Upper Tribunal
(Immigration and Asylum Chamber)

RS (immigration and family court proceedings) India [2012] UKUT 00218(IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 23 May 2012

Directions Promulgated

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Before

LORD JUSTICE McFARLANE
MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE MARTIN

Between

RS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Khan, instructed by JL Solicitors
For the Respondent: Mr Saunders, Senior Home Office Presenting Officer

1. Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the Immigration and Asylum Chamber should first consider:

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?

2. 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?

3. Having considered these matters 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 as per the decision on MS (Ivory Coast) [2007] EWCA Civ 133?

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?

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

RULING AND DIRECTIONS

1. The appellant is an Indian citizen born in April 1976. He arrived in the United Kingdom in September 2000 with a valid visa and was granted six months leave to enter. He has remained in the United Kingdom without leave since March 2001. In June 2002 he came to adverse police attention for the offences of driving without a licence, no insurance and obstructing a constable and was fined. No immigration action followed until July 2003 when he was served with a notice of liability to removal as an illegal entrant. He made a claim for asylum that he withdrew in November 2003 and he was placed on weekly reporting conditions.

2. On 12 November 2004 he married HK, a UK born British citizen of Pakistan ancestral origins. Mrs S gave birth to the couple's daughter H on 4 April 2005.

3. On 27 June 2008 the appellant made an application to remain on the grounds of marriage and that application remained outstanding until a decision was taken to deport him in December 2009.

4. In April 2009 police were called to the matrimonial home occupied by the appellant in connection with a disturbance. A search of the premises revealed a false identity document in his possession. He was arrested and detained and on 29 June 2009 convicted of possession of a false identity document and given a sentence of twelve months imprisonment. Despite our repeated requests the judge's sentencing remarks have not been made available to us and we now presume that they are lost.

5. The appellant's conviction and sentence made him susceptible to automatic deportation pursuant to s.32 of the UK Borders Act 2007 and, despite his representations to the contrary, a deportation order was made on 14 December 2009. Having served his sentence the appellant remained in immigration detention until 1 March 2010 when he was released and returned to the matrimonial home. The appellant appealed to the First-tier Tribunal against the decision to deport him relying on the family life he enjoyed in the United Kingdom with his British citizen wife and daughter.

6. On 8 February 2010, while the appellant was still detained, the local authority became concerned about H's welfare as a result of a GP referral to social services. There were concerns about the mother's mental health and her ability to cope with the child alone. An urgent visit was made to the house which was in a very poor state of cleanliness, and H had not been fed or clothed properly. Mrs S said she had insufficient resources to do so. An emergency protection order was made and the child taken into interim care on 12 February 2010. Those proceedings have continued in the county court ever since.

7. The appellant's case on appeal was that his presence in the household was vital to keeping the family together and in a good state of health and without it H would remain in care as his wife could not cope alone. There was some support for the appellant's contention in a statement made before the panel in the care proceedings of Lynne McGowan, a social worker employed by the Luton Borough Council.

8. As to his offending, the Probation Officer's report before the panel revealed that the appellant had told the author that he used the false Italian passport to obtain employment to provide for his family pending the outcome of his application for indefinite leave to remain as a spouse. The family had not claimed benefits when he was at liberty but had needed to do this when he was in detention. There were good reports of his behaviour in prison, and he was in regular contact with his wife who he was anxious to support on his release from detention.

9. The Home Office submissions were that it was not disproportionate to remove the appellant to India since his British wife and daughter could be expected to follow him there, and they could still continue a level of communication if they chose not to go there.

10. A panel of the First-tier Tribunal allowed his appeal on 26 March 2010. The panel concluded:

> "We have considered all the evidence in [the round]. We do not think it is proportionate for maintaining immigration control for this Appellant to be removed to India. We have noted that he is a caring husband and that his wife is almost entirely reliant upon him and without him is unable to survive on a daily basis as the evidence demonstrated, since the result of the imprisonment was that the child was taken into care as she could not cope with looking after her. He is not able to go to India as she has no relatives there and she cannot live with her husband and her husband's family. Her husband knows no-one in India except his parents and he cannot live without his wife and daughter. If the husband was to return to India the wife would not be able to retain custody of the daughter who would remain in care until the age of majority. She has never been to India and she has never been to Pakistan. The Appellant could not go to Pakistan either with his wife. She has no relatives in Pakistan. Her relatives in the UK do not like to be associated with the Appellant. It seems to us that far from assisting the wife's mental health, by returning the Appellant to India she would become progressively worse mentally. We have taken into account the case of Beoku-Betts, the rights of third parties when assessing the provisions of article 8, in this case the rights of the wife and the child. We consider it would be wholly disproportionate to remove the Appellant in these circumstances".

11. The respondent was granted leave to appeal and the appeal came before Designated Immigration Judge Woodcraft sitting as a Deputy Judge of the Upper Tribunal. He found that the panel had made a material error of law, in that the primary legitimate aim in deporting the appellant was the prevention of crime rather than maintaining immigration control, and the panel had accordingly failed to give weight to the gravity of the offence as determined by the Court of Appeal in Benabbas [2005] EWCA Crim 2113. He further concluded that he should proceed with the immigration appeal rather than await the outcome of the care proceedings, as otherwise each court would be continue to wait for the other to decide the issue.

12. The judge noted:-

    i. The appellant had not applied to regularise his status for some years after his marriage.
    ii. He had been working as a building contractor without informing his employers of his false passport.
    iii. His family life had already been interfered with by the decision of the local authority to seek a care order.
    iv. He was in no position to know whether the local authority still contended that the appellant had been violent to his wife which was an allegation that the wife made resulting in the attendance of the police but he noted that the care proceedings had continued despite the appellant's release on bail.
    v. It would not be possible for the family court to anticipate the decision on the deportation appeal and in the circumstances the decision of the local

authority to continue with the care proceedings was wholly understandable.

vi. It was common ground that Mrs S could not be expected to look after H on her own if the appellant is deported.

vii. Mrs S's family had not provided assistance to her with H when her husband was in prison, but he was not prepared to assume that the appellant's parents would not be supportive to her in India although this was a mixed marriage between a Moslem mother and a Hindu father.

13. The judge examined the various scenarios as to the family's future: Mr and Mrs S going to India without H; Mr S being deported to India without his wife and child; Mrs S and H joining Mr S in India with the leave of the family court. He had no doubt that it was in H's best interests that she be looked after by her parents rather than be placed in foster care. Whilst the panel's approach might have been legitimate if the public interest in removing the appellant was limited to the fact that he had no leave to remain, this was not the case and in addition he had committed a serious offence of identity fraud.

14. He concluded that the interference with family life would be diminished if Mrs S and H could join the appellant in India and concluded that the interference was justified because it pursued the legitimate aim of the prevention of crime.

15. The appellant then sought leave to appeal to the Court of Appeal against this remade decision. Whilst he accepted that the original panel had made a material error of law in not considering the legitimate aim of the prevention of crime, he contended that the Deputy Judge had erred in his conclusions:-

i. by speculating on the outcome of the family proceedings;

ii. by failing to have regard to the fact that the wife and child were British citizens by birth who had never lived in India or Pakistan;

iii. by failing to give weight as a primary consideration in the decision to H's interests as a child.

Permission to appeal was granted and on the 8 March 2011 the decision of the UT was set aside by consent of the parties on the basis that ii. and iii. above demonstrated errors of law, particularly in the light of the guidance given in ZH (Tanzania) [2011] UKSC 4, 1 February 2011.

16. The appeal came back before the UT on 17 June 2011 (The President and Judge Martin) when the appellant was unrepresented. Our initial reading of the papers suggested that applying the basic findings of fact of the First-tier Tribunal with respect to the best interests of the child to the enhanced case of deportation in the public interest by reason of the appellant's passport offence, and applying the developing jurisprudence on automatic deportation where the best interests of a British citizen child are concerned (see Omotunde (best interests - Zambrano

applied - Razgar) [2011] UKUT 247 (IAC), 25 May 2011) we could remake this decision on the available evidence without further delay or difficulty.

17. However, the Tribunal made contact with the judge of the court where the care proceedings were continuing to find out when they would be resolved. The District Judge was kind enough to provide us with the transcript of his fact finding hearing on 3 December 2010 where he concluded that the father had been violent towards the mother on more than one occasion including in the presence of the child, and the appellant's refusal to accept that finding might well result in the local authority seeking an order permanently removing H from the care of her parents.

18. Since in our view H's best interests were likely to play a decisive role in the outcome of the deportation appeal, we concluded that we had no alternative but to adjourn these proceedings until the family court had examined all the information available to it and determined where those best interests lay. We were informed that there would be a case management hearing likely to lead to a final hearing in the autumn of 2011. We made a number of supplementary directions on that occasion including directions that the respondent should:-

    i. make contact with the local authority solicitors to obtain relevant information about the issues in the case;
    ii. supply us with a copy of the sentencing transcript;
    iii. give consideration to granting the appellant permission to work pending the adjourned hearing of this appeal so he could support his family without their having recourse to public funds.

    From what we heard from Mr Saunders on 22 May it appears that no consideration has been given to i. and iii.

19. In August 2011, the District Judge ordered that a copy of an agreed 'case summary' from the family proceedings and a copy of the latest order be disclosed to the Tribunal.

20. The case next came before the President on 2 November 2011, when the Tribunal was informed that the final hearing in the family court was listed for 11 January 2012 with a time estimate of three days. This appeal was directed to be listed for a date after 1 February 2012 and a response from the respondent was directed to be issued by 25 January 2012.

21. On the 16 February 2012 further directions were made by the President in the light of the information supplied by the appellant's solicitors, including the fact that the family hearing had been adjourned to early May. No response of any kind had been received by the respondent. The directions were as follows:

"The Tribunal proposes to re-list this appeal on a date to be fixed between 15 and 25 May. The matter will not be further adjourned whatever the state of the family law proceedings by this date.

The Tribunal directs that the respondent comply with [previously issued] directions not later than 28 days from the date of this direction. In the response to this appeal the respondent should address the following:

i. Has Mr S been granted permission to work pending determination of this appeal, consideration of which was directed (direction 6(viii)) in June 2011. If not, why not?

ii. What submissions does the respondent make as to the best interests of the child in this case, and on the basis of what investigations (if any)?

iii. Does the respondent accept that in a case where public law proceedings are outstanding at the time of the decision to deport, and the outcome of those proceedings is considered material to the decision in the deportation appeal that the Tribunal should either adjourn the deportation appeal for a period to enable those proceedings to be completed or else allow the appeal on the basis that deportation should not take place until the outcome of the care proceedings is known, and that the appellant should be given such leave as is necessary to enable him to participate in those proceedings pursuant to the approach in Ciliz v Netherlands ECtHR and MS (Ivory Coast) [2007] EWCA Civ 133, if not why not?

iv. In the event that a Tribunal allows an appeal on the basis of iii) above, does the respondent have the power to make a fresh decision to deport (whether discretionary deportation or a further automatic deportation decision)?

The Tribunal proposes to consider the interplay of public law care proceedings and deportation proceedings in this appeal and the respondent's informed participation in these proceedings is needed.

Notwithstanding the failure to comply with the two previous directions, the Tribunal expects to receive the assistance it has asked for as set out in this letter within the extended time set.

An unexplained failure to comply with this further direction may lead the Tribunal to conclude that the appeal is not opposed on the basis of iii. above and the matter may be determined on the papers without further notice after the expiry of the 28 days."

22. Following these directions the appeal was listed before the Tribunal on 22 May 2012 before a panel that now included Lord Justice McFarlane in order to ensure we had the benefit of his family law experience in addressing the issues of principle we had previously identified.

23. On 15 May 2012 we received a bundle from the appellant's solicitors from which it was apparent that the family proceedings scheduled to be heard in May had yet again been adjourned to a date in June 2012.

24. On 21 May 2012, the respondent outlined to the appellant its present position based on the information available to it by this date:-

    i. Although Mrs S was dependent on the appellant there was no reason why she could not join him in India or in his absence could turn to her parents for support.
    ii. Since February 2010 H has been in foster care with Mr and Mrs S visiting her for two hours three times a week.
    iii. On the basis of the District Judge's findings that the appellant had twisted his wife's arm, hit her with a golf club, attempted to strangle her with a scarf and was sexually, physically and verbally abusive of her, and that it was likely that H had witnessed some of this behaviour, the local authority did not support returning H to the care of her parents.
    iv. The appellant had now accepted those findings.
    v. UKBA concluded that H's best interests are that she remains in foster care as per the local authority care plan.
    vi. The UKBA consider that H's interests are a primary consideration in the deportation decision but there are other factors that outweigh them.
    vii. By contrast to the decision in ZH (Tanzania) the appellant was a foreign criminal as defined in s.32 of the UK Borders Act 2007 and the child was not being required to locate to India, on the contrary her best interests were that she remains in foster care in the United Kingdom where she has a right to remain as a British citizen.
    viii. The separation from H was a consequence of the appellant's criminality; he had been an "inconstant presence" in her life having regard to his term of imprisonment and he could continue to enjoy contact with her by electronic means from India.
    ix. The seriousness of the appellant's conduct had been summarised by Deputy Upper Tribunal Judge Woodcraft who had pointed out that the appellant had used the passport to obtain employment and his previous contact with the police had involved dishonest use of a name to avoid traffic prosecution.

The submissions before us

25. Mr Khan submitted that the most appropriate course now was to adjourn pending the outcome of the family court decision in June. It was not possible finally to decide this appeal unless it were known whether the court concluded that H's interests favoured a structured return to the care of her parents or a cessation of the parental relationship by placing the child for adoption or in long term foster care as was the local authority's proposal. Mr Saunders did not oppose that course.

26. Before reaching a conclusion on this application we explored with the parties what their respective submissions as to the outcome of this appeal were if following the decision of the family court:

    i. H was to be returned to the parents' care or
    ii. H was to be permanently separated from her parents.

27. It appeared to us from the history of the care proceedings that no member of Mrs S's family had come forward to offer to look after H, and all possible other informal carers had been eliminated from the investigation.

28. We consider the second option first. In addressing ii. Mr Saunders relied on the UKBA decision letter and the fact that the family life between Mr and Mrs S had been established when he had no leave to remain, he had no expectation of being allowed to remain on the grounds of marriage, and he had then gone on to commit criminal offences and in addition had been violent and abusive to his wife. Whether or not it would be reasonable to expect Mrs S to go to live in India for the first time, it was submitted that exceptional factors would be needed before it could be concluded that the appellant's deportation was disproportionate in these circumstances.

29. Mr Khan acknowledged that applying the authorities noted above and below where the case law is reviewed in more detail that if option ii. were to be the outcome, exceptional reasons would be needed to make the appellant's removal disproportionate. He nevertheless submitted that Mrs S's nationality plus her poor mental state and her unusual degree of dependence on her husband supplied those reasons.

30. As to option i. Mr Saunders had no detailed submissions to make apart from the general one that it was open to us to hold that the strength of the public interest in the prevention of crime was such to entitle the Tribunal to conclude that H's best interests could be outweighed by other pertinent considerations. He acknowledged that the UKBA letter was drafted on a fundamentally different basis than Deputy Judge Woodcraft's assumptions and conclusions, and had not addressed the contingency that the family court may decide that it was in H's best interests to return her to the care of both parents.

31. As to the seriousness of the index offence, Mr Saunders accepted that the criminal courts in sentencing offenders had stressed the distinction between offences of simple possession and offences of possession with intent; further they had distinguished between those who used a false passport to deceive an immigration officer or indeed a judge considering a claim to remain under the Immigration and Nationality Acts on the one hand and those who were awaiting a decision from the Home Office as to their immigration future and obtained a false document to obtain employment to support themselves or their families: see Attorney General's Reference Nos 1 and 6 of 2008 (Dziruni and Laby) [2008]

EWCA Crim 677 4 March 2008 at [16], [19] [26] and [31]. The distinction is summarised in the decision of the Court of Appeal in R v Ovierakhi [2009] EWCA Crim 452 at [16]:

> "wherever the case is on the spectrum, a custodial sentence is likely , save in exceptional circumstances, for the reasons stated in Carneiro. In cases in which a false passport is to be used for the purposes of securing entry into the United Kingdom, the guidance contained in Kolawole applies. Where, however, a false passport is used to obtain work or a bank account, its use does not enable the offender to obtain entry to the United Kingdom and for that reason it may properly be treated less severely than the use of a passport which does, or may, have that effect. What the use of a passport to obtain work does, however, do is to facilitate the offender remaining in the United Kingdom in breach of immigration controls. For that reason a custodial sentence is usually required. But it can justifiably be less, particularly if the offender is of good character and has done no more than use or try to use it to seek employment in order to maintain himself/herself of his/her family".

See further Archbold Criminal Pleading and Practice 2011 22-45e at 2126.

32. We take as a given fact that the appellant has received a sentence of twelve months and is therefore liable to automatic deportation. Any crime deserving such a sentence is a serious one. In the absence of one of the exceptions to automatic deportation, such a sentence will result in deportation, but where there is a credible human rights claim advanced by way of resistance to deportation, part of the assessment that the determining judge is required to make is to assess the seriousness of the offence and the circumstances of the offender in the overall balance. For reasons we have explained in Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 48 (IAC) it is not the case that because Parliament has set the level of offending engaging automatic deportation at twelve months, Parliament has also decided that all Article 8 claims are automatically outweighed by the public interest in the legitimate aim of preventing crime. In assessing proportionality, the nationality of the various parties, the immigration status of the appellant at the time of the marriage, the seriousness of the offending, whether it is reasonable to expect the family members affected by the removal of the appellant to relocate abroad, and whether there are insurmountable obstacles to removal are all relevant factors.

33. We normally expect to have the judge's sentencing remarks available to us in deportation cases, but our endeavours to obtain them through UKBA have been unsuccessful and the description of the offence in the deportation letter was minimal. We have had to make our own evaluation without such assistance. It is in that context we note and accept Mr Saunders' acknowledgement that the use Mr S put this passport to, whilst undermining an aspect of immigration control and therefore serious, was to support his family pending a decision on his application rather than to deceive the UKBA by falsely representing that he did not need permission to reside here.

The care proceedings

34. It is apparent that the care proceedings have been outstanding for more than two years now, and while the most important question in the case may be resolved at the next date for the final hearing in June, there is no certainty that this will be the case, and on the most favourable outcome to the appellant it is likely that a carefully structured plan with continuing local authority involvement will be needed if it is concluded that H is to be returned to her parents.

35. As we understand the history of the proceedings from the information provided to us:-

    i. The proceedings started when there was striking evidence of H's neglect by mother in February 2010 at a time when the family had lost the financial and other material support of the father, who had been in detention for ten months, and the mother was struggling to feed and clothe H and to heat and maintain the house in father's absence.

    ii. The local authority was also concerned about Mrs S's allegation of violence towards her by the appellant that had led the police to the matrimonial home in the first place. It was aware of a previous report of abuse.

    iii. Mrs S did not support her allegation of being the victim of violence in these proceedings. She was at first considered too mentally incapacitated to represent herself. By January 2012 this assessment had changed, in the light of up to date medical reports and the services of the Official Solicitor to represent her were dispensed with.

    iv. The appellant at first disputed that he had been violent towards the mother and accordingly there was no basis for work to address his conduct in that respect. The District Judge made the findings summarised at [17] and [24 (iii)] above and the appellant continued to dispute them until the autumn of 2011. The father was assessed by a psychiatrist as posing a moderate risk of harm to mother in May 2011.

    v. On the basis of the mother's capacity, the father's violence towards mother and his unwillingness to acknowledge it, the local authority plan for H was to remove her from her parents as they were considered unsuitable carers for her.

    vi. Following his acknowledgment of his violent conduct the appellant has been seeking psychotherapy and counselling since December 2011.

vii. The proceedings were adjourned in May 2012 to determine how far the appellant has progressed in addressing his behaviour and whether he is now still assessed to be a moderate risk of harm to mother.

viii. The appellant has attended for assessment as directed by the District Judge on 9 May.

ix. Throughout this period mother and father have been seeing H regularly three times a week for two hours.

The inter-relationship of care and immigration proceedings

36. Deputy Judge Woodcraft acknowledged the problem of 'who goes first' where there are parallel proceedings in immigration and family cases. The family court may well be assisted by knowing whether a person in the position of the appellant is likely to be able to remain in the United Kingdom and be an active presence in the child's life. The immigration court would be informed by the family court's assessment of the child's welfare.

37. Although both the Secretary of State and the judges of the First-tier Tribunal and Upper Tribunal have a duty to treat the child's best interests as a primary consideration in the application of administrative action including immigration action that is likely to affect the child, the Tribunal does not have any means of assessing these matters for itself, in particular: there is no local authority or children's guardian, no access to the service provided by CAFCAS, and no independent means of ascertaining the wishes, concerns and interests of the child. It is generally not considered desirable to hear oral evidence from a child of tender years (below the age of 12) when this is likely to be a source of stress, anxiety and possibly tension with any caring parent. It would be undesirable if the child felt responsible in some way for the removal of an offending parent.

38. Although the Tribunal encourages either party to provide independent assessments from teachers, doctors, social workers, or other child-centred professionals, this cannot be compelled and funding arrangements for such reports are uncertain and are unlikely to improve with the coming into force of the Legal Aid Courts and Sentencing Act 2012. The Upper Tribunal has considerable case management powers under rule 5 and following of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), but it is conscious of the funding restraints on both appellants and the UKBA when making such directions. Quite frequently there is no, or no timely, response to directions, particularly, as in this case, by the respondent. Even if the Tribunal concludes that it will consequently remake the decision on the papers in the light of what material is available it will often be wholly uninformed about important aspects of the child's life and development.

39. Our directions in February 2012 invited the parties to consider the case of Ciliz v Netherlands [2000] ECHR 265 where the European Court found a procedural violation of Article 8 when Mr Ciliz was deported before the family courts had had the opportunity to determine his application for contact/residence with his child. This led the Court of Appeal in MS (Ivory Coast) [2007] EWCA Civ 133 to consider that where family proceedings are under consideration in the case of a party who has no leave to remain or is facing removal, a period of discretionary leave should be granted to enable that person to remain lawfully in the UK and participate in those proceedings. It observed:

70. "In our judgment the AIT did not decide the hypothetical question it was incumbent upon it to decide, namely whether the appellant's Article 8 rights would be violated by a removal when the case was before it i.e. when the contact application was outstanding. Time has moved on. It is now 9 months since the AIT's decision. The circumstances will be different. The AIT will need to know what has happened in the contact proceedings. One can envisage arguments both ways. Mr Bourne points out that the facts are some way removed from those in Ciliz. The appellant has served a lengthy prison sentence for physical abuse of her children and, as far as we are aware, has not seen them for some time. The present views of the children and their father are unknown. If the AIT had decided the question it should have decided and concluded that her Article 8 rights would be violated by her removal then the next question would have been the length of discretionary leave to remain and quite a short period might have been appropriate to cater for the outstanding contact proceedings; it could of course always be extended. The AIT had jurisdiction to decide this issue (see s 87 2002 Act).

71. Whilst it is correct, as the authorities show, that the decision maker is, to an extent, required to consider a hypothetical situation, it is neither required nor appropriate to speculate about the future. Thus questions about what may happen, for example, to the appellant's mental health in circumstances as yet unknown were irrelevant to the AIT's consideration.

72. The appellant was entitled to have determined whether removal from the United Kingdom with an outstanding contact application would breach s 6 of the Human Rights Act 1998. That question was capable of resolution one way or the other. What was not appropriate was to leave her in this country in limbo with temporary admission and the promise not to remove her until her contact application has been concluded. Temporary admission is, as we have explained, a status given to someone liable to be detained pending removal. If the appellant had a valid human rights claim she is not liable to be detained pending removal. And if she has not, she ought to be removed. If she is entitled to discretionary leave to remain she ought to have it for the period the Secretary of State thinks appropriate, together with the advantages that it conveys; and if not she ought not to.

73. In the course of argument the point was made that circumstances could arise where a contact hearing was likely to be resolved in, for example, a matter of days. It would in those circumstances be impractical to expect a human rights decision without knowing the outcome of that application. In our judgment that is the kind of situation that can be dealt with by appropriate case management. "

The Court then concluded at [75]:

> "On the point of principle the AIT should have decided whether the appellant's removal on the facts as they were when they heard the appeal, i.e. with her outstanding application for contact with her children, would have violated Article 8 of the ECHR and thus put the Secretary of State in breach of s 6 of the Human Rights Act 1998 if he removed her. It was not open to the AIT to rely on the Secretary of State's assurance or undertaking that the appellant would not be removed until her contact application had been resolved. Nor was it appropriate to speculate upon whether there might be a violation of Article 8 on different facts at some point in the future. Had the AIT decided the Article 8 point in the appellant's favour she should have been granted discretionary leave to remain as envisaged in the API of January 2006. This could have been for quite a short period, whatever was regarded as sufficient to cover the outstanding contact application. It would have been open to the appellant later to apply for the period to be extended should the circumstances so warrant. It was open to the AIT under s 87(1) of the 2002 Act, if it allowed the appeal, itself to fix the period of discretionary leave to remain. Alternatively it could have remitted that question to the Secretary of State. "

40. These remarks were made in the context of a case where the appellant had been sentenced to three years imprisonment for violence to the children she was seeking contact with. It was not a case of automatic deportation, but in principle we can see no reason why the Tribunal could not conclude that leave to remain should be granted on a discretionary basis pending the resolution of family proceedings that should be concluded before a person is removed and/or the outcome of which is material to whether that person should be removed.

41. The statutory structure of s.32 of the UK Borders Act does not prevent the respondent from subsequently relying on the criminal conviction to justify deportation even if there has been an interim period of discretionary leave granted. The application of an exception does not remove the conclusion that deportation is in the public good (see s.33 (7)(b) of the UK Borders Act 2007).

42. However, there is no universal obligation that a period of discretionary leave must be granted where family proceedings remain unresolved. The Court of appeal so decided in DH (Jamaica) [2010] EWCA Civ 207. In this case an appellant had been permitted to re-enter the UK for the sole purpose of giving evidence in a criminal trial. He had a child by a partner with whom the relationship had broken down. The Immigration Judge had found:

> "29. In the present case balancing the public interest against extent of the interference with both the appellant's and his daughters' right to respect for their family life and taking into account the appellant's immigration history and the circumstances in which he returned to this country and the fact that he has on two occasions made asylum claims specifically for the purpose of delaying his removal, I find that removal would not be disproportionate to a legitimate aim within article 8(2) even though it deprives him of the opportunity of pursuing a contact application in this country."

The appellant obtained leave to appeal to the Court of Appeal on the basis of the failure of the Tribunal to direct that discretionary leave be granted pending the outcome of the contact proceedings. Sedley LJ said in dismissing the appeal at [10]:

> "What is happening is an example of the unfortunate game of cat and mouse that develops when removal of an illegal entrant is resisted on the ground that he has children here with whom he hopes to establish a right of contact. The family court in order to decide contact needs to know what his immigration status is. The Home Office in order to decide his immigration status needs to know what his contact rights are. The stalemate can go on for years. If contact is granted, Immigration Rule 246 confers an entitlement to leave to enter provided the qualifying criteria are met. The proposition for which MS (Ivory Coast) is authority is that the Home Office cannot meet the state's Article 8 obligation by simply granting temporary admission (in effect release on bail from immigration detention) and undertaking not to remove the entrant while contact is decided. If it is going to authorise his remaining here they must grant him leave to remain in the way specifically envisaged by asylum policy instruction (or API). ….."

and concluded at [12]

> "What MS (Ivory Coast) concerns is the unacceptability of keeping an individual in limbo rather than giving legal effect, by the grant of limited leave to enter outside the Rules, to her accepted entitlement to remain here for a specified purpose. What the present case concerns is whether the appellant has any such entitlement."

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?

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?

45. As to the choice between discretionary leave and adjournment, we are particularly conscious that irregular migrants do not have the right to work or obtain social security absent a human rights bar to their removal. The present appellant has not been able to work since his release on bail in March 2010 and the longer legal proceedings take to resolve the important issues, the greater the burden of self-sufficiency or dependence on a relative's social security entitlement is likely to be. Indeed his automatic deportation appears to have come about as a result of his intention to make his family self-sufficient whilst his future was decided. An inability to support his family may adversely impact on the family proceedings themselves.

46. There is, however, a public interest that immigration proceedings be expeditiously decided and a right to remain on human rights grounds should not be created solely by reason of family links created or significantly developed during pending appeals.

47. In addressing these questions there will need to be informed communication between the judge deciding the immigration question and the judge deciding the family question. It is important that a system be established so that both jurisdictions can be alerted to proceedings in the other and appropriate relevant information can be exchanged, without undermining principles of importance to both jurisdictions.

Conclusions

48. In the light of the above we now reach our conclusions on the future conduct of this appeal.

49. As we announced at the conclusion of the hearing we have decided that, in the light of the submission of the parties, the short period of adjournment anticipated before decisions are made as to where H's interests lie means that we should not attempt to decide this appeal today on the material known to us, either finally or to the extent envisaged in MS (Ivory Coast).

50. With some reluctance, therefore, we will further adjourn these proceedings until after the decision of the family court is known. The present decision is not a determination but a ruling. Our determination will follow the ruling of the family court in the light of the directions we make below. That determination will be a final one.

51. However, it appears to us that the family court will either decide that H should be returned to the care of her parents in some form or placed permanently elsewhere. The primary facts are settled, as indeed is the nature of the judgement that we are called on to make in determining the human rights ground. We consider that we can indicate what the immigration decision will be on the material now known to us and in the light of the submissions developed before us. We also conclude that the family court may be concerned to know what immigration outcome is likely to follow if it reaches a decision in principle about future relations between H and her parents.

52. The conclusions we indicate at [53] and [54] below are necessarily provisional and, as the history of these proceedings demonstrate, new facts may emerge and further considerations relevant to the decision may still come to light. If the family court makes either of the two decisions we have identified above, we will afford a further opportunity to the parties to permit them to make written representations to this Tribunal within 28 days from communication of the family court's decision. On receipt of those submissions or expiry of the period of 28 days whichever is the earlier, we will decide whether any consideration arises that either justifies a further oral hearing or requires us to set aside or vary our provisional decision. If it does not, then we will make a final determination without an oral hearing in the light of the decision of the family court. We stress that a failure to comply with these directions will deprive the party in default of the opportunity of making further submissions to us.

53. In the event that the family court concludes that H should be permanently removed from the care of her parents then we do not consider that the deportation of the appellant would breach his human rights or amount to 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. We apply the principles developed in the automatic deportation cases noted above. In summary our reasons are as follows:-

    i. The appellant had no right to reside in the UK when he married Mrs S, indeed he had stayed beyond the period of his visitor's leave and had been informed he was liable to removal as an illegal entrant. In those circumstances the state is not obliged to respect the couple's preferred choice of matrimonial home, and in the general run of such cases interference with the family life existing between the couple will be justified.

ii. Mrs S may choose not to travel to India and may not be so committed to the future of the marriage as a result of her husband's past conduct towards her, or risk of repetition of future conduct, or her mental frailty. But in our judgment none of these reasons make the interference in the marital relations disproportionate in the present factual context.
iii. We recognise that there will be real difficulties for Mrs S to move to a new country that she has never been to and where she may not have the support of her husband's family given the distinctions of religion and national origins between the couple. Although it may not be reasonable to expect her to leave the United Kingdom in the light of her nationality, long residence here and mental frailty, we do not consider the problems facing the couple in living together if that is their primary concern are insuperable. There is no reason to believe that Mrs S would not be admitted to India or would otherwise not be safe there. Her husband has skills that he can employ there and he can support her financially and emotionally. Such a move would not result in loss of important contact by Mrs S with her own parents who are resident in the United Kingdom as they have already failed to support her through the marriage and its problems.
iv. Whilst it would be the case that such residence in India would be apart from H, such separation results from the conclusion of the family court as to where H's best interests lie; it would not be contrary to H's best interests and welfare and it may be doubted in such circumstances whether family life between H and her parents continues after such a decision.
v. The appellant's offending makes it conducive to the public good that he be deported. He is not only guilty of the offence of possession of the false identity document but he has, by his own admission, been violent to his wife.

54. If on the other hand, the family court concludes that H's welfare requires her to be re-introduced to the care of her parents, we conclude that the appellant's deportation would be disproportionate and in breach of the human rights of each member of the family. Again we apply the principles set out in the authorities noted above where the interests of a child, particularly a British one, are to be given weight as a primary, albeit not a paramount consideration. Again we give our reasons in summary form:

i. A family court has decided where H best interests are and effect should be given to that conclusion as a primary consideration in the case.
ii. H is seven years of age, has lived in the UK all her life, and in the light of her experiences to date, we anticipate that her welfare will require the continued supervision of the local authority and the family courts.
iii. We consider that Deputy Judge Woodcraft's previous assessment that the family court would approve H's removal to India with her parents in the foreseeable future to be speculation and improbable in the light of what we now know about the case.

iv. Serious as the offending of the appellant is, it does not reach that level of criminality that demands expulsion for the protection of the public from harm from the individual appellant or to deter others from acting as he has had, irrespective of the impact on his British wife and child.
v. It would not be reasonable to expect wife and child to follow the appellant to India to resume the family life they have enjoyed together since the child's birth with the exception of the time the appellant was in custody. The child cannot be penalised for both the irregular status and the criminal offending of the appellant.
vi. Assessing the appellant's character, conduct, length of residence and every other relevant factor in the Article 8 balance it is not proportionate to separate this family as they rebuild their relations of mutual interdependence.

Directions

51. We now give the following directions to give effect to this ruling:

1. This appeal is further adjourned to await the decision of the family court.
2. The identity of the child H and her parents shall remain confidential. The Tribunal will examine the question of whether the appellant's identity should remain confidential in its final determination.
3. The appellant must notify the Tribunal and the respondent promptly when those proceedings have been determined.
4. The Tribunal will in addition forward to the parties any information it receives about the outcome of those proceedings that is not already known to them and identity the start date for any further representations to be made.
5. Either party may make written representations within 28 days of the date of transmission in 4 above to make representations in accordance with this ruling.
6. The Tribunal will issue a determination on receipt of the submissions or the expiry of the period for making them whichever is the sooner.
7. The Tribunal anticipates it will remake the decision in accordance with this ruling without a further oral hearing.

Signed Date 18 June 2012

Mr Justice Blake
President of the Upper Tribunal,
Immigration and Asylum Chamber