IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/30792/2014**

THE IMMIGRATION ACTS

Heard at Field House Face to Face	**Decision & Reasons Promulgated**
On the 25th May 2021	**On the 28th June 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR A U O
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp, instructed by D J Webb & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision by the respondent dated 15th July 2014 (served on 21st July 2014) to remove the appellant from the United

Kingdom under Section 10 of the Immigration and Asylum Act 1999, and the refusal under the immigration rules and on human rights grounds on 15th July 2014 of the appellant's application dated 30th May 2014.

2. The appellant is a citizen of Nigeria, born on 3rd May 1989, and had been granted entry clearance as a visitor on 22nd July 2004 valid until 22nd January 2005, He landed in the United Kingdom on 1st August 2004, aged 15 years old.

3. In 2006 he was included as a dependent child on the application submitted by his mother but that was withdrawn in July 2007. He was included as a dependant of his father in an application dated 20th April 2007 which was rejected, and the resubmission rejected again on 14th November 2007 and the appellant was served with a notice of liability to removal in line with his father as an illegal entrant. His father had arrived in the United Kingdom in 1981 and the appellant's mother joined her husband in London in 1999. A further application made by the appellant's father was refused on 2nd December 2009, a humanitarian protection claim was refused on 28th July 2010. The appellant made an application on his own behalf which was refused on 30th August 2013. The appellant made a further application on 30th May 2014 which was refused and which generated this right of appeal.

4. The human rights' decision dated 15th July 2014 under appeal considered that the appellant met the suitability requirements for consideration of limited leave to remain either as a partner or parent under Appendix FM. At the time, the appellant however had no partner and was rejected under Appendix FM of the Immigration Rules because he was not in a relationship and was further rejected under Appendix FM because he was not a parent of a child in the United Kingdom.

5. The appellant appealed on 30th July 2014, in accordance with the previous appeal regime under Sections 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), (amended with transitional provisions on 6th April 2015), that his return to Nigeria and the decision was not in accordance with the law, not in accordance with the immigration rules, the discretion should have been exercised differently and the decision was unlawful under section 6 of the Human Rights Act 1998 and would breach his human rights.

6. The appeal against the decision of 15th July 2014 has a long and protracted history. His appeal against removal was allowed by First-tier Tribunal Judge Kimnell on 4th March 2015 who noted that the appellant had been present in the UK for over ten years, came as a child, had spent his time well obtaining qualifications, including his masters degree in pharmacy and was capable of making a significant contribution to the community in the United Kingdom. The appellant stated that he had ambitions to study further and qualify as a surgeon. Judge Kimnell found it to be a marginal case but on balance the decision to remove him was a disproportionate interference with his Article 8 rights.

7. The Secretary of State appealed that decision on the basis that the judge failed properly to apply Section 117B of 2002 Act and secondly failed to conduct an

adequate balancing exercise attaching too much weight to the respondent's qualifications and potential future contribution to the United Kingdom. On 8th September 2016, Upper Tribunal Judge Kamara and Deputy Upper Tribunal Judge Harris found the First-tier Tribunal Judge had attached too much weight to the respondent's ability to speak English and to the likelihood of him becoming financially independent given his qualifications in pharmacy, in line with **Rhuppiah and the Secretary of State for the Home Department [2016] EWCA Civ 803**. Additionally the judge erred in relation to Section 117B(4) and (5) in that there was no recognition that the appellant's presence in the United Kingdom was overwhelmingly unlawful and initially precarious. The judge did not identify any "compelling reasons" which merited allowing the appeal outside the Rules.

8. The matter was remitted to the First-tier Tribunal. It was heard again by First-tier Tribunal Judge Grant on 15th March 2017. The appellant did not learn until 16th November 2017 that his appeal had been dismissed. The judge noted the appellant was gifted academically and had a younger brother who was a successful professional footballer but found that he had gone to university and lived an independent life. The appellant had not established that he had enjoyed family life ties above normal family ties within the meaning of Article 8 as per 'AA v United Kingdom' (sic). She noted that the three years the appellant had spent in the United Kingdom as a minor unlawfully was entirely the responsibility of his parents but that as an adult, he knew his immigration status was precarious and he had no right to be in the United Kingdom. She found he was integrated, motivated and an upstanding member of his local community and did not arrive at his own behest. She found there were no insurmountable obstacles to the appellant's reintegration into Nigeria and that he had a brother there already with whom although he was not in contact, and an aunt and he could locate and old friends from school.

9. That decision of the First-tier Tribunal was again challenged on 29th November 2017 by an application for permission to appeal, this time by the appellant. The matter came before Deputy Upper Tribunal I A Lewis on 11th July 2018. Regrettably, no decision was promulgated until 14th June 2019, over two years since the refusal by First-tier Tribunal Judge Grant. When the decision was promulgated Deputy Upper Tribunal Judge Lewis found an error of law in the approach by the First-tier Tribunal to the family life of the appellant and set aside the decision.

10. On 16th January 2016, a child had been born to the appellant following a relationship. That relationship had broken down by the date of the birth of the child. I acknowledge that the decision of Judge Grant was set aside but the evidence recorded is relevant. It is right to state that First-tier Tribunal Judge Grant noted that the appellant has numerous family members in the UK, comprising his father, his mother, his younger brother, six cousins and two aunts. She also noted that the appellant has a daughter in the UK called GF and that the appellant and the mother had split up when the child was a few weeks old and

> *"He has not been allowed to have contact with the child since. The mother of the child has now moved back to Hull where her parents live and taken GF with her. The*

appellant has sought legal advice about seeking contact with his daughter but was told that because he has no lawful presence in the United Kingdom he would not qualify for any kind of legal aid and the fact he is unlawfully in the UK would also be considered a negative factor in terms of being able to provide any kind of stability for his daughter.

The appellant is not seeking to capitalise on the fact that he has a child in the UK. He cannot prove that GF is his daughter because he does not have a birth certificate showing his name as the father, but he presumes DNA testing could prove that, but in the absence of the mother volunteering to allow the child to be tested he would have to pursue this through the Family Court".

11. The above sets out the position of the appellant vis-à-vis his daughter as in 2017. At that point there was no evidence that he was indeed the father of his child, but it does indicate that he had been considering attempts to have contact with his child and that he had not ignored those prospects. In the bundle before me there was a DNA Profiling test report dated 19th December 2018 which demonstrated that the appellant was indeed the biological father.

12. In relation to the resumed matter the appellant's solicitors wrote to the Tribunals in July 2019 submitting that the appellant had ongoing proceedings in the Family Court concerning contact with his daughter and that an application had been made to the courts for those proceedings and any orders by the court to be disclosed to the Tribunal. It was noted that the appellant would obviously wish to rely on those matters in any resumed hearing and that the matter should be adjourned to September 2019. It was made clear to the Tribunal that there were ongoing contact proceedings to which the appellant was a party but that the Tribunal needed the permission of the Family Court under the family Procedure Rules in order for disclosure. The appellant's representatives pointed to **RS immigration and family court proceedings India [2012] UKUT 00218**. The matter was set down for hearing not before 1st October 2019.

13. On 26th November 2019, the respondent confirmed that as the decision under appeal was made on 15th July 2014 the new provision of Section 85(5) of the Nationality, Immigration and Asylum Act 2002 was not applicable to the appeal and therefore the issue of consent in relation to a new matter, that being the child did not arise. In the event this was conceded by the Secretary of State.

14. The first order of the Family Court in relation to the appellant and his child G, was dated 10th December 2019 and confirmed that there should be indirect contact by way of the father sending letters and/or cards each fortnight to his daughter and that the mother should encourage the daughter to send pictures and cards to the father and provide quarterly updates on her welfare and development to the father. Permission was granted to disclose the order to the immigration Tribunal. A further order was made on 23rd April 2020 by the Family Court, noting that a final hearing listed for 22nd April 2020 was adjourned, that the order of 31st May 2019 for a female genital mutilation order in relation to the child for the duration of her minority was maintained and that there should be indirect contact by way of the father sending

letters and/or cards, together with appropriate photographs of himself once a week to his daughter (inter alia).

15. The case was relisted for a final hearing before the same family judge on 10th July 2020. It was noted that the father remained a litigant in person. Once again permission was granted for disclosure to the immigration Tribunal.

16. The matter was adjourned within the Upper Tribunal (IAC) for case management direction hearings and following the COVID pandemic. A further case management hearing made directions and on 13th May 2021 an updated composite appeal bundle was provided for the resumed hearing before me which included pages 1 to 303 and contained an updated witness statement of the appellant which he signed at court and a "child arrangements and prohibited steps Section 8 Children Act 1989" order dated 10th July 2020 and a "child arrangements" order dated 21st October 2020.

17. The Family Court order of 10th July 2020 granted the appellant supervised contact once every two weeks for a period of two hours and continued the indirect contact by way of letters and/or cards, together with appropriate photographs of himself and his family once a week to his daughter.

18. The child's birth certificate was ordered to be amended to add the appellant as her biological father and for the daughter's homework to be sent weekly to the appellant. Pictures of the appellant's daughter celebrating her subsequent birthdays were to be sent to the appellant and for the mother to advise the appellant at least four weeks before she intended to take the daughter out of the United Kingdom. On 21st October 2020 a contact order was made that, subject to the COVID-19 Regulations permitting the continued opening of child contact centres, the mother must make sure that the child spends time or otherwise has supervised contact with the father once per month for the period of two hours. It would appear that this was amended during the COVID restrictions with a proviso that the father would have to evidence his commitment for a period of approximately twelve months before a progression could be considered. Again the mother was to send updates on the child's welfare and development, to include appropriate pictures to the father once a month and the father was permitted to send letters and/or cards, together with appropriate photographs of himself once a week. The mother was to encourage the child to send pictures and cards to her father.

19. At the hearing before me the appellant signed and adopted his witness statement dated 25th May 2020 and confirmed by questioning from Mr Fripp that his family paid £1,200 each month by way of financial support. It was his father, mother and brother who paid, and he stated that as a qualified pharmacist if he were able to work, he would be able to pay himself. He was excited at the prospect of having direct contact with his daughter whom he had not seen since she was 4 months old, and he felt very emotional about the prospect. He last saw his daughter in May 2016 on his birthday and he was excited at the possibility of the COVID restrictions being lifted so he could have contact. He thought it was important that he could help her know her background and answer her questions as to why she looked like she did as

she was white English and black African and that he would be able to contribute to putting the family's values into her education and upbringing.

20. Under cross-examination he stated that he formerly tried to make contact in 2018 but prior to that time her mother and the appellant had split and she was difficult. He had attempted to text her. He stated that prior to the hearing before Judge Grant he had tried to contact the mother informally. Because of his status he was confused, and he thought he was not entitled to help and had stopped using a lawyer. He first started sending money in 2019 which was after the decision from Judge Grant but prior to the error of law decision. He only had the information he had in relation to the financial payments and he had been provided with no statement from the mother.

21. He confirmed that it was correct that his parents had declared that they did not have enough money to support him if he removed to Nigeria but at present his father as a nursing associate was doing extra shifts and so was his mother and the brother was making a contribution.

22. Enquiry was made of the FGM order, and the appellant stated that the mother had declared that he would take the child to Nigeria and conduct FGM, but he stated that his family found the practice abhorrent and would in no way would consider it and further in any event the appellant could not remove the child from the jurisdiction. The appellant stated he had been at the Family Court at that point as a litigant in person and this was an argument that was raised by the mother without justification.

23. When asked why he suddenly decided to make a financial contribution he responded that mentally he had become an adult and he wished to contribute to the things that she wanted, such as pets and he wanted to be a father she was proud of. He had no contact with his brother in Nigeria who had been deported.

24. Mr Tufan submitted that the appellant had arrived in the UK when he was 15 years and 3 months old and had spent his formative years in Nigeria and did not accept that there would be very significant obstacles to his reintegration there. The appellant claimed he had no relationship with his brother, but his parents were funding his brother in Nigeria. It was not accepted that there would be unjustifiably harsh consequences to his removal because the appellant was both intelligent and educated. He had qualified as a pharmacist, and it may be argued that his potential contribution to society was important in **UE (Nigeria) v SSHD [2010] EWCA Civ 975** terms but that had to be very substantial and did not come near the relevant threshold. With regards his family life with his parents he had lived in the same dwelling and there was some financial dependency but as stated in **AAO v Entry Clearance Officer [2011] EWCA Civ 840** financial dependency on its own was insufficient to engage Article 8 and Mr Tufan did not accept that Article 8 family life was engaged.

25. It was accepted that the appellant was the father of the child G but the last time he saw her was when she was 4 months old and the evidence in the bundle was that

there had been some financial transactions but no more than that and the timing of the contributions should be considered; they did not commence until 2019 and postdated the First-tier Tribunal decision. I was referred to the authorities of **RS immigration family court procedures [2012] UKUT 00018** and **AB Jamaica [2019] EWCA Civ 661 [2019]**; each case turned on its own facts. It was clear that the appellant had been attempting to make contact now, but the real issue was whether he had a genuine and subsisting parental relationship as per Section 117B(6) of the 2002 Act. Mr Tufan submitted that the rationale of **MS Ivory Coast [2007] EWCA Civ 133** was relevant and the proceedings in the Family Court were not finalised, and the Tribunal could allow the appeal to a limited extent or at least give a direction thereto. Mr Tufan did not accept that there had been a parental relationship and referred me to **RS.**

26. Mr Fripp relied on his skeleton argument and submitted that the appellant's relationship and his contact ended at approximately the same time. There was no evidence that the appellant had been uninterested and uncaring. The fact that it took two years to take formal proceedings was highly understandable and was an identifiable phenomenon that going through the court process worsened relationships and here the relationship had been hardened. There was no restrictive order from the Family Court and the appellant had been awarded a large amount of indirect contact. He was a non-custodial parent, but he took the role seriously and responsibly. The fact that it took two and a half years to go to law did not go to the factual position under Section 117B(6). The position as at today was what was relevant. The view of the Family Court was that there should be direct contact as soon as restrictions were removed. **AB Jamaica [2019] EWCA Civ 661** rejected the suggestion that there needed to be direct parental care and nor did there need to be parental responsibility. This was a case some way up the spectrum in relation to Section 117B(6) and on the current facts it should be accepted that there was a parental relationship for the purposes of Section 117B(6). The cultural aspects and heritage were important.

27. In relation to private life the appellant had entered lawfully as a child and had overstayed at the behest of his parents while still a minor. He had now lived in the United Kingdom for seventeen years and substantially acclimatised having excelled in his secondary education. He had been educated to professional level and had a qualification as a pharmacist. He had evidently been unable to work but had been involved in the church and was supporting family members and actively volunteering. He has a family life with his child, and it was also submitted that he had a family life with his parents bearing in mind he had not founded a separate independent household. That was consistent with the Strasbourg Court ruling of **AA Nigeria**, the reference to which was found at paragraph 18 of his skeleton argument. Given the appellant's lengthy presence and good character, having left full-time education in June 2011, it would be disproportionate to remove the appellant. And the appeal should be allowed.

Analysis

28. The fundamental issue in this appeal is whether the appellant can meet the immigration rules and whether the respondent's decision represents a disproportionate breach of Article 8 European Convention on Human Rights. The position of the Secretary of State is set out in Appendix FM to the Immigration Rules in relation to family life and paragraph 276ADE(1) in relation to private life.

29. Under the Immigration Rules the requirements for leave to remain as a family member are set out at Appendix FM and these include provisions for those seeking leave to remain as the parent of a child in the United Kingdom. It should be noted that the requirements under R-LTRPT.1.1 include that the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner (R-LTRPT1.1(b)). The applicant's refusal decision was made back in 2014 and prior to any child being born. His application was considered however under Appendix FM (both partner and parent limbs), but it was noted that he did not claim that he was in a relationship at that time nor had a child. Appendix FM 'suitability provisions' were considered. As I indicated above the Secretary of State conceded that the question of the new matter did not arise because the appeal was being considered under the 'old appeal' regime and the decision made prior to the introduction of Section 85(5) of the 2002 Act. I consider those immigration rules below.

30. Section 117B of the Nationality, Immigration and Asylum Act, however, sets out as follows;

> *"117AApplication of this Part*
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a)breaches a person's right to respect for private and family life under Article 8, and
>
> (b)as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a)in all cases, to the considerations listed in section 117B, and
>
> (b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> *117BArticle 8: public interest considerations applicable in all cases*
>
> *(1) The maintenance of effective immigration controls is in the public interest.*

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a)are less of a burden on taxpayers, and

(b)are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a)are not a burden on taxpayers, and

(b)are better able to integrate into society.

(4) Little weight should be given to –

(a)a private life, or

(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom".

31. As stated in **KO (Nigeria)** [2018] UKSC 53 (paragraph 17) subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. Albeit the question of the reasonableness of the child being with the parent outside the UK would still need to be addressed, it was accepted and conceded by Mr Tufan that it would not be reasonable to expect the child in this case to leave the United Kingdom and thus Section 117B(6)(b) is satisfied. Should those two limbs (Section 117B(6) (a) and (b) be satisfied statute which prevails over the Immigration Rules dictates that the appeal should be allowed. The question is whether the appellant has a "genuine and subsisting parental relationship with a qualifying child".

32. The Court of Appeal in **AB Jamaica** held at paragraphs 86 to 98 that there did not have to be an element of direct parental care for a subsisting and genuine relationship and Singh LJ accepted it was possible to have a genuine and subsisting parental relationship with a child particularly in cases where contact had only recently been resumed on a limited basis.

33. In particular at paragraphs 89 and 90 of **AB Jamaica** Singh LJ held [my underlining]:

> "89. Like UTJ Plimmer I also have found helpful the judgment of UTJ Grubb in *R (RK) v Secretary of State for the Home Department* [2016] UKUT 00031 (IAC). Although the facts of that case were quite different, as they concerned a grandmother and whether she needed to have "parental responsibility" for a child, what UTJ Grubb said at paras. 42-43 contains an analysis of the concept of "parental relationship" with which I would respectfully agree:
>
> > "42. Whether a person is in a 'parental relationship' with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have 'parental responsibility' in law for there to be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child.
> >
> > 43. I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not *per se* 'parents'. A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship.'"
>
> 90. Returning to the case of *SR (Pakistan)* I would also respectfully agree with what was said by UTJ Plimmer at para. 39:
>
> > "There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other. There are also cases where the nature and extent of contact and any break in contact is such that although there is contact, a subsisting parental relationship cannot be said to have been formed. Each case turns on its own facts."

34. Additionally in **AB (Jamaica)**, King LJ from paragraphs 107 to 111 emphasised the importance of the right of the child to have a relationship with a parent and ensuing the principles when stating the following

> "107. The considerable importance which the Family Court places on the right of a child to have a relationship with his parents was restated by Sir James Munby P in *Re Q (Implacable Contact Dispute)* [2015] EWCA Civ 991; [2016] 2 FLR 287 by reference to an earlier decision of his in 2011:
>
> > "[19] The first are the principles which I sought to distil in *Re C (A Child) (Suspension of Contact) [2011] EWCA Civ 521*, [2011] 2 FLR 912, para 47, as follows:
> >
> > - Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
> >
> > - Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
> >
> > - There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
> >
> > - The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
> >
> > - The key question, which requires "stricter scrutiny", is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.

- All that said, at the end of the day the welfare of the child is paramount; "the child's interest must have precedence over any other consideration."

108. The recognition of the importance to a child of contact with a parent with whom he is not living is also reflected in the terms of section 117B(6)(a).

109. In order to demonstrate a genuine and substantial parental relationship, it is common ground that it is not necessary for the absent parent to have parental responsibility and, in my judgement, it is hard to see how it can be said otherwise than that a parent has the necessary "genuine and substantial parental relationship" where that parent is seeing his or her child in an unsupervised setting on a regular basis, whether or not he has parental responsibility and whether or not by virtue of a court order. Equally, the existence of a court order permitting direct contact in favour of the absent parent is not conclusive evidence of the necessary parental relationship. It may be that a court would conclude that there is no "genuine and substantial parental relationship" where, for example, a parent has the benefit of a court order but does not, or only unreliably and infrequently, takes up his or her contact.

110. So far as indirect contact is concerned, it should be borne in mind that the Family Court typically strives to promote regular, unsupervised, face to face contact between a child and his or her parent. If a court limits that contact to indirect contact only, that is because the court, in a decision making process in which the child's welfare is paramount (Children Act 1989, section 1) has decided that such a significant limitation on the parental relationship is in the best interests of the child in question and the reasons for such a decision having been reached by the judge will be highly relevant to the tribunal's consideration of section 117B(6)(a).

111. Having said that, whilst perhaps more likely, it is by no means inevitable that a tribunal will conclude that a parent has no "genuine and substantial parental relationship" absent direct contact. It may be that there has been a long gap in contact and that indirect contact marks a gentle re-introduction, or that a parent has to show (and is showing) commitment to indirect contact before direct contact can be introduced. Where however a Family Court has made a final order limiting contact to indirect contact, particularly when there is no provision for progression to direct contact, the tribunal should look closely at the reasons which led to the court making such a restrictive order'".

35. Mr Tufan also referred me to the case of **RS and the immigration family court process [2012] UKUT 00018** and the following principles set out in the headnote.

'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?'

36. With these principles in mind and the various questions raised in **RS** to be addressed it is clear that the 'contemplated family proceedings' which are both underway and ongoing are material to the immigration decision, not least because of the application of Section 117B(6). There are no 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. The decision taken in 2014 by the Secretary of State confirmed that the appellant would not be excluded on suitability grounds.

37. The third question which was to be answered was whether there was any reason to believe that the family proceedings had been instituted to delay or frustrate removal and not to promote the child's welfare.

38. In assessing that third question in **RS** the judge would normally want to consider

    (1) the degree of the claimant's previous interest in and contact with a child;

    (2) the timing of contact proceedings and the commitment with which they have been progressed;

    (3) when a decision is likely to be reached;

    (4) what materials (if any) are already available or can be made available to identify the pointers to where the child's welfare lies.

39. I also had regard to the Home Office guidance in 'Family Policy Family life (as a partner or parent), private life and exceptional circumstances' dated 28 January 2021 and referred to by Mr Tufan. In particular the relevant paragraphs at pages 50-51 set out as follows:

    'The contact can be indirect although it is likely, although not inevitable, that a relationship will not be sufficient to engage Article 8 if there is no or infrequent contact. Where the contact is not direct, the reasons for that must be adequately considered. …

    …Where there are 2 parents, unless evidence is provided to the contrary, it should be assumed that one or both could provide parental responsibility for the child.

    In each case a finding on whether there is a genuine and subsisting parental relationship capable of engaging Article 8 is highly fact specific. You should consider whether the applicant is:

    - *the child's parent*
    - *taking an active role in the child's upbringing and making decisions that directly affect them*
    - *the child's primary or secondary carer*
    - *willing and able to look after the child*
    - *living with the child*
    - *seeing the child on a regular basis*
    - *making an active contribution to the child's life*

    Consideration should also be given to whether there any relevant court orders governing access to the child and if there is there any evidence provided within the application as to the views of the child, other family members or social workers or other relevant professionals.

    Factors which might prompt closer scrutiny include:

    - *the person has little or no contact with the child or contact is irregular*
    - *any contact is only recent or is infrequent or sporadic*

• *support is financial in nature; but there is little or no contact or emotional support*

• *the child is largely independent of the person ...'*

40. The question of whether there is a subsisting and parental relationship is fact-sensitive in each case. I am not persuaded that the relationship is being used to frustrate the appellant's removal. I accept the appellant's evidence as being candid and consistent with the evidence he gave to First-tier Tribunal Judge Grant in 2017. At that point the appellant stated that he had a child and explained the difficulty which he had encountered when trying to secure contact. The appellant explained in his evidence that he had broken up with the mother of the child prior to her birth but had retained contact with the child until she was approximately 4 months old and since that time had lost contact. He explained at court that he had attempted to make informal overtures to the mother to try and secure contact, but this had not been possible. I accept that the provisions of the Children Act 1989 encourage contact in relation to children to be undertaken preferably without formal court orders and further there is a very limited legal aid in that respect. The child was born in 2016 and the appellant explains that for the first few years of the child's life he attempted to secure contact informally. It is also important to note that until the appellant was able to secure the results of a DNA profiling test on 19th December 2018, he would not have been in a position to maintain that he was indeed the father of his child and enforce rights thereto. That report confirms that his probability of paternity is 99.99%.

41. Following that DNA test , I accept that the court proceedings were initiated fairly rapidly; indeed there was a female genital mutilation protection order dated 31st May 2019. The appellant was adamant in the proceedings before me that he found such practice reprehensible, and he thought that this had been raised in court without foundation. Whatever the nature of this claim it is likely to have caused considerable difficulty between the parties and might explain the approach to contact. Nonetheless I accept that the timing of the contact proceedings and the commitment with which they have been progressed underlines the appellant's commitment to maintaining and interest in maintaining contact with his child. This in turn supports his contention that he has a genuine and subsisting parental relationship with his daughter who is a British citizen. As described above the family court has confirmed that there should be indirect contact through the sending of letters and cards and photographs between the appellant and his child and from his child to the parent, but also latterly on 21st October 2020 there was an order for direct supervised contact with the father once a month for a period of two hours. The Court of Appeal has indicated that it is possible to have a genuine parental relationship with indirect contact. In this case there has been indirect contact but also the imminent prospect of direct, albeit supervised contact.

42. In terms of section 55 of the Borders Citizenship and Immigration Act 2009 and the best interests of the child, I take guidance from the court that in the recital it was recorded that the mother indicated she would promote an increase of the supervised contact between the child and the father in due course when she was satisfied that

the child had a sufficiently stable attachment with the father in accordance with her wishes and feelings.

43. I also note that the court recorded that it would be necessary for the father to show that he is committed to maintaining direct supervised contact with the child. He needs to evidence his commitment for a period of approximately twelve months before any further progression. I take from this that not only does the court consider that contact with the child was beneficial to the child's best interests (and indeed this is the presumption of the Children Act) but further that a direction that the appeal be allowed to the limited extent and a discretionary leave be directed as per the decision in **MS Ivory Coast** is not appropriate. In my view a core decision to order contact (albeit supervised direct contact) has already been made. The underlying import of the Family Court proceedings was that there needed to be stability and durability in the contact over a period of time and that the father needed to show commitment for a period of approximately twelve months before a progression could be considered. I am not persuaded on the facts that I should direct a period of shortened leave tied to the family proceedings.

44. I also note from the court documents that the appellant is a litigant in person, and he has displayed some tenacity and commitment in his attempts to secure child arrangements through the court process. Although a previous court order indicated that he had parental responsibility, the court order of October 2020 stated that any application to be granted parental responsibility was likely to be premature at this stage and once again it was necessary for him to demonstrate commitment to maintaining direct supervised contact for approximately twelve months. The court order of 10th July 2020 confirmed that the child's birth certificate should be amended to add the appellant as her biological father.

45. Overall the extent of the indirect contact through photographs, the letters and cards and the sending of homework weekly by e-mail underlines and supplements the direct contact that has been ordered and soon to be pursued by the appellant. The indirect contact evidences an emotional content, is regular in nature and the amount of contact is ordered by the court not because the appellant has avoided contact

46. I thus accept that on the evidence presented to me both in oral testimony and written evidence, through the court orders and witness statement of the appellant that there is a genuine and subsisting relationship between the appellant and his daughter and that it is in her best interests to maintain contact with the appellant. . I do not find that contact has been initiated to frustrate removal.

47. I therefore consider that the appeal should be allowed under Section 117B(6). Further I consider that the appeal, which was framed under the previous appeal regime would be allowed under the immigration rules. The issue of the child was not categorised as a new matter for the reasons given above and this interpretation was agreed by the Secretary of State.

48. The appellant can meet the requirements for limited leave to remain as a parent under Appendix FM of the Immigration Rules, R-LTRPT with reference to EX.1. The child is a British citizen under the age of 18 years and living in the UK and the mother is a British citizen settled in the UK and not the partner of the applicant. The appellant has shown he has a court order for direct access and intends to continue to take an active role in the child's upbringing. The appellant is in breach of immigration law owing to his illegal status, but EX.1 applies (in similar terms to Section 117B(6).

49. There is therefore no need to proceed to consider the matter under paragraphs GEN.3.1. and GEN.3.3. of Appendix FM (relevant to partner and parent applications) and any unjustifiably harsh consequences on removal.

50. I have also considered further to the five stage steps in **Razgar v SSHD [2004] UKHL 27** whether the appellant has a family life in the United Kingdom with his parents.

51. The appellant is now 32 years old and was brought to the United Kingdom at the age of 15 at the behest of his parents. He confirmed to me that he left full-time education in 2012 having qualified as a pharmacist and lives with his parents and continues to be financially dependent upon them. Indeed he provides financial assistance to his child via his parents. As set out in **Kugathas [2003] EWCA Civ 31** there is no presumption of family life between an adult child and his surviving parents or other siblings unless something more exists than normal emotional ties. Once again this depends on the circumstances of each particular case. One of the key issues in **AA and the United Kingdom [2011] ECHR 1345** was whether a young adult had founded a family of their own. It was noted that at paragraph 47

> *"The court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34 year old applicant in that case did not have 'family life' with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration".*

52. This appellant is single and has lived with his parents since leaving formal education in 2012. I was invited to distinguish this case from that described in **AA** because in that case the applicant had a child following a relationship of some duration which was not the case here. Following **SSHD and HK Turkey [2010] EWCA Civ 583** although the appellant has reached his majority he has continued to live at home and clearly been and remained dependent on his family. It is open to the Secretary of State to argue that the appellant could have removed himself to Nigeria but that is not the reality of the situation. The reality is that although I have found there is a subsisting parental relationship with a child which might be said to militate against the relationship with the appellant's own parents, they do in fact financially support the child of the appellant. This was evidenced by copies of financial transfers to the child's mother without more, and it does appear that the mother has latterly become more cooperative in terms of contact with the child. As the authorities state,

including **Uddin and the Secretary of State [2020] EWCA Civ 338** family life with a parent does not suddenly cease at the age of 18. The appellant was absent the family home as a student but has now been living with his parents for many years because he has been unable to work. It was not said there was any long term relationship with another adult with whom the appellant had children.

53. I am therefore prepared to accept that the appellant does have a family life with his parents. They have supported him emotionally and financially throughout this process. His removal would be an interference with that relationship but on the fact on it the appellant has no right to be in the UK and the decision is in accordance with the law and necessary for the protection of rights and freedoms of others. The decision by the respondent was taken in 2014 and prior to the birth of the child. The question is whether the decision is proportionate. I must consider whether refusal of the application could breach ECHR Article 8 because it could result in unjustifiably harsh consequences for the applicant, or a relevant child. In conducting my assessment, and I must have regard to all of the information and evidence provided by the appellant. I also have regard to the parents in line with **Beoku-Betts v SSHD** [2008] UKHL 9. The appellant has succeeded under Section 117B(6) and even if the ties to his parents are insufficient in Article 8 terms to outweigh the balance in favour of removal and he could re-establish himself with his professional qualifications in Nigeria, he has a relationship with his child, who cannot be removed. I take into account, as a primary consideration, the best interests of the child. Although the child has had little contact with the appellant to date, I consider that the court has found in favour of contact, the appellant's ability to pursue contact proceedings will be hampered should he be removed. The court has also expressed the view that contact should be reliable and consistent. That would be interrupted. Although to date there has been little contact the green shoots of the relationship would wither to the detriment of the child and overall, I find that separation from his family including the child would be disproportionate and result in in unjustifiably harsh consequences.

54. For completeness with reference to paragraph 276ADE the appellant's application was considered by the Secretary of State on this basis. The appellant has not secured the twenty years required under the Immigration Rules. As per **Kamara and the Secretary of State for the Home Department [2016] EWCA Civ 813,** I consider whether that there would be very significant obstacles to his reintegration in Nigeria on a broad evaluative judgment. He does retain family in Nigeria and indeed his parents are supporting his brother abroad although he has no contact with that brother. No doubt the parents would support the appellant until he could find employment as a pharmacist. That said his immediate family are here. The appellant has secured an education and qualifications in this country and he has a daughter here. The appellant has been present in the UK since 2004 and been living in the UK for seventeen years and I accept that he has not returned to Nigeria because the likelihood of him being readmitted to the United Kingdom is most unlikely. I am persuaded that there would be very significant obstacles to his return to Nigeria on private life grounds because essentially the private life and family life considerations are intertwined. Cumulatively, together with the infringement of his ability to be able

to pursue court proceedings from abroad and the hindrance to the development of his relationship with his child (which must form part of his private life), I find that there would be very significant obstacles to his integration in abroad.

55. Turning to consideration of unjustifiably harsh consequences under Article 8, with regard the Section 117B considerations, where relevant, the appellant has remained in the UK illegally, his status has always been precarious, albeit his family brought him to the UK. He can speak English and is not, at present, financially independent. That said for the reasons given above I find overall his removal would be disproportionate. He was brought as a child to this country and I accept that the appellant has a family life both with his child and his parents and sibling in the United Kingdom; his second brother in the United Kingdom has now been granted leave to remain. I have found that the appellant can satisfy the immigration rules which sets out the position of the Secretary of State and public interest in removal. Further, his appeal would be allowed under section 117B(6) of the 2002 Act. In the light of the considerations I consider that on Article 8 (family and private life) grounds it would be disproportionate and unjustifiably harsh to remove the appellant from the United Kingdom and I allow the appeal.

Order

I allow the appeal under the Immigration Rules
I allow the appeal on human rights grounds (Article 8)

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. This is because there is a minor involved and proceedings before the Family Court.

Signed *Helen Rimington* Date 22nd June 2021.

Upper Tribunal Judge Rimington