Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05214/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Teams*
On 27 July 2021

Decision & Reasons Promulgated
On 01 September 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

ERNEST KALU OBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. N Uddin, Counsel, instructed by Nathan Aaron Solicitors
For the Respondent: Mr. T Lindsay, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Ripley ('the Judge'), sent to the parties on 3 December 2020, by which the appellant's

appeal against a decision of the respondent to refuse to allow him leave to remain in this country on human rights grounds and to maintain a deportation order was dismissed.

2. Judge of the First-tier Tribunal Chohan granted the appellant permission to appeal to this Tribunal by a decision dated 8 January 2021.

Remote Hearing

3. The hearing before me was a Teams video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. The Judge did not make an anonymity order and neither party requested an order before me.

5. I note the recent observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings concerned with sexual offences, that defendants in criminal proceedings are not usually anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. I am satisfied that the appellant in this matter has already been subject to the open justice principle in respect of his criminal conviction, which is a matter of public record and so considered to be known by the wider community. I find that the common law right permitting the public to know about Tribunal proceedings in this matter, a right further protected by article 10 ECHR, outweighs the appellant's rights under article 8 ECHR. I do not make an anonymity order in this matter.

6. The appellant has been convicted of a serious sexual offence. Whilst there is no requirement for the victim to be named in my decision, I take the opportunity to observe that consequent to section 1 of the Sexual Offences (Amendment) Act 1992 ('the 1992 Act') there is a prohibition upon the reporting of any matter which may lead to the identification of a complainant in respect of certain sexual offences, including sexual assault on a female by penetration contrary to section 2 of the Sexual Offences Act 2003: section 2(da) of the 1992 Act. Such anonymity is for life.

Background

7. The appellant is a national of Nigeria and is presently aged 51. He entered the United Kingdom with leave to enter as a visitor in May 1999. A subsequent application for further leave to remain was refused by the respondent by means of a decision in March 2000. The appellant did not enjoy an attendant right of appeal.

8. The appellant claimed asylum in March 2000, but the application was refused in July 2000 on non-compliance grounds. The respondent withdrew this decision in June 2001. The application was again refused in February 2004. The appellant's appeal was dismissed on 1 March 2005.

9. The appellant entered into a relationship with 'JB' and their child was born in December 2004. At the date of the Judge's decision the child was a few days short of their 16th birthday.

10. In the same month as his first child was born, the appellant commenced residing with his first wife, 'VM'. An application for leave to remain based on his marriage was received by the respondent in February 2005. A subsequent application for indefinite leave to remain in this country was submitted in September 2005. The application was initially refused by the respondent in February 2006, but that decision was withdrawn in January 2007.

11. Following the appellant's convictions for failing to provide a specimen for analysis (x2), no insurance and driving otherwise than in accordance with a licence the respondent issued the appellant with a warning letter in 2009.

12. On 28 July 2009 the respondent granted the appellant indefinite leave to remain in this country.

13. The appellant married his present wife, 'CO', in Nigeria in 2013 and they have two children. CO and the children currently reside in Nigeria.

Previous convictions

14. The appellant was convicted in relation to driving offences on four occasions between 2005 and 2014 in relation to: driving with excess alcohol (x1); failing to provide a specimen for analysis (x2); no insurance (x1); driving otherwise than in accordance with a licence (x1); and driving whilst disqualified (x1). For all offences he received non-custodial sentences and at his last court appearance in 2014 he was disqualified from driving for a period of 46 months.

Index Offence

15. The index offence can be addressed briefly. The Crown's case, as accepted by a jury, was that in 2010/11 the appellant returned to the victim's family home with her mother. Both the appellant and the victim's mother had been drinking. Over time, the appellant acted in a manner that concerned the victim, then aged around 14 or 15 years of age, such as sitting next to her when her mother left the room, holding her hands and stating that he wanted to take her to Nigeria and marry her. The appellant followed the victim upstairs to her bedroom and requested that he be allowed entry. The victim refused and blocked the door. When the appellant and the victim's mother went to bed, the victim decided to stay downstairs for safety. She armed herself with a knife. The appellant came downstairs at around 2am and again requested that the victim become his wife. A sexual assault took place.

16. On 14 December 2017 the appellant was convicted after a trial held at Snaresbrook Crown Court on one count of sexual assault on a female by penetration. He was sentenced by HHJ del Fabbro to 5 years imprisonment, ordered to pay a £120 surcharge and ordered to sign the Sex Offenders Register for life.

17. The appellant continues to deny his guilt.

18. An OASys report dated 24 August 2020 identifies the appellant as having not demonstrated any insight as regards the impact of his offence upon the victim. His risk to children was assessed to be at its greatest when under the influence of alcohol.

Deportation proceedings

19. A deportation order was signed on 2 October 2018 and served alongside a deportation decision dated 3 October 2018.

20. In the meantime, the appellant filed an out-of-time appeal against his conviction with the Court of Appeal in February 2019. In his application for an extension of time in which to appeal the appellant confirmed that his trial lawyers had advised him that there was no identifiable error of law that could found a meriotorious appeal. The appellant relied upon grounds of appeal that he drafted. He asserted that there had been a failure by the CPS to comply with lawful disclosure. He referred to the victim as being a liar and a manipulator. He accused the CPS of being aware that the victim was lying and having taken steps to conceal evidence that would establish his innocence. An allegation was made as to police bias. Witnesses were accused of fabrication. Criticism was made of judicial directions to

the jury. An allegation was made that the jury pool was tainted. Complaint was made that defence counsel erred in his professional duty by failing to call three witnesses to give evidence. Complaint was also made that his solicitor had failed to disclose that he 'works for the CPS'.

21. On 19 August 2019 the appellant's application to appeal against conviction was refused by a Single Judge of the Court of Appeal. Such decision was entirely to be expected considering the grounds of appeal advanced.

22. The appellant submitted further representations and the respondent refused his human rights claim by means of a decision dated 11 March 2020.

Hearing before the FtT

23. The appeal came before the Judge sitting at Hatton Cross on 17 November 2020. It was conducted remotely, by means of CVP. The Judge had before her a range of documentation including documents relied upon by the appellant and a skeleton argument filed on his behalf.

24. The appellant contended that he suffered a miscarriage of justice and affirmed that he is not guilty of the offence for which he was convicted in 2017. He stated that for the purpose of the appeal he was rehabilitated. He confirmed that he is a very committed Christian and had founded a charity in Nigeria.

25. He relied upon medical conditions, including an enlarged prostrate, haemorrhoids, a stomach ulcer, and injuries to his shoulder and wrist. He stated that his removal to Nigeria would be tantamount to a 'death sentence' given his medical condition.

26. The appellant provided evidence that on 7 September 2020 he had applied for a child arrangement order at the Central Family Court, London.

27. He asserted that he supported his child financially and if deported would not be able to continue such support, nor have contact with or build up a relationship with his child. He provided documentary evidence to establish such support.

28. I note documents filed with the First-tier Tribunal establishing that JB had sought child maintenance from the appellant by 2011, and that in 2014 he was in arrears to the sum of approximately £13,400. In October 2014 he was informed by the Child Support Agency that he was required to pay the sum of £5 a week. An order from Bow County Court issued following a hearing held in August 2015 confirms that the Child Support Agency secured a charge upon the appellant's home in

March 2015. The Court ordered in August 2015 that the charge continue with sums remaining outstanding in maintenance.

29. I further note that the appellant filed two bank statements for October and December 2006 identifying two cheques in the sum of £50 that are said to be payments in respect of his child. He provided bank statements from July 2010 to November 2010 identifying two payments, each in the sum of £100, with a reference detailing that they related to his child. Such evidence pre-dates the Order of Bow County Court addressed above. No further evidence as to the payment of maintenance or the provision of funds supporting the child was filed and relied upon.

30. The appellant further detailed at the hearing that he would be at risk of persecution upon return to Nigeria on the basis of his being a Christian. Such concerns were not raised in his witness statement of 20 October 2020 and had not previously been detailed to the respondent. I observe that in his witness statement the appellant confirmed at §17 that he intended to visit his wife and children in Nigeria upon revocation of the deportation order. The Judge noted that the appellant had not made an asylum application on this basis, despite having been notified in 2018 as to the respondent's intention to deport him. The respondent did not give consent at the hearing for this issue to be considered as a new matter: section 85(5) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and *Hydar (s 120 response; s 85 "new matter": Birch)* [2021] UKUT 176 (IAC). In any event I observe that the claim was vague in nature and on its face enjoys no merits with Nigeria possessing a vibrant Christian community and having the largest Christian population in West Africa amounting to over 80 million people. Further, the asserted fear does not correspond with the appellant's stated intention some three weeks before the hearing to visit Nigeria to see his family.

31. As to the hearing, the Judge observed at para. 9 of her decision:

> '9. Although there were increasing difficulties with CVP connectivity during the hearing, the evidence of the appellant and the witnesses and submissions was recorded and is set out in full in the Record of Proceedings. Neither representative made a complaint nor argued that this had been detrimental to a fair hearing. …'

32. In her decision the Judge correctly observed that section 117C of the 2002 Act and paragraph 398(a) of the Immigration Rules ('the Rules') applied, with the appellant having been sentenced to a custodial term of over four years, and so he was required to show that the public interest in his deportation was outweighed by very compelling circumstances over and above those described in section 117C(4) and (5) of the 2002 Act and paragraphs 399 and 399A of the Rules.

33. With regard to the appellant's child in this country, the Judge found at para. 30 that the appellant had not had any contact with his child since at least 2015. The Judge found at para. 31 that the appellant had not had a subsisting relationship with the child for at least 5 years. At para 32 the Judge held:

> '32. Further, as the appellant has had no contact with his [child] since 2015 it is not considered that his deportation would have an unduly harsh impact on [the child]. [The child] would be able to remain in the UK with [their] mother. I do not consider that it would be unduly harsh if the appellant was deported before the court application for contact was considered. The appellant's [child] is now 16 years old and there is a lack of evidence to suggest that [the child] wants to see [their] father face-to-face. There was also a lack of evidence that his absence from his [child's] life was having a deleterious effect on his [child]. The appellant's departure would not interfere with indirect contact, if his [child] was willing to engage in this and, if [the child] did want to see [the appellant], he could visit him after [the child] turned 18.

34. As to the appellant's health, the Judge records at para. 34 that counsel for the appellant confirmed that no article 3 claim was advanced. In respect of medicial health and article 8 the Judge found that the appellant could secure employment in Nigeria and pay for his treatment through his income.

35. In respect of the appellant's appeal against conviction, the Judge held at para. 37:

> '37. It has been argued that it is premature to deport the appellant before the outcome of his application to the full Court of Appeal. However, it was stated in the letter from the CCRC dated 3 February 2020 that the appellant would be notified by the end of April as to whether the CCRC would refer his case for review or required further time to decide whether or not to do so. The appellant has not provided any further letter from the CCRC. it is accepted that he has instructed a solicitor to assist him in relation to a potential appeal but, in the absence of further evidence, it is not accepted that the appellant has shown that the CCRC will undertake a review or an application will be made to the full Court of Appeal or that there are merits to do so.

36. The Judge undertook the balancing exercise approved by the Supreme Court in *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 W.L.R. 4799. She concluded that the public interest rendered the decision to refuse the appellant leave to remain on human rights grounds and to deport him to Nigeria proportionate.

Grounds of Appeal

37. Unfortunately, the grounds of appeal drafted by counsel adopt the unhelpful approach of not identifying individual grounds of challenge. The individual grounds that could be identified were jumbled across several pages.

38. Mr. Uddin kindly informed me that there were three separate grounds of challenge that can properly be summarised as follows:

    1) The decision of the Judge was unlawful for procedural unfairness.

    2) Too great an emphasis was placed by the Judge upon the appellant's conviction in circumstances where the conviction was 'under challenge'.

    3) The judge erred in her consideratipn of the appellant's private and family life rights when considering as to whether very compelling circumstances arose outweighing the public interest in the appellant's deportation.

Decision on Error of Law

39. The respondent filed and served a skeleton argument authored by Mr. Lindsay, dated 21 April 2021. Mr. Lindsay noted, *inter alia*, that the appellant had filed no evidence as to the purported problems experienced at the hearing and that 'insofar as [the appellant's] grounds of appeal seek to make unsupported assertions of fact, these should carry no weight.'

40. The appellant filed and served a skeleton argument authored by Mr. Uddin, dated 6 May 2021.

Procedural unfairness

41. By means of the grounds of appeal the appellant makes several assertions as to the difficulties he and his witnesses are said to have experienced at the remote hearing. The issues identified at paras. 4, 6, 7 and 8 were not raised as a concern before the Judge at the hearing. As for the stated fact detailed at para. 5 of the grounds, namely that problems with the technology caused considerable disruption to the hearing, again no express concern was raised with the Judge.

42. There are several significant difficulties for the appellant.

43. Firstly, the complaints now advanced as to procedural fairness were not raised with the Judge, who was therefore provided with no notice of them.

Consequently, the proper means for conveying the now identified concerns of the appellant and his witnesses before this Tribunal as to their ability to hear questions posed and engage in various parts of the proceedings was by filing and serving signed witness statements. I observe that it is a mandatory requirement for evidence not placed before the First-tier Tribunal that an application for its admission by this Tribunal be made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Such step was not taken in this matter, despite the respondent having clearly informed the appellant and his legal representatives in April 2021 that the unsupported assertions of fact detailed within the grounds of appeal should properly carry no weight.

44. Rather, information as to the appellant's complaints, and those of his witnesses, have been presented to this Tribunal by means of grounds of appeal and counsel's skeleton argument. It is trite law that evidence cannot be presented for the first time in such form: see for example *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch), at [71].

45. I identified to Mr. Uddin and the appellant that there was a singular lack of any evidence filed as to the assertions advanced by the appellant concerned with procedural unfairness. I granted a short adjournment to permit Mr. Uddin to take instructions as to whether the appellant wished to apply for an adjournment to be permitted to file and serve relevant witness statements by means of a rule 15(2A) application. Upon his return some 20 minutes later, Mr. Uddin confirmed his instructions as being that the appellant wished to proceed with the hearing. Mr. Uddin recognised that he could not properly rely upon assertions as to the experiences of the appellant and his witnesses made within the grounds of appeal and skeleton argument that were not raised before the Judge and were not evidenced before this Tribunal by the appellant by witness statements.

46. Before considering Mr. Uddin's limited submission on this ground, I observe that the appellant was represented before the Judge by experienced counsel, Professor Rees, who made no complaint as to detriment or unfairness at the time of the hearing. The Judge could properly rely upon no complaint being made when considering the potential impact of technological difficulties. It is not recorded that the appellant personally made a complaint to the Judge as to procedural unfairness.

47. I am satisfied that the ground now advanced implicitly criticizes Professor Rees' conduct of the hearing. This must be the position as the appellant now wishes to assert that the presentation of his case by Professor Rees was adversely impacted by technological issues and that such concern was not properly advanced by counsel. It would be expected that if counsel considered themselves disadvantaged, they would have informed the Judge. Complaint is also made that

the appellant's witnesses were unable to hear questions posed to them and so it was unclear at the hearing as to whether they understood the questions. Again, Professor Rees raised no complaint, though if it was apparent that witnesses were unable to hear questions counsel would be expected to raise such concern with the judge.

48. The expected course to be adopted when criticism is made of professional representatives in this Tribunal is to write to them, identifying the substance of complaint, and to secure their observations in writing as to events. Such step permits this Tribunal the opportunity to consider complaints as to professional conduct in the round. Such step was not undertaken in respect of Professor Rees and consequently the Tribunal is left entirely unaware of counsel's view as to the criticism made in relation to his conduct of the appellant's appeal before the Judge.

49. Mr. Uddin submitted that the Judge accepted that there were problems with the CVP technology at the hearing, and the appellant should have been given a fair hearing. He accepted that beyond what was acknowledged by the Judge at para. 9 of her decision, he had no evidence to rely upon as to such difficulties adversely impacting upon the hearing. He further accepted that Professor Rees had raised no complaint at the hearing and no step had been taken by the appellant's legal representatives to ascertain from Professor Rees as to why he adopted this position.

50. I am satisfied that in circumstances where neither representative indicated a concern as to proceedings, and where technical difficulties are usually overcome without any impact upon the fairness of a hearing, the simple fact that there were technological problems is wholly insufficient to establish procedural unfairness. This limb of ground 1 is dismissed.

51. Mr. Uddin's general submission that a remote CVP hearing is not suitable for deportation appeal hearings enjoys no merit. As confirmed by the Court of Appeal in *Re: B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, [2020] 2 F.L.R. 330, remote hearings can replicate some of the characteristics of a fully attended hearing and so provided that good practice is followed a remote hearing will be a fair hearing. I am further satisfied that the cross-examination of an appellant or witnesses in deportation proceedings is not objectionable in the present climate. In the circumstances and being mindful of the general principles identified by the High Court in *Municipio de Mariana v BHP Group Plc (formerly BHP Billiton)* [2020] EWHC 928 (TCC), at [24], there is no merit to a general challenge as to the suitability of deportation hearings being heard remotely in the Immigration and Asylum Chamber.

52. In any event, this submission could not properly be advanced by the appellant. No objection was made on his behalf to the holding of a remote hearing in this matter at the case management review hearing held before Judge of the First-tier Tribunal Bulpitt on 2 October 2020, where the appellant was represented by Ms. P Glass of counsel. Nor was any objection raised by Professor Rees before the Judge. In the circumstances, it is wholly inappropriate that complaint is now made in such general terms that a deportation hearing cannot fairly be conducted by means of remote proceedings.

53. I further observe that para. 8 of the grounds enjoys no merits. It is simply conjecture as to whether the Judge could or could not hear the presenting officer's submissions and it would properly be expected for the Judge to convey any difficulties they were experiencing to the representatives. Further, the appellant had the benefit of counsel who raised no complaint as to being unable to hear proceedings and so can properly be considered to have heard and understood all that occurred during the course of the hearing. This challenge is dismissed.

Too great a focus upon the criminal conviction

54. Before me, Mr. Uddin advanced no positive case on this ground save for a request that I consider it as drafted in the grounds of appeal. In its entirety the ground is identified as:

> '10. The Judge has focused extensively on the appellant's conviction, for which the appellant had provided evidence that he was challenging. The Judge ought to have focused more on the merits of the case as a pose [sic] to refusing this appeal on a conviction that he knew was under challenge.'

55. The ground as drafted wholly fails to engage with the present deportation regime, established both by statute and the Rules. For the purposes of this appeal it is clear that (i) a foreign criminal convicted of an offence to which identified conditions apply is to be deported: section 32 of the UK Borders Act 2007; (ii) when considering whether a decision to deport breaches protected human rights, the Tribunal is required to consider the public interest and the deportation of foreign criminals is in the public interest: section 117C(1) of the 2002 Act; and (iii) the index offence and conviction are properly placed in the balancing exercise as they are incorporated within the deportation of a foreign criminal being in the public interest and in the application, or otherwise, of the exceptions identified in section 117C(3) to (6).

56. Further, the ground wholly fails to engage with the fact that the appellant's appeal to the Court of Appeal against his conviction was refused by the Single Judge in 2019. There is no present challenge to the conviction under section 1 of the

Criminal Appeal Act 1968. Therefore, the assertion that there is an extant 'challenge' is misleading and should not properly have been asserted by counsel when drafting the grounds or relied upon at the hearing.

57. What is being pursued by the appellant is an application to the Criminal Cases Review Commission ('CCRC') seeking a referral to the Court of Appeal. This application was initially made in or around October 2019 and I understand that to date no decision has been reached by the CCRC as to whether a referral will or will not be made. The Commission is required to consider as to whether new evidence or a new legal argument has been identified that now makes the case significantly different to that when permission to appeal was originally refused. Such evidence or argument must, save for in exceptional circumstances, not have been considered at the time of the trial or at the initial appeal. I take judicial notice that the number of referrals to the Court of Appeal is low (in the region of 3%) in comparison to files opened by the CCRC.

58. In his witness statement before the First-tier Tribunal, the appellant provided no detail as to whether any new evidence or argument was being advanced to the CCRC. Indeed, the witness statement dated 20 October 2020 is in my consideration woefully light in providing any cogent detail on any relevant matter. Very limited detail was provided in oral evidence to the Judge, as recorded at para. 37 of the decision, and before me the appellant was entirely incapable of remembering the name of the solicitors' firm he had instructed in respect of his application to the CCRC, despite his confirmation to me that he had spoken to a solicitor at the firm in June 2021.

59. I am satisfied that the Judge considered the public interest appropriately, gave due weight to the conviction when conducting the balancing exercise at para. 39 and gave due weight to factors favourable to the appellant. There is simply no merit in this ground, which should never have been advanced, and it is dismissed.

Private and family life rights

60. Para. 11 of the grounds makes the bald submission that, "The Judge ought to have focused more on the appellant's private and family life having found that paragraph 24 that he has established a private life in the UK that would engage article 8, having been in the UK for more than 20 years."

61. The next four paragraphs of the grounds are concerned with the appellant's child and can properly be identified as follows:

    1) The Judge erred in law in relying upon the fact that the appellant had not enjoyed a subsisting relationship with his child for at least five years, "the

correct application of the law would be to assess whether or not the relationship was subsisting": para. 12 of grounds.

2) The Judge erred in not placing appropriate weight upon the appellant's application to the Family Court for an order in respect of his child: para. 13

3) The Judge erred in not explaining as to why the appellant's child should wait two years until they were 18 before they could visit their father in Nigeria: para. 14

4) The Judge erred in failing to sufficiently explore the impact the appellant's deportation would have upon his child: para. 15

62. Again, this ground of appeal is entirely misconceived and should not properly have been advanced. As accepted by Mr. Uddin before me the appellant has not had a subsisting relationship with his child for over five years. There is not said to have been any contact at all between father and child during such time. Mr. Uddin withdrew reliance upon the paragraphs asserting that there was a subsisting relationship between father and child.

63. It is extremely unfortunate that grounds have been drafted in this mattrer advancing a case based upon the purported impact the appellant's deportation would have upon the child. There is no merit at all in paras 14 and 15 of the grounds, which have no tangible nexus to the actual facts existing in this matter. These grounds should never have been advanced.

64. I indicated to Mr. Uddin that para. 12 of the grounds was nonsensical. If there had been no subsisting relationship for at least five years, what else was the Judge to find other than there was no subsisting relationship at the date of the decision. This ground should never have been advanced.

65. In respect of the appellant's application for a child arrangement order filed with the Family Court some two months prior to the hearing before the Judge the appellant's challenge wholly fails to engage with the clear findings at para. 32 that it would not be unduly harsh for him to be deported before the court application was considered in the circumstances existing in this case. I observe that the appellant has had minimal contact with the child for over five years. Though it was asserted by the appellant that he supports his child financially, the evidence as to such fact presented to the Judge was extremely limited. Indeed, the evidence suggested, on balance, that the appellant was tardy in acknowledging his parental commitments requiring court proceedings to be initiated to secure a charge on his property in respect of outstanding maintenance. No evidence was provided as to

the child having any interest in contact with their father being established. I observe that in the month the child was born the appellant had commenced living with VM, as confirmed by his 2005 application for leave to remain. There is no evidence that father and child have ever resided together in a family home. The Judge was therefore able to make an informed and reasoned decision as to there being no subsisting relationship between father and child.

66. In the circumstances, I have considered the reported decisions of *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC) and *Mohammed (Family Court proceedings – outcome)* [2014] UKUT 00419 (IAC) as well as *Mohan v. Secretary of State for the Home Department* [2012] EWCA Civ 1363, [2013] 1 W.L.R. 922 and I am satisfied that the Judge gave cogent and lawful reasons for finding that the late issuing of Family Court proceedings did not outweigh the public interest in deportation. She lawfully concluded that the outcome of the contemplated proceedings was unlikely to be material in this matter.

67. I observe *R (Singh) v. Secretary of State for the Home Department* [2014] EWHC 461 (Admin) where the Court of Appeal held that when considering a claim that deportation would violate article 8 because of a close and subsisting bond with a child in the United Kingdom, there was a clear and obvious difference between a case in which contact (or now child arrangement order) proceedings were pursued against a background of prior contact and genuine interest on the one hand, and a case in which such proceedings had been initiated only on the date of removal with limited evidence of prior contact. On the evidence placed before the Judge, both documentary and in his evidence, the appellant came nowhere close to establishing that he fell anywhere but in the latter category, having delayed seeking a Family Court order until just before the hearing of his deportation appeal. I am satisfied that the application for an order from the Family Court is strongly suggestive of being predicated solely on a desire to remain in this country.

68. As for the appellant having been present in this country for over 20 years, it is not explained as to how this could properly reduce the public interest in his deportation in circumstances where he has spent over half of his life, including his formative years, residing in Nigeria and he was sentenced to 5 years imprisonment for a serious sexual assault. This challenge is, at its highest, a simple disagreement with the decision reached by the Judge and was not pursued with vigour by Mr. Uddin. I dismiss all limbs of ground 3.

Postscript

69. It is unfortunate that the First-tier Tribunal granted permission to appeal in this matter when there were no merits to the grounds advanced. The focus of the

Judge granting permission to appeal was on procedural unfairness, but it was abundantly clear that there was a significant failure by the appellant to evidence his complaint.

70. I take this opportunity to observe that even if the substance of the appellant's complaint as to procedural fairness identified within the grounds of appeal was taken at its highest and observing the importance of the right to be heard, the appellant could not succeed as no reasonable judge could properly conclude that there was material irregularity. When taking the appellant's underlying human rights case at its highest, no reasonable judge could conclude that the very compelling circumstances test could properly be satisfied in this matter: section 117C(6) of the 2002 Act. The test is a very stringent one. No criticism can properly be made of the balancing exercise undertaken by the Judge in this matter. In respect of the factors the appellant has sought to rely upon little weight can be given in his favour with respect to his education in this country, to his church attendance, the friendships he has developed with people in the community or to his charity work. Whilst he has resided in this country for over 20 years, he has served a custodial sentence arising from a very serious sexual offence for which he received a custodial term of 5 years and in relation to which he continues to deny his guilt. He has no insight into his offending behaviour, and his failure to engage with his sexual offending is strongly suggestive that he is not rehabilitated. He possesses no subsisting relationship with his child in this country.

71. The appellant has produced little or no evidence that he has been pursuing a decision from the CCRC, and indeed has produced no detail as to any suitable ground having been identified to suggest that a reference could meritoriously be made to the Court of Appeal. The grounds of appeal drafted by the appellant to the Court of Appeal in 2019 are strongly suggestive of a man wholly unwilling to engage with his criminality, seeking to blame everyone from the judge, his legal team, the CPS, the police, the jury and the victim for his conviction. I note the approach adopted by the appellant because the failure to engage with his offending behaviour is also identified in his letter to the respondent dated 2 September 2019 where he denied his guilt in respect of two of his four convictions before Magistrates' Courts, dated 2009 and 2014, observing, *inter alia*, that specimen results were unconnected to him. I observe that the appellant possesses a trait of identifying himself as the victim of miscarriage of justice, with accompanying indications that he will file out of time appeals without identifying any cogent basis for the proposed challenge having any merits.

72. I am satisfied that the appellant is using his application to the CCRC simply as means of seeking to delay his deportation.

73. His effort to raise a weak asylum claim at the hearing is, I am satisfied, further evidence that the appellant is simply seeking to defer his deportation.

74. His very late application to the Family Court for an order in respect of his child, with whom he has had no contact for over 5 years, is strongly suggestive of being predicated on a desire to remain in this country.

75. I made clear to the appellant at the hearing, in the presence of his counsel, that if he were to exercise his right of appeal against this decision, he will be required to expressly inform the Court of Appeal that he instructed his counsel to proceed with the hearing after I had given time for advice and instructions to be provided in relation to an adjournment. The Court of Appeal should also properly be informed that Mr. Uddin made no oral submissions as to ground 2 and withdrew reliance upon the majority of the arguments advanced in ground 3.

Notice of decision

76. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

77. The decision of the First-tier Tribunal sent to the parties on 3 December 2020 is upheld. The appeal is dismissed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 4 August 2021

TO THE RESPONDENT
FEE AWARD

No fee was paid and so no consideration is given to a fee award. In any event, the appellant has been unsuccessful in his appeal.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 4 August 2021