Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15093/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
By Microsoft Teams	
On 19 May 2021	**On 23 August 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MR SENESIE ISSA KAKAY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Revell, Counsel instructed by Sunrise Solicitors
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sierra Leone born on 12 November 1972. He appeals with permission against the decision of First-tier Tribunal Judge Callow sent on 11 March 2020 dismissing his appeal against a decision dated 20 August 2018 to refuse his human rights claim. Permission to appeal to this Tribunal was granted on 22 July 2020 by Upper Tribunal Judge Jackson.

2. There were some connectivity issues during the hearing. At first the appellant was not able to obtain a visual but he remedied this so that he and his partner could be seen when they were giving evidence. Later there were connectivity issues. Ms Cunha complained that she was receiving messages from her department throughout the hearing but did not ask for an adjournment. Nevertheless with patience and determination, both witnesses were able to give their evidence to a satisfactory standard and both representatives were able to make submissions. At the end of the hearing both parties confirmed that it had been a fair hearing.

Appellant's Background

3. The appellant entered the United Kingdom on 4 July 2004 illegally. He claimed asylum on 20 December 2010. His claim was refused, and he was excluded from the protection of the Refugee Convention on 20 May 2011 because of his claimed involvement with the Revolutionary United Front ("RUF"). His appeal against this decision was dismissed on 18 July 2011. He then remained unlawfully in the UK. On 16 March 2017 the appellant made a human rights application based on his Article 8 ECHR family and private life in the United Kingdom as the parent of a British citizen child. The application was refused on 22 August 2019.

Appellant's case

4. The appellant claims that he lied about his involvement with the RUF. His family were not murdered. His mother is alive, remains in Sierra Leone and visited the UK the previous year. He had a relationship with a British national who became pregnant with his child. He asserts that he has a genuine and subsisting parental relationship with a British child. His daughter was born in the UK on 5 June 2016 and at the date of the application she was living with her mother and 3 half siblings. The appellant visited his daughter regularly and shared parental responsibility for her. It is not reasonable for the child to leave the UK. He can meet the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. It would be a disproportionate breach of his family life to remove him from the UK.

The decision of the respondent.

5. The respondent relied on the decision of the previous judge in 2011 as a starting point. The appellant was excluded from the protection of the refugee convention because it was found that he had committed crimes against humanity and war crimes because he had admitted to being a member of the RUF. The appellant does not meet the requirements of the immigration rules in respect of parents because he does not meet the suitability or relationship requirements. He is not the sole carer of his child. There are no very significant obstacles to the appellant returning to Sierra Leone. There are no exceptional circumstances which would result in a grant of leave outside the rules. No consideration is given to section 117B(6) in the refusal decision.

First-tier Tribunal Decision

6. FtT Judge Callow took into account that the appellant had a chequered immigration history and had put forward various different versions of events in Sierra Leone. He noted that the appellant initially claimed to be a member of the RUF but did not attend his asylum appeal in 2011 which was decided in his absence. He took into account that in his grounds of appeal, the appellant stated that he was forced to join the RUF and that his family had been murdered by rebels and that in his amended grounds of appeal, he asserted that he had lied about his claim and that his mother was in fact alive in Sierra Leone.

7. The appellant, his ex -partner and his sister gave oral evidence. Both representatives made submissions on section 117B(6).

8. The judge found that the appellant had a genuine and subsisting relationship with his daughter who lived with her mother and stepfather. The judge took into account the appellant's precarious immigration status. The judge then turned to the authority of KO(Nigeria) [2018] UKSC 53 and quoted various passages.

9. The judge concluded that the appellant has no right to be in the UK. He has never had lawful leave. His family and private life were established in precarious circumstances. The best interests of the child would be for the child to remain with her mother in the UK. The judge concluded that it is reasonable for the appellant to leave the UK and apply for leave to enter under the immigration rules. He concluded that it would not be a disproportionate breach of Article 8 ECHR for the appellant leave the United Kingdom.

Grounds of Appeal

10. It is asserted that the judge misdirected herself in law when considering section 117B(6). The judge did not consider whether it was reasonable for the British child to leave the United Kingdom in the real-world scenario where the child lived with her mother who was her primary carer who would not permit her to leave the UK and relocate to Sierra Leone with her father.

11. The judge wrongly relied on the reasoning in KO because the situation of the appellants in KO was materially different to that of the appellant, in that in KO all members of the family would be returning together as a family unit.

12. A third ground of appeal was that the judge had wrongly applied the suitability criteria applied to the appellant given that he had produced evidence that he was not in fact involved with the RUF and had not committed war crimes.

Concession

13. At the outset of the appeal, after a short discussion, Ms Cunha accepted that the judge had misapplied the law in that the judge had not made a best interests assessment in respect of the child and also had failed to make a finding on whether section 117B(6) applied because the judge failed to consider whether it was reasonable for the child to leave the UK. She conceded that ground 1 was made out.

Decision on error of law

14. I am in agreement the judge manifestly misapplied the law by failing to make a finding on whether section 117B(6) applied. Having found that the appellant was not subject to deportation proceedings and that he had a genuine and subsisting relationship with his child, it was incumbent on the judge to decide whether it was reasonable for the child to leave the UK against the real-world situation in which the child found herself which is fact sensitive. The judge did not address this issue. The judge simply stated that the child could remain in the UK with her mother and stepfather and then went onto consider whether it was reasonable for the appellant to leave the UK focusing on the appellant's negative immigration history. This is manifestly not the correct test in line with the guidance in SSHD v AB (Jamaica) [2019] EWCA Civ 661 and Runa v SSHD [2020] EWCA Civ 514. I refer to [36] of Runa where it is said by Lord Justice Singh;

> "I would emphasis again, as the Supreme Court did in KO (Nigeria) and this Court did in MA (Pakistan) and AB (Jamaica) that once all the relevant facts have been found the only question which arises under section 117(6)(b) is whether or not it would be reasonable to expect the child to leave the UK. The focus has to be on the child".

15. In these circumstances there was no need for me to consider the remaining grounds. I indicated that I would set aside the decision of the judge and re-make the decision. I indicated that the following findings were preserved.

Preserved Findings

i. The appellant is the biological father of M.

ii. M is a British citizen and a "qualifying child".

iii. The appellant has a genuine and subsisting relationship with his daughter.

iv. At the date of the previous hearing the appellant did not live with his daughter but had regular contact with her

v. The appellant cannot satisfy paragraph 276ADE(vi) of the immigration rules

Re-making

16. I indicated to the parties that I would hear further evidence in order to re-make the appeal. In respect of the remaking, Ms Revell indicated that she intended to call the appellant and his partner to give evidence. She produced a new bundle of evidence with the requisite rule 15(2A) notices as well as a skeleton argument. She submitted that the evidence post-dated the hearing and was relevant to the Article 8 ECHR assessment. Ms Cunha indicated that she had received the bundles on Monday but that she had not had sight of them. I gave her 30 minutes to consider the new evidence which she accepted was sufficient time to read the documentation. She did not object to the further evidence being adduced. I decided to admit the evidence because it post-dated the previous appeal and was relevant to the issue of whether it was reasonable to expect the child to leave the UK and any Article 8 ECHR assessment.

17. The evidence before me comprised of the new 58-page appellant's bundle, the previous 115 page appellant's bundle, the rule 15(2A) notices and the new skeleton argument as well as the original respondent's bundle.

Evidence

18. The appellant gave his evidence by video link from his living room. His partner who is the mother of M (who I will refer to as A) also gave oral evidence from the same living room, and they took turns holding M. Given the medical evidence before me of the appellant's partner's vulnerability, I indicated that I would treat her as a vulnerable witness. I explained to her that she would not have to answer distressing questions and that she could ask for breaks. I reminded Ms Cunha of the approach towards vulnerable witnesses and at one point stopped her from asking a direct question about her abusive ex-partner. The witness' oral evidence is set out in the record of proceedings.

19. Both representatives made submissions. Ms Revell submitted that the appellant has a genuine and subsisting parental relationship with his daughter who is a qualifying child and it is not reasonable for her to leave the UK. The appellant falls within section 117B(6) and this is determinative of the Article 8 ECHR appeal.

20. Ms Cunha submitted that the appellant does not have a parental relationship with his child, and that family life is not engaged between the appellant and his daughter. Further the respondent's position is that it is not accepted that the appellant lives with his partner nor that she has initiated divorce proceedings against her ex-husband. She also submitted that it is not reasonable to expect the child to leave the UK.

Legal Framework

21. It is not asserted that the appellant can meet any of the requirements of the immigration rules. He does not meet the partner requirements because he is not married to his partner and has not been co-habiting with her for over years. He does not meet the parent requirements because he does not meet the requisite relationship requirements.

22. The appellant did not assert that there would be very significant obstacles to his integration to Sierra Leone in accordance with paragraph 276ADE(vi). Judge Callow made findings on this issue which were not challenged by the appellant and it is settled that paragraph 276ADE(vi) is not met.

23. The appeal turns on whether it would be a disproportionate breach of Article 8 ECHR to remove the appellant from the UK.

> Section 117B(6) 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 child 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 UK.
>
> A qualifying child is one who is British or has lived continuously in the UK for seven years or more (s117D(1)).

24. Where Article 8 ECHR is engaged and s117B(6) is satisfied, this will be determinative of the Article 8 ECHR proportionality balance in the appellant's favour in accordance with R (on the application of MA (Pakistan) and others v Upper Tribunal (Immigration and Asylum Chamber) [2016] at EWCA Civ 705 at [17] which states;

> "Subsection (6) falls into a different category again. It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the

> sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself".

25. In SSHD v AB(Jamaica) and AO (Nigeria) [2019] EWCA Civ 661, Singh LJ rejected the Secretary of State's argument that the reasonableness test plays no role where the child in question will not in practice leave the UK. His Lordship stated at [75];

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

26. In Runa v SSHD [2020] EWCA Civ 514 Singh LJ emphasised that the correct question is not whether it is reasonable for the child to remain in the UK with their other parent but whether it is reasonable for them to leave with the appellant. This question must be answered against the background of the relevant facts including whether the other parent is likely to accompany the appellant abroad.

Facts

27. The circumstances had changed since the hearing before First-tier Tribunal Judge Callow. The mother of the appellant's daughter and ex-partner had separated from her husband due to domestic violence. The ex partner had been evicted from the home by the police and social services had been involved. She has now instituted divorce proceedings against him. She previously worked full time as a team lead in a Dementia care home but gave up her job when her PTSD symptoms started at the end of 2019. The appellant has now moved in with her and his daughter. The appellant's partner now has a support worker and is under the mental health team.

28. At no point did Ms Cunha raise the issue of a 'new matter'. Further, in my view the essential question to be asked in this appeal was the same as in the previous appeal which is whether the appellant has a genuine and subsisting parental relationship with his qualifying child and whether it is reasonable for the child to leave the UK.

29. In this appeal the following facts are not in dispute:

    A. The appellant is the biological father of M. He has been living in the UK for 17 years since 2004. He is a Sierra Leone national and until March 2020 had been living with his sister.

B. M is a British citizen, born in the UK on 5 June 2016. At the date of the appeal hearing, she was five years old.

C. The appellant's partner is a British citizen of Sierra Leone origin. She has three other children, H, V and M2 who are M's older brothers. At the date of the appeal hearing, they were aged 18, 17 and 6. They also live in the family home with the appellant's partner and M. The two eldest have settled status and the younger boy is a British citizen. H is currently studying light vehicle maintenance and repair at B College and V is at BDB school.

D. The appellant's mother continues to live in Sierra Leone. His father died some time ago. He has siblings in Sierra Leone with whom he is in contact. They are in work.

E. I have also preserved Judge Callow's finding that the appellant has a genuine and subsisting relationship with his daughter.

Facts in dispute

30. Ms Cunha submitted that the evidence of A's mental health difficulties was not sufficient, there was no evidence that her previous partner was abusive and no evidence that she is divorcing her partner. She disputed whether the appellant was living with his partner. She submitted that the relationship that the appellant has with his daughter is more akin to that of a childminder and is not a parental relationship.

31. I had before me a witness statement from M's mother A who is now aged 33. Her evidence is that she has post-traumatic stress disorder, depression and back pain. Her health has deteriorated since 2019. She does not feel safe to leave the house. She has difficulty sleeping and sleeps a lot in the daytime. She is anxious and has stopped working. She is struggling to look after the children. She takes medication for her depression and anxiety. Both of her parents are deceased and her sister in the UK has her own responsibilities as a mother. In her oral evidence she stated that she has a support worker as well as help from the mental health team. Her two oldest children are from the same father and her third child is from a different father.

32. In her previous witness statement, she described being the victim of domestic violence since 2009. Her ex-husband frequently beat her and forced himself on her. When she was pregnant with M2 in 2013 her ex-husband beat her until she started bleeding and she went into a refugee centre for her safety. Later she reunited with her husband, but the abuse continued. She was frequently beaten, called names and left unconscious. The police were frequently called. On 29 July 2019 he beat her so badly she was left with a fractured left eye socket.

33. The appellant also gave evidence of his partner's poor mental health. His evidence is that her physical and mental health has got progressively worse since December 2019. A feels anxious and worried to leave the house and sometimes her bed. She has had to give up work because of this. She is heavily dependent on the appellant to assist with the housework and childcare particularly with the two younger children. The older son H also helps out. A has counselling telephone calls every Friday.

34. Supporting evidence of A's poor mental health included a letter from her GP Dr Alliya Mohamed dated 21 March 2021. This confirms that the appellant has been registered with the GP since May 2018 and that she is under the care of the community mental health team recovery service. The GP confirms that A has diagnoses of post-traumatic stress disorder (PTSD) and moderate-severity depression with possible paranoid psychotic features. She is suffering from significant back pain and episodic shivering and coldness episodes. The GP also confirms that the illnesses lead to difficulty sleeping and anxiety about leaving the house. This evidence is consistent with that of the appellant and of A herself. I place weight on the evidence of the GP who has known the appellant in a professional capacity for over a period of three years.

35. There was a further letter before me from Dr Sidra Shaheed MRCPsych from Woking CMHRS. Dr Shaheed confirmed that A was first referred to mental health services in December 2019 and that prior to March 2021 her mood has deteriorated. She is said to be tearful most of the time and is worse when she is on her own in the daytime. She cannot sleep at night. Her appetite is erratic, and she does not want to eat. She feels very low and constantly exhausted. She has poor concentration. She has no motivation to leave home. She does not have any social contacts or friends.

36. Dr Shaheed refers to the symptoms of flashbacks, nightmares and hyper-vigilance improving, but her mood symptoms deteriorating. A reports hearing voices and seeing people around the house and hearing footsteps. She feels as if she is being followed and smells things. Dr Shaheed also refers to previous assessments and that it is well documented that A has experienced several trauma across her life span. Dr Shaheed states that she did not explore this in the current assessment because the traumatic events had already been documented in detail and it would be distressing for A to go over them again. Dr Shaheed confirms that A has been on medication and that she has had trauma based psychological input from CMHRS which she has found useful.

37. A was described as being tearful during the assessment, and I also noted that she was tearful when giving her oral evidence which I limited for this reason because she became very upset.

38. I give great weight to the evidence from Dr Shaeed because she examined A at her home, clearly has detailed knowledge of A's history and completed a mental state examination independently of these immigration proceedings.

She manifestly has the relevant qualifications. I accept her opinion that A has very prominent features of depressive symptoms including low mood, anhedonia, limited energy level, biological symptoms of depression with diurnal mood, insomnia and psychotic symptoms and also that her symptoms of PTSD (nightmares, flashbacks and hypervigilance) have improved. Following this examination the plan was to gradually stop sertraline, cross taper with duloxetine and increase quetiapine as well as give A further tests, refer her to EIP, give her a follow up appointment and details of a crisis helpline.

39. Having considered all of this evidence, I am satisfied on the balance of probabilities that A has significant mental health problems, is currently very unstable and that she is receiving a high level of input from mental health services. I also find that her mental health problems are impacting on her ability to work, to leave the house, to function properly and to carry out basic tasks such as shopping and housework and that her poor mental health restricts her ability to look after her children.

40. Ms Cunah then submitted that there was no evidence that A's previous partner was abusive.

41. It has consistently been A's evidence that her previous partner was abusive. She stated this at her last appeal indeed she provided a detailed witness statement in this respect. In her oral evidence she stated that she had previously been offered sheltered accommodation in a women's refuge. First-tier Tribunal Judge Callow accepted her evidence as credible. Dr Shaheed also refers to the previous well documented trauma that she has suffered. She has PTSD and low mood and is afraid to go out which is consistent with suffering trauma. Although there was a lack of evidence from, for instance, the police or local authority there was sufficient consistent evidence before me from A, the appellant and in the medical evidence to persuade me on the balance of probabilities that A was subject to prolonged and intense domestic abuse from her previous partner and that she has separated from him because of domestic violence.

42. Ms Cunah also submitted that there was no evidence of a divorce. There was in the bundle at page 19 a receipt from Gov.uk confirming that A has instituted divorce proceedings against her ex-husband and this together with the oral evidence of the witnesses which is consistent with the evidence in their witness statements and my findings that A has suffered domestic violence is sufficient for me to find that she has initiated divorce proceedings.

Article 8 ECHR

Family life

43. Ms Cunha attempted to argue that the appellant does not have family life with his daughter. I have no hesitation on the basis of the preserved finding

that there is a genuine and subsisting relationship between the appellant and his five year old daughter which is on-going that family life exists between this father and his minor child. I find that Article 8 (1) is engaged.

Genuine and subsisting parental relationship.

44. Judge Callow at [13] of his decision made the following finding which has been preserved.

> "Nonetheless a consideration of all the evidence reveals that that it has been established on a balance of probabilities that he is the father of M, a British child, who lives with her mother married to Boateng Darkwah and with whom he has regular contact. The contact is such that he has a genuine and subsisting relationship with M"

45. At the outset of the remaking, I indicated that I would preserve this finding. However, Ms Cunha still persisted in submitting that the relationship is not a "parental" relationship because the appellant's role was more akin to a 'caretaker' or 'childminder'. She also submitted that the respondent's position is that the appellant does not have a relationship with A.

46. Ms Revill submitted that the finding that the appellant had a genuine and subsisting relationship with his child had not been cross appealed in a rule 24 response – indeed no response had been served and that Ms Cunha had made no objection when I indicated that I would preserve this finding. She submitted that Ms Cunha was attempting to relitigate this point. I was in agreement with Ms Revell that it was now not open to Ms Cunha in the re-making hearing to seek to go behind findings that had been preserved, although strictly speaking the preserved finding is that the appellant has a genuine and subsisting relationship with the child not a genuine and subsisting "parental" relationship.

47. Dealing firstly with the appellant's relationship with A. The witnesses gave compelling and consistent evidence. They both claim that the appellant moved in with A after her mental health deteriorated and there is significant independent evidence of a significant deterioration in her mental health. The witnesses both gave their evidence from a domestic setting where they were both taking turns to look after their child. The school records that the appellant is regularly taking his child to school from which I infer that he is taking the child from her home which is in Woking. I note that the report from Dr Shaheed does not mention the appellant and that this is a slightly strange omission for which the appellant had no explanation. However, the evidence before me is that the appellant and A have a biological child together and are living together to try and work things out and have resumed their relationship. In any event the material issue is not whether the appellant is in a relationship with A but whether he has a genuine and subsisting parental relationship with his daughter.

48. Turning to the relationship between the appellant and his daughter, it was not very clear how it could be rationally argued that this is not a parental relationship when the previous judge made preserved findings that the appellant had regular and meaningful contact with his daughter describing the relationships as genuine and subsisting and the child is the appellant's biological daughter. I also note that this issue was not raised in any response by the respondent.

49. Nevertheless, to dispel any doubt, I have had regard to those authorities that deal with the issue of what constitutes a "parental" relationship.

50. The authority of R (on the application of RK) (s.117B(6); "parental relationship" (IJR) [2016] UKUT 00031, was approved by the Court of Appeal in AB (Jamaica) [2019] EWCA Civ 661 in which it was said;

> "89. Like UTJ Plimmer I also have found helpful the judgment of UTJ Grubb in **R (RK) v Secretary of State for the Home Department [2016] UKUT 00031 (IAC)**. Although the facts of that case were quite different as they concerned a grandmother and whether she needed to have parental responsibility for a child, what UTJ Grubb said at paras. 42 to 43 contains an analysis of the concept of parental relationship with which I would respectfully agree:
>
> > '42. Whether a person is in a parental relationship with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have parental responsibility in law for there to be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child.
> >
> > 43. I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not per se parents. A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for

> example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship.'

90. Returning to the case of **SR (Pakistan)** I would also respectfully agree with what was said by UTJ Plimmer at paragraph 39:

> 'There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other. There are also cases where the nature and extent of contact and any break in contact is such that although there is contact, a subsisting parental relationship cannot be said to have been formed. Each case turns on its own facts.'

91. On the facts of **SR (Pakistan)**, at paragraph 40, UTJ Plimmer concluded that *SR* did have a parental relationship with the child in question and that it was genuine and subsisting for the purposes of Section 117B(6)(a). It may have been a limited parental relationship but that did not mean that it was not genuine or subsisting."

51. I take from the authorities of AB(Jamaica) and from SR (subsisting parental relationship, Pakistan s117B(6)) [2018] UKUT 00334 (IAC), much of which was approved in AB, that whether a genuine and subsisting relationship exists between a parent and child is intensely fact-sensitive and will depend on the relationship between parent and child. The words 'genuine and subsisting parental relationship, are ordinary English words which should be given their plain meaning and there should be no future gloss on them. I must look at the quality and the nature of the relationship.

52. The evidence at the previous hearing was that the child always knew that the appellant was her father and her step-father did not take on that role. There was evidence before Judge Callow that the appellant visited his daughter on a very regular basis travelling from London to Woking to see her including the witness statements, photographs and tickets. The judge was satisfied that the child had regular contact with her father.

53. There was also a brief letter before me from B Primary school which confirms that the appellant regularly drops off and collects his daughter from school. The letter was written by the headteacher and was dated 23 February 2021. I give weight to this letter. There were also numerous photographs of the appellant not only with his daughter M but with her brother M2 as well.

54. The evidence before me was consistent in that both the appellant and his partner live with the child and that because of A's significant health problems, he is heavily involved with both the two younger children and is at present carrying out much of the childcare. A describes the appellant as also assisting the older children by going to football with them at weekends and taking them cycling and taking their child to school. A also refers to the very close relationship between the appellant and her daughter which is described as loving.

55. It is difficult to see how a biological father who lives with his child on a full-time basis because of his partner's health difficulties and assists to bring her up by looking after her and taking her to school regularly could be said to be a "childminder" as opposed to a father with a genuine and subsisting parental relationship with his own child.

56. Having considered the facts of this appeal and having regard to the authorities above I find that the appellant has an important role in his daughter's life, he takes her to school, looks after her, spends time with her and has a genuine and subsisting parental relationship with her.

Is it reasonable for M to leave the UK?

57. Ms Cunha then submitted that it is not reasonable for the child to leave the UK which was somewhat confusing as it appears that this is the issue on which the re-making exercise turned in the first place. This appeared to be a concession in favour of the appellant. Ms Cunha did not make any detailed submissions why it would be reasonable to expect the child to go to Sierra Leone, she focused on the issue of whether the appellant has a genuine parental relationship with his child.

58. Nevertheless, for the avoidance of doubt and since First-tier Judge Callow did not make findings on this issue, I will give it full consideration.

59. I note in this respect that the respondent in making the decision in respect of the appellant has not made any detailed assessment in respect of the best interests of M. There is no s55 consideration.

60. Ms Cunha's submission was that it is in the best interests of the child to remain in the UK with her mother who has always been her primary carer. She submitted that if the appellant is not there the local authority has the power to intervene if the child is not stable and can take over the primary responsibility. I do not understand this submission. She referred to the best interests assessment being carried out in the immigration context rather than the family court context and spoke of a "three way" relationship.

61. When making this assessment, I must firstly take into consideration the welfare of any child affected by the decision under appeal in accordance with ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4,

which is a primary but not determinative consideration. I consider the authorities and guidance on the welfare and wellbeing of the child in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009 and the numerous relevant factors set out in the various authorities. I also take into account the guidance in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53 in which it is clarified that the assessment of the child's best interests is to be made without reference to the parent's immigration status but that in general the best interests of a child is that they remain with their parents wherever their parents are expected to be.

62. In general, it is settled law that it is in the best interests of all children to grow up and have a meaningful relationship with both parents and in normal circumstances the best interests of a child will lie in remaining with their parents and going to where they are going.

63. In the case of M, she has always lived with her mother who is her primary carer and who is a British citizen. She has also lived with her older three step-brothers aged 19,17 and 7 respectively. Like her 7-year-old brother M2, she is a British citizen. She previously lived with her stepfather until 2019 but he left after a history of domestic violence. It is only since March 2020 that she has been living in a family unit with both her mother, father and her half siblings. She has experienced domestic violence in the household and also her mother's physical and mental health problems. I find that it is not in M's best interests to be separated from her mother and half-siblings with whom she has a close relationship and with whom she has resided all of her life. Indeed, Ms Cunha's submission was that it was in her best interests to remain with her mother. Nor do I find that it is in her best interests to be separated from her father with whom she also has a very close bond and who is providing the family unit with support and security. I find that, in common with most children, it is in her best interests to grow up having a meaningful and good quality relationship with both of her parents.

64. I also find that it is in her best interests to remain in the United Kingdom. She has always resided in the UK as have her older brothers. She is in the UK education system attending primary school. I recognised that at the age of 5, she will not have many ties outside of her immediate family and that she is not in a crucial stage of her education. Nevertheless, there has already been considerable instability in her family with prolonged domestic violence, her stepfather moving out, her mother giving up work and becoming very ill and her father moving in and I find that a move to Sierra Leone would be another significant change. In the UK, she has entitlement to free education and health care. She has a secure home and income and some extended family in that her maternal aunt and her paternal aunt both life in the UK. Her mother is adamant that she would not return to Sierra Leone. Her mother is receiving support from the NHS, is under the care of the community mental health recovery service and is receiving treatment and support. I have no hesitation

in finding that it is in her best interests to remain in the UK with both of her parents and her half-siblings.

65. I also find that it is in the best interests of M's two older brothers that they continue to live in the UK where they have settled status and are at crucial stages in their education and that it is in their best interests to remain with their mother. Neither live independently and they are both in full time education. I also find that it is in M2's best interests to remain living with his mother in the UK. He is British. He was born in the UK and has lived in the UK for 7 years. He is said to have special needs although there was limited evidence of the extent of his needs. I accept that he is subject to an Education, Health and Care plan on the basis of a letter before me from Surrey County Council dated 22 April 2021 which is at least indicative that he requires additional support.

66. It is in the best interests of all four children that their mother continues to receive treatment and support for her mental and physical health difficulties and that her health improves so that she is able to function better.

67. Ms Cunha sought to bring up the Exclusion issue. She claimed that the appellant previously admitted to raping and murdering women and was found to be excluded from the refugee convention. She submitted that we do not know if social services are aware of this. It is impossible to assess whether the appellant should be having contact with his child.

68. Ms Revill pointed to the fact that the appellant had admitted lying in his original asylum claim at his last appeal and Judge Callow had accepted this and relied on the appellant's lies as a reason for why it would not be disproportionate for the appellant to leave the UK. I take into account that Judge Callow had before him statements and affadavits from the appellant's sister, mother and various persons of standing in the community all of whom set out the appellant's early life and the circumstances in which he grew up as well as confirmation from the Sierra Leone authorities that he is not on the list of wanted individuals. I am satisfied that Judge Callow accepted at [13] that the appellant had lied in his asylum claim and that the respondent had not cross-appealed by asserting that this finding was unlawful. There was no evidence before me that any professionals have any concerns about the appellant's involvement with his daughter.

69. What is in M's best interests is important but not determinative of the issue of whether it is reasonable for M to leave the UK. When carrying out this exercise, I need to ask the statutory question against the facts as I have found them above.

70. M was born in the UK and attends B primary school. She has always lived with her mother and three older brothers and until 2019 lived with her stepfather who I accept was violent. She is now aged 5. She does not speak the

local language in Sierra Leone. Her next brother is two years older than her. He is 7.

71. It is her mother's evidence that she will not relocate to Sierra Leone because she has been living in the UK for 13 years and is a British citizen. She no longer has close ties to Sierra Leone. She does not consider that it is in the best interests of her three older children nor indeed M to relocate to Sierra Leone. Her two oldest children are in full time education at crucial stages. Neither have any contact with their own fathers. Her second son is undertaking a college course and her 7-year-old British child has an Education Health and Care Plan. Additionally, her mental health is very poor. She has PTSD, very low mood and episodes of psychosis. She is suffering from depression and also has physical health problems including significant back pain for which she has been referred to a specialist. She is under the care of a specialist psychologist, and she would not be able to replicate this treatment and support in Sierra Leone. She has been a long-standing victim of domestic abuse. She does not wish to be separated from her daughter or her children to be separated from each other.

72. Against this background it is not reasonable to expect M to leave the UK because she would be separated from her mother and half-siblings with whom she has lived all of her life and who cannot be expected to abandon their life in the UK to travel to Sierra Leone with an individual who is not their father.

73. I consider the scenario in which A does go to Sierra Leone with her mother and father. As a matter of common sense, given that A cannot cope in the UK and is not functioning well on a basic level, her health is unlikely to improve in a country that she has little recent connection with and does not wish to return to and when she is separated from her older children. She has complex health problems and requires specialist treatment. Given her poor health, I find that she would not be able to work in Sierra Leone. I find on the evidence before me that were M to go to Sierra Leone with her two parents and potentially her youngest brother her mother's health would deteriorate further which would have a negative impact on her. I have also found that it would not be in the best interests of M to have further change after so much instability in her young life. I also find that she would be separated from her two eldest brothers who would not relocate. There was little evidence about how the family would be living in Sierra Leone but given that the appellant was formerly a diamond trader and has half siblings in Sierra Leone, although he has been absent from the country for 17 years, I find that he would eventually be able to find some kind of employment and accommodation for the family.

74. However this is not a situation where the family is a self-contained unit, none of whom have citizenship or status in the UK, a move to Sierra Leone would involve separating members of the family either in terms of A being separated

from her elder sons, or M being separated from either her mother or father or her siblings and would involve the break-up of the family where although there has been a poor immigration history there has been no criminality.

75. Having considered all the factors in the round, giving weight to the best interests of the child as a primary but not determinative consideration and having given particular weight to M's mother's mental and physical health, her history of domestic violence and the fact that her three half-brothers have grown up in the UK, the current intensive support her mother is receiving from the mental health team and the likely instability of her future life in Sierra Leone, I find that it is not reasonable for M to leave the UK.

76. In accordance with AB and Runa since I have found that section 117B(6) applies, I find that this is dispositive of the appeal. I am satisfied that it would be a disproportionate breach of Article 8 ECHR to remove the appellant from the UK.

Notice of Decision

77. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

78. The decision of the First-tier Tribunal is set aside with the findings at [11] preserved.

79. The appeal is re-made.

80. The appeal is allowed on Article 8 ECHR human rights grounds.

Signed *R J Owens*

Upper Tribunal Judge Owens Date 4 August 2021