danger to the UK community. The panel was said to have failed to give due weight to the documents and certificates from prison confirming that the

appellant had shown good behaviour in custody and had wrongly concluded that he posed a medium risk without having the evidence of any report before them.

10. Taking the last ground first, we find it wholly devoid of merit. Even focusing solely on the latest offence for which the appellant was convicted, that was an index offence culminating in a sentence of 30 months' imprisonment. The FtT did not have the benefit of an OASys Report but did have the relatively recent sentencing remarks of the judge who recorded that the appellant had been assessed as having a high likelihood of further offending and had failed to understand the importance of his behaviour on others. As stated by Laws LJ in SS (Nigeria) [2013] EWCA Civ 550 at para 55, the 2007 Act attributes great weight to the deportation of foreign criminals.

11. In addition, the panel noted that whilst pursuing contact proceedings through the courts, the appellant had continued to commit a range of offences including for violence and possession of drugs, and his own explanation for why he had committed these offences betrayed a failure to come to terms with his offending behaviour. Whilst it would have resulted in a more complete determination had the panel specifically addressed the prison documents and certificates, there is no reason to consider it failed to have regard to them and even if it was thought it overlooked them, they were not capable of demonstrating that the decision reached – that he continued to pose at least a medium risk of the public – was erroneous in law. Given the appellant's history of persistent offending and lack of evidence that he had come to terms with his offending behaviour, the panel's conclusions were entirely within the range of reasonable responses. We would also observe, insofar as the Article 8 balancing exercise is concerned, that on the public interest side of the scales there was not only his serious and persistent history of criminal offending but also his history of immigration wrongdoing – he had been in the UK illegally the entire time. Both counted against him in the proportionality assessment.

12. Reverting to the first ground, we are unable to establish from the file whether the panel made a copy of the email from Mr O'Kane available to the parties, but it is clear that it did make the contents known to the parties and made reference to them in the questioning of the appellant and submissions. Whilst no adjournment was given to enable the appellant and his representatives to consider the email, there is nothing to suggest that it took the appellant or his representatives by surprise and indeed it simply recorded what must have been known to him. Although he expressed concern that a change in the solicitors dealing with his immigration case meant he lacked all documents relevant to his immigration case, he did not suggest that he had changed the solicitors dealing with his contact proceedings and, from his own evidence, he was aware of every stage of those proceedings. Further, on 14 October 2013 he had already obtained an adjournment of his immigration appeal so that Family Court documents could be produced (which they were) and there had been subsequent adjournments for various reasons in January, February and April 2014.

13. The appellant complains that the panel did not have sufficient information before it to form a proper conclusion about the state of the Family Court proceedings, but the burden of proof rested on the appellant and the documents that he himself had produced showed that the Family Court had (i) ordered that the child K and her half-sibling remain in the care of the local authority until they were 18 (that was the order made by the Family Court on 9 August 2012); (ii) subsequently refused to grant the appellant direct contact; and (iii) confined itself to an order for indirect contact which was limited to continued indirect contact via letters, presents etc but in addition 4 videolinks, two being introductory; thereafter 2 videolinks per year. There was nothing to show that the order for indirect contact was qualified by any suggestion that it might be changed to direct contact. In short, the documentary evidence before the FtT established that the Family Court has reached a concluded view as to the best interests of the child which identified them as entailing no direct contact with the appellant. Whilst the appellant sought in evidence to claim that the Family Court left open that the appellant could become more directly involved in K's life, he had simply failed to substantiate that claim. That claim was at best an explanation of his own aspiration. Moreover, the further documents enclosed with the response by the appellant's representatives to the Tribunal's request for comments on the O'Kane email included a transcript of the Belfast Family Proceedings Court hearing which took place on 29 August 2013. This confirms that the understanding of the FtT was correct. Faced with an application for direct contact, the Family Court ruled that contact should "not now progress to direct contact" and "realistically...the time for attempting a possible long-term rehabilitation with [K's] father, even if he is allowed to stay in the United Kingdom..., is long since past. " We consider that the guidance given by the Upper Tribunal in Azimi-Moayed and others (decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC) is extremely pertinent in this case. In this case the President, Mr Justice Blake observed in the headnote that:

"Although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child's best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter."

14. This brings us to the second ground of appeal concerning the panel's treatment of the best interest of the child. Given the documentary evidence regarding the Family Court proceedings, the position before the FtT panel was that it had been established by that court that the best interests of K lay with remaining in care, away from both her mother (who had mental health problems) and her father. From the evidence it was sufficiently clear why the Family Court had come to the conclusion it had. As explained by the FtT panel, although the appellant had endeavoured to build a relationship with K and had first initiated contact proceedings in 2010 (resulting in an order that he be allowed direct contact for a limited period), (i) he had never lived as a family unit with K; (ii) his own history of offending meant that for much of her young

life he was in prison; (iii) the appellant had himself accepted that (although he held hopes to the contrary) that it was unlikely that he would be able to live with K as a family unit in the future because of the view taken by the Family Court that K should be kept together with her half-sibling. We draw particular attention to what the FtT said at paras 53 to 55: see above para 4.

15. We consider what the panel said in these paragraphs to be a well-reasoned assessment, leaving the reader in no doubt why K's best interests did not lie with being in any closer relationship with the appellant other than by way of indirect contact. Given that finding it was entirely proportionate for the FtT panel to consider that his removal would not prevent him from maintaining from abroad an indirect contact of a similar kind that he had been granted in the UK.

16. In response to our direction made shortly after the hearing that the parties furnish any submissions they wished in response to our forwarding them the email from Mr O'Kane, the appellant's representatives state that they had received an email from the appellant's family solicitors from which it was now clear that the adoption plan alluded to by Mr O'Kane in his email of July 2013 had not been proceeded with, the decision having been made to arrange long-term fostering instead. We lack fuller information about this, in particular we are not told whether the Family Court has endorsed the long-term fostering arrangement. But it was not suggested that there was any issue of Family Court non-endorsement and there is no reason to consider that there had been any unlawful exercise by the Belfast Health and Social Care Trust of its legal duty to have care of the child until she is 18, in respect of how to arrange that care. Nothing has been forthcoming to suggest that there was anything that had altered the clear conclusion reached by the Family Court that the appellant was not to have a direct role in K's life. We find, as did the Upper Tribunal in the follow-up to RS - RS (Immigration/ family court liaisons: outcome) [2013] UKUT 82 (IAC) - that where a decision is made approving long-term foster care, such an arrangement clearly envisages permanent separation of the child from its parents.

17. Mr Sesay for the appellant has argued that the panel failed to apply the principles set out in RS which indicate that when an appellant who is resisting deportation has pending Family Court proceedings the proper course was to grant discretionary leave to remain in order for the Family Court to resolve the issue of the best interests of the child.

18. It is as well at this point to quote from the relevant parts of RS as set out by the Court of Appeal in Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363 at paras 18-19:

"18. The material parts of that guidance are to be found in the following extracts:

"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 by 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 interests 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 the 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?"

19. The Tribunal then went on to identify issues which would require resolution in the light of the answers to those questions, including whether a claimant has an Article 8 right to remain until the conclusion of the family proceedings and, if so, whether he should be granted a limited discretionary leave to remain or, alternatively, whether it is more appropriate for a short adjournment of the immigration case to be granted "to enable the core decision to be made in the family proceedings" (paragraph 44)..."

19. At para 20 The Court started that it "should endorse that approach".

20. Contrary to what is asserted on behalf of the appellant, we see no conflict between the principles set out in RT and Mohad and the approach taken by the FtT panel in this appeal. For one thing, the panel was aware that the appellant had already been granted an adjournment to ensure he could produce evidence regarding the Family Court proceedings and in response he had done so. For another thing, the appellant did not need a further adjournment so he could pursue Family Court proceedings because he had already pursued them with the result that the "core decision" in the Family Court proceedings had already been taken, with the outcome being that he had been unsuccessful in obtaining direct contact. The Family Court had made clear that the care of K was to remain vested in the local authority, not in either the appellant's or the child's mother. This was a case, therefore, in which the substance of the judgment from the Family Court with all the tools at its disposal had been made known to the immigration court which had acted accordingly.

21. There is a further aspect to this, relating to point (ii) of the RS guidance cited above. It is suggested by the appellant's representatives that the Family Court left open taking a different view regarding direct contact dependent on the outcome of the appellant's immigration appeal. But, as already noted, that is plainly contradicted by what the Family Court said in August 2013: see above para 13. Not only in this judgment did the Family Court find that it did not consider the appellant's was a case in which the immigration court should

await developments in any Family Court proceedings, but it went so far as to say that even if the appellant succeeded in being allowed to stay in the UK, the time for rehabilitation of K's relationship with the appellant was "long past".

22. Given the suggestion made by the appellant's solicitors in their response to the Tribunal's request for any observations about the O'Kane email, namely that the FtT should have borne in mind that it was always open to the appellant to make another application for direct contact, it is as well that we add the following observation. Whilst it may be that in the Family Court jurisdiction in Northern Ireland¹ and in the pre-April 2014 jurisdiction in England and Wales there is always the possibility of a parent making a fresh application, there is nothing in the guidance given in RT or in Mohad, or in the previous case law which these decisions clarify, that supports the notion that the mere possibility of such an application being made (or pursued) is a relevant criterion for an immigration judge or panel when deciding whether to adjourn an immigration appeal or to direct a grant of discretionary leave in order for proceedings to be pursued. The guidance is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as deportation.

23. We would accept that the workings of the Family Court jurisdiction hitherto have made it difficult in some cases to identify any "core decision". As stated by Sir Andrew McFarlane, in the Hershman Levy Memorial Lecture 2014:

"Too often cases have limped on with the judge making an order as to the arrangements for the child and then being encouraged to list the case for "review" in 6 months' time to see how it is going with the expectation that the parties will, once again, trot back to court with a list of complaints about each other and the hope that the judge will, on this next occasion, produce a different result that favours more closely the outcome that they each seek. "

24. We take note, however, that Sir Andrew McFarlane considers that with the coming into force in England on 22 April 2014 of the Children and Families Act 2014, such procedures will be a thing of the past. The new provisions provide in England for a "final" hearing. His lecture also alerts us to the fact that the new Act does away with "residence" and "contact" orders. In their place is the more neutrally worded "child arrangement order". The new Act has as a central element a "Parenting Plan" which is designed to help separated parents (and their families) work out the best possible arrangements for the child. Any parent who now makes an application for a court order with respect to their child will not be allowed to proceed with the application unless they have attended a Mediation Information and Assessment Meeting (MIAM).

25. For the avoidance of doubt, we have applied the statutory provisions relating to Article 8 set out in s.117A-D of the Immigration Act 2014, which have effect from 28 July 2014. They make no difference to our overall

¹See The Adoption (NI) Order 1987 [SI 1987 No 2203, NI 22] and The Children (NI) Order 1995 [SI No 775, NI 2]; on the former see P & Ors, Re (Northern Ireland) [2008] UKHL 38.

assessment in this case that the appellant cannot succeed either under the pre- or post- 28 July 2014 legal regime.

26. For the above reasons we conclude that FtT did not err in law and its decision to dismiss the appellant's appeal should stand.

Signed

Date

Upper Tribunal Judge Storey