IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11855/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 26 January 2015	**On 4 March 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

JN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel instructed by Peer & Co
For the Respondent: Mr N Smart, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following a hearing before Upper Tribunal Judge Hanson on 6 November 2014. At that hearing he decided that First-tier Tribunal Judge Graham had erred in law in her decision in the appellant's appeal against an immigration decision made by the respondent.

2. The appellant, who is a citizen of Burundi born on 18 August 1981, appealed to the First-tier Tribunal against a decision of the respondent dated 28 March 2013, being a

decision to refuse to vary leave to remain. The application was made with reference to paragraph 287 of HC 395 (as amended) and it was refused under the immigration rules, including with reference to paragraph 322(1A) having regard to the appellant's failure to disclose a conviction for driving with excess alcohol. Having considered the Article 8 immigration rules, paragraph 322(1A), and Article 8 proper, Judge Graham dismissed the appeal on all grounds.

3. For the reasons given in the 'Error of Law Finding and Directions' Judge Hanson concluded that the decision in respect of Article 8 of the ECHR only, was to be set aside, for the decision to be re-made in the Upper Tribunal. I set out the material parts of Judge Hanson's decision as follows:

"ERROR OF LAW FINDING AND DIRECTIONS

1. This is an appeal against a determination of First-tier Tribunal Judge Graham promulgated on 5th August 2014 in which she dismissed the Appellant's appeal, both under the Rules and on Article 8 ECHR grounds outside the Rules, against the refusal of the Secretary of State to grant the Appellant indefinite leave to remain in the United Kingdom as the spouse of a person present and settled in this country under the provisions of paragraph 287.

2. The Judge considered the evidence and sets out her findings from paragraph 13 of the determination. The Judge upheld the dismissal of the appeal under the Immigration Rules on the basis the Appellant deliberately intended to mislead by failing to disclose a previous conviction which engaged paragraph 322 (1A). The Judge stated that that was determinative and that the appeal must therefore be dismissed.

3. Judge Graham thereafter went on to consider the Appellants contact with his children. The Judge noted the existence of proceedings in the Family Court in Birmingham and considered the case of RS (Immigration family Court proceedings) India [2012] UKUT 00218. The Judge accepted that the family proceedings may have relevance to the appeal although thereafter stated that in light of the findings in relation to paragraph 322 (1A) the appeal must be dismissed. The Judge was not satisfied the Appellant was able to meet the requirements of the Rules as a parent of a child in the United Kingdom.

4. The Judge noted the existence of a report detailing two supervised contact sessions. The Judge noted that the children live with their mother and that the Appellant has contact on a supervised basis, fortnightly, although also states "whether it is in the best interests of the children for this to continue or for this level of contact to be increased is to be determined by the Family Court at a later date". The Judge acknowledged that a favourable CAFCASS report was available and her understanding that a second report was required, but thereafter concludes:

> "Bearing all of this in mind and based on the evidence before me I am unable to find that it is in the best interests of the children to have

> more contact with their father than the present status quo. The children are of an age where the Appellant can communicate with them by modern means of communication whether or not he is in the UK. In the circumstances I do not find that the Appellant's contact with his children amounts to compelling circumstances which would give rise to a grant of leave outside the immigration Rules."

Error of law

5. The Appellant relies on four grounds of challenge. Ground one asserts that the refusal of the application made under paragraph 287 on the basis of the engagement of paragraph 322 (1A), which is mandatory, does not apply to applications and appeals under Appendix FM. Such cases are determined by reference to the suitability criteria in S-LTR 2.2 which provides that false representations and failure to disclose material facts are discretionary and not mandatory grounds of refusal. It is stated this is a material error as the Appellant arguably met the eligibility requirements for leave to remain as the parent of a child in the UK.

6. Ms Revill's interpretation of the legal provisions is not challenged. 322(1A) is a mandatory ground for refusal which was found to be established both in relation to the failure to disclose a previous conviction and the Appellant's intention in deliberately not making such disclosure. The language of S-LTR 2.2 indicates that this is a discretionary factor which would have to be considered along with all relevant facts when thinking about how the discretion should be exercised. The Judge does indicate that the appeal would have to be dismissed as a result of the mandatory refusal and also stated she was satisfied that the Immigration Rules could not be met. The question is whether this is as a result of a misunderstanding of the law by the Judge or not. Even if the Judge has misunderstood the law, such that she has erred, it is necessary to consider whether such error is material. The conclusion that the Appellant failed under Appendix FM too as a result of his failure to disclose a material issue in his application form, when combined with the other relevant facts known to the Judge, does not appear to be a decision outside those the Judge was permitted to make on the evidence. The Upper Tribunal when considering this matter for itself would have come to the same conclusion on the facts, leading to the finding in relation to this ground being that no material error of law has been established.

7. The remaining grounds have arguable merit but only in relation to the challenge to the Judge's treatment of the appeal outside the Immigration Rules under Article 8 ECHR in light of the material before the Judge and the existence of contact proceedings in the Family Court in Birmingham, which discloses legal error. It is not suggested or found that this is a contact application made as a means to defeat removal from the United Kingdom and it is clear that those proceedings were at a fairly advanced stage with interim contact having been arranged to reintroduce the Appellant to his children, who had not seen him since 2011, with an initial report to hand and further reports anticipated.

8. The Judge refers to RS but there are a number of other relevant cases when considering the correct approach to be taken in relation to such a matter. In addition to RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC) there is RS (immigration/family court liaison: outcome) [2013] UKUT 00082 (IAC) (Blake J), and the judgement of the Court of Appeal in Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363**.** In Mohan the court refer to the Tribunal case of Nimako-Boateng in which it was found that the family court was best placed to make the necessary evaluations. In Nimako-Boateng there was also material before the Tribunal to justify the conclusion that it would be unnecessary to delay determination of the deportation appeal in order to await the judgment of the family court because the material in favour of the claimant lacked substance and the public interest in deportation was overwhelming. The judgment of the family court, with all of the tools at its disposal (including the assistance of CAFCASS and the opportunity to assess the adults involved) could and should inform the decision-making of the Tribunal on the issue of the proportionality of deportation, in relation to the best interests of the child.

9. In Mohammed (Family Court proceedings-outcome) [2014] UKUT 419 (IAC) it was held that the guidance in the above cases is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as deportation.

10. The Judge, on the basis of the evidence available, arguably went beyond making findings supported by the available evidence in finding that it was in the best interests of the children to have more contact with their father than the present status quo permitted. There is no evidential basis on which such a finding could be made and that issue is precisely the type of matter that is within the remit of CAFCASS who were tasked with investigating and reporting upon this matter for the Family Court. The Judge's conclusion that the contact with the children did not amount to 'compelling circumstances' arguably misses the point. The best interests of the children require a judge to undertake a full and complete analysis of all the available information. The jurisprudence is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and parent facing immigration measures. Contact in this case has not occurred since 2011 and was being reintroduced gradually to allow such contact be assessed within a secure environment. It was recognised from the reports that the Appellant was seeking greater contact and it was the resolution of that issue that the Family Court was seeking to address. If further contact in terms of frequency or nature of a greater quality was eventually ordered it is arguable that there would be a material impact on the relationship between the appellant and his children which would need to be properly assessed if the Appellant was to be removed. The Judge arguably materially erred in law by making a decision not supported by the available material and in not following the guidance provided by the courts in relation to such issues.

> 11. Once the nature of the contact is known, which would be that which was deemed to be in the best interests of the children, an informed decision can be made. Whether there are exceptional compelling circumstances will have to be assessed taking into account the case law relied upon by the Appellant, the nature and quality of his ongoing contact, the effect of that being lost upon the children, and the case advanced by the Secretary of State.
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> 12. In summary, the Upper Tribunal finds that the First-tier Tribunal has materially erred in law. The decision is set aside so far as it relates to the findings concerning Article 8 ECHR outside the Immigration Rules only and the following directions shall apply to the future conduct of this appeal…"

4. Essentially, the re-making of the decision was to be centred on the issue of the appellant's relationship with his three children. To that end directions were made, in respect of further evidence in terms of that relationship.

5. It was accepted before me that although Judge Hanson concluded that First-tier Judge Graham had erred in law in her conclusions in relation to the immigration rules, her decision in that respect was not set aside.

The oral evidence at hearing on 26 January 2015

6. The appellant adopted his witness statement in examination-in-chief. He said that he sees his children every two weeks. Initially it was for two hours but in November last year it increased to three hours. From February 2015 onwards his contact with them is expected to be for four hours and with the freedom to take the children "outside" and on little trips.

7. In cross-examination he said that he separated from his wife in May 2010. There was no period of separation before that. The appellant was referred to the CAFCASS report dated 3 December 2013 where it is recorded that the appellant's wife said that she and he separated in 2009. In response, the appellant said that this was not the case.

8. When they separated they were living at [-] in Birmingham. After they separated he went to live in Coventry. That is to the address that he now lives at which is [-].

9. In response to further questions the appellant explained that he left their home in May 2010 but there was no divorce. There was nothing official initiated. There were some small areas of disagreement between them. At the time his feeling was that those could be resolved. It was his hope that they would be able to stay together.

10. The application which is the subject matter of this appeal was an application for further leave to remain. His family were, and are, here. It is true that at that time he could have qualified for indefinite leave to remain. His understanding was that he would be given leave for two years and then he could ask for permanent leave to

remain. He had passed the English language test. He did not do any test in respect of knowledge of life in the UK.

11. As to whether his wife had ever lived at [-], Coventry, she had not. In respect of his application for leave to remain made on 3 January 2013, he had completed the application form himself. The appellant was referred to the application form where it states that his wife resided at [- , Coventry]. The appellant said that he thinks he made a mistake in that respect because he does not think he understood the question in English on the form. He had thought that he was putting his address there.

12. Further questioned on this issue, the appellant said that at that time they had not filed for divorce. There had already been a request for them to be a couple within the reconciliation process and there was talk of them sharing a home together as part of that process.

13. Similarly, where it is stated that that address was his spouse's main residence, again, he does not think that he understood the question correctly on the form. As to why he wrote that he and his partner at that time currently lived together, this is because they had not yet divorced. His understanding of the question was that as they had not divorced and were still married, he was being asked whether they were still together.

14. The appellant denied the suggestion that he had intended to deceive the Home Office into believing that he and his wife were living together.

15. It is true that he was informed that in November 2012 his wife took out a non-molestation order against him. He respected that order fully. It is also true that his wife called the police on one occasion and said that he had breached the order. However, what had happened was that they were in a public place and the children ran over to embrace him. He is not able to remember when that was. He thinks it was before this application for leave to remain in January 2013.

16. It is correct that there was a period of time for about two years when he did not have proper contact with the children. He thinks this was for about a year between 2011 and 2012. There was contact with the children during that time. The children's mother would bring the children to him and he would spend one day over the weekend with them and then take them back to her in the evening. He had said that he did not have proper contact with the children because it was not the result of a court order. It was just informal between him and the children's mother.

17. As to why the CAFCASS report dated 24 January 2014 at paragraph 27 states that apart from occasional contact in the street the children had not had any proper contact with the appellant for the past two years, he thinks most of the information in that report came from his ex-wife. She was not telling the truth.

18. The appellant accepted that according to the date on the court document he made his application to the court for a contact order on 19 April 2013.

19. As to why he waited so long to make that application, it was when his ex-wife decided not to let him see the children that he decided he should make that application.

20. In respect of his application for leave to remain, it is true that the UKBA had asked him for recent evidence of cohabitation between him and his ex-wife. He did not reply to the UKBA because he had asked his ex-wife if she could provide her ID card but she refused. He did not give any evidence of recent cohabitation because he realised that she was not prepared to give him proof of this. It was suggested to the appellant that he did not provide that evidence because they were not living together. The appellant said that he believed it was a temporary situation that could be resolved.

21. He did not write to the UKBA to explain that they were living apart because he thought that this could complicate things for him.

22. He is not able to remember exactly when he received the refusal of his application for leave to remain but accepted that it was about the time of the refusal letter on 28 March 2013 or the notice of decision itself on 4 April 2013. It is not true that he made his application for contact with the children as a result of his application for leave to remain having been refused by the Secretary of State. It had nothing to do with that he said.

23. As to the CAFCASS report dated 23 July 2014 recommending at paragraph 19 that he would benefit from completing a parent course, he had not done such a course. CAFCASS had called him and he went to their office. They subsequently told him that it would not be necessary.

24. As to how well he speaks English, at the moment he is doing a "level 3:3 at college". He is in employment.

25. He pays maintenance to the children of £25 per week. That is not as a result of a court order but through the Child Support Agency.

Submissions

26. Mr Smart relied on the refusal letter and submitted that the appellant was not a witness of truth. The evidence established that he had lied in respect of this application as well as the one in 2010. Furthermore, he was deliberately evasive when he replied to the refusal letter of 13 March 2013.

27. It is clear that he was not living with his wife at the time of the applications made in 2010 or 2013. In addition, the timing of the application for contact with the children was relevant. Certainly by April 2013 his application for further leave had been refused and he made his application for contact with the children on 19 April 2013. This is despite the fact that it is evident that he had significant difficulties over contact with the children as evidenced by the CAFCASS reports. He clearly had difficulties with contact from 2011. The CAFCASS report dated 3 December 2013

shows that there was significant information from the children's mother, which puts the appellant's evidence into context. He obtained contact with the children as a mechanism to remain in the UK and to defeat his removal.

28. His relationship with the children is not a genuine parental relationship, as evidenced by the way the situation in respect of his children had been engineered.

29. I was referred to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). It is accepted that the public interest does not require removal where there is a genuine and subsisting relationship with children in the UK. It was similarly accepted on behalf of the respondent that it would not be reasonable to expect the children to leave the UK.

30. On behalf of the appellant Ms Revill submitted that Section 117B(6)(a) is a crucial feature of the appeal. It is not suggested that the appellant is liable to deportation. There is a public interest in maintaining immigration control. However, whether the appellant had intentionally lied in previous applications is somewhat beside the point in this appeal.

31. Central to the appeal are the best interests of the appellant's children. I was referred to the decision in ZH (Tanzania) v SSHD [2011] UKSC 4. As set out in the skeleton argument, this Tribunal can and should be guided by what the family court had found. Reliance was placed on the authorities as set out in the skeleton argument.

32. The family court was in the best position to make a judgement about the children's best interests, which judgement should inform the immigration court's assessment.

33. The family court could be said to have been aware of the appellant's immigration history in the light of the requests by the immigration tribunal for disclosure. It is clear therefore, that the family court would have been aware that the appellant had ongoing immigration matters and a potential for that to have been used by him as a way of enhancing his immigration case.

34. The family court even acknowledged that there had been no contact for a long period of time. A series of CAFCASS reports concluded that the best interests of the children lay in the appellant having regular contact with them.

35. Although his ex-wife had made allegations of harassment, it is clear from the CAFCASS reports (pages 202 – 203) that none of those allegations were proceeded with by the police.

36. Recent CAFCASS reports reveal that the attitude of the appellant's ex-wife has softened in terms of contact between the children and him, albeit that she does not want to see him herself. It would be clear if she thought he was just using the children for immigration purposes and would, therefore, be likely to oppose contact.

37. The appellant has been seeing the children every two weeks, attending a contact centre. His oral evidence is to the effect that that contact continues. He had opened a

bank account in the children's names. All this shows a genuine and subsisting parental relationship which would continue into the future. Whatever could be said about the timing of the application for contact with his children, the finding of the family court is that there is a genuine and subsisting relationship.

38. Similarly, the nationality of the children is an important factor, it not being expected that they would leave the UK, living as they do as British citizens with their mother.

39. So far as concerns the point made on behalf of the respondent about the possibility of the appellant applying for entry clearance under the rules for contact with the children, Section 117B(6) suggests that there is no public interest in such a requirement. I was referred to the decision in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40.

My assessment

40. The appellant has three sons, one born on 20 September 2004 and twins born on 22 March 2006. In response to Judge Hanson's directions, it was confirmed by Mr Smart at the hearing before me that all three children are British citizens. It was further accepted that it would not be reasonable to expect the children to leave the UK with the appellant.

41. Both parties agreed that, in reality, the outcome of this appeal depends on the assessment of the credibility of the appellant's claim to have a genuine and subsisting relationship with his children.

42. Although Ms Revill in her skeleton argument advances a case in support of the contention that the appellant is in fact able to meet the requirements of the Article 8 immigration rules, it was conceded before me that Judge Hanson's decision settles the question of whether the decision of First-tier Tribunal Judge Graham dismissing the appeal under the Article 8 immigration rules, was to be set aside. He decided that it was not, concluding that the error of law in her assessment of that aspect of the appeal was not material to the outcome.

43. Section 19 of the Immigration Act 2014 inserted Sections 117A - D into the 2002 Act. There was no dispute between the parties before me but that those provisions apply in this appeal. So far as relevant, those new provisions provide as follows:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application 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).

117B Article 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."

44. Thus, in the case of a person who is not liable to deportation, which this appellant is not, the public interest does not require his removal where he has established that he has a genuine and subsisting parental relationship with a qualifying child. A qualifying child is defined in Section 117D as a person who is under the age of 18 and who is either a British citizen or has lived in the UK for a continuous period of seven years or more. As already indicated, it is accepted on behalf of the respondent that the appellant's three children are all British citizens. In addition, given the acceptance that it would not be reasonable to expect the children to leave the UK, the outcome of the appeal really does depend on the appellant's credibility in terms of his relationship with the children.

45. The appellant's evidence is that he separated from his wife in May 2010. Notwithstanding that, it appears that he made an application on 30 November 2010 for further leave to remain as a spouse. At the hearing the appellant was referred to a CAFCASS report dated 3 December 2013 in which his ex-wife said that they had in fact separated in 2009. The appellant's evidence was that this was not the case. Of course, I did not hear evidence from the appellant's ex-wife. That, added to the inherent difficulty in resolving factual disputes in cases where a relationship has broken down, makes it all the more difficult to resolve the question of when they separated.

46. Regardless of that, even on the appellant's own account, at the time he made his application for further leave to remain in November 2010, he was no longer with his wife. I bear in mind his explanation for having made the application for further leave to remain on the basis that he was still in a relationship with her, he having said that their differences could be resolved. However, this issue must be seen in the context of the other credibility matters advanced on behalf of the respondent before me.

47. The appellant was asked about the application which is the foundation for this appeal, namely the application for indefinite leave to remain as a spouse dated 3 January 2013. As can be seen from my summary of the oral evidence, he was asked a number of questions in relation to that application. To summarise, the application form gives every appearance of the appellant and his ex-wife still being together, and indeed, residing together. It is not necessary for me at this point to repeat the appellant's evidence. Suffice to say, that in my view it is apparent that on the application form which is to be found at B1 of the respondent's bundle the appellant did deliberately intend to convey the impression that they were still together and in fact living together. Thus, at question 2.4 he has ticked a box indicating that he and his partner currently live together. At question 2.13 he similarly indicated that they had lived together permanently in the UK since he was granted leave as a partner. On page 6 of the form he gave his ex-wife's address as the same address as his. He indicated in the affirmative to the question as to whether that was his partner's main residence.

48. I reject the appellant's explanations for those answers on the application form in terms of his not having fully understood the questions that were being asked. A

consideration of the form as a whole makes it apparent that the appellant was able to fill in the application form without any apparent difficulty in all other respects. Furthermore, I do not accept his explanation for why he said that they were currently living together, namely that they had not yet divorced. My conclusions in this respect also take into account that his ex-wife apparently sought a non-molestation order against the appellant in November 2012.

49. A further matter relied on by Mr Smart before me was the date of the appellant's application for contact with his children. It is apparent that the application was made on 19 April 2013 (page 189 of the appellant's bundle). That date was accepted by the appellant. The significance of it is that it postdated the reasons for refusal letter in connection with this application, the letter being dated 28 March 2013, and the notice of decision refusing to vary his leave to remain, served on the appellant on 4 April 2013.

50. The appellant said in evidence that his application for contact with the children had nothing to do with those refusals. In the light of the other credibility matters relied on by the respondent, I do not accept that explanation.

51. It is also to be borne in mind when assessing the appellant's credibility, that Judge Graham concluded that he deliberately intended to mislead in his application for further leave to remain as a spouse, when he failed to declare on the application form that he had a criminal conviction for driving with excess alcohol. That finding is undisturbed by Judge Hanson's decision that Judge Graham had otherwise erred in law.

52. Ms Revill submitted that whether or not the appellant lied in a previous application, to which I infer she meant the one in 2010, is irrelevant to the issues to be determined in this appeal. I do not, however, agree. In any event, the application made in 2010 on the basis that the appellant was still in a subsisting relationship with his ex-wife is but one feature of the credibility assessment.

53. I do take the view that the appellant is not someone whose evidence can be taken at face value because I am satisfied that he has attempted to mislead the respondent in his applications for leave to remain in 2010 and 2013. That is in respect of the state of his relationship with his ex-wife, but also in terms of the 2013 application, in relation to the failure to disclose a criminal conviction. It is difficult in those circumstances to rely on the appellant's evidence to the effect that the application for contact with his children was unrelated to the refusal of his application for further leave to remain. In my view the application was directly related to the refusal of his application. I am satisfied that prior to the making of that application there had been difficulties between the appellant and his ex-wife in terms of his contact with the children such that it is reasonable to have expected him to have made the application for contact much earlier than he did. The CAFCASS report dated 28 January 2014, which took into account the views and wishes of the appellant's children, concluded that apart from the occasional contact in the street, the children had not had any proper contact

with the appellant for the previous two years, although the report does describe the occasional and often *ad hoc* nature of that previous contact.

54. On the other hand, the CAFCASS report dated 3 December 2013 does state at [16] that the appellant's ex-wife would not agree to contact, following their separation, because he had refused to provide his address and she did not know where he would be taking the children. Other reasons were given in terms of his apparently having harassed her. It does seem apparent from the CAFCASS reports, that even though the appellant and his ex-wife had separated, the appellant did still express an interest in the children, albeit as already indicated, that his contact was rather sporadic and ad hoc. At that time, I note that at [20] of the December 2013 report the appellant's ex-wife said that she did not believe that he was genuinely interested in the children's welfare, he having been so preoccupied with verbally abusing her rather than focusing on the children. He had also not apparently contributed financially to their upbringing or offered to contribute towards necessities like school uniforms, or expressed any interest in their lives.

55. I have already alluded to the difficulty in resolving factual disputes of this nature, and the appellant was not asked about that aspect of that CAFCASS report. Nevertheless, the CAFCASS reports do not reveal that the appellant had lost interest in the children.

56. Whilst I have rejected the appellant's explanations for the various credibility matters that were put to him, that does not of itself indicate that he does not have a genuine and subsisting parental relationship with his children. That he may have initiated contact proceedings at least in part through cynical motives does not necessarily mean that there is no genuine and subsisting parental relationship between him and them.

57. The Child Arrangements Order is described as being effective as the final hearing of the appellant's application for a Child Arrangements Order. It appears to be dated 15 August 2014. The final CAFCASS report dated 23 July 2014 made a recommendation for such an order, plainly concluding that it was in the children's best interests for the children to continue to develop their relationship with the appellant (as set out at [23]).

58. As Ms Revill, rightly in my view, submitted, in reliance on the decision in Nimako-Boateng (residence orders - Anton considered) [2012] UKUT 00216 (IAC) the family court is best placed to evaluate the best interests of children in proceedings before it and the decision of the family court is itself material to the Article 8 balance to be conducted by the immigration judiciary (see [32] of the judgment). As was also pointed out in that case, the family court has, amongst other things, procedural advantages in investigating what a child's best interests are, independent of the interests of the parent, as well as the necessary expertise in evaluating them. Nevertheless, as indicated in Mohan [2012] EWCA Civ 1363 at [17] the tribunal is not bound or tied to the outcome of the family proceedings, the two jurisdictions

applying different tests. Indeed, in an immigration appeal there may be further information available which was not before the family court.

59. As I think is apparent from my analysis of the evidence, the appellant's motives in securing a Child Arrangements Order were not entirely free from cynicism. Nevertheless, that does not lead me to conclude that he does not have a genuine and subsisting parental relationship with his three children. Putting it another way, and no doubt more correctly, I am satisfied that the appellant has established on a balance of probabilities that he does have such a relationship.

60. That being the case, Section 117B(6) of the 2002 Act comes into play. It means that the public interest does not require the appellant's removal.

61. Applying the structured approach set out in Razgar v Secretary of State for the Home Department [2004] UKHL 27, the appellant does have family life with his children. The decision of the respondent amounts to an interference with that family life. That interference will have consequences of such gravity as potentially to engage the operation of Article 8. The decision does at least in principle pursue a legitimate aim, namely the maintenance of effective immigration control. It is a decision which is in accordance with the law.

62. The ultimate question in this case being one of proportionality, is answered by the statutory provision to which I have referred. The legitimate aim pursued does not require the appellant's removal. The "public interest question" identified in Section 117A(2), means the question of whether an interference with the person's right to respect for private and family life is justified under Article 8(2) of the ECHR.

63. Section 117B(6) does not exclude from the benefit of it anyone other than persons who are not liable to deportation. People who have otherwise attempted to deceive, or who have a bad immigration history, are nevertheless entitled to the benefit of that provision in terms of a conclusion that their removal is not in the public interest where a genuine and subsisting parental relationship is established.

64. I have regard to the only other issue that was raised on behalf of the respondent, albeit not with much vigour it has to be said, namely the question of the appellant's ability to speak English, relevant to Section 117B(2). Whilst the appellant did need the services of an interpreter at the hearing before me, and indeed during CAFCASS meetings, he did complete the applications for leave to remain himself and is studying English at college, although what level 3:3 actually is was not explained. Even so, it was not suggested on behalf of the respondent before me that this was a factor which would militate in favour of his removal in circumstances where he was able to establish the genuine and subsisting parental relationship as set out at 117B(6).

65. Accordingly, the appeal is allowed under Article 8 of the ECHR.

Decision

66. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal having been set aside in respect of Article 8 of the ECHR only, the decision is re-made, and the appeal is allowed under Article 8 of the ECHR.

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 in order to preserve the anonymity of his children. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

Upper Tribunal Judge Kopieczek **3 March 2015**