Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00331/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Repromulgated**
On 16 February 2022	**On 13 July 2022**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

AY
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: none
(a letter from Hunnewoth Solicitors dated 14 February 2022 indicated that they were no longer instructed to represent the appellant at the hearing)
For the respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. Although neither party made an application for an anonymity order, given that this appeal concerns access to a young child and proceedings in the Family Courts, I consider it appropriate to make an anonymity direction.

2. Pursuant to s.12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal remakes the decision of Judge of the First-tier Tribunal Davey, promulgated on 10 September 2019, in which he allowed the appellant's appeal against a decision of the respondent dated 30 November 2018 refusing the appellant's human rights claim, which was based on his family life relationship with his son, A, and the private life he had established in the United Kingdom ("UK"). Judge Davey's decision was found to contain a material error on a point of law and was set aside by Upper Tribunal Judge Kamara, although Judge Davey's factual findings were preserved.

3. The appellant is a national of Ghana who was born in 1975. He entered the UK on 4 April 2003 pursuant to a grant of entry clearance as a visitor. He overstayed. He made an Article 8 ECHR based human rights claim on 6 April 2018. He claimed to have a family life in the UK with his partner and child, but he failed to provide any details of these relationships. The respondent therefore only considered the application under the Article 8 ECHR private life route. The respondent was not satisfied that the appellant met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules, or that there were exceptional circumstances that would result in unjustifiably harsh consequences for the appellant such as to breach Article 8 ECHR were his application to be refused.

4. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Judge Davey heard oral evidence from the appellant to the effect that he entered into a relationship with MD, a British citizen, in 2008 and their son, A, was born on 24 January 2009. The appellant said that he had a normal parental relationship with his son until 2017 when his ex-partner prevented him from having any further contact. Judge Davey noted the appellant's claim that he could afford to afford to undertake legal proceedings seeking a contact order with his son.

5. Judge Davey found the appellant "… for the purposes of the appeal hearing to be honest and reasonably reliable…" and that "the evidence was overwhelming as to the fact of" the appellant's relationship with his son. Despite there being no direct or indirect contact, Judge Davey found that the appellant and his son, then aged 10, had a genuine and subsisting relationship, that it would not be reasonable to expect the child to leave the UK, and therefore that the appellant met the requirements of s.117B(6) of the 2002 Act, which states:

> 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.

6. Judge Davey's decision was set aside by Upper Tribunal Judge Kamara in an 'error of law' decision promulgated on 4 March 2020 which found that the Judge Davey's decision contained a material error on a point of law. Judge Kamara found that, at the time of the hearing in the First-tier Tribunal, the appellant had not seen nor had any contact with his son for around 2 years, and that he could not be described as having a subsisting relationship as understood in s.117B(6). Relying on R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC) Judge Kamara held that the First-tier Tribunal could not rationally conclude that there was a genuine and subsisting relationship between the appellant and his son.

7. The remaking of the decision was adjourned, and, on 30 July 2020, Judge Kamara stayed the remaking of the appeal pending the outcome of an application for a Child Arrangement Order ("CAO") and a Parental Responsibility Order ("PRO") made by the appellant to the Family Court on 5 June 2020 in relation to his son. In correspondence with the respondent and the Tribunal the appellant invited the respondent to grant him a short period of leave to remain pending the resolution of his Family Court proceedings in accordance with the 'Protocol on communications between judges of the Family Court and Immigration and Asylum Chambers of the First-tier and Upper Tribunals' dated 19 July 2013 ("the Protocol"). The Protocol applies where an immigration appeal is pending before the Tribunal and the welfare of a child in the United Kingdom is likely to be affected by the decision in those proceedings and there are family proceedings in existence relating to that child (paragraph 2 the Protocol). Paragraph 6 of the Protocol reads:

> "It is not the role of the judges in either jurisdiction to predict the outcome of the proceedings in the other jurisdiction. Where the decision in the Family Court is likely to be a weighty consideration in the immigration decision, it is anticipated that it will normally be necessary for the Tribunal to wait until the Family Court judge has reached a decision on the issue relevant to the immigration appeal. If so, either the appeal will be allowed by the Tribunal in anticipation of a short period of leave being granted or the hearing will be adjourned, depending on the anticipated timescale of the family proceedings."

8. The request for a short period of leave was refused by the respondent on 12 June 2020. Written submissions, drafted by Mr J Metzer of counsel on behalf of the appellant, inviting the Upper Tribunal to allow the appeal with a view to the respondent granting a limited period of leave in accordance with the Protocol, were made on 28 July 2020. A

response by the respondent was issued on 19 August 2020 written by Mr I Jarvis (then a Senior Presenting Officer). The respondent resisted the appellant's request that the appeal be allowed to enable the appellant to be granted a short period of leave. The respondent considered that an adjournment of the proceedings to await the outcome of the Family Court proceedings was "the most apposite option." This was because the Tribunal had yet to have the benefit of the Family Court's examination of the reasons why the appellant's ex-partner took the decision to end contact in 2017, and in light of the fact that the appellant was convicted for common assault on 26 January 2018 in respect of an offence committed on 26 June 2017 (he received a Community Order for 18 months with a fine; during the remaking hearing the appellant accepted that this offence related to his ex-wife). Reference was made to other charges levelled against the appellant, although he has not been convicted of any criminal offence other than the common assault conviction in January 2018. The respondent additionally noted that the appellant had been living unlawfully in the UK for a long period of time including the currency of his former relationship, and that the respondent had not previously recognise the strength and nature of his relationship with his son. These were all said to be factors that supported an adjournment of the case rather than the Upper Tribunal allowing it to enable the respondent to grant the appellant a short period of leave in order to await a final decision of the Family Court.

9. In Directions dated 17 May 2021 (but sent on 18 May 2021) the Upper Tribunal informed the parties that it intended to invoke the Protocol to allow for disclosure to the Upper Tribunal of documents and information relating to the Family Court proceedings involving the appellant.

10. An Order dated 18 May 2021 of District Judge Sawetz of the Family Court at East London adjourned the Family Court proceedings until the appellant provided written proof of the decision of the Home Office or the Immigration Tribunal of the outcome of his current appeal against the refusal to grant him permission to remain in the UK. The Family Court was unwilling to arrange further direct contact between the appellant and his son until satisfied that the appellant could remain in the UK, but the appellant was granted indirect contact with A by way of letters and cards to show his commitment to the child.

11. Following a Case Management Review Hearing on 26 October 2021 the respondent indicated that she wished to rely on Mr Jarvis's written submissions of 19 August 2020, and the appellant relied on written submissions authored by Mr Metzer of counsel dated 8 November 2021.

Hearing to remake the decision

12. The appellant was not legally represented at the hearing to remake the First-tier Tribunal's decision. He informed the Tribunal that he did not have funds to pay his solicitor for representation. The appellant provided no new documents. I have considered the documents and photographs filed on the appellant's behalf and which were before the First-tier Tribunal. These included two statements from the appellant, statements from extended family members and friends, character references and some qualifications obtained by the appellant in this country. I have additionally considered the submissions authored by Mr J Metzer on behalf of the appellant dated 8 November 2021.

13. The respondent provided a Police National Computer ("PNC") printout dated 15 February 2022 confirming that the appellant was convicted of common assault on 26 January 2018 in relation to an offence committed on 26 June 2017 and that following a guilty plea he received a community order of 18 months duration. Ms Ahmed provided a number of authorities including Mohan v SSHD [2012] EWCA Civ 1363 ("Mohan"), Nimako-Boateng (residence orders - Anton considered) [2012] UKUT 00216 (IAC) ("Nimako-Boateng"), and SSHD v GD (Ghana) [2017] EWCA Civ 1126.

14. It became apparent during the hearing that the actual Upper Tribunal case file only contained some of the documents sent from the Family Court pursuant to the Protocol. There was a brief adjournment to enable the Upper Tribunal to obtain the relevant documents. These included, *into alia*, two Family Court statements by MD, Cafcass reports, an A&E hospital report and a police disclosure document.

15. The appellant was asked some clarificatory questions by the Tribunal and he was then cross-examined. I recorded the oral evidence from the appellant, and the oral submissions made by Ms Ahmed on behalf of the respondent, and the submissions made by the appellant. I have read and considered with care all the documents before me even if they are not specifically identified later in this decision. Both parties are aware of the evidence, both written and oral, that was before the Tribunal. This evidence is, in any event, a matter of record. I shall refer to this evidence only in so far as it is necessary for me to lawfully determine the appellant's human rights appeal.

Findings of fact and conclusions

16. In determining the appellant's human rights claim I have considered the public interest factors set out in s.117B of the 2002 Act which are relevant to my assessment of the proportionalty of the respondent's decision. I have additionally considered the 2013 Protocol, and the authorities relating to a situation, such as the present, where there are concurrent legal proceedings in the Immigration Tribunals and the Family Courts. In relation to the establishment of an interference with a protected Article 8 ECHR right, including the procedural aspects of

Article 8 ECHR, the burden of proof rests on the appellant and the standard of proof is the balance of probabilities.

17. Upper Tribunal Judge Kamara held that the First-tier Tribunal was not rationally entitled to conclude that there was a genuine and subsisting relationship between the appellant and his son at the time of the First-tier Tribunal hearing because the requirement for a 'genuine and subsisting parental relationship' in s117B(6) was phrased in the present tense and the appellant had, at that stage, had no contact at all with his son for around 2 years. It is now some 4½ years since the appellant last had contact with his son in August 2017. He had produced no new evidence to show that he has had any contact, direct or indirect, with his son since that time, and he was frank in his oral evidence in accepting that this was the case. In these circumstances I find the appellant cannot demonstrate that he has a genuine and subsisting parental relationship with his son and he cannot therefore meet the requirements of s.117B(6).

18. The appellant's case is however firmly put on the basis that the procedural protections inherent within Article 8 ECHR require him to be granted a short period of leave because the outcome of his Family Court proceedings is likely to be materially relevant to any future assessment, either by the respondent or by another Tribunal or Court, of any further application he may subsequently make based on his relationship with his son. This is clear from the written submissions of Mr Metzer. Both parties place reliance on several relevant authorities including Nimako-Boateng, Mohan, and RS (immigration and family court proceedings) India [2012] UKUT 00218(IAC) ("RS"), and the appellant additionally relies on MH (pending family proceedings-discretionary leave) Morocco [2010] UKUT 439 (IAC) ("MH"), MS (Ivory Coast) v SSHD [2007] EWCA Civ 133 ("MS"), and R (on the application of Singh) v SSHD [2014] EWHC 461 (Admin) ("R(Singh)").

19. In MS, a case concerning an appellant who had been sentenced to 3 years imprisonment for violence to the children she was seeking contact with, the Court of Appeal (applying Ciliz v Netherlands [2000] ECHR 265) considered that where family proceedings are under consideration in the case of a party who has no leave to remain or is facing removal, a period of discretionary leave should be granted to enable that person to remain lawfully in the UK and participate in those proceedings. The Court of Appeal found that it was not appropriate to speculate upon whether there might be a violation of Article 8 ECHR on different facts at some point in the future.

20. In RS the Upper Tribunal considered the interplay of public law care proceedings and deportation proceedings. The Upper Tribunal panel included Lord Justice McFarlane (who was described in Mohan as "… a Lord Justice with enormous experience of child welfare law" and is currently the President of the Family Division and Head of Family

Justice) and Mr Justice Blake (then president of the Upper Tribunal (immigration and Asylum Chamber).

21. The appellant in RS had a significantly adverse immigration history having overstayed for approximately 11 years at date of the Upper Tribunal decision. He made an asylum claim in 2003 but shortly thereafter withdrew it. He was convicted of offences of driving without a licence, having no insurance and obstructing a constable (for which he received a fine) in 2002. He got married and a daughter was born from the relationship in April 2005. In 2009 he was convicted of an offence of possessing a false identity document in respect of which he received a sentence of 12 months imprisonment. A deportation order was made against him in December 2009. In 2010 the daughter was the subject of an emergency protection order issued on behalf of the local authority which had become concerned about her welfare. Concerns were raised in respect of mother's mental health and her ability to cope with the child alone at a time when RS was in detention. In subsequent Family Court proceedings a District Judge found that RS had been violence towards the mother of his child on more than one occasion including in the presence of the child. The Family Court indicated that RS's refusal to accept that finding may result in the local authority seeking an order permanently removing the child from the care of her parents. The Family Court proceedings were ongoing at the time of the Upper Tribunal's decision.

22. The panel in RS noted that, although the Immigration Tribunals have a duty to treat a child's best interests as a primary consideration in the application of administrative action, they did not have any means of assessing these matters for itself. There was no local authority or children's Guardian, no access to the service provided by Cafcass, and no independent means of ascertaining the wishes, concerns and interests of the child (at [37]). There were also funding restraints in respect of family life based immigration proceedings (at [38]).

23. Having considered MS and DH (Jamaica) [2010] EWCA Civ 207 (a case in which the Court of Appeal upheld the decision of an Immigration Judge that it would not be disproportionate to remove a person even though there were unresolved family proceedings in circumstances where the person had a particularly bad immigration history, had only been permitted to re-enter the UK for the sole purpose of giving evidence in a criminal trial, and had on two previous occasions made asylum claims specifically for the purpose of delaying his removal), the panel in RS reached the following conclusions, which are contained in the headnotes:

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

i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?

ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of the child?

iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?

2. In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?

3. Having considered these matters the judge will then have to decide:

i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?

ii) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision on MS (Ivory Coast) [2007] EWCA Civ 133?

iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?

iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?

24. At [45] the panel noted that regular migrants do not have the right to work or obtain Social Security absent a human rights bar to their removal, and that the longer legal proceedings take to resolve the important issues, the greater the burden of self-sufficiency or dependency on others will be. The panel also noted at [46] that there is a public interest that immigration proceedings be expeditiously decided and a right to remain on human rights grounds should not be created solely by reason of family links created or significantly developed during pending appeals.

25. Nimako-Boateng was a decision of the same Upper Tribunal panel. The panel held that a residence order or prohibited steps order made by a judge of the family court under s.8 of the Children Act 1998 did not bind the Secretary of State for the Home Department. It is

unnecessary to summarise the factual background of the case which is materially similar to the instant appeal. Relevant however is the acknowledgement by the panel that the decisions of family courts in respect of the welfare and best interest of children are important sources of information for judges considering immigration appeals. The panel again noted the procedural advantages available to the Family Court in investigating what a child's best interests were, independent of the interests of the parent, and that it had the necessary expertise in evaluating those best interests (at [32]).

26. The issue of the relationship between the "automatic deportation" of a foreign criminal and Article 8 ECHR, particularly where the Secretary of State is seeking to deport someone who is engaged in family proceedings in this country concerning the best interests of a child, was considered in Mohan. This case concerned a Jamaican national who had remained unlawfully in the UK for approximately 12 years (although he was removed to Jamaica as an overstatement 2006 he returned three months later using a false passport) at the date of the Court of Appeals decision. He had been convicted of possession of a Class A controlled drug with intent to supply and sentenced to 30 months imprisonment. He was liable to automatic deportation under s.32 of the UK Borders Act 2007. Prior to his arrest for the drug offences he had initiated proceedings in the Family Court for a residence order in respect of his child from an earlier relationship.

27. The Court of Appeal considered a number of authorities including Ciliz, MS and MH. MH concerned a Moroccan national whose leave to remain as a spouse was curtailed because his marriage was no longer subsisting, but who, in an appeal, sought to resist removal under Article 8 ECHR on the basis that he was pursuing an existing application in family proceedings for an order for contact with his daughter. A First-tier Tribunal judge refused an application to adjourn the hearing until after the outcome of the Family Court proceedings and, having found that the appellant had no contact with his child and did not enjoy family life in the UK, dismissed the appeal. The Upper Tribunal found that there had been an error of law in the failure to grant an adjournment and proceeded to allow the appeal pursuant to Article 8 ECHR on the basis that the appellant would be granted a short period of leave (nine months) to enable him to focus on the Family Proceedings from a position of legal entitlement to be present in the UK. The headnote noted that a decision to remove an applicant in the process of seeking a contact order may violate Article 8 ECHR on the basis that it prejudged the outcome of contested Family Court proceedings and denied the applicant the possibility of any further meaningful involvement in the proceedings. The headnote also indicated that where such a case arises before the Tribunal it is usual for the appeal to be allowed pursuant to Article 8 ECHR rather than for the proceedings to remain within the Tribunal system to be

adjourned. It was for the Secretary of State to decide of the period of leave that should be granted.

28. In Mohan the Court of Appeal considered in some detail the decisions in RS and Nimako-Boateng and endorsed the approach identified in both decisions (see [20]), including [43] of RS which was reflected in its headnote and which is set out at paragraph 23 of this decision. The Court of Appeal noted that the Family Courts and the Immigration Tribunals apply different tests and endorsed observations in Nimako-Boateng that in family law proceedings the welfare of the child is the paramount consideration whereas in immigration proceedings it is 'a primary' rather than 'the paramount' consideration and can be outweighed by other compelling rights-based factors. The Court of Appeal additionally endorsed observations that the Family Court is best placed to evaluate the best interests of the child in proceedings brought before it for the reasons set out at paragraph 22 of this decision ([17] of Mohan).

29. In his written submissions Mr Metzer submitted that an application of the relevant principles set out in RS, in conjunction with paragraph 6 of the Protocol, entitled the Upper Tribunal to allow the appeal on the basis that the appellant would be granted a short period of leave. In the respondent's written submissions dated 19 August 2020, adopted by Ms Ahmed (at least to the degree that they were not inconsistent with her submissions relating to an adjournment of proceedings), the respondent submitted that there was nothing particularly between the parties in respect of the relevant authorities, and reliance was also placed on the principles set out in RS. In her oral submissions Ms Ahmed invited me to apply the principles in RS and to find, having regard to the evidence before me, that this was a case in which it was appropriate to dismiss the appeal. Having regard to the above authorities and decisions, and the submissions of the parties, I am satisfied that it is appropriate to apply the principled approach set out in RS, having additional regard to the observations made both in Nimako-Boateng and Mohan, to the particular facts of this case.

30. The starting point for my consideration are the findings of fact made by Judge Davey, which were preserved by Upper Tribunal Judge Kamara. Judge Davey found the appellant "… for the purposes of the appeal hearing to be honest and reasonably reliable…" [13] and that the appellant 'had' a genuine and caring relationship with his son which was supported by photographic evidence of the two of them together [12].

31. Halfway through the hearing Ms Ahmed informed the Tribunal and the appellant that she would be inviting the Tribunal to revisit the factual findings that had been preserved by Judge Kamara. She submitted that the new evidence contained in the documents disclosed with the permission of the Family Court, which I will consider shortly,

undermined Judge Davey's factual findings and that those factual findings would either not have been made or would not have been preserved had the full picture of the appellant's conduct been known.

32. As already noted, the application by the respondent was only made halfway through the remaking hearing. No explanation was offered by Ms Ahmed for the failure to inform both the Tribunal and the appellant in advance of the hearing of the respondent's intentions. The respondent has been in possession of the Family Court documents and has had knowledge of the appellant's criminal conviction for several months at the very least. I can discern no reason why the respondent waited until halfway through the hearing to inform both the appellant and the Tribunal of its intentions. The request to revisit factual findings that had been clearly preserved in the 'error of law' decision has therefore been made at the latest possible opportunity. The appellant, who was not legally represented at the hearing, attended on the understanding that no issue had been taken with the factual findings reached by Judge Davey, and Mr Metzer's written submissions were also drafted on the understanding that there was no dispute as to the nature of the appellant's relationship with his son prior to August 2017. There would be substantial prejudice to the appellant if I acquiesced to the respondent's application as he would be deprived of an opportunity (absent an adjournment) to seek to obtain evidence to rebut the respondent's assertion, now advanced, that he did not have a genuine and subsisting parental relationship with his son prior to August 2017. In the circumstances, and having regard to the overrising principle in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, I do not consider it appropriate to revisit Judge Davey's factual findings relating to the nature of his previous relationship with his son.

33. However, in the alternative, even if I was to allow the respondent to revisit the First-tier Tribunal's factual findings, I do not find that the evidence upon which the respondent now relies, and which is primarily contained in the Family Court documents, supports the respondent's assertion that the appellant did not have a genuine and subsisting parental relationship with his son before contact was stopped.

34. Ms Ahmed relies on a 'Position Statement' prepared on behalf of MD and a witness statement written by MD, both for the purposes of the Family Court proceedings. The Position Statement asserted that MD was afraid the appellant would take their son from school, that she was concerned for her own safety and that of her son because the applicant was a "persistent domestic violence abuser" who had assaulted partners in the past and who shouted at A in 2017 because he spilt some milk, and because the appellant had not been consistently involved in the child's life. Assertions were made in the Position Statement that the appellant would not respond to requests

made by MD to contribute to childcare and that he would claim to be working when it was half term. It is alleged that the appellant appeared and disappeared from MD and her son's lives throughout an 11-year period and that he did not want genuine contact with his son. The Position Statement additionally claims that the appellant had not seen his son since early 2017 because he was "occupied with abusing his previous wife and had disappeared."

35. A Cafcass 'Outcome of Safeguarding Checks' document dated 28 January 2021 concerned information provided during a telephone interview in which MD claimed, *inter alia*, that the appellant assaulted her in 2010 causing a fracture of her cheekbone, that the applicant had been restricted by another Local Authority from having any form of contact with another child, that contact between the appellant and A stopped in 2017 because A refused to spend time with the appellant, and that the appellant's application to the Family Court was motivated by his immigration application.

36. A&E documents dating from April 2010 referred to allegations that MD had been assaulted by her in circumstances where he sought access to his child. There is a CRIS record of the incident, but it does not appear that any prosecution was brought against the appellant. Several police documents indicated that MD had made complaints of harassment against the appellant in 2019 and 2020.

37. A Cafcass document 'Outcome of Safeguarding Checks' dated 24 June 2021 indicated that the City of London Police did not hold any further information regarding the appellant, that safeguarding checks had been completed, and that there was no further role for Cafcass as the Family Court matter had been adjourned generally until the outcome of the appellant's immigration appeal.

38. I have additionally had regard to the letter from MD, issued in response to the Upper Tribunal's disclosure request of documents relating to the Family Court proceedings, in which she asserted that the appellant does not genuinely wish to show any commitment or have any contact with his son and that he refused to send him any letters or cards. MD asserted that the appellant does have financial means, and that his initiation of Family Court proceedings is purely based on his desire to remain in this country. MD also referred to issues concerning the appellant's criminality.

39. Without in any way wishing to diminish the seriousness of the appellant's assault on his ex-wife in 2017, or the evidence indicating that he seriously assaulted MD in 2010, this speaks primarily to his reprehensible conduct to women with whom he has been in relationships, but it does not necessarily speak to the nature or quality of his previous relationship with his son. I note that the assault on MD in 2010 occurred in the context of the appellant seeking access

to his son, and the Cafcass report od 28 January 2021 notes that there had been no further violent incidents despite the appellant and MD seeing each other during handovers, although it was accepted that these did not occur on a regular basis. MD's assertions relating to the appellant's reluctance to contribute to childcare are denied by the appellant and, as yet, are unproved in the Family Courts, and there is some evidence in the mobile phone text message documentation accompanying the appellants Position Statement dated 9 September 2020 and prepared for the Family Court hearings suggesting that the appellant did contribute financial support to his son. The assertions in the Position Statement and MD's witness statement that the appellant appeared and disappeared from his son's life for an 11-year period are also unproved in the absence of a final decision by the Family Court. The photographic evidence provided by the appellant and which was before the First-tier Tribunal shows him and his son at various stages of the child's life. Having balanced this evidence against the information upon which the respondent relies as disclosed by the Family Court documents, I find that the appellant did have a parental relationship with his son prior to the breakdown in 2017.

40. I apply the approach considered in RS. In relation to headnote 1(i), although the Family Court has adjourned the appellant's case until the outcome of his appeal before the Upper Tribunal, I am in no doubt that the eventual outcome of the appellant's Family Court proceedings will be material to his Article 8 ECHR claim. If the Family Court orders direct contact between the appellant and his son, then it is very likely he would have established a 'genuine and subsisting' parental relationship and that is material to whether he meets the requirements of s.117B(6) of the 2002 Act. I remind myself that it is not appropriate for me to predict the outcome of the Family Court proceedings.

41. In relation to headnote 1 ii), whilst there are some public interest reasons for excluding the appellant from the UK irrespective of the family proceedings, such as his poor immigration history, his criminal conviction for assault against his ex-wife, and the evidence of a serious assault against MD in 2010, the respondent has not made a deportation order against him and there is little other evidence that his conduct in the UK has been such that there are 'compelling public interest reasons' for his exclusion.

42. In relation to headnote 1 iii), I have considered the evidence that was before the First-tier Tribunal hearing on 12 July 2019. I note that the appellant's first witness statement dated 1 July 2019 made no reference to the nature of his relationship with his son and did not mention that he had been prevented from seeing his son from 2017 onwards. The appellant produced an addendum witness statement dated 10 July 2019 in which he claimed to have a "special son-father connection" and that he helped with school runs, shopping and

attending church over a number of years, and that his son previously stayed with him from Fridays to Sundays. In the addendum statement the appellant stated for the 1st time that his ex-partner prevented him from having any contact with his son since 2017. The supporting witness statements from the appellant's extended family in the UK and from friends made no mention of his relationship with his son, either past or present. This is surprising given the basis upon which the appellant advanced his appeal before the First-tier Tribunal and, to some extent, undermines his assertion that his initiation of Family Court proceedings was not a cynical attempt to remain in this country.

43. I have additional concerns with the appellants general credibility. He made his human rights claim in April 2018 based on his relationship with his child and his partner even though the relationship with his partner had ended and even though he last had any contact with his son in August 2017. There was no initiation of Family Court proceedings until 2020, although I note the appellant's claim that this was due to his impecuniosity.

44. In the order of 18 May 2021 Judge Sawetz allowed the appellant indirect contact with A by way of letters and cards to show his commitment to the child. In his oral evidence before me the appellant claimed that he wanted to send his son a card at Christmas 2021. I note that this would have been at a point approximately seven months after the order of District Judge Sawetz. He described how he asked his solicitor whether it would be possible to send his son a Christmas card and the solicitor informed him, apparently after speaking to MD's barrister, that he should not send a card. There is no evidence from the appellant's solicitors confirming this account, although I appreciate that the appellant was not legally represented at the hearing and may not have appreciated the need to obtain confirmation of his answer to a question he did not know he was going to be asked. I nevertheless have concerns with this aspect of the appellant's account. The order of District Judge Sawetz is clear: the appellant "may have indirect contact with the child by way of letters and cards only to show his commitment to the child." It is not credible that the appellant would have been unaware of this important element of the District Judge's order, and it is not reasonably likely that his solicitors would have advised him not to send a Christmas card to his son even if this was contrary to the wishes of MD. Nor is it apparent why the appellant would have waited until Christmas in order to initiate indirect contact with his son. These are factors that tend to undermine the appellant's claim that his Family Court proceedings are motivated by a concern with his son's welfare as opposed to delaying his removal from this country.

45. By way of explanation the appellant claimed that he did not know MD's address in order to send a card. When he was however asked about the efforts he made to attempt to get the address he said he

had done nothing. He claimed he had been waiting for the Family Court to "finish the case" before he could send the letter, and he did not want to provoke his ex-partner in light of allegations she had made against him. I have difficulty in understanding the appellant's explanation about wanting to "finish the case" before he would attempt to communicate even indirectly with his son. Nor is it clear to me why sending his son a Christmas card would further provoke MD in light of the evidence already available through the Family Courts. Nor do I find it credible that the appellant would not have made any effort to obtain the address through which he would be able to send his son a Christmas card given the clear order by the District Judge. This further supports the respondent's submission that the family proceedings have been instituted to either delay or frustrate the appellant's removal and not to promote his son's welfare.

46. I have additionally noted that section 9 of the FLR(FP) application form completed by the appellant in respect of his application for leave to remain, which falls to be completed by those who have children in the UK, was left incomplete. Ms Ahmed invited me to draw an adverse inference that this indicated that the appellant did not have a parental relationship with his son at the time. For his part the appellant appeared surprised when this was put to him and claimed that he had no knowledge of the content of the application form as it was completed by his solicitor. Whilst the absence of any reference to A in the application form is surprising, I have considered the covering letter from Huneewoth Solicitors dated 19 March 2018 that accompanied the application form. The covering letter expressly asserted that the appellant had a British citizen son in the United Kingdom and that he had contact with his son, and that he enjoyed family life with his son. Whilst the details of his relationship with his son are not particularised in the covering letter, the fact that there is express reference to this relationship militates the incomplete nature of section 9 of the application form

47. Judge Davey however found the appellant "… for the purposes of the appeal hearing to be honest and reasonably reliable…" and that the appellant 'had' a genuine and caring relationship with his son which was supported by photographic evidence of the appellant and his son. I have again considered the photographic evidence which does show the appellant with his son on several occasions over a period of years, including what appears to be the son unwrapping gifts. Although there is no express finding that it was the appellant's impecuniosity that prevented him from initiating Family Court proceedings, the tenor of Judge Davey's decision suggests this assertion was accepted. The appellant additionally provided screenshots of what appear to be text messages between the appellant and ex-partner sent in 2014, 2016 and 2017 the content of which suggested that the appellant did, at that time, have a relationship with his son and that the appellant financially supported him.

48. The appellant's explanation for his failure to initiate Family Court proceedings in respect of his son (that his impecuniosity prevented him from making any application) is not supported by any documentary evidence, but his assertion is inherently plausible given his immigration status and is further supported by the fact that he was not represented at the remaking hearing. I additionally note that the Position Statement prepared on behalf of MD in the Family Court proceedings asserted that the appellant did not have a job.

49. Having considered the evidence of the appellant's previous interest in and contact with A, and having balanced that against my concerns relating to the appellant's credibility and the absence of any attempt by him to contact his son indirectly, I am persuaded, albeit by a narrow margin, that the Family Court proceedings have not been initiated by the appellant in order to delay his removal rather than to promote A's welfare. The evidence of the appellant's previous relationship with A does indicate that there was a close relationship prior to contact being stopped in 2017. In reaching this conclusion I remind myself that, if I allow the appeal, the appellant will only be grated a limited period of leave to enable a final decision of the Family Court to be provided, and that I should not prejudge the decision of the Family Court who is best placed to determine the best interests of A (see RS at [37] and [38], Nimako-Boateng at [32], and Mohan at [17]).

50. As previously indicated, if the Family Court were hypothetically to find that the best interests of A were to have direct contact with his father, then this is likely to be a materially relevant consideration both for the Secretary of State and the Immigration Tribunal in determining whether there is a genuine and subsisting parental relationship between the appellant and his son and whether it would be reasonable to expect the son to leave the United Kingdom. Although the appellant has a criminal conviction for common assault, and although there is evidence that he has previously been the instigator of domestic violence against MD, he is not and has not been the subject of a decision to deport him and is not liable to deportation. Given that a person will be subject to automatic deportation under section 32 of the UK Borders Act 2007 only if the person is sentenced to a period of imprisonment of at least 12 months, the appellant's previous conviction will not expose him to the automatic deportation provisions.

51. If, in the future, the appellant were to make an in-time application for limited leave to remain as a parent under Section R-LTRPT of the Immigration Rules, he would need to demonstrate that he has direct access in person to his child either as agreed with MD or as ordered by a court in the UK, and he will need to provide evidence that he is taking, and intends to continue to take, an active role in the child's

upbringing (E-LTRPT.2.4). The appellant would also need to demonstrate that he did not fall for refusal under the Suitability requirements for leave to remain (S-LTR of Appendix FM). S-LTR .1.5 refers to the presence of an applicant in the UK not been conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender shows a particular disregard for the law. It is possible, although in my judgement unlikely, based on the current evidence before me, that the Secretary of State may consider the appellant's previous offending as having caused serious harm sufficient to refuse his application under the suitability requirements.

52. S-LTR .1 .6 is another Suitability requirement based on the presence of the applicant in the UK not been conducive to the public good because his conduct (including convictions which do not fall within paragraphs S-LTR .1 .3 to 1.5), character, associations, or other reasons, make it undesirable to allow him to remain in the UK. There are other Suitability grounds relating, *inter-alia,* to a failure by a person to comply with procedural requirements in relation to their application, and to their provision of false information, representations, or documents or a failure to disclose material facts in relation to an application, or their previously making false representations etc for the purpose of obtaining a document from the Secretary of State. There is nothing in the evidence before me to suggest that the appellant would fall foul of these other Suitability grounds.

53. For the reasons given above I am satisfied, albeit by a narrow margin, that the appellant does have at least an Article 8 ECHR right to remain in the UK until the conclusion of the Family Court proceedings, and that it would be disproportionate to remove him prior to the completion of those proceedings.

Notice of Decision

The human rights appeal is allowed (on the basis that the appellant will be granted a short period of leave until the conclusion of the Family Court proceedings)

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify

him or any member of 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.

D.Blum 7 March 2022

Signed Date
Upper Tribunal Judge Blum