Neutral Citation Number: [2019] EWCA Civ 661

Case Nos: C5/2016/4003
C5/2016/4350

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Grimes
Deputy Upper Tribunal Judge Latter

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2019

Before:

LORD JUSTICE UNDERHILL,
VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION),
LADY JUSTICE KING
and
LORD JUSTICE SINGH

- -

Between:

Secretary of State for the Home Department	**Appellant**
- and -	
AB (Jamaica)	**Respondents**
and AO (Nigeria)	

- -
- -

Carine Patry (instructed by **the Government Legal Department**) for the **Appellant**
Richard Drabble QC and **Ranjiv Khubber** (instructed by **Lambeth Law Centre**) for the **Respondent in the first appeal**
Andrew Otchie (directly instructed) for the **Respondent in the second appeal**

Hearing dates: 13-14 March 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. These are two separate appeals, both brought by the Secretary of State against decisions of the Upper Tribunal (Immigration and Asylum Chamber) which found in favour of the Respondents, AB and AO. In both cases, the Upper Tribunal ("UT") found that the public interest did not require the removal of either Respondent, on the ground of the right to respect for family life in Article 8 of the European Convention on Human Rights ("ECHR"), as set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

2. AB is a Jamaican national, who has a son, R, born in the UK in 2006. AB's relationship with R's mother has deteriorated, but they see each other around three times a week, during which AB assists R with his homework. AB challenged the Secretary of State's refusal to grant him leave to remain in the UK. The First-tier Tribunal ("FTT") dismissed AB's appeal. AB appealed to the UT, which found that it would be a disproportionate interference with AB's right to respect for family life to remove him from the UK. The Secretary of State was granted permission to appeal by Sir Kenneth Parker (sitting as a judge of the Court of Appeal) by order dated 14 September 2017.

3. AO is a Nigerian national, whose son, I, was born in the UK in 2010. AO was granted discretionary leave to remain in 2011 on the grounds of his relationship with his wife, VN. That leave was curtailed in 2014, on the basis that AO had failed to meet the requirements under which leave was granted, namely his (since deteriorated) relationship with VN. He was also the subject of family court proceedings, as a result of which he is only permitted "indirect contact" with his son, I, through written letters and similar forms of communication. The FTT and the UT found that it would be a disproportionate interference with AO's right to respect for family life to remove him from the UK. Permission to appeal was granted to the Secretary of State by Sir Alan Wilkie (sitting as a judge of the Court of Appeal) by order dated 5 July 2017.

4. After a hearing in the Secretary of State's appeal in *AO* on 18 October 2018 Hickinbottom and Nicola Davies LJJ directed that the two appeals should be heard together.

Factual and Procedural Background

AB (Jamaica)

5. The Respondent AB is a Jamaican national, born on 17 November 1977. He has three children, by two different women. There is a dispute regarding his immigration history (specifically regarding when he came to the UK), but, for the purposes of this appeal, that dispute is immaterial. AB came to the UK in either 1999 or 2002. After his arrival, AB met his future wife, JO, and they married on 22 March 2003. He then applied for, and was granted, leave to remain for two years as the spouse of JO. He had that leave until 30 June 2005, after which he was granted indefinite leave to remain. This was later revoked.

6. Their relationship ran into difficulties, and at that time AB met NB, who was a British citizen. NB became pregnant, and gave birth to their son, R (who is also a British citizen), on 20 June 2006. NB also had children from other relationships. AB then became reconciled with his wife and moved back into the matrimonial home. In 2009, AB was granted a residence order in respect of R. Shortly afterwards, in September 2009 JO gave birth to M, their daughter. AB then moved out, and was R's primary care giver from 2010-2012.

7. Following his application for a driving licence, AB was charged with and convicted of giving false information or using deception in order to obtain his immigration status (in connection with his alleged entry into the UK in 1999). For this, he was sentenced to six months' imprisonment. In the meantime, on 18 March 2012, JO gave birth to a son, J. Upon release from prison, AB moved back in with NB. In 2013, JO was granted a non-molestation order against AB, preventing him from seeing his other two children, M and J. Before the FTT, AB stated that he sees R three times a week, frequently picking him up from school and helping him with his homework.

8. It is accepted by the Secretary of State that R is a "qualifying child" for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended.

9. AB appealed to the FTT against the decision of the Secretary of State to refuse him leave to remain in the UK on the basis of his rights under Article 8 of the ECHR. He was called to give evidence before the Tribunal. There was evidence before the FTT from the police setting out reports of domestic violence by AB over the years, and a number of convictions for cannabis offences. On 10 August 2015, the FTT concluded that it was not a breach of AB's or his son's rights to remove him. AB appealed to the UT and, on 14 April 2016, Deputy UTJ Grimes allowed his appeal, finding that the FTT's judgment contained an error of law, setting it aside and remaking it by allowing it on human rights grounds. The Secretary of State now appeals against that determination.

10. The Secretary of State initially raised two grounds of appeal. The first is whether section 117B(6) of the 2002 Act applies at all in circumstances where there is no realistic prospect of a child leaving the UK as a consequence of one of their parents being removed from the UK. The second was run in reliance on the Court of Appeal's decision in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705; [2016] 1 WLR 5093. However, in light of the Supreme Court's decision in *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 WLR 5273, that second ground of appeal has been formally withdrawn.

AO (Nigeria)

11. AO arrived in the UK aged 12 as a visitor and has remained since then. He is now in his late 20s. In September 2011, he was granted discretionary leave to remain as the spouse of his wife, VN, whom he met in 2008. They have a son, I, who was born on 22 January 2010 and who is a British citizen. AO's relationship with VN deteriorated, and on 3 January 2012 a non-molestation order was made, requiring AO not to contact VN. The decision to curtail his discretionary leave was made in 2014, on the basis that he had ceased to meet the requirements of a concession under which leave was granted.

The circumstances justifying leave outside the Immigration Rules no longer applied as the marriage was no longer subsisting and the parties no longer lived together. AO challenged this curtailment decision.

12. Prior to the appeal against this decision being heard, there were Family Court proceedings relating to AO's relationship with his son, I. The Family Court ordered that I should live with his mother, and not have any direct face to face contact with the Respondent, although he could communicate in writing with his son via grandparents, and he could send cards and gifts to him.

13. It was common ground before the FTT that AO could not meet the requirements of the Immigration Rules as a parent as he did not have direct access to his son (LTRPT.2.4(a)(ii)) or sole responsibility for him; therefore the appeal proceeded under Article 8 outside the Rules.

14. The FTT, in a decision promulgated on 8 September 2015, found that AO had a family life with his son and that the Secretary of State's decision would have consequences of such gravity as to engage Article 8 as the contact, even only in writing, would be less easy if he was living in Nigeria and the son would be aware that he now lived very far away. There was a legitimate aim for his removal, namely maintenance of immigration controls, but the removal would be disproportionate.

15. The UT, in a decision promulgated on 5 August 2016, set aside the FTT decision on the ground that it had been erroneous in law; remade the decision; but again allowed the appeal on human rights grounds.

The decision of the FTT in *AB (Jamaica)*

16. In *AB* the decision of the FTT promulgated on 10 August 2015 was given by a panel comprising FTTJ Easterman and Ms L Schmitt JP. For relevant purposes the reasoning of the FTT is set out at paras. 92-97. In essence the FTT interpreted section 117B(6) to be freestanding or exclusive of Article 8 considerations generally. For that reason it turned to what it called "the traditional tests" (para. 94) and, at para. 96, weighed the child's best interests against all the other factors that weighed against the Appellant. It concluded that the Secretary of State was correct to conclude that the Appellant's presence in the UK was not conducive to the public good notwithstanding the position relating to his child R. It concluded that any interference with Article 8 rights pursued a legitimate aim and was in accordance with the law and proportionate: see para. 97 of the judgment.

The decision of the UT in *AB (Jamaica)*

17. When the matter came before the UT, in its decision promulgated on 14 April 2016, Deputy UTJ Grimes concluded that the FTT had erred in law and set aside its decision. At para. 4 it was noted that the Secretary of State conceded that the Appellant had a subsisting relationship with a qualifying child, namely his son R.

18. At para. 8 it was noted that the Secretary of State placed reliance on the decision of the UT in *Forman* [2015] UKUT 00412 (IAC), where it was held that the list of considerations contained in sections 117B and 117C is not exhaustive and that a court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question. It was contended for the Secretary of State that, whilst the public interest may not *require* a person's removal where the factors in section 117B(6) apply, absent any countervailing factors, it may nevertheless *permit* removal where such factors are in play.

19. It was noted that AB relied on the fact that this was not a deportation case involving criminality and therefore the exclusive considerations in section 117B(6) applied: see para. 12 of the judgment. Reliance was also placed on the decision of the UT in *Treebhawon and Others* [2015] UKUT 00674 (IAC). That judgment was considered at length by the UT in the present case. Deputy UTJ Grimes agreed with the interpretation of section 117B(6) set out in *Treebhawon* for the reasons given in that decision: see para. 18 of her judgment. He continued:

> "… In my view the wording of section 117B(6) is clear. There is only one public interest question, as defined in section 117A(3), that is the question as to whether an interference with a person's right to respect for private and family life is justified under Article 8(2). Whilst the other provisions of section 117B set out factors to be considered or the weight to be attached to various factors section 117B(6) is phrased in definitive terms. Section 117B(6) clearly answers the public interest question, that is whether the interference is justified under Article 8(2), in cases where the conditions are met. If the public interest does not 'require' removal in these circumstances then it is not the Tribunal's role to look for other factors which weigh in the public interest. …"

20. At para. 19 she said:

> "This means that the correct interpretation is the narrow interpretation identified by the [FTT] Panel in the instant appeal. In these circumstances the Panel erred in going on to consider other factors in assessing the public interest. The statutory provisions are clear in their statement of the public interest. In this case, the conditions of section 117B(6) having been met, no further examination of the public interest was required in the proportionality assessment."

21. For those reasons, at para. 20, the UT remade the decision by allowing the appeal under Article 8.

22. As will become apparent later, I respectfully agree with the interpretation given to section 117B(6) by the UT in the case of *AB*.

The decision of the Family Court in *AO (Nigeria)*

23. The final order of the Family Court was made by District Judge Murdoch sitting at Northampton and was dated 9-10 February 2015. The recitals to the order included the following. At recital c) it stated:

> "AND UPON the Court indicating to the Respondent father that in the event an application for direct contact is to be made by him, the Court would hope and expect to see progress with regards to; his understanding surrounding the impact of domestic violence/abuse upon the victim of the same as well as clarification to the Father's immigration status and ability to remain in this country."

24. Recital e) included the following, at sub-para. v): The Applicant mother confirmed that she would provide the father with copies of I's school reports, school photographs and a bi-annual update as to his likes/dislikes and further information to assist the father with indirect contact, which should also include a further selection of photographs of I for his father.

25. Para. 7) of the order set out the Child Arrangements Order in the following terms, so far as material:

> "a) The child shall live with the Applicant mother.
>
> b) The child shall not spend any time with the Respondent father in terms of face-to-face contact. The father shall, however, write letters and cards to [I] and send any gifts that he wishes to send. Such contact shall not be on set days but should on average be once a month. Such communications should be sent to the maternal Grandparent's home address …"

26. Although this Court does not have the advantage of seeing the reasons which the District Judge gave in any judgment for making that order, it is of assistance to see the two underlying reports by CAFCASS, which clearly led to the making of that order, since the recommendations of the CAFCASS officer were accepted by the Court. Those two reports were dated 1 October 2014 and 21 January 2015.

27. In the first of those reports, at para. 22 the author (Saima Ali, Family Court Advisor) said:

> "[I] is young and therefore requires stability and security. It is my view that [I] spending time with his father by letter and photograph exchange, not face to face meetings, would contribute to [I's] identity. I would suggest that [the Applicant mother] promotes this and ensures that [I] has access to indirect contact pieces and photographs of his father. There is a need for

> a conclusion to these proceedings and so I would recommend Final Orders are made at this time."

28. In her formal recommendations, at paras. 23-24, she concluded that I should spend time with his father by way of cards/letters, photographs and small parcels on special occasions as agreed by both parties. This should include no reference to Court proceedings, comments or questions in relation to the Applicant mother. Further, it was recommended that I should spend no time with the Respondent father.

29. In the second of those reports, at para. 11, Ms Ali noted that, upon the completion of the report dated 1 October 2014, the Applicant mother had accepted her responsibility for promoting I's identity, particularly in relation to his father. At para. 13 she concluded that it was her professional judgement that it would be unsafe for I to spend any form of time with his father at this stage. At para. 14 she said that the risks to I should he spend any form of time with his father at this stage were both of emotional and physical harm. At para. 16 she said that it would not be in his best interests and would place him at risk of harm. I was in need of long term stability and security to achieve positive outcomes. The recommendations outlined in her previous report had not altered and indirect contact would contribute to his "identity development." Accordingly, at paras. 18-19, she repeated her formal recommendations that there should be indirect contact by way of cards/letters/photographs once a month. There should be no reference to the Court proceedings, comments or questions in relation to the Applicant mother. Finally, she repeated her recommendation that I should spend no time with his father.

The decision of the FTT in *AO (Nigeria)*

30. The decision of the FTT by FTTJ Pacey was promulgated on 8 September 2015. As she noted at para. 25, it was common ground before the FTT that AO could not satisfy the requirements of Appendix FM as a parent. For example he did not have direct access in person to I or sole responsibility for him. Accordingly, the appeal had to proceed under Article 8 outside the rules.

31. The critical reasoning of the FTT is to be found at paras. 26-28, which need to be set out in full here:

> "26. In my view, given that A has a minor son, who is a British citizen, living with his British citizen mother, and given that it is generally accepted that, absent any countervailing factors, it is preferable for children to have contact with both parents, there are circumstances of such a nature that I can and should consider this appeal on the basis of article 8 outside the rules.
>
> 27. This Appellant has a family life with I (on the basis that he is indisputably I's biological father, even though he has not met him face to face for a considerable period of time. He

> maintains regular postal contact with him). Article 8(1) is therefore satisfied.
>
> 28. Turning to the *Razgar* steps, *(R v Secretary of State for the Home Department ex parte Razgar (FC)* [2004] UKHL 27) the decision interferes with the Appellant's family life, and would have consequences of such gravity as potentially to engage the operation of article 8 since contact, even by post, would of necessity in my view be less easy if the Appellant were living in Nigeria, and I, who is a very young child, would be aware that his father has moved from living close by to living thousands of miles away. The interference is in accordance with the law, namely the immigration rules, and is necessary in a democratic society in the interests of immigration control (bearing in mind the Appellant's less than flawless immigration history) which falls within the purpose of the economic wellbeing of the country."

32. At para. 36, FTTJ Pacey accepted that it would be much more difficult for AO to support I and VN from Nigeria, where he had not lived since the age of 12 and where he has no job. At the hearing before this Court, Mr Otchie emphasised what the FTT had said earlier, in summarising AO's evidence, at paras. 8-9 of the judgment.

The decision of the UT in *AO (Nigeria)*

33. The decision of the UT was promulgated by Deputy UTJ Latter on 5 August 2016. On the Secretary of State's appeal against the FTT decision, the UT accepted that the FTT had fallen into error. In particular, at para. 18 of its judgment, the UT said that:

> "… It was for the Family Judge to decide what weight to attach to the CAFCASS reports and to decide what order should be made. Criticisms of the CAFCASS reports made on the basis of only hearing from one side concerned were irrelevant to the assessment of proportionality."

34. Furthermore, at para. 20, the UT was satisfied that the comment in recital c) to the Family Court's order (quoted above), in which it envisaged the clarification of AO's immigration status had "been taken out of context and without consideration of the other matters the Court said it wished to see addressed." The UT was not satisfied that the FTT Judge gave proper weight to the public interest in maintaining proper immigration control when carrying out the exercise of proportionality. Accordingly, the decision of the FTT had to be set aside.

35. The UT then heard further evidence from AO for itself. This is summarised at paras. 22-23 of the UT judgment.

36. In remaking the decision the UT had regard to the earlier decision of the UT in *Treebhawon*, to which I have referred earlier.

37. At para. 27 the Deputy UT Judge said that the only live issue was whether *AO* had "a genuine and subsisting parental relationship." At para. 28 he again identified that as the "core issue". He continued:

> "… There is nothing to indicate that that must, of necessity, involve either living with a parent or having direct contact. The appellant has family life with his son, at least within Article 8(1). Whilst the Family Court found that direct contact was not appropriate at the present time, it is clear that the Court emphasised the importance of I's continued relationship with his father in recital e) in which the applicant's mother confirmed that she would ensure that I had a 'daddy box', that he was encouraged to look at his memory box on a regular basis and that I maintained a positive image of his father and that she would not speak negatively about him or allow others to do so in his presence or within his earshot and would share appropriate letters, cards, gifts and photographs from [AO] in a positive way and provide encouragement to I to respond to them. Further, she confirmed she would provide [AO] with copies of I's school reports, photographs and bi-annual update of his likes and dislikes and further information to assist the appellant with indirect contact."

38. At para. 29 the Deputy Judge interpreted what the Family Court said in its recital c) as to clarification of AO's immigration status as "essentially a neutral comment by the Court, neither encouraging nor discouraging a further application, which in any event would need to be dealt with on its own merits if, and when, made."

39. At paras. 30-31 of the judgment the UT said:

> "30. On the evidence before me, I accept that the appellant has written letters and sent gifts in accordance with the court order. In his oral evidence he expressed his hopes that he might have direct contact with his son and said that he had more understanding of the consequences of domestic violence and how it could be avoided. Looking at the evidence in the round, I accept that the appellant does have a genuine and subsisting relationship with his son even though it is maintained through indirect contact. In these circumstances he meets the conditions set out in s117B(6) and it follows that the public interest does not require his removal from the UK.
>
> 31. I agree with the way the judge put it in the First-tier Tribunal at [49] that 'the appellant has by his continued and regular postal contact with I, and its nature, as much of a genuine and subsisting parental relationship with his as the Family Court

> currently allows.' As is now apparent, the decision in Treebhawon that s117B(6) stands by itself and is not simply one of a number of factors in s117B has answered the concerns I had about whether all the relevant public interest factors had been properly taken into account. Had I been reminded of that decision at the error of law hearing, in all likelihood I would have found that any errors made by the judge were not material to the outcome of the appeal but, having set the decision aside and considered the merits for myself, I agree with the judge and I am satisfied that the appeal should be allowed."

Relevant legal principles

40. The Immigration Rules and in particular Appendix FM are the starting point, as they allow a person to qualify for limited leave to remain as a parent if a series of requirements are met (see e.g. E-LTRPT.1.1.). A relevant provision for this case is E-LTRPT.2.4.:

> "(a) The applicant must provide evidence that they have either –
>
> i. Sole parental responsibility for the child; or
>
> ii. Access rights to the child; and
>
> (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing."

41. It is not suggested that either of the present Respondents meets these requirements. Where a person cannot meet the requirements of Appendix FM, their claim to remain in the country must proceed outside the Rules, by way of a claim under Article 8 of the ECHR.

42. Article 8 of the ECHR provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43. In *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368, at para. 17, Lord Bingham of Cornhill set out the questions that arise for determination when removal is resisted in reliance on Article 8 grounds:

> "(1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

44. In that context, courts and tribunals must have regard in particular to the matters set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014.

45. Sections 117A and 117B form part of Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014, which is headed "Article 8 ECHR: Public Interest Considerations".

46. Section 117A provides:

> "(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)."

47. Section 117B provides:

> "(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."

Grounds of Appeal

AB (Jamaica)

48. There is now only one ground upon which the Secretary of State relies in the context of this appeal. The central issue is whether section 117B(6) of the 2002 Act applies at all in circumstances where there is no realistic prospect of a qualifying child leaving the UK as a consequence of one of their parents being removed from the UK. This Ground is the same as Ground 3 in the case of *AO*.

AO (Nigeria)

49. Ground 1: The Upper Tribunal erred by failing to find that the First-tier Tribunal had made an error of law in finding that the Respondent's removal would amount to an interference with his family life with his child of sufficient gravity to engage Article 8, meaning that there was no need to consider section 117B(6) at all.

50. Ground 2: Having found an error of law in the First-tier Tribunal's decision and when re-determining the appeal, the Upper Tribunal further erred in failing to consider for itself whether the Respondent's removal would amount to an interference with his family life with his child of sufficient gravity to engage Article 8, so again meaning that there was no need to consider section 117B(6) at all.

51. Ground 3: Alternatively, having found an error of law in the First-tier Tribunal's decision and when re-determining the appeal, the Upper Tribunal erred by applying section 117B(6) of the 2002 Act in its assessment of Article 8 outside the Rules. This section only applies in cases where there is a realistic possibility that the consequence of removal of the parent is that a qualifying child will have to leave the UK.

52. Ground 4: Alternatively, having found an error of law in the First-tier Tribunal's decision and when re-determining the appeal, the Upper Tribunal erred by concluding that the Appellant has a "genuine and subsisting parental relationship" with his child.

The appeal in *AB (Jamaica)*

53. The provision which lies at the heart of this appeal (and also Ground 3 in the appeal in the case of *AO*) is section 117B(6)(b) of the Nationality, Immigration and Asylum Act 2002, as inserted by the Immigration Act 2014, with effect from 28 July 2014.

54. That provision needs to be placed in its statutory context. Section 117A of the 2002 Act, as amended by the 2014 Act, provides that Part 5A of the Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 of the ECHR, and as a result would be unlawful under section 6 of the HRA. In considering what the Act calls "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: see subsection (2).

55. Subsection (3) defines "the public interest question" in subsection (2) to mean "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

56. It is clear, in my view, that the public interest question thus defined is confined to the question which arises under para. (2) of Article 8 only. It corresponds to questions 4 and 5 as set out by Lord Bingham in his opinion in *Razgar*, at para. 17.

57. The relevant provisions were considered by this Court in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617; [2016] imm AR 954, in particular in the judgment of Laws LJ. That approach was followed by this Court in *R (MA (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) and Another* [2016] EWCA Civ 705; [2016] 1 WLR 5093: see in particular the judgment of Elias LJ at paras. 14-19. As is plain from paras. 36-44 in the judgment of Elias LJ, if the matter had been free of authority, he would have favoured the arguments presented by the applicants and not those presented by the Secretary of State. However, as he observed at para. 45, that approach was inconsistent with the very recent decision of this Court in the *MM (Uganda)* case. Elias LJ did not think that this Court ought to depart from that approach or distinguish it despite the reservations he had about whether it was correct.

58. Subsequently, the series of cases known in this Court as *MA (Pakistan)* became *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273 in the Supreme Court. That Court held that the approach taken by this Court in the *MM (Uganda)* case was wrong. The Supreme Court endorsed the approach which Elias LJ would have taken at para. 36 of his judgment if the matter had been free from authority: see para. 17 in the judgment of Lord Carnwath JSC; and generally the discussion by Lord Carnwath at paras. 12-19. It is clear that the approach taken by Laws LJ in *MM (Uganda)*, referred to by Lord Carnwath at paras. 26 and 31 of his judgment, was considered by him to be wrong: see para. 32 in the judgment of Lord Carnwath.

59. Accordingly, the position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in *MM (Uganda)* but indeed is required to do so in order to follow the binding decision of the Supreme Court in *KO (Nigeria)*. That can be done by following the preferred approach of Elias LJ in *MA (Pakistan)*, at para. 36, where he said:

> "Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."

60. The essential submission which Ms Patry makes on behalf of the Secretary of State is that the condition for section 117B(6)(b) simply did not arise on the facts of the two cases before this Court now. She submits that there was no question of either of the relevant children concerned being expected to leave the United Kingdom. In those circumstances there was no need for the Tribunals to ask the question whether it was reasonable to expect them to do so.

61. In my judgement, this submission must be rejected. It founders on the clear wording of the legislation. As Mr Drabble QC submitted to this Court on behalf of the Respondent AB, it requires the Court to insert words into the Act which are simply not there. Furthermore, as he submitted, it requires the Court to divide the concept of a "qualifying child" into two types. There is simply no warrant in the legislation itself for doing so.

62. In this context, I should mention the recent decision of the UT in *JG v Secretary of State for the Home Department* [2019] UKUT 00072 (IAC), a judgment of Lane J, President of the UT (IAC), and UT Judge Gill. The issue in that case was the same issue as the one that arises in the present appeals in relation to the meaning of section 117B(6)(b) of the 2002 Act. The judgment is helpful because it was decided after the recent decision of the Supreme Court in *KO (Nigeria)* and therefore summarises the authorities before that important decision and considers that decision too.

63. At para. 14 the UT set out the rival contentions as to the proper interpretation of paras. 18-19 in the judgment of Lord Carnwath JSC in *KO (Nigeria)*:

> "… For the respondent, Mr Malik submits they support a construction of section 117B(6)(b), whereby the application of subsection (6) depends upon a Tribunal finding, on the particular facts of the case, that the child will be expected to leave the United Kingdom if the person concerned is removed. For the appellant, Mr Bazini submits that such a construction is not possible, purely as a matter of statutory interpretation, and that paragraphs 18 and 19 of *KO (Nigeria)* do not permit the Tribunal to hold otherwise."

64. At para. 24 the UT said that there was no previous authority which shed light on that question of construction. It therefore had to address that question for itself, in the light of paras. 18-19 of *KO (Nigeria)*.

65. At para. 25 the UT said that:

> "'To expect' something is to regard that thing as likely to happen. If we decide to wait at home on a particular day in order for a parcel to be delivered, it is on the basis that we consider it likely the Post Office or delivery company will deliver the parcel on that day. Many other such examples could be given. The key question, therefore, is whether the element of conditionality which is introduced by the word 'would' in section 117B(6)(b) governs <u>both</u> the question of reasonableness <u>and</u> that of

> expectation; in other words, whether one must hypothesise that the child leaves the United Kingdom, whether or not in the 'real world' he or she is likely to do so."

66. At para. 26, the UT concluded that, purely according to the ordinary principles of statutory construction, the interpretation for which Mr Bazini contended was the correct one. The UT continued:

> "… As a matter of ordinary language the question 'would it be reasonable to do X?' presupposes the doing of X. It is unlikely to be an appropriate or helpful response to such a question to refuse to answer it on the basis that one does not intend to do X."

67. At para. 27 the UT said that it did not consider that paras. 18-19 of *KO (Nigeria)* mandate or even lend support to the Secretary of State's interpretation. In those paragraphs, the point being made by Lord Carnwath and by the authorities he cited was merely that, in determining whether it would be reasonable to expect a child to leave the United Kingdom, one must have regard to the fact that one or both of its parents will no longer be in the UK.

68. At paras. 39-40, the UT did not consider that its construction of section 117B(6) could be affected by the Secretary of State's submission that, in cases where (on his interpretation) the subsection does not have purchase (because the child would not in practice leave the UK at all), there would nevertheless need to be a full-blown proportionality assessment, with the result that a person with parental responsibility who could not invoke section 117B(6) might, nevertheless, succeed in a human rights appeal. The UT concluded that that submission did not begin to affect the plain meaning of subsection (6). It said that, if Parliament has decreed a particular outcome by enacting that subsection, "that is the end of the matter."

69. At para. 41 the UT concluded:

> "We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan)."

70. Finally, it should be noted that, at para. 96, after considering the facts of the particular case before it, the UT concluded that it would not be reasonable to expect the appellant's

children in that case to leave the UK in the event of her removal. That meant that her appeal succeeded. That was because Parliament had stated, in terms, that the public interest did not require her removal in those circumstances. "It does so despite the fact that, absent section 117B(6), the appellant's removal would be proportionate in terms of Article 8 of the ECHR."

71. At the hearing before this Court, Mr Drabble QC queried whether the UT was correct to consider, at para. 41, that Parliament had been "more generous" than was strictly required by the HRA in enacting section 117B(6). Mr Drabble suggested that Parliament had rightly decided to enact a provision which was *sufficiently* generous to ensure that there should not be a breach of Article 8. I am not sure that it is necessary for this Court to take a view on that question. The fundamental point, as it seems to me, is that Parliament meant what it said when it enacted section 117B(6) and it is the duty of courts and tribunals to give effect to that provision on its correct statutory interpretation. Furthermore, it should be noted that it was common ground between the parties before this Court that Article 8 must always be complied with. There is no intention evinced in the amendments to the 2002 Act to breach the obligations of the UK under the ECHR. Furthermore, one always has to bear in mind that the strong obligation of interpretation in section 3 of the HRA applies to all legislation, including Part 5A of the 2002 Act. Section 3 requires all legislation to be read and given effect, so far as possible, in a way which is compatible with the Convention rights, including Article 8.

72. I respectfully agree with the interpretation given by the UT to section 117B(6)(b) in *JG*.

73. Speaking for myself, I would not necessarily endorse everything that was said by the UT in its reasoning, in particular at para. 25, as to the meaning of the concept "to expect". However, in my view that does not make any material difference to the ultimate interpretation, which I consider was correctly set out by the UT in *JG*. In my view, the concept of "to expect" something can be ambiguous. It can be, as the UT thought at para. 25, simply a prediction of a future event. However, it can have a more normative aspect. That is the sense in which Admiral Nelson reputedly used the word at Trafalgar, when he said that "England expects every man to do his duty." That is not a prediction but is something less than an order. To take another example, if a judge says late in the day at a hearing that she expects counsel to have filed and served supplementary skeleton arguments by 9 a.m. the following morning, so that there is no delay to the start of a hearing an hour later: although she may not be ordering the production of that skeleton argument, that is what she considers *should* happen. That is not a prediction of a future occurrence. It carries some normative force.

74. Finally, in that regard, I agree with and would endorse the following passage in the judgment of UTJ Plimmer in *SR (Subsisting Parental Relationship – s117B(6)) Pakistan* [2018] UKUT 00334 (IAC), a case which was decided before decision of the Supreme Court in *KO (Nigeria)*, at para. 51:

> "… It is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B(6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relation with a qualifying child. The question that must be answered is whether it would not be

> reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question – should the child be 'expected to leave' the UK?"

75. I respectfully agree. It is clear, in my view, that the question which the statute requires to be addressed is a single question: is it reasonable to expect the child to leave the UK? It does not consist of two questions, as suggested by the Secretary of State. If the answer to the single question is obvious, because it is common ground that the child will not be expected to leave the UK, that does not mean that the question does not have to be asked; it merely means that the answer to the question is: No.

76. Accordingly, I would dismiss the Secretary of State's appeal in the *AB* case and dismiss Ground 3 in the Secretary of State's appeal in the *AO* case.

The appeal in *AO (Nigeria)*

Ground 1

77. On behalf of the Secretary of State Ms Patry advances, as Ground 1 in the appeal, the submission that the UT failed to correct what was an error of law by the FTT which had held that the limited contact permitted in this case was interfered with by the Respondent's proposed removal to Nigeria in such a way as to engage Article 8. She reminds this Court that question (2) in *Razgar* was:

> "Will such interference have consequences of such gravity as potentially to engage the operation of Article 8?"

78. Ms Patry submits that there could only reasonably be one answer to that question: No.

79. I have set out above the relevant passage in the determination of the FTT in full, in particular para. 28 of its reasoning, where it addressed the *Razgar* questions in terms. Ms Patry submits that, although FTTJ Pacey did refer to the questions required by *Razgar*, the answer which she gave to question (2) was one which was not reasonably open to the FTT on the undisputed facts before it. In particular, Ms Patry submits that it was not reasonably open to the FTT to come to the conclusion that there was an interference with family life of sufficient gravity such as to engage Article 8. The only reasons given by the FTT were, first, that contact by post would of necessity be less easy if AO were living in Nigeria. Ms Patry submits that that is not obvious nor is it explained why such postal communication would be less easy. I respectfully agree.

80. The second reason given by the FTT was that AO's son, I, would become aware that his father had moved from living close by to living thousands of miles away. While I would accept that it is very likely that the content of letters and postcards from AO to

his son would quickly reveal that he was living in Nigeria, I cannot for myself see how this is such an interference with family life as to engage Article 8. This is particularly so in the context of this particular case, where it is clear that the only reason why the CAFCASS reports recommended that there should be that limited form of indirect contact at all was so as to maintain I's identity and not for reasons of maintaining his relationship with his father. To promote that purpose it would make no difference and might indeed be helpful if I were made aware that his father was now living in Nigeria and, as a consequence, learnt something about life in that country through his father's letters and cards.

81. I would therefore allow the Secretary of State's appeal on Ground 1.

Ground 2

82. Under Ground 2, Ms Patry submits that the UT for its part completely failed to ask the second question posed by *Razgar* at all. The UT, she submits, simply went from answering the question whether there was family life within the meaning of Article 8(1) to considering the "public interest question", which only arises if one gets to the need for justification in Article 8(2).

83. Ms Patry fairly accepts that, if she succeeded only on Ground 2, that would be a reason for remittal to the UT but no more. However, she submits, the UT's fundamental error of law was as pleaded under Ground 1. If she is right about that, it would follow that this Court should not remit the case for redetermination but should simply substitute its own judgment that there was no breach of Article 8. As I have already said, I would accept her submissions on Ground 1, so strictly Ground 2 does not arise. However, I can deal with Ground 2 briefly.

84. Ms Patry submits that the fundamental error into which the UT fell was that, unlike the FTT, it did not even ask itself *Razgar* question (2). I respectfully accept that submission. It follows that the UT erred in law.

Ground 3

85. I have already addressed Ground 3 above, when considering the appeal in *AB (Jamaica)*. For the reasons set out there, I would reject Ground 3.

Ground 4

86. Under Ground 4, Ms Patry's primary submission is that the meaning of "a genuine and subsisting parental relationship with a qualifying child" in section 117B(6)(a) has the meaning that there must be some element of direct care for the child by the relevant person. In support of that submission Ms Patry relies on the decision of this Court in *Secretary of State for the Home Department v VC (Sri Lanka)* [2017] EWCA Civ 1967, in which the main judgment was given by McFarlane LJ.

87. In the alternative, Ms Patry submits that the conclusion to which the UT came was one that was not reasonably open to it on the facts before it.

88. I have already referred to the judgment of UTJ Plimmer in *SR (Pakistan).* In that case UTJ Plimmer also addressed the question of whether there was a "genuine and subsisting parental relationship", as required by para. (a) of section 117B(6). At para. 35 UTJ Plimmer said:

> "The assessment of whether there is a 'genuine and subsisting parental relationship' for the purposes of EX.1 and section 117B(6)(a) is different in form and substance to whether a parent has taken an 'active role' in the child's 'upbringing' for the purposes of R-LTRPT1.1. It is possible to have a genuine and subsisting parental relationship with a child, particularly in cases where contact has only recently resumed on a limited basis, but for that relationship not to include a parent playing an active role in the child's upbringing. The fact that SR has not been involved in making important decisions in A's life does not necessarily mean that he has not developed a genuine and subsisting relationship. The nature and extent of that relationship requires a consideration of all the facts referred to RK at [42]. The child's age is also likely to be a relevant factor."

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."

91. On the facts of *SR (Pakistan)*, at para. 40, UTJ Plimmer concluded that *SR* did have a parental relationship with the child in question and that it was genuine and subsisting for the purposes of section 117B(6)(a). It may have been a limited parental relationship but that did not mean that it was not genuine or subsisting. SR and his daughter, A, had seen each other on a regular fortnightly basis. There were unsupervised sessions that occurred away from a contact centre, in which SR provided A with elements of direct parental care. For that period of time SR was not looking after and directly caring for A in any other capacity than as a parent. Although, therefore, the Judge was satisfied that SR played "no active role in any significant decision-making regarding A's day to day care and well-being, he has nonetheless developed in recent months a genuine and subsisting parental relationship with her."

92. As is apparent from that passage, on the facts of that case, UTJ Plimmer was satisfied that SR was providing an element of "direct parental care". The issue of law which arises before this Court now is whether such an element is an essential requirement of there being a "genuine and subsisting parental relationship" for the purpose of section 117B(6)(a). At paras. 36-37 UTJ Plimmer considered that such an element is required in this context. For that proposition she relied upon the judgment of McFarlane LJ in *Secretary of State for the Home Department v VC (Sri Lanka)* [2017] EWCA Civ 1967, in particular at paras. 42-43. In order to assess whether that understanding of the law is correct I must therefore go to the underlying judgment of McFarlane LJ in the case of *VC (Sri Lanka)*.

93. In that case McFarlane LJ said, at paras. 42-43:

> "42. For the reasons put forward by Mr Cornwell, it was, in my view, not possible for the circumstances of this case to come within the requirements of paragraph 399(a) of the Rules. On the basis of the Court of Appeal's analysis of the family history, [VC] had played only a minimal role in the care of his children and, even when living at the family home, he had on a regular basis rendered himself unable to act as a parent as a result of heavy drinking and abusive behaviour. By the time of the Secretary of State's decision to deport him, any vestiges of a 'parental relationship' with the children had long fallen away and had reduced to their genetic relationship coupled with the most limited level of direct contact which was intended to cease altogether on adoption. Mr Cornwell is correct to stress the words 'genuine', 'subsisting' and 'parental' within paragraph 399(a). Each of those words denotes a separate and essential element in the quality of relationship that is required to establish a 'very compelling justification' [per Elias LJ in *AJ (Zimbabwe)*] that might mark the parent/child relationship in the instant case as being out of the ordinary.
>
> 43. Although, as I have explained, [VC's] case falls, as it were, at the first hurdle in that it was not possible on the facts as they were at the time of the decision to hold that he had a 'genuine and subsisting parental relationship', I am also persuaded that the Appellant is correct in submitting that for paragraph 399(a) to apply the 'parent' must have a 'subsisting' role in personally providing at least some element of direct parental care to the child. The phrase in paragraph 399(a)(ii)(b) which required that 'there is no other family member who is able to care for the child in the UK' strongly indicates that the focus of the exception established in paragraph 399(a) is upon the loss, by deportation, of a parent who is providing, or is able to provide, 'care for the child'. This provision is to be construed on the basis that it applies to a category of exceptional cases where the weight of public policy in favour of the default position of deportation of a foreign criminal will not apply. To hold otherwise, and to accept Ms Jegarajah's submission that her client comes within the exception simply because he has some limited, non-caring contact with his child would enable very many foreign criminals to be included in this exception."

94. I respectfully disagree with UTJ Plimmer that those passages could simply be transplanted to the context of section 117B(6)(a). First, it is clear that what McFarlane LJ was considering was the different context of deportation of foreign criminals. That explains the reference to a "very compelling justification" at the end of para. 42 and also the last sentence of para. 43 in his judgment.

95. Secondly, and even more importantly, the language and structure of para. 399(a) of the Immigration Rules which were under consideration by McFarlane LJ in *VC (Sri Lanka)*

are different from the language and structure of section 117B(6)(a). The relevant passage was set out in full at para. 16 in the judgment of McFarlane LJ and needs to be reproduced here. There he said:

> "Finally, the relevant parts of paragraph 399 provided:
>
> > 'this paragraph applies where paragraph 398(b) … applies if:
> >
> > > (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
> > >
> > > > i. the child is a British Citizen, or
> > > >
> > > > ii the child has lived in the UK continuously for at least 7 years immediately preceding the date of the immigration decision;
> >
> > and in either case
> >
> > > (a) it would not be reasonable to expect the child to leave the UK; and
> > >
> > > (b) there is no other family member who is able to care for the child in the UK;"

96. In my view, it is clear that the provisions of para. 399 in that case included, as an essential element, that there was "no other family member who is able to care for the child in the UK". That led McFarlane LJ to interpret the provision as a whole to require "at least some element of direct parental care to the child." In my view, it would not be right to give the same interpretation to the very different language of section 117B(6)(a).

97. I note that, in *RK* UTJ Grubb did not add this gloss to the meaning of "parental relationship". In my view, UTJ Plimmer was right to derive assistance from what UTJ Grubb had said when she quoted para. 42 of his judgment in her judgment in *SR (Pakistan).* However, in my view where she then fell into error was in the subsequent passage, where she considered, at paras. 36-37 of her judgment, that the interpretation given by McFarlane LJ to para. 399 of the Immigration Rules in *VC (Sri Lanka)* also applies to the interpretation of section 117B(6)(a). In my respectful view, that interpretation would be wrong and should not be followed.

98. I would therefore reject Ms Patry's primary submission under Ground 4. In my view, the words used in the Act with which we are now concerned are words of the ordinary English language and no further gloss should be put upon them. Their application will depend on an assessment by the relevant court or tribunal of the facts of the particular case before it. The exercise is a highly fact-sensitive one.

99. However, I would accept Ms Patry's alternative submission, that the conclusion to which the UT came was one that was not reasonably open to it on the undisputed facts of this case.

100. The Respondent AO was restricted by an order of the Family Court in the contact which he could have with his son R in a very substantial way. Although that can be described as "indirect contact", in the sense that direct contact was prohibited, it was of a very limited kind even of indirect contact. In essence he was permitted to communicate with his son only by post and, furthermore, those letters, postcards and presents had to be sent to the address of the maternal grandparent and not to R or his mother's address.

101. Furthermore, and crucially, it is important to appreciate the underlying reasons why such a limited order was made. It is clear from the two CAFCASS reports that the recommendation made to the Court was that direct contact should be prohibited because of the Respondent's history and conduct, for example domestic abuse and inappropriate comments on social media. It is also clear that the very limited contact which was to be permitted was for the purpose of contributing to R's understanding of his dual heritage *identity* and not in order to maintain the *relationship* with his father.

102. I bear in mind that this Court should not lightly interfere with the conclusion of a lower court or tribunal on what is essentially a mixed question of law and fact, as it involved the application of the statutory language to the facts of this case. In particular, I would note that Mr Otchie said everything that could be said on behalf of his client AO. However, in my judgement, the UT fell into error because the conclusion that it came to was one that was not reasonably open to it on the undisputed facts of this case.

Conclusion

103. For the above reasons, I would dismiss the Secretary of State's appeal in the case of *AB (Jamaica)*; and would allow the Secretary of State's appeal in the case of *AO (Nigeria)* on Grounds 1, 2 and 4 but dismiss it on Ground 3. I have had the opportunity to read the judgment of King LJ in draft and would also like to associate myself with her remarks.

Lady Justice King:

104. I agree.

105. I would however add a little in relation to Ground 4 of *AO (Nigeria)* concerning the question of what amounts to a "genuine and substantial parental relationship" for the purposes of section 117B(6)(a).

106. I would first respectfully add my endorsement to the emphasis placed by Singh LJ (at para. 98 above) on the undoubted fact that the application of the words "genuine and substantial parental relationship*"* will depend upon an assessment of the facts in any particular case. As Singh LJ points out, this type of evaluation is highly fact-specific.

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.

112. It follows that the tribunal in question is likely to require the release of relevant information and documents from the Family Court to help inform their decision. The *Protocol on Communications between the judges of the Family Courts and Immigration and Asylum Chambers of the First tier Tribunal and Upper Tribunal* [2013] Fam Law 1197 ("The Protocol") is designed to facilitate the process.

113. The Protocol emphasises that, whilst there are no formal constraints on disclosure of material supplied for the purpose of an appeal in the tribunal, "documents in family proceedings cannot be disclosed to third parties including judges in the tribunal without an order of the Family Court Judge". (Protocol para. 7.)

114. An application for disclosure of documents in family proceedings should be made directly to the Designated Family Judge of the court in question (the Protocol para. 11). The Designated Family Judge will usually pass the application on to be heard by the judge allocated to the case who can make such order as he or she think fit under their powers to give directions under the Family Proceedings Rules 2010, r. 12.12.

115. In the present case, for the reasons outlined by Singh LJ at para. 100 of his judgment, I would unhesitatingly agree that the Appellant has not established the parental relationship necessary for him to come within the provisions of section 117B(6)(a).

Lord Justice Underhill:

116. I agree with the disposal of both these appeals proposed by Singh LJ, for the reasons which he gives. Although we are thus agreeing with the conclusion of the UT in *JG v Secretary of State for the Home Department*, like Singh LJ I think its approach to the phrase "reasonable to expect" in section 117B(6)(b) was rather wide of the mark. That is a composite phrase, commonly used in ordinary English, in which the real work is done by the word "reasonable" rather than by the word "expect", which simply reflects the fact that the child would have to leave in order to maintain the relevant relationship with the parent. It does not require elaborate analysis of the concept of "expectation" in other contexts.