Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10831/2016**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 7th March 2018	**On 1st May 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

HS
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Woodhouse, Sultan Lloyd Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Afghanistan born in 1984. On the 20th July 2017 the First-tier Tribunal (Judge Butler) dismissed his appeal, brought on human rights and protection grounds against a decision to deport him from the United Kingdom. The Appellant now has permission to appeal against that decision, granted by First-tier Tribunal Judge Cruthers on the 23rd August 2017.

Anonymity Order

2. The Appellant is a foreign criminal and there is no reason why he should benefit from an order protecting his identity. This case does however turn on

the presence in the United Kingdom of his British son. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am concerned that the identification of the Appellant could lead to the identification of his son. I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

The Decision to Deport

3. The Appellant is known to have arrived in the UK in October 2003, when he was aged 19. He claimed asylum but when it was identified that he had already made a claim in Austria arrangements were made under the Dublin Convention for his return there. He absconded and that return was not therefore affected. The Appellant was encountered by police in November 2004 when he claimed asylum in a false identity. His fingerprints revealed the truth and that claim was therefore rejected without consideration because it was a 'multiple claim'. By March 2006 it would seem that the Respondent had abandoned all hope of removing the Appellant to Austria because he was invited to interview. He did not attend. His claim was rejected and on the 3rd August 2007 his appeal was dismissed. The Appellant was encountered again by the police in April 2010. In May 2011 he made a further claim for asylum, and made human rights submissions. These were under consideration when the Respondent was notified, in January 2012, that the Appellant had been convicted of robbery and had been sentenced to two years imprisonment.

4. The circumstances of the index offence were that the Appellant had developed a problem with gambling and alcohol. He had been in a betting shop at closing time and the cashier, who was known to the Appellant, agreed to allow him to stay in the shop whilst she "cashed-up". She made him a drink. When she had approximately £275 in her hand the Appellant demanded that she give it to him. She refused and he attacked her, biting her hand until she let go of the money. It was, by the estimation of the trial judge, a serious and frightening attack on a lone woman. It is not the Appellant's only conviction. On the 3rd June 2005 he had been convicted of failing to stop after an accident, using a vehicle with no test certificate, using a vehicle whilst uninsured and with no licence. He had on that occasion been fined £200 and disqualified from driving for 6 months.

5. The Respondent decided to make an order for the Appellant's deportation on the 9th April 2015.

The Appellant's Case

6. The Appellant sought to resist the deportation order on both protection and human rights grounds.

7. In respect of protection the Appellant asserted that he faced a real risk of serious harm in Afghanistan arising from the general violence there, but that the risk to him was enhanced because he has spent so long in the UK. As a 'westernised' Afghan he would face particular adverse interest from criminal and extremist elements.

8. The human rights case rested on the Appellant's relationship with his son. The child C was born on the 3rd April 2014 to a British mother, T. T has not been able to care for her son and since the 16th February 2015 C has been the subject of a Special Guardianship Order in favour of his paternal grandparents. Mr and Mrs S, the Appellant's father and step-mother, have looked after C ever since. He lives in their home in Birmingham. The Appellant also lives in that house. He states that he shares a bedroom with his son, and that the two of them are close. He avers that he has an Article 8 family life with C and that it would be contrary to C's best interests, and in all the circumstances unduly harsh, to interfere with that right.

The Decision of the First-tier Tribunal

9. The first thing that the First-tier Tribunal had to deal with was the fact that the Appellant was without legal representation. He attended the hearing on his own and requested an adjournment. He explained that he had had solicitors previously but he could not afford the fees they required to attend the hearing. Although his father had agreed to pay it seems it was not possible to arrange this prior to the appeal being listed. The Appellant submitted a handwritten note said to have been given to him by someone at the Solicitors confirming, in bullet points, what he had told the Tribunal. It said that he needed time to get further evidence including making a 'subject access request'. The Tribunal noted that there was on the file a letter from the solicitors saying that they had withdrawn and that this had been received approximately three weeks before the hearing. This had given the Appellant ample time to pay any fees required or get a new representative. The Tribunal was unable to attach very much weight to the handwritten note since there was nothing at all to indicate that it was actually from a solicitor. The adjournment request was therefore denied, but the Tribunal did set the matter back in the list so that the Appellant could contact his father and ask him to attend the hearing, which was duly done.

10. The Tribunal noted that this was a case that was certified under s72 of the Nationality, Immigration and Asylum Act 2002. This meant that as a serious criminal the Appellant could not have the benefit of the Refugee Convention unless he could not rebut the presumption that his presence in the UK would

constitute a danger to the community. It did not accept that the presumption was rebutted. The index offence had been particularly serious. Although a weapon had not been used the Appellant had preyed on a vulnerable woman on her own. There was no evidence that the Appellant was unlikely to re-offend. He had not produced evidence to demonstrate that his problems with alcohol or gambling had been resolved. The probation report stopped short of confirming that he was a low risk of re-offending. The Appellant was not therefore entitled to the protection of the Refugee Convention.

11. The Tribunal turned to consider whether he was, nevertheless, at a risk of serious harm in Afghanistan. It directed itself to consider, per Devaseelan [2002] UKIAT 00702, the decision of the First-tier Tribunal promulgated on the 3rd August 2007. On that date Judge Deavin had made what the First-tier Tribunal described as "scathing criticism" of the Appellant's credibility as a witness. His evidence was rejected as a complete fabrication. That had to be the Tribunal's starting point in the evaluation of his protection claim. It was bound to follow that decision unless there was new evidence, or a material change in circumstances. The Appellant had pointed out that there was a war in Afghanistan. The Tribunal declined to find that the level of violence was such that Article 15(c) would be engaged and applied the country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC). There was not a sufficiently high risk of harm to the Appellant such that he had made out a protection claim, even to the lower standard of proof.

12. In respect of human rights the Tribunal directed itself to consider paragraphs 398-399A of the Immigration Rules. If the Appellant could show that any of the exceptions to the automatic deportation scheme applied, he would succeed on Article 8 grounds. The Appellant had claimed to be in a relationship with an Iranian woman whom he planned to marry, but she had not attended and there was no evidence of a relationship available before the Tribunal. He could not therefore succeed on the grounds that he had a family life with a partner. In respect of the 'private life' provisions in 399A the Appellant could not rely on those because he had never had leave to remain in the UK.

13. The only possible exception that might apply to his case was that set out at paragraph 399(b). It was for the Appellant to demonstrate three things. First he had to show that he had a genuine and subsisting parental relationship with a British child. He then had to show that it would be 'unduly harsh' for that child to remain in the UK without him, and that it would be 'unduly harsh' for that child to go to Afghanistan with him if he were to be deported. The Respondent accepted that the last of those tests was met. The child is British and subject to a Special Guardianship Order. He could not therefore be removed from the UK and the Respondent accepted that it would be unduly harsh to expect him to go to Afghanistan.

14. Turning to consider the remaining matters in issue the Tribunal was not satisfied that the Appellant did in fact enjoy a *parental* relationship with his son.

Although the Appellant had lived with C since C was approximately six months old, and the Tribunal appeared to accept his evidence that they enjoy a "very close relationship" it found that the nature of that relationship was not of father and son. The Family Court had decided that it was the Appellant's father and step-mother who should look after the child. They had a parental relationship with C. The Appellant's father did not believe that the Appellant was responsible enough to look after C. They were content for him to live in their house, and share a room with the child, but they were clear that they would remain C's guardians. They had indicated that even if the Appellant were to enter into a new relationship the boy would nonetheless remain with them. The inescapable conclusion was that the child's best interests lay with remaining with his grandparents. The Tribunal therefore dismissed the appeal under the Rules.

15. Finally the Tribunal considered whether it would, notwithstanding the failure under the Rules, be disproportionate to deport the Appellant. Having had regard to the various matters arising in respect of the public interest, it concluded that it was not.

The Appeal

16. The Appellant sought to appeal the decision on several grounds.

17. First it was submitted that there was a procedural unfairness in the Tribunal's decision not to adjourn. It is obviously preferable that appellants are legally represented, particularly where the fundamental rights of a child are involved. It is however not a pre-requisite. Were that the case then there would be guaranteed legal aid funding for such cases. Unfortunately the reality is far from that ideal. This Chamber deals on a daily basis with appellants who are unrepresented, either because they could not secure legal aid and they do not have the money themselves or because they have been unable to find a specialist with time to take their case. Judges in the First-tier Tribunal are therefore well-versed in the appropriate measures to be taken in such cases, such as taking particular care to ensure that the appellant understands the proceedings, and is able to participate effectively in them. There is nothing in the grounds or determination itself which would indicate that those measures were not implemented here. The Judge explored the possibility of the Appellant finding a representative. Since he had already had three weeks to do so it was not satisfied that any further adjournment would be of assistance. That was a finding open to it on the evidence before it. I am not satisfied that it has been shown that the decision of the First-tier Tribunal is vitiated by any unfairness.

18. I need deal with the next two grounds very briefly since Mr Woodhouse made no submissions on them, and because the new country guidance case of AS (Safety of Kabul) Afghanistan [2018] UKUT (IAC) renders them unarguable. Complaint was made first about the way that the Tribunal approached the rebuttable presumption in s72; the grounds further submitted that the First-tier

Tribunal had erred in its approach to protection because it had failed to address the changed circumstances on the ground since AK was decided. AS expressly maintains the position of AK, and the submission that 'westernised' returnees face an "enhanced risk" is rejected. There can therefore be no arguable error in the Tribunal having failing to consider the submissions contrary to the findings in AK. Nor can its findings on s72 be of any relevance. If there is no risk of harm, it matters not what Convention the Appellant was seeking protection under.

19. In respect of Article 8 it is submitted that the Tribunal has erred in its approach to whether there is a "genuine and subsisting parental relationship" because it has failed to take material evidence into account, namely the significance of the biological relationship and the fact that the Appellant shares a room with C. In his submissions Mr Woodhouse submitted that the Tribunal has misunderstood the significance of the Special Guardianship Order. Whilst such an order does confer legal responsibility on C's grandparents, it does not take anything away from the Appellant's father. As a matter of law he has retained parental responsibility. Similarly in terms of the substantive relationship there is nothing to show that C's relationship with his grandparents has diminished his relationship with his Dad. The evidence about the living arrangements was not challenged. It was this point that persuaded Judge Cruthers to grant permission.

20. The Tribunal's findings are found at paragraph 49:

> "I cannot ignore the fact that the Appellant's father and step-mother have a special guardianship order in respect of the Appellant's son as a result of which they are his primary carers and they are the ones who make day to day decisions about his upbringing. [Mr S] senior also made it clear that if the Appellant was to enter into another relationship which, according to his evidence, he intended to do, his son would remain with his grandparents".

21. Whilst I understand Judge Cruthers' concerns, I am not satisfied that the Tribunal was here simply imagining that the making of a Special Guardianship Order automatically creates a "genuine parental relationship", or that it automatically destroys another. It was properly concerned with the substance of the relationship. There can be no criticism of its finding that it is C's grandparents who are his primary carers, and that they are the ones who have made the day to day decisions about his upbringing. Conversely Mr Woodhouse was quite unable to direct me to any evidence that indicated that there was a substantively parental relationship between the child and the parent. The fact that they share a bedroom adds little to the equation; conventionally children share bedrooms with their siblings, not with their parents. The same can be said of the evidence that the Appellant plays with C. The Appellant does state that he "sometimes" takes C to nursery and that he helps with his care, both matters arguably consistent with a parental role, but

what is strikingly absent from his statement and that of his father is any confirmation that the child looks to the Appellant *as a father*, rather than as a brother or playmate. Neither statement even confirms that C is aware that the Appellant is in fact his biological father: since he has lived with his grandparents since he was six months old that is a significant omission.

22. Even if the First-tier Tribunal – and I am wrong about the nature of the relationship, there was not before the Tribunal sufficient evidence to support a finding that it would be unduly harsh for C, or otherwise a violation of Article 8, if the Appellant were to be deported. The Appellant committed a serious criminal offence for which he was sentenced to two years in prison. That was not his first offence, and he has in addition a very poor history of compliance with immigration control. All of that weighed heavily in the balance. Against that was the Appellant's evidence that it would "not be fair" on his son if he were to be deported. No particulars were offered about how the child might be affected, or why, as alleged in the grounds, it would be contrary to his best interests if his father was to be removed. This is a child who is looked after – by all accounts well – by his grandparents who have cared for him since he was 6 months old and have declared it to be their intention to carry on doing so. In the absence of any actual evidence about what the detriment to him might be as a result of the Respondent's decision, the First-tier Tribunal could have done nothing other than dismiss the appeal.

Decision

23. The decision of the First-tier Tribunal contains no error of law and the decision is upheld.

24. There is a direction for anonymity.

Upper Tribunal Judge Bruce
24th April 2018