Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21510/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 20th May 2019 and 25th June 2019	**On 24 July 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Sharma, instructed on behalf of the Appellant
For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

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 as the appeal concerns minor children. No report of these proceedings shall directly or indirectly identify him or his partner and children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant appeals with permission against the decision of First-tier Tribunal (Judge Manyarara), promulgated on the 27th July 2018 dismissing his appeal against the decision to refuse his human rights claim based on his family life. Permission to appeal was granted on the 21st November 2018.

The background:

2. The appellant is a citizen of Nigeria. He entered the UK on the 14th February 2011 with entry clearance as a student with a visa valid until June 2012. On the 29th February 2012 he made a further application for leave to remain which was granted from the 12th July 2012 until the 12th July 2014.

3. There is a complicated history thereafter concerning his relationships with two women; his current partner referred to as the "sponsor" in the decision of the FtTJ an whom I shall refer to as "E" and also his EEA spouse whom he married by proxy in September 2014 and to whom he remains married. I shall refer to her as "K". The judge made a number of adverse findings in respect of those relationships within the determination.

4. He claimed to have met an EEA national in 2011 but that they began a relationship in 2014 when on a break from his relationship with the sponsor. He had a child from that relationship, G, born in 2013. He had met the sponsor in 2012 and they had an affair, but he went on to marry the EEA national K on the 17th September 2014. This is despite asserting in his evidence that he and the sponsor E were in a relationship akin to marriage in February 2013. The sponsor was also married to an EEA national (who I shall refer to as "L"), whom she married in 2010 but was divorced from him in October 2014.

5. The appellant claimed that in January 2015 (when encountered by immigration officers at his address) he was intending to make an application for a residence card. The EEA spouse K was not there but had returned to her home country. However, as the judge set out, he made no reference to E, their relationship or that he had a child G and that he gave no explanation for that failure (see paragraphs 36 and 37). Furthermore, he claimed in his evidence before the FtTJ that the sponsor was living with him at the time of the enforcement visit but had made no reference to her or their child.

6. On the 19th January 2015 submissions were made to the respondent on the basis of his relationship with E and his child G born in 2013. He was served with a notice of liability for removal and with a statement of additional grounds to which he responded on the 26th January 2015. On the 9th March 2015 he was served with a decision letter which certified his claim but following judicial review proceedings, there was a consent order on made the 12th June 2015 and the respondent agreed to reconsider his claim

7. In 2016 GP his second child was born, and the respondent refused his claim in a decision taken on the 25th August 2016.

8. The appeal came before the First-tier Tribunal on the 6th July 2018. The judge heard evidence from the appellant and his partner E. In a decision promulgated on 27 July 2018 the Judge dismissed his appeal on all grounds. The judge found that the appellant could not meet the requirements of Appendix FM as he could not meet the suitability requirements as result of his conduct and what was described as a " bogus marriage" with his EEA national partner K but even if that did not apply, he could not meet the requirements for leave to remain as either a partner or a parent. As to paragraph 276ADE, consideration was given to the length of time in the UK since 2011 but the applicant did not have 20 years continuous residence; he had spent most of his life in Nigeria and could not be said to have lost ties or that there would be significant obstacles to his re-integration to that country given his previous length of residence there and continuing linguistic ties.

9. When considering Article 8 outside of the Rules, the judge addressed the question of the best interests of the children noting that as a starting point, it was in the best interests of children to be with both their parents. The judge then considered the conduct of the appellant and found that the appellant had shown himself to be a person who was "willing to utilise all avenues possible in order to remain in the United Kingdom". In this respect, the judge took into account that when the enforcement visit had taken place in January 2015, he had made no attempt to refer to either the sponsor E or his child and only did so when he could no longer make an application for residence card as his EEA spouse K had left United Kingdom in November 2014. The judge found that if the appellant had an intention to play an active role in his children's lives, he would not have waited until all other avenues had been exhausted before making an application on the basis of Article 8 (at [84]). The judge found that the respondent had been right to raise the suitability grounds and that whilst the best interest of the child must be assessed in isolation from other factors, such as parental misconduct, the best interests were capable of being outweighed by other public interest factors. The judge found that there were public interest factors that applied in this appeal (see [85]).

10. When applying the section 117B public interest factors, the judge took into account that the appellant's immigration status had always been "precarious" and thus little weight was attached to the private life that he had established in the United Kingdom. The judge found that the appellant's children were "qualifying children" by virtue of their citizenship and that the sponsor was a "qualifying partner" under paragraph 117D but that there were no compelling reasons why leave should be granted outside the rules and dismissed the appeal.

11. The appellant sought permission to appeal which was granted on the 21 November 2018.

12. At a hearing on the 19th February 2019 I heard the submissions of the advocates (then Mr Plowright of Counsel and Mr Avery, Senior Presenting officer) on the issues identified in the grounds.

13. In a decision promulgated on the 18th March 2019 I set out my reasons as to why I had reached the conclusion that the decision did involve the making of an error on a point of law. I reproduce that below:

"Decision on the error of law:

(i) I have carefully considered the competing submissions of the advocates, and having done so, I am satisfied that the decision demonstrates the making of an error on a point of law. I shall set out my reasons for reaching that view.

(ii) I am satisfied that ground 2 is made out. In my judgment there was a clear error in the determination by the failure to make clear findings as to whether or not there was a genuine and subsisting relationship between the appellant and his partner and children at the time of the hearing.

(iii) In the decision reached, the judge considered whether the appellant could meet the "partner route" and made findings of fact which were based on the appellant's past conduct and relationship with his EEA national wife at a time when the appellant claimed to be in a relationship with his current partner (see paragraphs 35 – 40 of the decision).

(iv) In particular, at [36] the judge stated, "I find that the appellant's inability to be consistent about when his relationships began is as a direct result of a lack of credibility in his claim to have been in a genuine relationship with either woman." The judge later made reference to the enforcement visit that took place in January 2015 and that despite claiming that the sponsor (his current partner) was living with him at the time of the enforcement visit, he failed to make any reference to the sponsor (current partner) or his child G. The judge found that the appellant had "not provided any explanation for his failure to refer to the sponsor (his current partner). This is material to his current claim. This is because in order to show that he can meet the partner route on the basis of his relationship sponsor, the appellant would need to show that he and the sponsor were in a relationship akin to marriage for at least two years prior to the date of the application." (See paragraph 37).

(v) The judge went on to make a finding that to satisfy the "partner "provisions the appellant would need to show that he and the sponsor (his current partner) were in a relationship akin to marriage since January 2013 but that whilst he had suggested they lived together since February 2013, that could not apply because the appellant's case was that the sponsor's former EEA spouse, to whom the sponsor was legally married to the time was living at the same property. The judge went on to state at paragraph 38, that even if the appellant had begun to live together in February 2013, the sponsor was still at that time living with her former

EEA spouse from whom she had not separated and that in a letter to the respondent dated 19 January 2015, the sponsor stated that the appellant had moved on with his life. As the appellant had married the EEA national in July 2014, he could therefore not have been in a relationship akin to a marriage with the sponsor since January 2013.

(vi) It is clear from those findings that they relate to his past conduct and that the judge did not accept that they had been living together in a relationship akin to marriage from the date the appellant stated namely February 2013. That was a finding open to the judge to make, however no findings are made as to whether the appellant was now in a genuine and subsisting relationship with his asserted partner (sponsor) or the children of that relationship.

(vii) At [45] when considering the issue of sole responsibility, the judge stated, "the appellant and the sponsor claim to be in a subsisting relationship and a further claim to be living in one family unit with the children in this appeal." Further on at [48] the judge stated "I find that the appellant does not have sole responsibility of either of the children in this appeal. That is because the sponsor is their biological mother and the appellant's evidence is that he is in a relationship with her."

(viii) The next relevant finding is at paragraphs 84 and 85 under the heading "the appellant and his children." The judge stated as follows: -

> "84. Having had the benefit of hearing the appellant gave oral evidence, and from considering the chronology of relationships in this appeal, I find that the appellant has shown himself to be a person who is willing to utilise all avenues possible in order to remain in the United Kingdom. I find that despite the fact that G had already been born when the enforcement visit took place in January 2015, the appellant made absolutely no attempt to refer to her and only raised his relationship with the sponsor and his children when he could no longer make an application for a residence card as his EEA spouse left the United Kingdom in November 2014. G was born in 2013. The appellant has not provided a credible explanation as to why he failed to mention her. I find that if the appellant had an intention to play an active role in his children's lives, he would not have waited until all other avenues were exhausted before making an application on the basis of Article 8.
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> 85. I find that the appellant has shown himself to be a person who is willing to utilise the immigration laws to suit his needs. I find that the respondent was right to raise the suitability grounds in this appeal. The appellant's evidence about the chronological history of his relationship has been inconsistent and I find that such inconsistencies have arisen as a direct result of the appellant's attempts to bring his circumstances into the provision of the rules. I find that whilst Kaur (children's best interests/public interest interface) [2017] UKUT 0014 (IAC) held that in the proportionality balancing exercise, the best interests of the child must be assessed in isolation from other factors, such as parental misconduct and

> was the best interests of the children are ordinarily to be with both of their parents, the best interests of the child are however capable of being outweighed by other public interest factors. I find there are public interest factors that apply in this appeal."

(ix) It is plain from paragraph 84 that the judge is referring to conduct in 2015 when during the enforcement visit he failed to mention that he had a daughter and that "if the appellant had an intention to play an active role in his children's lives, he would not have waited until all other avenues are exhausted before making an application on the basis of Article 8." However, whilst that was a finding plainly open to the judge on the evidence that was before her, it refers to conduct in 2015 and that he may or may not have been playing an active role then. Therefore, the finding is based on past conduct alone and does not take account of the appellant's present circumstances in which he asserted that he had a subsisting relationship with both children. Furthermore, it did not take into account that the appellant then went on to have another child with the sponsor (his current partner) in 2016.

(x) At paragraphs 87 – 100 in the section entitled "the appellant and the sponsor", there is no reference to whether the judge accepted there was a genuine subsisting relationship between the appellant and the sponsor and if so, the nature of it and its strength given the adverse credibility findings made about how the relationship had been established at an earlier stage. The judge appeared to accept that they were living together despite the observation at [45] that they "claim to be in a subsisting relationship". However, nothing further is said about the nature and strength of that relationship.

(xi) It was entirely open to the judge to question their earlier relationship given the chronology of the appellant's relationship with his partner at the same time as his asserted relationship with an EEA national to whom he is still married and his partner being in a marriage also with an EEA national at the same time. However, no clear findings are made as to the nature of the relationship thereafter and as at the date of the hearing.

(xii) I am also satisfied that there were no clear findings as to whether there were genuine subsisting relationships with the two children. There were no findings at all in this regard. At paragraphs 82 – 86, under the heading "the appellant and the children", the judge properly directed herself to the Supreme Court's decision in Zoumbas and the assessment of the best interests of children and that the starting point was that the best interests of children (in the general sense) were to be with both parents. The judge also observed that the assessment of the best interests must focus on the children concerned. The judge then set out her findings at paragraphs 84 and 85, which I have set out earlier. The judge made no assessment of the best interests of these particular children, in the light of their ages and their present relationship with their father and had only done so in the context of the past conduct. It was therefore not clear whether it was accepted that there was a subsisting relationship with the children and if so, the nature of it. There may well have been public interest factors or "countervailing factors" as described by Counsel Mr Plowright, but it was necessary to make clear findings as to the nature of the relationship

between the family members and expressly the appellant and the children. Whilst he could not satisfy Appendix FM and therefore EX1 did not apply, when carrying out the proportionality balance thereafter and including the section 117B public interest considerations, section 117B (6) still required determination.

(xiii) At best the judge properly directed herself to the nationality of the children as British citizens and the importance of that in the light of the decision in Zoumbas at [86] and applying the principles in the case of Zambrano accepted that the sponsor was settled in the UK and that there was no suggestion that the children should leave with the appellant and that the sponsor had been the primary carer. However, there is no reference in that paragraph to the second limb of section 117B (6) and any assessment of reasonableness.

(xiv) The only reference to section 117B (6) is at [103] where the judge stated that she accepted the children were "qualifying children" and the sponsor was a "qualifying partner" but stated "I have however found that there are countervailing factors that justify the appellant's removal from the United Kingdom. I have further found that there are no compelling reasons why leave should be granted outside of the provisions of the rules in relation to the appellant's relationship with the sponsor."

(xv) Nowhere in this paragraph does the judge make any analysis of the issue of reasonableness and whether it was reasonable to expect the children to leave in the particular factual context that was advanced on behalf of the appellant.

(xvi) Furthermore, while the judge cited the principle that the parents conduct should not be taken into account when making assessment of the best interests, the judge did take into account the conduct of the appellant in the context of removal (or if the judge meant to consider reasonableness) in that context.

(xvii) In MA (Pakistan) and Others [2016] EWCA Civ 705 the Court separated two issues: the best interests of the children and whether it is reasonable to expect them to leave the UK. When considering the best interests of the children, the conduct of the parents is irrelevant. However, when considering the issue of reasonableness, wider public interest factors may be weighed in the balance, including the conduct and immigration status of the parent.

(xviii) In this case the judge did not make findings upon the children's best interests as a separate matter before going on to consider reasonableness.

(xix) Subsequently, in KO (Nigeria) & Ors v SSHD [2018] UKSC 53 it was held that "reasonableness" does not require a balancing exercise in which the best interests of the child may be outweighed by the public interest in deportation, made all the weightier by the bad behaviour of the parent. Furthermore, section 117B (6) is a standalone provision in which the focus is purely the effect upon the child, who, as indicated, should not be blamed for the conduct of its parent.

(xx) However, reasonableness must be assessed in context. Lord Carnworth puts it this way at [18]:

> "[I]t seems to me inevitably relevant in both contexts [para 276ADE(1)(iv) and s117B(6) which both posit a situation where 'it would not be reasonable' to expect a child to leave the UK] to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain."

(xxi) Thus, the extent of the misconduct does not come directly onto the balance, but it is equally clear that the father's conduct is "indirectly material," because he is expected to be leaving; it is normally reasonable for children to be with their parents; and the assessment is to be made "in the real world in which the children find themselves" [18,19]. Whilst the judge did not have the benefit of KO, there is nonetheless a material error in her approach. The "real world" analysis would be on the basis that that the appellant's partner has settled status and there was no consideration of the best interests of the children or the assessment of reasonableness in that context.

(xxii) There had been no reference made to the guidance. Since the decision of the FtTJ, newer guidance has been published which seeks to reflect the decision of the Supreme Court in KO (Nigeria). That guidance was published on 19 December 2018. On the question of reasonableness of return for a qualifying child there is no longer a reference to the need for "strong reasons" being required before leave is refused. The President has also recently reported a decision of direct relevance in JG (s 117B (6): "reasonable to leave" UK (Rev 1)) [2019] UKUT 92.

(xxiii) For those reasons I am satisfied that the judge made an error on a point of law in relation to ground 2.

(xxiv) Permission was not granted in respect of ground 1, although as I have set out above Mr Plowright sought to rely upon it when making his submissions in relation to section 117B (6).

(xxv) For the avoidance of doubt, I have considered the submissions made in respect of ground one and as set out in the papers and the oral submissions that I have referred to. In my judgment, the judge made clear findings in relation to his previous conduct in his relationships with both women.

(xxvi) It was entirely open for the judge to make the adverse credibility findings that she made having heard the evidence of both the appellant and his present partner. By way of example, at [35] it was open to the judge to reach the conclusion that the appellant's evidence was inconsistent as to when he embarked upon a romantic relationship with the EEA national. It was the appellant's case that he met her in 2011, however in contrast, in his oral evidence he stated that his relationship with the EEA national

began in 2011 and in 2014. The judge recorded his evidence that he had met the sponsor through a friend in January 2012. It was wholly open to the judge to find that the appellant's evidence that the sponsor subsequently embarked upon an affair in 2012 suggested that any relationship with EEA national started in 2011 as he could not have been having an affair in 2012 if he had not been in a relationship with the EEA national until 2014 as he said in his oral evidence.

(xxvii) The judge's finding as to events in 2015 were also open to the judge to make and were amply supported by the evidence. It is common ground that he was encountered by the immigration authorities in January 2015 and it was not disputed that he had not attempted to make an application for an EEA residence card at the time of the visit by the immigration authorities. The judge set out that it was the appellant's case that he and the EEA national had been having problems and that she had was not present during the visit because she travelled to Belgium. The appellant suggested that he had been intending to make an application for residence card. The judge also observed at paragraph 36 that the appellant suggested that the sponsor was living at the address where the enforcement visit took place. It was open to the judge to find that that evidence of the appellant was not consistent with his claim that he was intending to make an application for a residence card based on his relationship with EEA national nor was it consistent with his claim that he had a subsisting relationship with EEA national at that time.

(xxviii) It was further open to the judge to make the finding that despite claiming that his partner was living with him at the time of the enforcement visit, that he failed to make any reference to the sponsor or his child G. There was no explanation provided to the judge about that failure to refer to the sponsor.

(xxix) The factual chronology demonstrates that he married the EEA national in July 2014 and therefore could not have been in a relationship akin to marriage with the sponsor since February 2013 as claimed. Furthermore, the evidence was before the judge was that contrary to the appellant's assertion that they had lived together since February 2013, the sponsor was living with her former EEA spouse from whom she had not separated.

(xxx) I am therefore satisfied that the findings of fact that were made as to past conduct were open to the judge to make on the evidence that was before him. However, the question remains whether those findings of fact were sufficient to establish whether this was a "marriage of convenience". Whilst this was not an EEA appeal, it was necessary to consider this in the context of whether the conduct allegations were made out.

(xxxi) The grounds at paragraph 31 make reference to the failure to take account that the appellant's partner succeeded in her appeal. Despite making reference to this in the grounds, no copy of the decision made by the Judge in the EEA appeal heard on the same date was provided to this Tribunal. Therefore, it will be necessary for that evidence to be considered when reaching an overall conclusion on the conduct issue.

(xxxii) I have therefore reached the conclusion that the decision should be set aside but that the adverse findings of fact set out above (paragraphs 35-40) should be preserved. There also has been no challenge made against the findings made in respect of Paragraph 276ADE and they shall also be preserved."

14. The appeal was therefore listed in accordance with the directions served on the parties which made reference to any further evidence being filed in order to re-make the decision.

The re-making of the decision:

The evidence:

15. At the hearing on the 20th May, the appellant was represented by different Counsel as was the respondent. For the purposes of the hearing, the appellant relied on the bundle of documentation before the FtT and a new bundle.

16. I have now been provided with a copy of the other decision made by FtTJ Manyarara which relates to the appeal of E under the EEA Regulations. Whilst the appeals heard by the same judge on the same day, E was represented by different Counsel although the presenting officer remained the same. It appears from that decision that no oral evidence was given and that both advocates submitted that the appeal could proceed on submissions only (paragraphs 13 – 14). At paragraph 25 the judge records the only live issue in the appeal is whether the appellant can establish a right to retain right of residence under the regulations following the breakdown of her marriage to an EEA national. The paragraph also makes plain that the respondent had not taken any issue as to whether the appellant's marriage to her former EEA spouse was a genuine one (see paragraph 25). The judge concluded that the appellant had established a right to permanent residence on the evidence before the Tribunal.

Evidence of the appellant:

17. I heard oral evidence from the appellant. He adopted his original statement as his evidence in chief. There was no updated statement from the appellant despite the direction being made.

18. He was asked about his relationship with his two children and he stated that he had a fatherly relationship with both children and that they did things together. He gave examples of things that they would do together as a family.

19. As to his background, he stated that he was from Edo State in Nigeria and his wife was from Akew-Ibo State which was a full day's journey away by bus. He stated that there was a difference between the two states: different cultures, don't eat the same food and language is "a hundred percent different". When asked what language he spoke, he said "English".

20. He was asked what connections the children had with Nigeria and he stated, "no connections really". He stated that his wife had her mother and father in Nigeria, but both were old. He said the children had not spoken to them as they don't speak English, he said that he had his mother also in Nigeria.

21. He was asked whether the children would cope with relocation to Nigeria, he stated that they would not cope with the environment and the food. He made reference to the eldest child having an allergy to dust and that she been in hospital and given a pump for her nose. He said that she was in hospital for two days.

22. When asked what the issues would be for the children, he said that relocation would really affect them in many ways as they are comfortable United Kingdom. They have lived in the United Kingdom and have friends and established their lives. They would find it very difficult to follow the language.

23. In cross-examination, he was asked about his daughter G when she went to the hospital. The appellant said that it took place in 2016 and he agreed that it was not a recent condition but that it occurs all the time.

24. When asked if either child had any recent health problems, he stated that both had been to see the GP and that he had submitted some evidence to the Home Office. He described G as having "blood in her eye" and she was prescribed antibiotics in 2016/7. He said she was also rushed to hospital as it was thought that she had drunk something. He said that the youngest child GP had no health problems.

25. He gave evidence of his contact with the school. "They called me and asked me to talk to G she had had a fight at school with a boy. This took place in 2018. Another occasion was in October/November 2018 when the school spoke to him and wanted to know if their mother was living alone in the home and leaving the children. G said she had told a friend that when a mother was at work the children had stated that he was not in the home.

26. He was referred to E's letter and it was that said that the letter did not give details of any day-to-day activities that he undertook with the children. The appellant stated that "parents take care of children and I'm doing 90% of the work at home. I clean the home; I did everything for the children and make sure that their happy".

27. He was referred to page 7 of the bundle (his sisters' statement) which again gave no details of the relationship. He stated "my sister brought me to this country I did my master's degree and I lived with her. She has been here for me and the children call her "big mummy". She is very close to them".

28. He was asked about the circumstances in Nigeria for the children. He confirmed that English was spoken in Nigeria and that education was an English but that in the markets they did not speak English and the local language was spoken. He stated that the children and his partner had a "very close relationship" with his mother and that his mother understood English. He confirmed that the children had never been to Nigeria. When asked if his wife had ever wanted to take them there bearing in mind that she had status in the UK, the appellant stated that she had gone to Italy but could not go to Nigeria with the children because one of the children had an allergy. He was asked why he had provided no evidence as to circumstances in Nigeria (in respect of the different languages between the district that he lived in and his wife). He stated that he was not asked to do this.

29. He was asked about his witness statement (paragraph 9) and it was suggested to him that it portrays him as a tenant in the house with E and her former husband L. The appellant stated that he was not a tenant and that he was living with his sister. He stated his evidence that E was finding it difficult to rent and said as he was working that they should look for a house together and therefore they rented a house.

30. It was put to him that E and a husband L were already living at 14 CC? He stated that they were living in another area together in 2012 and wanted a bigger house and as he was working as an area manager it would be easier for him to get a home. There was a tenancy agreement in his name.

31. Again it was put to him that paragraph 9 of his witness statement said that in February 2013 when he was struggling to find somewhere to stay E and her former partner allowed him to live with them at their flat at 14 CC and that he moved in in February 2013 and have been residing there ever since and that E and her partner ended their relationship in 2014.

32. It was put to him that paragraph 9 made reference to him moving in on 27 February 2013 and that it was common ground that the child was born in May 2013 that the account later he had given did not add up. He stated that he was looking for a home and was living with his sister, E was looking for a place to live and he said to her "why don't we look for a place to live together".

33. It was suggested to him that he had married the EEA national in 2014 and he was asked if he had married her for the purpose of obtaining residence in the UK. He denied that, he said that he knew G was his child but didn't remember the date.

34. It became clear that there were some difficulties in the evidence and the appellant had not provided an up-to-date witness statement. Over the lunchtime adjournment Counsel took a witness statement from the appellant to ensure that there was no misunderstanding of his evidence.

35. In that witness statement he said that he had met his wife E in 2012 through a friend, that they became friends who met socially. He was in a relationship within EEA national K and intended to marry.

36. His child G was a result of the visit to a party in 2012 having been to a club. His partner was out of the country and so he invited E out and they ended up having a "one-night stand".

37. He said that he was not aware that G was his daughter until she was born in May 2013 and was not present when the birth was registered. He said that K was living with him in an address at CC at the time and she overheard E arguing with her husband L who accused her of having an affair with him. K was very angry, and he explained what had happened and begged her to forgive him. She agreed to continue the relationship and to marry him. The situation changed we he lost his job because his visa expired. K said he should go find himself a place when he sorted things out, he should call her back because she was not comfortable in the house. He said he couldn't pay his share of the rent, so he had to rent out his room and he slept on the sofa. K left the house in November 2014.

38. As to E's former partner, he left the house in 2013 after the quarrel he said he was taking care of G and living in the same flat whilst E went to work but his relationship with the did not start until he was detained in 2015 and their second child was planned so that G would have a younger sibling.

39. He was cross-examined by Miss Isherwood. He was asked to explain why he had stated that he was not aware that G was his daughter and referred to living with E at CC, when the birth certificate (page 63) gave a different address? He stated that E had moved to CC in February 2013 but most of her correspondence had not changed. The address in the birth certificate is the address that she was living then but she had left that address in 2013.

40. He was asked to consider his previous statement (page 4) when he said that he heard met E in January 2012 and moved into CC in February 2013 but that in fact E was already living there in January 2012(see paragraph 9 of witness statement). The appellant stated that that was not correct and that when he went to visit her, he lived at an address in D xxx Street and she lived in Cxx. When she was pregnant, she was looking for a house. She was living in C xx in 2012 and most of the bills were in the bundle she had not changed her address. The reason why the birth certificate is different is because that was her address before CC, and she was attending the hospital before giving birth and needed to prove her address at the hospital.

41. He was referred to paragraph 6 of his witness statement in which he stated that after K found out about the affair they decided to have a break in the belief that

they would soon reconcile and get back together and that he later found out that she'd gone to Belgium. It was suggested to him that after she found out about the affair that they had then broken up. He denied that and stated that they were going to reconcile. However, it was suggested to that it did not say that they had reconciled. Again, he denied this, stating that he had told K that it was "one-night stand" and that she was very angry, but K was still around.

42. It was put to him that if that was the truth why didn't he say in witness statement that they had reconciled? He stated "it was not immediate; my daughter was born in May 2013 and K left in November 2014. The incident happened in May 2013 for the period from May 2013 until November 2014 we were together. She did forgive me for having a child.

43. He was asked why she would leave him one month after the marriage? He stated "because I did not have a job and my leave to remain had expired.

44. It was put to him that from the evidence he had given, he had got married in September 2014 and that she left in November 2014, but he did not make an application when they were married. He reiterated that he did make an application through the solicitors.

45. It was suggested to that he had never provided evidence that he and K ever lived together at CC. In reply he stated the address in the bank statements in her name have that address on and it was sent to the Home Office.

46. It was put to him that he had said that he had provided evidence that K was living at CC but although he lost contact the correspondence went to the address at CC/he stated that he was sending her money even though she had left in November 2014. He said that he still received post from K.

47. In re-examination he was asked to what extent his sister paid his lawyers fees? He said that it was only occasionally.

<u>Evidence of the appellant's partner:</u>

48. We resumed evidence on 25 June 2019. I heard evidence from the appellant's partner E. She adopted as her evidence a letter dated 2 May 2019 (see bundle provided for the hearing on 20th of May 2019). In that letter the following was stated:

> "SA has been very helpful in the up keeping of our children, he is always there for us. He helps G1 when she has homework to do, also teaches that when she's back from school. We go out together with the kids when I'm not working. S is a responsible father, that cares for us kindly and morally, he is well respected amongst his friends and a dedicated Christian. G and G feel very comfortable with their daddy S, they go to

the park, town centre, church, library, take them to the GP sometime and also take them to X to spend the weekend in his elder sister's house. In a nutshell, he is a lovely father."

49. In addition, she relied upon a further witness statement that had been filed on 13 June 2019. In respect of that witness statement there was one alteration at paragraph 11 which she stated should read "S was living with me during this time and he was taking care of our daughter G whilst I went to work by relationship with S did not start until he was released from detention in March 2015."

50. In that witness statement, she gave details as to how the parties had meet and then later embarked on a relationship.

51. She stated that her partner E discovered she had had an affair with S and one day they were arguing and K overheard the conversation with a and that G was S's child as a result the relationship ended in September 2014 between her and he and the divorce was finalised in April 2015. K after listening to the conversation had problems with S but they continued their relationship and married one another. They got married by proxy Nigeria on 17 September 2014. She stated that "sometime after their marriage" S and K began to have a relationship problem again and they decided to have a break in the belief that they would soon reconcile and get back together. S found out that K had gone to Belgium and would not come back anymore because of the child between us. S lost a job and was struggling financially. She stated her relationship with S did not start until he was released from detention in March 2015. She stated that they have been together since then and their second child was born in February 2016.

52. She stated that she is in as genuine and subsisting relationship with S and the children. She described the family as being "very happy together and enjoy spending quality time together as a family". At paragraph 14, she described sharing joint parental responsibility with S for their two daughters.

53. She stated that she could not raise the children on her own at they both need their parents. Both daughters are British and have a right to remain.

54. She stated that it would be unreasonable to expect them to leave the UK as they had established a private family life and were settled as a family unit. If he was asked to leave the country this would cause a hardship in the family and the children could not stay without their father present in their life as their very attached to him and spent more time with him than they do with her.

55. As to his ties in Nigeria, it was said that he had no remaining ties, no family, no friends, no assets no property or prospects. He will be alone without his family and children and will be destitute if retuned. She stated that she could not

follow her partner to Nigeria. She had been in the UK for many years and had a well-established private and family life with children. She had a career and her networks in the UK. All her friends and family members in the UK and she could not leave it would be "unfair".

56. Both children were attending school in the UK and are actively involved in extracurricular activities and it would be unjust to separate them from the educational and social ties they had developed in the UK. They are progressing well at school it would be in their best interest to continue to stay in the UK. Any disruption would have significant consequences on them emotionally and physically and would affect their futures. She stated that neither child been absent from the UK nor had not lived in Nigeria. The children had made very close friends and that her partner had been in the UK for eight years and has both family and friends in the UK with him shows a "strong bond". He has adopted British culture and considers the UK as his home.

57. Paragraph 27 she described S as an essential part of her in a children's lives and that they required his support and that if removed family would be broken and it would have a "significant impact" on her and the children. He played an important role in the lives of many people who would be adversely affected.

58. In evidence in chief she stated that S came from Edo State and that she was born in a different state and that both had different cultures; they didn't understand each other languages were different. She said they spoke English at home. When asked to provide examples as to why the culture was different, she made reference to eating different food and "our culture is so different."

59. In cross-examination she was asked about family members in Nigeria, she said that her mother lived there. When asked if she had any relatives, she said that she had a sister who was married, and a younger brother living in Nigeria. In the UK she said she had a great aunt. She stated that she did not often see her because she worked 12-hour shifts in the last time she saw her was in December 2018 when they spoke of Christmas.

60. She stated that S did have relatives in Nigeria, he has a sister and also his mother. She said that his mother came on a visit had been here for a year since early December and would be returning back to Nigeria. She has visited previously to years ago. She speaks Edo. When asked how she communicated with children, she said she does not understand English and so it is translated. She said the children had no connections in Nigeria and they did not speak to her mother.

61. As to contact with family in the UK, she stated that the children do not go out and is only seen the family once a Christmas.

62. She was asked about the effect on G when her father was detained in 2015. She stated that G was not very happy and that the school had called her to say that she had not been mixing or playing with her friends. When asked why she changed a mind about telling the school that he was in detention, she said "I said this was going on and told them he was detained." When asked to describe any other effects on G, she said that G was not eating and that the school called in and asked what had been happening at home she said she would be moody and not happy.

63. She said that the children spend more time with S than with her because she worked. She said he did a good job with G and that G was doing very well and she is independent. She thought that was due to her father's help.

64. She confirmed that the children ever been to Nigeria and that they had spent all their life there. She said that she could not take them to Nigeria because a mother was old.
65. As to any health conditions, she made reference to G having a problem with dust which meant that she had to hoover the house every day.

66. She said that she would not be able to cope if S left the UK as she had to work and that children stayed with S during the day.

67. She was asked about her relationship with S and when it started and that she had previously said that it started in 2013 stop she stated "English is not my first language it is not the way I wrote it. It was not what I said I went to correct it (referring to her witness statement). It was put to her that she had adopted that witness statement before the FtTJ and why had she not corrected it at that stage? She said that she had told her lawyer that she was not in a relationship in 2013 and said that it was "friendship", but the solicitor had "put another thing." She confirmed that they had had the same representatives. She said she was aware of the error when they attended court in May 2019. It was put to her that she had made a witness statement for the appeal and that she'd signed it and that she had now changed evidence because she knew that S had given different evidence. She denied that stating that it was not really a change, that they were in a friendship but not a relationship.

68. She confirmed that her daughter had no current health needs and that the problem with dust happened to years ago. She confirmed that she was not receiving any treatment.

69. It was put to her that in her witness statement she had said that S had no family, no friends and no assets in Nigeria whereas his mother lived in Nigeria. The witness stated, "she had come to visit the UK" and that she came here often. She stated that he had no other close relatives.

70. The witnesses cross-examined about the living arrangements when they first met. She said that she was married to E and was not working, and she was introduced to S through a friend called I. In 2012 she was living in a flat with E. She said that she lived there with visited him in this flat was in Cam. She said that she had S lived in the same flat in CC in February 2013. She said that she did not have any references and I called S to tell him and so he said, "let's join together and take a flat". She said S joined with me to take out the tenancy. When asked if anyone else was there, she said "only me and him. When S moved in, he came with K."

71. As to her relationship with a, she said it broke down in 2014 (September) and a divorce petition was issued in October 2014 she said it broke down because he was having an affair and that when she gave birth to her daughter he found out that she was not his child.

72. He was asked to explain what had happened between May 2013 (went G born) in September 2014 (when she separated from E)? She stated that she was with L and he would leave her for two weeks.

73. When asked when K had left, she said this took place after she had heard her and the quarrelling about G not being his daughter. She left after two months she could not remember when.

74. She was asked to explain why the tenancy agreement dated the 27 February 2013 (page 73) was in her name and that of S when they were not living together? She stated that when they checked her references, they were not good enough and that S provided references which were combined. She was asked why the other two people in the property were not named on the tenancy. She stated that she had just started work and that she had not got enough money. When asked about K, she said she didn't know anything about her. When asked if she knew that K was moving in, she said that she only knew S and not K.

75. She was asked to demonstrate if there were any documents showing E 's name or K's name in the large bundle of documents? She stated "no, only my name and S's name".

76. She confirmed in evidence that S still received post from K and two months ago K and she put on it "return to sender". She said that he still had contact with K.

77. She was asked why she thought S did not say anything about his daughter when he was arrested in 2015? She said "I did tell him that he was the father when they arrested him. When we went to visit S, I told him the truth and that was in late March 2015 that was the first time that he knew he was G's father". It was put to her but according to his witness statement para 3 (handwritten; dated 20/5/19) that S had said he was not aware that G was his daughter until

she was born in May 2013 and that this was inconsistent with her account that she had first told him that he was her father when she went to visit him in custody. It was put to her that her evidence was inconsistent as to when he knew he was G's father- his evidence was that it was in May 2013 whilst her evidence was that it was in March 2015. She stated that it was in 2015 when she had told S. When asked when she changed the birth certificate to show that S was the father, she said that was in 2014.

78. When asked when K became aware that he was the father of G, she said it was when K had heard the argument between her and her husband E.

The submissions:

79. At the conclusion of the evidence I heard submissions from each of the advocates. Ms Isherwood on behalf of the respondent made the following submissions:

(1) In her submissions she acknowledged that the question that the Tribunal had to consider was the genuineness of his relationship with the children and his partner and the public interest considerations an S117B (6). However, she submitted that it was not possible to ignore the fact that the applicant would do anything to remain in the UK and that neither the appellant nor his partner had been clear or consistent in their evidence as to their respective relationships with their EEA national spouses.

(2) She submitted that the appellant's evidence was evasive concerning his relationship with K and when it broke down and the evidence given at the hearing was inconsistent concerning their relationship. In the witness statement of E (dated 16/1/18 at page 9) she had stated that he had moved to her address as a friend, their relationship grew, and they were in love. They had been continuously residing together since February 2013."

(3) Similarly, as to the relationship, the appellant's statement was that he was aware of his daughter at the point when she was born but the evidence of his wife was that she had only told him that he was the father of G when he was in detention in 2015. That is also inconsistent with the birth certificate which was changed in 2014. She submitted none of the dates had been consistent.

(4) Other evidence was not credible. It was said that he still received letters from K but there was no evidence in the way of official documents relating to K and S ever living together. It was acknowledged that the appellant was still asserting to UKBA that he was in a relationship with K in January 2015 when he was detained. However, that relationship had never been satisfactorily explained and that K and S were married in September 2014, but K left in November 2014.

(5) Therefore, it is reasonable to reach the conclusion that the relationship with K was not genuine and that this reflects on the relationship with his current partner. Ms Isherwood referred to a letter from the appellant's sister (page 314 dated 24.4.2016) which referred to S living with her at before going to rent an apartment with E at CC. She submitted that there was no reference to K in that letter even when he was relying on that relationship in 2015.

(6) She submitted that the issue that the Tribunal would have to resolve was whether he was in a genuine relationship with his wife. She submitted there were a number of letters to the address addressed to both E and the appellant from approximately 2014 but their evidence had been inconsistent as to their relationship. She further submitted that when considering the genuineness of their relationship now, there was still an unclear picture with no details of the actual relationship. His partner made reference to them staying together and going to work but no real details of their activities. The letters from friends did not paint any particular picture.

(7) As to the issue of reasonableness, the witness statement of his partner stated that the appellant had no family in Nigeria which was plainly incorrect as his mother lived in Nigeria and was only in the UK on a visit. She had been evasive in her evidence.

(8) There was no up to date medical evidence relating to the children and the only evidence referred to an example in 2016.

(9) A's partner is settled in the UK and both children are British citizens. However, there is a lack of evidence concerning the relationship between the appellant and the two children and there was a lack of detail in the witness statements provided. Ms Isherwood therefore submitted that there was no genuine subsisting relationship with children.

(10) In the alternative, she submitted that it would be reasonable for the children to live in Nigeria. The starting point in the decision in KO (Nigeria) was the "real world context" and that the conduct of the appellant is indirectly material to this issue. The children do not have to leave, they can remain with their mother. In respect of the decision of JG, the appellant in that case was an overstayer but here the appellant is more than overstayer.

80. Miss Sharma made the following submissions:

(1) She acknowledged that the appellant could not meet the Rules and that the claim was based on Article 8 outside of the rules based on the genuine subsisting relationship between the appellant and his two children.

(2) She acknowledged that there had been some difficulties in the evidence as outlined by Ms Isherwood but that this may have been due to difficulties with problems of language. In particular, the witness statement which the appellant's partner had said was taken over the phone and that she had

not seen it. It could be that there had been an element of not understanding and that it was not a case of anyone being evasive. She submitted that a detailed witness statement been provided which corroborated their account that they had met, became intimate and that the relationships of their respective parties had broken down and that they began to live together. This was further corroborated by a letter from K (undated) which stated that he had been in a genuine relationship with her and that they decided to get married in September 2014 when she found out that he'd had an affair, they decided to have a break but that they were still communicating with each other.

(3) Miss Sharma submitted that irrespective of any past events, a long time had elapsed, and the appellant and his partner E lived together as a family unit with the two children. There were letters of support from a number of places including the church and the children's schools which demonstrated that there was an ongoing interest in both children and was supportive of the fact that this was a genuine and subsisting parental relationship.

(4) She submitted that it would not be reasonable to expect the children to live in Nigeria with their parents. Both adults were from different areas of Nigeria and spoke different languages as demonstrated by the English which was used in the home.

(5) It would also not be reasonable to separate the children from their father. The temporary effects upon the child G was set out in evidence and that the school were concerned about behaviour and described as being withdrawn and G's mother was called into school twice. Given that there had been an effect upon G when the parties were separated for a short period, there was a greater likelihood of stronger harm if permanently separated.

(6) The evidence demonstrated that they lived together as a family since 2015 and as the appellant was unable to work, he has looked after the children.

(7) The appellant has had no status in the UK since June 2014 and has overstayed since that time but it is clear from the photographs that he is in an ongoing genuine and subsisting relationship with both his partner and children and both have given evidence as to why would not be reasonable the children to return to Nigeria as a family unit. They are from different regions and speak different languages. There are no family members that they communicate with, neither child has lived in Nigeria and both are British citizens and their nationality is of importance to the decision.

(8) When looking at the best interests of the children there was ample evidence to show that the relationship had been genuine and subsisting since 2015. In those circumstances S116B (6) applied and the appeal should be allowed.

81. At the conclusion of the hearing I reserved my decision.

Findings of fact and analysis of the evidence:

82. The starting point of my consideration of the findings of fact made by the FtTJ. For the reasons set out in my earlier decision, the findings of the fact made were not infected by any error therefore were preserved.

83. The judge found that the appellant had been inconsistent about when his relationships began with each of the women involved (see paragraph 35 of the FtTJ). In respect of his relationship with K, the EEA national, he gave two dates as to when the relationship began-2011 and 2014. The judge found that his evidence that he had embarked on an affair in 2012 suggested that the relationship with K, the EEA national must have started in 2011 on the basis that he could not have had an affair if his relationship with the EEA national had not begun until 2014.

84. The FtTJ found that the sponsor E had given birth to a child in 2013 prior to his subsequent marriage to K, the EEA national in 2014. As to the circumstances in which the appellant was encountered by the immigration authorities in January 2015, the judge found that the EEA national K was not present as she had travelled to Belgium. The judge rejected his evidence that he had been intending to apply for a residence card based on his relationship with K. The appellant's evidence before the FtTJ and that of his partner E was that they had been living together at the same address and in a relationship. The FtTJ found that that did not sit well with his claim that he was still intending to make an application for a residence card (see paragraph 36 of the FtTJ decision).

85. As his relationship with his partner E, the judge found that he had claimed that they had been living together since February 2013 which was the basis of his application for leave as a partner. However, despite that claim, at the enforcement visit in January 2015, the appellant failed to make any reference to his relationship with E or his child G. The judge found at [37] that the appellant had not provided any explanation for his failure to refer to E or his child. The judge found that his evidence was also inconsistent with the letter he provided to the respondent dated 19 January 2015 that the appellant had moved on with his life but still saw his daughter (see paragraph 38 of the FtTJ decision and the decision letter).

86. As the appellant married the EEA national K by proxy on 17 September 2014, the judge found that he could not have been in a relationship akin to marriage with the sponsor since January 2013.

87. The judge therefore made an omnibus finding it [40] that "the appellant attempted to rely on to relationships in circumstances where the chronology suggests that neither the relationship could have been genuine and subsisting at the same time."

88. The judge went on to state that "whilst the requirements of the rules do not incorporate the need to examine whether a person's behaviour is morally reprehensible, in light of the admission of the extramarital affair by the appellant, I find that if the appellant is seeking to rely on one of his relationships (with the sponsor in this appeal close bags, this requires an extermination of the relationship at all material times. I find that the chronology in this appeal does not support a finding that the appellant and the sponsor had been in a relationship akin to marriage since January 2013…."

89. Whilst those findings of fact were preserved, both the appellant and her partner have given evidence seeking to undermine those findings of fact. Ms Sharma has not sought to address that evidence in her closing submissions. She acknowledged that their evidence had not been consistent and had been discrepant and whilst she did not address the specifics of that evidence, she submitted that it could be due to problems of language and an element of not understanding what they had been asked rather than being evasive as submitted by Ms Isherwood.

90. I have had the opportunity to hear both of the parties give their evidence and where they have given evidence concerning their past history, I am satisfied that their evidence is not consistent as to the important events in the history and chronology.

91. I give by way of example, the appellant's evidence that he was not aware of G's birth until she was born in May 2013 and that the relationship with E did not start until he was detained in 2015. The appellant's partner's evidence was entirely to the contrary. She stated in her oral evidence that she did not tell the appellant that he was the father of G until late March 2015 when she went to visit him in custody and that this was the first time that he knew. That evidence was given to explain why he had not mentioned G when he was arrested. That is wholly inconsistent with the appellants evidence. The inconsistency could not be accounted for in the way Miss Sharma suggested.

92. A further inconsistency in her account relates to when his relationship ended with K and the circumstances. She claimed in evidence that her relationship with E broke down because he found out that he was not father of G. She further stated that ensued between her and E which was overheard by K and that she had left the appellant due to this however, this is contrary to the account given that K left in July 2014 which is a number of months after the date the incident occurred.

93. As to the date when the relationship began with the appellant, E had previously set out in her witness statement that the relationship had begun in 2013. When this was put to her, she denied saying this, claiming that English was not a first language only "a friendship" but that the solicitor had "put

another thing." I do not find that that account is supported by the material before the tribunal. The FtTJ recorded at [20] that E adopted her witness statement dated 16 January 2018 and the contents of it as "true and accurate". There was no attempt made to change any of the contents of the witness statement on the basis that it was inaccurate in any way.

94. As to the appellant's relationship with EEA national K, the FtTJ found that there was no evidence that the parties had been in a relationship or to support them living together in a property before her departure from the UK. There was a typed letter from K, but the judge recorded that the envelope was not provided and that she did not attend the hearing. Nor was there any documentary evidence in their joint names in the tenancy agreement for the property which it was asserted that they lived, was in the joint names only of the appellant and E.

95. Despite the oral evidence from both the appellant and E that the appellant is still in touch with K and they are on good terms and that correspondence still arrived at the property addressed to K in her name, no further evidence has been provided in support of any cohabitation at that address.

96. Consequently, having considered the evidence and the findings of fact previously made by the FtTJ, it is not been demonstrated that they have been undermined in any material respect. It follows that I am not satisfied that the appellant or E have given a credible and consistent account as to the nature of their relationship and when it began.

97. Nor am I satisfied that the appellant has demonstrated that he was ever in a genuine relationship with K given the lack of credible evidence as to the relationship, as before the FtTJ and the failure to provide any further cogent evidence in support. Neither advocate has sought to address the issue as to whether this was a "marriage of convenience" by reference to the necessary legal test and it has not been pursued on this basis before the Upper Tribunal by the respondent. However, in the light of the findings made by the FtTJ as preserved and my assessment, it remains the position that he has not demonstrated by any credible evidence that the relationship, if genuine at the time it began, subsisted in any material way by way of cohabitation or otherwise.

98. I consider that it is more likely than not that the difficulties in the evidence are caused by the parties seeking to conceal the true nature of the relationship at a time when the appellant was asserting that he was in a relationship with K. This does not undermine the other findings made by Judge Mayanara in the decision made on the EEA application that relates to E, in which the judge noted that the respondent did not challenge the genuineness of the relationship between E and her EEA national partner, L.

99. Notwithstanding those findings, I am required to consider the evidence as to the appellants relationship with his partner and children who are now 6 and 3 years of age. The FtTJ, whilst forming a negative view of the appellant did not make any findings of fact as to the circumstances of the children or their relationship with the appellant nor the current relationship between the appellant and the sponsor.

100. Having considered the evidence in its totality I am satisfied that it demonstrates that the appellant and E are in a genuine and subsisting relationship. As Miss Isherwood acknowledged in her closing submissions, there are a large number of documents in the bundle which demonstrates that they have been living together at the same address for a number of years. Whilst that by itself may not be weighty evidence, the birth of their second child in 2016 supports the evidence of the appellant and E as to the continuing cohabitation and relationship. There is also independent evidence in the form of letters from the school where the children attend and the church that both parties present as a couple along with their children as a family unit.

101. I now turn to the evidence concerning the appellant's relationship with the two children. I have taken into account the evidence of the appellant. He was asked about his relationship with his two children and he stated that he had a fatherly relationship with both children and that they did things together. They called him "their hero". He said they do "everything together". When asked to give further detail, he said that when they are not at school and at home they go to the library or after school it is bad weather, and he teaches them; goes through books with them. He said he studied education for his 2nd degree. He said that his input and improved G's work that she was the "best in class". He said his input help them in school and that G is ahead of other children the class.

102. He described her bringing a card home every Friday and that he would go to the teachers at school and discuss children there. He thought that he had visited their previous school three times in the present one four times.

103. He was asked how much time he spent with the children and stated that when it home, they are all together. He stated that E worked as a security officer and that when she works on a Friday night he looks after the children and during school holidays.

104. When asked if the children had ever been apart from him, he said the only time was when the eldest child went to stay with his sister. This was last year, and it was the only time that he'd been apart from his children save for that when he was in detention between January and March 2015. He was asked to describe how G reacted to him being in detention. He stated "it was reported at school that she was not eating and feeling sick and when she was at school, she was saddened she was crying. She did not want to tell people that her father was in detention, but she did tell the teacher."

105. The evidence of E set out at paragraph 14 of her witness statement, describes them sharing joint parental responsibility for their two daughters and that they both made decisions regarding major and daily aspects of their life. She stated S had always been actively involved in their life by dropping them at school and picking them up after school. He attended meetings at school when needed and helped with homework. It was said that G was ahead of the class because of extra lessons of father was giving her home. At paragraph 15 she stated that they went to church together as a family each week sometimes S would go with both daughters when she was tired. He cares for the children and does domestic work at home. They go to the GP and hospital together when the children are not feeling well.

106. The evidence of the appellant and E provide a picture of a subsisting family unit. However given the general lack of credibility as to other parts of the evidence, I have considered whether there is any evidence that could be viewed as independent of the parties. In this respect, there are a number of letters from the children's schools, nursery, and friends which lends support and weight to that evidence. There is a letter from the nursery (April 2016) which evidences the parental relationship between the appellant and his children (and also supports the relationship with E). It confirms that both regularly bring and collect G from nursery, and this also refers to the time when she was a baby. It further confirms that the appellant plays a parental part in G's life (page 72). There are letters from the church (page 321) from 2016 confirming the family attend together and that G was baptised at church with the family. There are further up-to-date letters, from 2018 and 2019 confirming that both parents are involved in the upbringing of their children (pages 45 – 46).

107. At page 3 of the additional bundle there is a letter from G herself and refers to the activities that she hunter father undertake and family life she has with him.

108. Consequently, having considered the evidence in its totality, I am satisfied that there is a genuine subsisting relationship between the appellant and both children and that they live together as a functioning family unit.

109. By virtue of section 55 of the Borders, Citizenship and Immigration Act 2009, in making decisions on removal, the Secretary of State must have regard to the need to safeguard and promote the welfare of children who are in the UK.

110. The House of Lords, in ZH (Tanzania) v Home Secretary [2011]2 AC 166 , held that, in the application of article 8(2), the children's best interests should be treated as "a primary consideration", to give effect to article 3.1 of the UN Convention on the Rights of the Child. Nationality and the rights of citizenship are of particular importance in assessing the best interests of any child. Thus, the decision-maker must ask whether it is reasonable to expect the child to live in another country, and to be deprived of the opportunity to exercise the rights of a British citizen. However, even if it is found to be in the best interests of the

child to remain in the UK, that factor can be outweighed by the strength of "countervailing considerations" in favour of removal (per Lady Hale at [29] - [33]).

111. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, Lord Hodge, delivering the judgment of the Court, summarised the principles to be applied, at [10]:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

112. I have carried out an assessment of the best interests of the children based on the evidence and in accordance with Section 55 of the 2009 Act. There is no dispute that the best interest must be considered and assessed in isolation form other factors, such as parental misconduct (see Kaur (children's best interests/public interface) [2017] UKUT00014 (IAC).

113. In the light of my assessment that appellant has a genuine and subsisting relationship with the two children concerned, it would plainly be in the best interests of the children for their current stable environment, in which both parents are present playing their respective parts, to continue. I take their best interests into account as a primary consideration. It would not be in their best interests for the children to be parted from the appellant, either on a temporary basis or on a permanent basis given the nature of the relationship and the effect upon G when they were separated in 2015.

Discussion:

114. It is accepted on behalf of the applicant that he cannot meet the Rules for the reasons set out in the FtTJ decision. Miss Sharma conceded that he could not meet the requirements under Appendix FM and under Paragraph 276ADE. The relevant findings under Paragraph 276ADE are as follows:

    (1) The appellant is over 18 years of age and has not continuously resided in the United Kingdom for 20 years given his arrival in the UK in February 2011 as a student. Therefore, he cannot meet paragraph 276 ADE (1)(i)-(v).

    (2) As to whether there were very significant obstacles to his reintegration to Nigeria, the FtTJ found that there were no such obstacles for the reasons set out at paragraphs 65 – 66.

    (3) The judge found that the appellant had spent the majority of his life in Nigeria where he had family to whom he could return. It did not been suggested that he had lost any connection to his country of origin that would suggest significant obstacle to integration there. There was no evidence he was a stranger in his family and the judge did not accept that he did not keep in touch with his family after he came to the United Kingdom. He has children in Nigeria from his previous relationship. The judge found that the appellant was a healthy man and was not suffering from any medical condition that would be likely to impair his ability to independently meet the needs of day-to-day living. Even if he did not have any familial ties in Nigeria, the judge found that he would be capable of living independently. The judge found that he had linguistic, cultural and family attachments to Nigeria and that any loss of connection to Nigeria in the time that he had been in the United Kingdom would be quickly recovered.

115. Miss Sharma advances the appellant's case based on Article 8 outside of the rules. Applying the test set out in *Razgar* [2004] UKHL 54, I find that the appellant has formed a family life with her partner E and British children. His removal to Nigeria would be an interference with the family life they share, but would be in accordance with the law, given that the appellant is an overstayer since his leave ended in July 2014. The issue is whether his removal would be proportionate.

116. As to the consideration of proportionality, I am required to address the public interest considerations set out at section 117B of the NIAA 2002.

Sections 117A - D NIAA 2002.

117. Sections 117A-D NIAA 2002 have set out public interest considerations which a court or tribunal must take into account in an appeal based upon article 8:

    "**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard-

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to-”

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part

(1) In this Part-

"*Article 8*" means Article 8 of the European Convention on Human Rights;

"*qualifying child*" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"*qualifying partner*" means a partner who-"

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

118. By reference to those factors, the appellant does speak English (s117B (2)) and has in the past been able to financially support himself by his employment as evidenced by the salary slips, he provided. I am satisfied that on the basis of his work history provided he would be financially independent if he remained in the UK.

119. As to when he formed his relationship with his partner, I have found that neither the appellant nor his partner have given consistent evidence as to when that relationship started but on the chronology provided it would have been at a time when his leave was precarious (as a student) or unlawful when was an overstayer: s117B (4) and therefore little weight should be attached to that relationship and the private life established. In addition, the FtTJ Judge found that the appellant had attempted to utilise all possible avenues to remain in the UK.

120. Both advocates agree that I should decide whether s.117B(6)(b) of the 2002 Act is satisfied, i.e. whether it is reasonable for the appellant's children to leave the United Kingdom. If it is satisfied, I would allow the appeal on human rights grounds on the basis that s.117B(6)(b) is satisfied. If not, I would be required to consider the overall proportionality balance.

121. I have therefore considered the decisions relevant to the consideration of S 117B (6).

122. In JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) a Presidential panel of the Upper Tribunal held *inter alia*:

"33. We have seen how, in KO (Nigeria), the Supreme Court had regard to the respondent's IDI in its examination of section 117B (6). In his submissions, Mr Malik drew our attention to the latest relevant publication of the respondent; namely "Family Migration: Appendix FM Section 1.0b"...

36. There are a number of things to say about this IDI. First, it cannot override ordinary principles of statutory construction. If, applying those principles, a court or tribunal determines that a statutory provision falls to be interpreted in a particular way, the fact that the IDI may take a different view is irrelevant.

37. Second, the IDI does not cite KO (Nigeria) in support of the proposition that it is only where the child would be required to leave the United Kingdom that EX.1. (b) or section 117B (6) falls to be considered. The citation of KO (Nigeria) merely recognises that, in deciding what would be reasonable, one must have regard to the fact that one or both parents is liable to removal under immigration powers (see paragraph 27 above).

38. Third (and relatedly), a previous version of the IDI, pre-dating KO (Nigeria), contained statements to the effect that if the departure of a parent would not result in the child being required to leave the United Kingdom, the question of whether it was reasonable to expect the child to leave would not arise. This was noted by Upper Tribunal Judge Plimmer in SR (subsisting parental relationship - s117B(6)) Pakistan [2018] UKUT 334 (IAC) . At paragraph 50 of her decision, Judge Plimmer said that "This aspect of the 2018 IDI provides an untenable construction of the plain and ordinary meaning of EX.1. and section 117B (6)". At paragraph 51, she held that "Self-evidently, section 117B (6) is engaged whether the child will or will not in fact or practice leave the UK". For the reasons we have given, nothing in KO (Nigeria) affects the correctness of her conclusion.

39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where - on his interpretation - the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.

40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B (6). But the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B (6), then that is the end of the matter.

> *41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B (6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan) ...*
>
> *80. Our assessment of the appellant is that she is both dishonest and unscrupulous, each to a high degree. She has flagrantly defied the law of the United Kingdom by overstaying her leave for a large number of years, without bothering to seek to regularise her status; by making entry clearance applications that she knew full well were predicated on an entirely false basis; and in gaining access to the United Kingdom ...*
>
> *96. We therefore conclude that, on the facts of this case, it would not be reasonable to expect the appellant's children to leave the United Kingdom, in the event of her removal. This means the appellant's appeal succeeds. It does so because Parliament has stated, in terms, that the public interest does not require her removal, in these circumstances. It does so despite the fact that, absent section 117B (6), the appellant's removal would be proportionate in terms of Article 8 of the ECHR."*

123. I have not been provided with the guidance by either of the advocates nor have I been addressed upon it. The relevant Home Office guidance entitled: "*Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*", version 4.0, published 11 April 2019. the guidance states:

> **"Will the consequence of refusal of the application be that the child is required to leave the UK?**
>
> The decision maker must consider whether the effect of refusal of the application would be, or would be likely to be, that the child would have to leave the UK. This will not be the case where, in practice, the child will, or is likely to, continue to live in the UK with another parent or primary carer. This will be likely to be the case where for example:
>
> - the child does not live with the applicant
> - the child's parents are not living together on a permanent basis because the applicant parent has work or other commitments which require them to live apart from their partner and child
> - the child's other parent lives in the UK and the applicant parent has been here as a visitor and therefore undertook to leave the UK at the end of their visit as a condition of their visit visa or leave to enter
>
> If the departure of the parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of

whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1. (a) does not apply.

However, where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the real-life circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK, or them having to leave the UK with them. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances.

Would it be reasonable to expect the child to leave the UK?

If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must consider whether it would be reasonable to expect the child to leave the UK.

Where there is a qualifying child

A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. *The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain.* "

124. It is clear from the above extract that the guidance does not appear to take account of the decisions in JG or KO.

125. Therefore, I determine the Appellant's appeal on the basis of the facts set out at above, the guidance in KO and *JG*, the guidance and the best interests of the Appellant's children, both of whom are British Citizens. My assessment of the best interests of the children is set out earlier in the decision. They are a primary consideration and not a "trump card".

126. I observe that the FtTJ appeared to be state that the appellant and E could leave the UK with the children on a temporary basis (see paragraphs 87). It is unclear whether the judge was stating that is reasonable for a child to accompany one of his or her parents temporarily to that parent's home country whilst the parent makes an entry clearance application. This question is unlikely to arise in a case where both parents of a qualifying child face removal. It does arise on the facts of this appeal, where one parent of a qualifying child is entitled to

remain in the United Kingdom (as a settled person) who is therefore able to act as sponsor to the parent facing removal in an entry clearance application.

127. The Tribunal in JG at paras 89-91 stated:

> "89. Section 117B (6) concerns an assessment of the reasonableness of a child's leaving the United Kingdom. It does not expressly demand an assessment of reasonableness by reference to the length of time the child is expected to be outside the United Kingdom. In the light of paragraphs 18 and 19 of KO (Nigeria), the child's destination and future are to be assumed to be with the person who is being removed. In a case where the respondent's position is that the person who is being removed can be expected to make an entry clearance application, does this require the Tribunal's assessment to take this into account, in determining whether it would be reasonable for the child to leave? There may, obviously, be a good deal of difference between a child living outside the United Kingdom for a matter of months and facing an indefinite period abroad.
>
> 90. We did not hear submissions on this specific question. Certainly, Mr Malik did not advance it as a reason why, if his construction of section 117B (6) were not adopted, it would nevertheless be reasonable for the children to leave.
>
> 91. In the circumstances, we do not consider it necessary to resolve the question; at least, in its stark form. The Chikwamba principle is predicated on the assumption that, where there are children, it is not envisaged that they would be expected to go and stay with the parent concerned, whilst the latter makes an application for entry clearance. To envisage otherwise would be almost to stand the principle on its head."

128. Whilst the Tribunal did not hear submissions on the point I do not consider that the S117B(6) properly read supports any analysis that such parents of qualifying children can reasonably leave the United Kingdom for a temporary period whilst the parent makes an entry clearance application and thus should being excluded from benefiting from s.117B(6). The section does not read in that way and in the absence of any words of qualification, I am satisfied that "*leave the United Kingdom*" in s.117B(6)(b) refers to a child leaving the United Kingdom in order to live permanently out of the United Kingdom..

129. Miss Isherwood submits that the Tribunal should consider the "real world analysis". At paras 18-19 of KO (Nigeria) the following is set out:

> "18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:

> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ..."

19. He noted at (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:

> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

130. Para 19 of the judgment in KO (Nigeria) approves of para 58 of the Court of Appeal's judgment in EV (Philippines) where Lewison LJ said that "the best interests of a child must be assessed on the basis that the facts are as they are in the real world" and that "If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted".

131. I therefore conclude that any assessment of the facts "*as they are in the real world*" must include consideration of whether it is reasonable for the parent who is entitled to remain in the United Kingdom to leave the United Kingdom with the parent facing removal. It seems to me that Miss Ishwerwood is correct in her submission and that the Tribunal's duty to assess the facts as they are in the real world does not preclude it from considering whether it would be reasonable for a British citizen parent of a qualifying child to enjoy family life with the child and the parent facing removal outside the United Kingdom in reaching its conclusion whether it would be reasonable for the qualifying child to leave the United Kingdom for the purposes of s.117B(6)(b) of the 2002 Act.

132. In considering the circumstances of each of the children, the fact that they are British citizens is an important factor. I remind myself of paragraph 30 of ZH (Tanzania) which I take into account and which reads as follows:

> "30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a

> nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:
>
> > (a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5 , (1998) 150 ALR 608, 614);
> >
> > (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
> >
> > (c) the loss of educational opportunities available to the children in Australia; and
> >
> > (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

133. If the appellant's children were to go to live in Nigeria, they would lose out on the opportunities of growing up in the United Kingdom, the country of their nationality, the loss of educational opportunities and any medical services available to children in the United Kingdom.

134. Neither child speaks any of the Nigerian languages referred to in the evidence and therefore there will be language barriers that they both will face. Their parents speak different languages themselves and come from different regions in Nigeria, although I accept that English is spoken in Nigeria. I take account of their respective ages which are 6 and 3 years of age. The eldest child G is in mainstream education and according to the reports she is doing well in her education. The youngest child has started nursery although in view of her young age, I take into account that her life is very much dependant upon that of the adults. However, the circumstances are different for G who is in a different position and is more attached and integrated via her education, her friendships and her church attendance. Her ties to the UK are considerable.

135. Both children were born in the UK and have not been to Nigeria or have any experience of that country. By way of comparison, both children have other family members in the UK in the form of the appellant's sister with whom they have some contact. Whilst I accept that the appellant and his partner have relatives living in Nigeria, it has not been established that the children have any meaningful relationships with any relatives that are living in Nigeria.

136. I take into account that both children are in good health and that whilst it is been stated that G has had some problems in 2016, it does not appear that this affects her functioning in any material way and that this would not prevent her living in a different country. I further take into account that the FtTJ found that the appellant could re-establish himself in Nigeria in the light of his retained

links with the country and her findings as to why there were no very significant obstacles to his reintegration.

137. My analysis of the evidence above is that the appellant has a genuine and subsisting relationship with both his partner and the children. The specific issue that requires determination, however, is whether it would be reasonable to expect the appellant's children to leave the UK: s117B (6) of the NIAA 2002. I find that *JG* requires a hypothesis that they would leave. Both children are British citizens. They are now aged 6 and 3 years. I find, for the reasons set out in *JG* and *KO (Nigeria)* that the issue has to be determined separately from their father's conduct and as a result of the assessment that I have made above, I find that on balance that it would be contrary to their best interests but I also find that it would be unreasonable to expect them to leave the UK. Whilst the respondent relied upon the appellant's general conduct, both paragraph 276ADE(1)(iv) and S117B(6) of the NIAA 2002 are directed solely to the position of the child and contain "no requirement to consider the criminality or misconduct of a parent as a balancing factor".

138. It follows, therefore, that the public interest does not require the appellant's removal, notwithstanding the adverse findings made. As the tribunal observed in JG at [39-41]:

> "39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where - on his interpretation - the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.
>
> 40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so, there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B (6). But the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B (6), then that is the end of the matter.
>
> 41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B (6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan)."

Notice of Decision

139. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. It is to be re-made as follows:
Pursuant to section 117B (6) of the 2002 Act (as amended), the public interest does not require the appellant's removal from the United Kingdom. The appellant's appeal against the decision of the Secretary of State is allowed on human rights grounds (Article 8 ECHR).

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him, his partner or children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed SM Reeds

Date 17 /7/2019

Upper Tribunal Judge Reeds