Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10390/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2020	**On 25 September 2020**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

RA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: None
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Appellant's immigration history and History of the appeal

The appellant is a citizen of Nigeria born on 8 July 1974. He entered the United Kingdom as a visitor on 28 August 2006 accompanied by his son, whom I will refer to as "X", who was at that time aged 3. X was born on 26 September 2002 and is aged 17 as at the date of the appeal hearing. The appellant and his son subsequently overstayed their visas.

From the outset, the appellant arranged for X to be privately fostered by a succession of carers. On 6 February 2017 the appellant made a human rights

application based on his Article 8 ECHR family life with X, who by that time had been living in the United Kingdom for ten years. X was included as a dependant on the application. Although the appellant asserts that he paid two application fees, no evidence has been produced of this, only one appeal was lodged in respect of the appellant and it is agreed that this Tribunal is seized of the appeal of the appellant only.

On 30 January 2018 the respondent refused the appellant's human rights claim. On 28 March 2018 First-tier Tribunal Judge Raymond dismissed the appeal against that decision. On 18 June 2019 First-tier Tribunal Judge Reeds granted permission to appeal.

There was then a considerable delay. The error of law hearing was originally listed in front of Deputy Upper Tribunal Judge King on 13 August 2019. On that occasion the hearing was adjourned for the appellant to submit further evidence. After a long delay, without the hearing being relisted, Deputy Principal Resident Judge Gleeson made a transfer order pursuant to the Senior President of Tribunals' practice statements directing the appeal to be heard by a differently constituted Tribunal to deal with the appeal as if it had been commenced before it.

The error of law hearing came before me on 3 July 2020 and I set aside the decision on the basis that there had been a material error of law for the reasons in the decision dated 5 August 2020 appended to this decision.

The appeal was adjourned for re-making with some of First-tier Tribunal Judge Raymond findings preserved as being an accurate reflection of the state of affairs at the date of the appeal hearing in March 2019 in relation to the relationship between the appellant and his son. After setting aside the previous decision I invoked the Family Court Protocol in respect of the Children's Act Proceedings in respect of X.

Decision under appeal

The decision under appeal is a decision dated 30 January 2018 to refuse the appellant's human right's claim.

Reasons for Refusal

The decision to refuse the human rights claim addressed both the situation of the appellant and X. Appendix FM does not apply to the appellant or X. The appellant is not able to meet the parent provisions of the rules and X is not able to meet the child provisions of the rules. The appellant is not able to meet paragraph 276ADE(1)(vi) of the Immigration Rules because he is unable to demonstrate that there would be very significant obstacles to his integration to Nigeria and X is unable to meet paragraph 276ADE(1)(iv) of the immigration rules because although he has lived in the UK for 7 years, it is considered that it is reasonable to expect him to leave the United Kingdom and return to Nigeria with the support of his father. It is considered that he spent the first four years of his life in Nigeria and would have gained some social and cultural

knowledge of life in Nigeria during this time. His mother also resides in Nigeria, which would assist him to reintegrate. It is considered that there are no exceptional circumstances pursuant to paragraph GEN.3.2 which would render the refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for either the appellant or X.

Grounds of Appeal

The grounds submit that it would be a breach of Article 8 ECHR to remove the appellant from the United Kingdom.

The Burden and Standard of Proof

In an Article 8 ECHR claim it is for the appellant to show that there has been or there will be if the respondent acts as she intends to an interference with his human rights. If interference is established, it is then for the respondent to establish that the interference is justified. The standard of proof is the balance of probabilities.

The relevant date for the determination of the Article 8 ECHR issue is the date of the hearing. This is agreed by all parties.

Documents in Evidence

I have before me the previous documents produced at the appeal before First-tier Tribunal Judge Raymond, the respondent's bundle, a new 75 page appellant's bundle containing an up-to-date witness statement, a letter from X, print out of WhatsApp messages and photographs as well as an up-to-date letter from the social worker as well as a Young Person 16 + Assessment dated 29 July 2019. There was also before me a considerable amount of documentation from the Central Family Court including an application for a care and supervision order in respect of X by the Royal Borough of Greenwich dated 5 September 2018, a position statement on behalf of the Guardian for the hearing on 17 September 2018 by Emily Carter-Birch, solicitor for the child, a case summary on behalf of the Royal Borough of Greenwich, position statement on behalf of the guardian for the hearing on 9 November 2018 by Emily Carter-Birch, solicitor for the child, an order of District Judge Jenkins dated 9 November 2018 with a Section 31 care order and a revised PLO Cafcass case analysis dated 8 November 2018. An order from the Family Court was made for this material to be disclosed for the parties to this hearing and to no other parties. The appellant also produced a more up to date 16+ report in respect of X.

The Hearing

The appellant gave evidence in English. He adopted his two statements as evidence-in-chief and confirmed that the contents were true. He gave further oral evidence. X also attended the hearing and gave evidence. He confirmed that he wrote the letter in the bundle by himself and that the contents were true. Since he was under 18 at the age of the hearing, I ascertained that the appellant was able to be his appropriate adult because he continues to have

parental responsibility for X along with his foster parents. I also considered that there was no conflict between the interests of the appellant and X because they both wish to remain in the UK and wish each other to remain in the UK. The oral evidence is recorded in the record of proceedings.

Miss Isherwood made submissions which are set out in the Record of Proceedings and the appellant had an opportunity to respond to those submissions.

The issue in the appeal

It is agreed by both parties that this appeal involves consideration of Article 8 ECHR outside the immigration rules only. It is not asserted that the appellant can meet the parent requirements of the rules or that he can succeed in demonstrating that there are very significant obstacles to his integration in Nigeria.

It is asserted that the appellant can satisfy section 117B(6) of the Nationality Immigration and Asylum Act 2002 which states;

> '(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.'

Qualifying child

It is agreed that as at the date of the hearing X is a qualifying child because he has been living in the UK continuously since 2006 for a period of 14 years. He has therefore resided in the UK for double the number of years necessary to meet this threshold. It is accepted by Miss Isherwood that if the appellant can demonstrate that he meet the remainder of the provision that the public interest does not require his removal from the UK.

The two issues for me to determine are as follows;

A. Is it reasonable for X to leave the UK?

B. Does the applicant have a genuine and subsisting parental relationship with X?

Discussion and Analysis

Various findings are preserved from the previous hearings and I now make the following additional findings, having had sight of the further evidence, particularly from the Central Family Court and Royal Borough of Greenwich reports.

Facts not in dispute

The following facts are not in dispute. X came to the UK when he was 3 years old with his father. His father and mother were married in a traditional ceremony in Nigeria and his mother remains in Nigeria. His mother and father are now separated. X did not have any contact with his mother for many years but resumed contact with his mother by WhatsApp from about 2018. He has not seen his mother other than by Skype since 2006. X has now been resident in the United Kingdom for fourteen years. The appellant was unable to provide his son with adequate accommodation or support because of his illegal immigration status which is why he left X with carers. X was initially left with a white British family in Burton-on-Trent. This arrangement continued for a few years until X was about 7 years old at which point the appellant brought him to London to live with another family in Bermondsey where he stayed until he was 12/ 13 years old. During this period X experienced some hardship and physical abuse. Eventually this arrangement broke down because the appellant could not afford to pay for the carer. Subsequently X stayed with two other families under private fostering arrangements for short periods. He came to the attention of social services in 2014 because the family in the last arrangement would not agree to be assessed by social services.

X was placed in foster care by the London Borough of Greenwich on 12 December 2014. His first placement in foster care was unsuccessful and short-lived and on 23 February 2015 he moved to his current foster placement where he has remained ever since. He has been in the current placement for a period of five years between the ages of 13 and 18. The reports from social services all indicate that X was negatively affected by being looked after a succession of carers in unstable arrangements and that he has thrived and matured during his current foster placement.

An application for a Care Order was initiated on by the London Borough of Greenwich on 5 September 2018. The Solicitor for the child Emily Carter-Birch raised concerns about the delay in applying for the order. The application was not opposed by the appellant who considered that it was in his son's best interests to be placed with foster carers because of his own inability to provide stable accommodation and financial support for his son. Social services also made contact with X's mother in Nigeria who also agreed to the order. The proceedings were not contested and the view of all concerned including X's parents, the local authority, the solicitor for the child and the Children's Guardian was that X should be subject to a care order placing him in foster care. The final care order care order was made on 9 November 2018 by District Judge Jenkins to last until X reached 18.

The order places X in the care of the Royal Borough of Greenwich, to remain with the foster carers who had accommodated him since 2015. The Care Order contains the following warning;

> "Whilst a Care Order is in force no person may cause the child to be known by a new surname or remove the child from the United Kingdom without the written consent of every person with parental responsibility for the child or the leave of the court. and

> It may be a criminal offence under the Child Abduction Act 1984 to remove the child from the United Kingdom without leave of the court."

As X is now approaching 18, social services have discussed with him what will happen next in the more recent 16+ plan and the likelihood is that the care order will be extended. This is the wish of X.

X has been attending [~] College in Rotherhithe since Year 7 and attained GSCE's. With the assistance of his Career's Advisor at school, he decided to stay on at [~] College for 6th Form and he is currently at the start of Year 13 undertaking a Btec in Business and a double Btec in PE. His aim is to obtain his qualifications and go to university.

Preserved Findings

The preserved findings from the last appeal which are an accurate picture in March 2019 are as follows. The appellant is the biological father of X. The appellant arranged for extracurricular lessons for X on Saturdays. The appellant saw X on a weekly basis after the sessions. The appellant spoke to X on a daily basis by WhatsApp. The appellant carries out other activities with X such as attending Notting Hill Carnival. X was placed in foster care by the local authorities since 2014. X was in a private informal fostering arrangements between 2006 and 2014.

Since the relevant date is the date of the hearing, it is agreed that I need to look at the position as it stands at the present time.

Is it reasonable for X to leave the UK?

Although Miss Isherwood for the respondent did not formally concede this point and the respondent's position statement continues to assert that it is reasonable for X to leave the UK, Miss Isherwood did acknowledge that given the evidence in respect of X, her submission that it is reasonable to leave the UK 'has difficulties'.

When making this assessment, I must firstly take into consideration the welfare of any child affected by the decision under appeal in accordance with ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, which is a primary but not determinative consideration. I consider the authorities and guidance on the welfare and wellbeing of the child in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009 and the numerous relevant factors set out in the various authorities. I also take into account the guidance in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53 in which it is clarified that the assessment of the child's best interests is to be made without reference to the parent's immigration status but that in general the best interests of a child is that they remain with their parents wherever their parents are expected to be.

I note in this respect that the respondent in making the decision in respect of the appellant has not made any detailed assessment in respect of the best interests of X. The s55 consideration is cursory and asserts that it is in X's best

interests to return to Nigeria with his father where his father can assist him to integrate. There is no consideration of the fact that X is subject to a care order or of the level to which he is integrated to the UK.

In general, it is settled law that it is in the best interests of all children to grow up and have a meaningful relationship with both parents and in normal circumstances the best interests of a child will lie in remaining with their parents and going to where they are going. In the case of X, his father is an illegal overstayer. He entered the UK as an economic migrant, and he has blatantly and deliberately remained unlawfully in the UK. He is expected to return to Nigeria where he has cultural, social and linguistic ties. X's mother is in Nigeria.

However, X's situation is unique. He has not been living in a family unit with his father. He has had an unstable situation in the United Kingdom as a result of his father leaving him in the care of others. He has been effectively abandoned by his mother and although X's father has been in regular contact with him throughout his life in the UK, it seems that X has some fairly unpleasant experiences in some placements and had remained with at least four different sets of carers before the local authority stepped in in 2014 to arrange a stable foster placement for him. For the last six years X has remained in foster care.

In 2018 the court made a Care Order pursuant to Section 31 of the Children Act in respect of him on the basis that it was agreed by the local authority, children's solicitor, Children's guardian, X's parents and X himself that his best interests was to be placed in the care of the local authority and live with his foster carers and for his status in the UK to be regularised. This is a weighty factor in my assessment of X's best interests. I also take into account that there is an order in place preventing X from being removed from the UK without the permission of the court and that the local authority is supporting X to extend the care order.

When deciding what is in X's best interests, I give weight to the view of the Children's Guardian which are set out in the Cafcass report which were prepared for the Family Court Proceedings as well as the from the Children's Solicitors. I also take into account the recent report prepared by social services and the evidence of X himself.

The recommendation of the Guardian in 2018 is as follows

> "It is very important that X's status in the UK is regularised; he has lived here since he was 3 years old and this is his home. It is my understanding there were discretionary arrangements that should allow the local authority to apply for British citizenship on X's behalf. I would like the local authority to give a commitment to making this application".

As the Children's Guardian, I find that Mr Abrahams is well-placed to make this recommendation. He is somebody who has appointed by the Family Court as an independent person to assess the best interests of the child. Mr Abraham's view is formed by the length of time that X has lived in the United Kingdom, his integration to the UK, his history of living in insecure placements and his

commitment to school and education. Indeed, the recommendation forms part of the Care Order which specifies that the local authority is to assist and fund an application for X to regularise his status in the UK. I give weight to this. The solicitor for the child was critical of the failure to make this application earlier.

From the latest 16 + report, I find that over the 6 years that X has been in foster care, he has thrived. His behaviour has improved greatly at home and in school. He is happy and has a sense of belonging with his foster family. He refers to his foster parents as grandmother and grandfather. X's wish is to remain in the United Kingdom. He wants to study business at university. On this basis I find that it is in X's best interests to remain in the UK where he can have a stable upbringing and continue his education. I also find that it is in X's best interests to continue to have contact and a meaningful relationship with his father not least because it is in all children's best interests to have a relationship with their parents and because it is implicit in the Care Order that contact is taking place and is in X's best interests. The appellant has also been awarded joint parental responsibility with the foster parents in recognition of his relationship with his child.

When considering whether it is reasonable for X to leave the UK, I need to hypothesise that X would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so in accordance with JG (s117B(6) 'reasonable to leave' UK) Turkey [2019] UKUT 00072 (IAC) Rev 1 as endorsed in AB (Jamaica) [2019] EWCA Civ 661**.**

X has grown up in the United Kingdom since the age of 3. He has been in the UK for 14 years. X has been educated entirely in the United Kingdom education system. He has completed his GSCE's and is half way through his Btec courses at [~] College 6th Form. He is at a crucial stage of his education and has hopes and aspirations for the future in relation to going to university in the UK. He has spent his formative years in the United Kingdom and has ties, links, friendships outside of his immediate foster family and his relationship with his father which is appropriate given his age. He plays sport as part of his Btec.

X wishes to stay in the United Kingdom where he has lived all his life, feels settled and where he believes he will have much more ability to access education and employment. His evidence is that he considers himself to be British and that his links with Nigeria are so remote that he does not consider himself to be culturally Nigerian and would not be an insider in Nigerian society. He has very little connection with or recollection of Nigeria. This is referred to in the Cafcass report. He does not speak Yoruba. He does communicate with his mother by WhatsApp but the social services reports comment on his feeling of abandonment by his mother and repeatedly state that he has little connection with his mother. X has spoken to his maternal grandmother in Nigeria on only a couple of occasions. He has not had any contact with any paternal relatives in Nigeria. He has very little ongoing connection with Nigeria although he has met some of his father's Nigerian friends and has a relationship with his Nigerian father. He feels that it would be

difficult for him to establish himself in Nigeria even with the assistance of his mother and father.

The appellant's evidence was that prior to leaving Nigeria the family lived in the Mushin area of Nigeria, in one room in shared accommodation with many other families. The family was very poor and had insecure supplies of gas and electricity. X has never lived independently and there is no 'bright line' because he is about to turn 18. He has never been employed. He is a young adult who is only starting to develop skills to assist him to live independently. I am satisfied that even with the support of his father and mother, X would struggle to adapt, continue his education or find employment. I find that it is likely that he would be living in impoverished circumstances. I also find that it would be emotionally very difficult for him given his previous experiences of instability as a child and young person and that this would impact negatively on his well-being. I am satisfied that he would struggle to bond with his mother. I also give weight to the fact that were X to leave the UK, he would not be able to return because of his immigration status and this would in effect be a permanent rupture with his life in the UK, his friends and his foster parents and the place where he has spent the vast majority of his life.

Having considered all the factors in the round, giving weight to the best interests of the child as a primary but not determinative consideration and having given particular weight to the fact that X is subject to a Care Order, X's length of residence in the UK, the extent of his cultural, social and educational integration, as well as to the difficulties he experienced as a child and his current stability, the likely instability of his future life in Nigeria as well as his own wishes and the view of the Children's guardian that his status should be regularised as soon as possible, I find that it is not reasonable for X to leave the UK.

I also note that after the appellant becomes 18 he will be eligible to remain in the UK under paragraph 276ADE(1)(v) because he will be aged 18 years or above and under 25 years and will have spent at least half of his life living continuously in the UK.

I am satisfied that there is no public interest in removing X and on the contrary his status should be regularised as soon as practicable.

Does the appellant have a 'genuine and subsisting parental' relationship with X?

It is the position of the respondent that the appellant does not have a genuine and subsisting parental relationship with X because the appellant does not live with X and there is insufficient evidence of the relationship, although this does sit at odds with the submission that X can return to Nigeria with his father.

The law

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

> "89. Like UTJ Plimmer I also have found helpful the judgment of UTJ Grubb in **R (RK) v Secretary of State for the Home Department [2016] UKUT 00031 (IAC)**. Although the facts of that case were quite different as they concerned a grandmother and whether she needed to have parental responsibility for a child, what UTJ Grubb said at paras. 42 to 43 contains an analysis of the concept of parental relationship with which I would respectfully agree:
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> > '42. Whether a person is in a parental relationship with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have parental responsibility in law for there to be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child.
> >
> > 43. I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not per se parents. A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship.'
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> 90. Returning to the case of **SR (Pakistan)** I would also respectfully agree with what was said by UTJ Plimmer at paragraph 39:
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> > 'There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other. There are also cases where the nature and extent of contact and any break in contact is such that although there is contact, a subsisting parental relationship cannot be said to have been formed. Each case turns on its own facts.'

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

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

I turn to the evidence before me of the relationship between the appellant and X. Findings preserved from the last hearing include an acceptance that the appellant had weekly contact with his son, spoke to him daily by WhatsApp, and had arranged a tutor for him.

Ms Isherwood's primary submission was that there was insufficient evidence before me to establish that there is a genuine and subsisting parental relationship, X has never lived with his father, there are gaps in the evidence and the appellant's evidence is unreliable. X is in care and the evidence before me in the local authority case summary is that X has 'no attachment' to his father.

The appellant's evidence is that he is the person who arranged the informal private foster arrangements for his son because they were living in very difficult circumstances because of his illegal immigration status. He paid various carers to take care of his son. When X was living in Burton on Trent he would visit him as often as he could. The appellant saw X more often after X came to live in London at the age of 7. At that time he arranged for his son to go to primary school. He would take his son to primary school and to the library in Canary Wharf and Woolwich and he used to take him to football practice which was held at [~] College. The appellant also attended primary school parent's evenings. It was the appellant that registered X with a GP, bought him school uniform and arranged everything so that X could go on a school trip. The appellant applied for his son to go to [~] College secondary school and purchased uniform for him.

Miss Isherwood's submission was that there was a lack of supporting evidence in relation to this period. I agree that there was little in the way of documentary evidence but what there was, for instance a letter from [~] College school dated 20 November 2013 in relation to the admission to the school addressed to the appellant was supportive of the appellant's evidence. There were other letters from [~] College addressed to the appellant at this time as well as receipts for school uniforms.

I take into account that there were some inconsistencies between the evidence of the appellant's and X. For instance, there was an inconsistency in the

evidence about the tutor. The appellant insisted that he arranged for a friend to turor X prior to his GSCE's. X could not remember very well although when prompted he recalled he had two tutors and he believed that these were arranged by social services. The social services report refers to social services obtaining a tutor for X. When considering this inconsistency I take into account that X was only 15 or so when he had the tutors, has very little recollection or knowledge about who organised the tutors and the fact that he had two different tutors suggests that one may have been organised by social services and the other by the appellant. Indeed the Guardian report refers to the appellant being at the foster carer's home the previous weekend in order to monitor X's homework and studying.

There were also inconsistencies in the evidence about family members. X did not know a great deal about his father's family. He believes his paternal grandfather to be dead and paternal grandmother to be in the USA. He also confirmed that he had not spoken to his grandmother and that he had not spoken much to his father about this. The appellant on the other hand was adamant that his mother died in 2000 and never went to the USA. There is no reference in the social services reports to any wider family in Nigeria or grandparents. X also believed that his father has siblings although he could give no details. He referred vaguely to meeting 'uncles' and 'cousins' in London but was not able to say where they came from or where they lived. The appellant clarified that these are not blood relatives but the word 'uncle' is used in a cultural way to refer to someone from the same area or a friend and that he has introduced X to his friends. The appellant also said that although X's mother speaks English, her English is not good. X thought her English was fine. These inconsistencies do throw some doubt on the reliability of the appellant's evidence and I am satisfied that he has probably sought to present his relationship with his son in the most positive light possible and gloss over any difficulties.

However I give a great deal of weight to that of X. He confirmed that he had written his letter without input from his father. He was not in the hearing room when his father gave evidence and he was asked additional questions about matters that were not covered in his letter and there was a great deal of consistency in aspects of the evidence. He also referred for instance to the school trip that his father assisted with and spoke of how the last placement broke down because his father could no longer afford to pay for the carer. X's evidence came across as natural and unrehearsed. He confirmed for instance that he would rather remain in care in the future when he was asked what would happen if his father stayed in the UK. I find that this demonstrates his honesty and a certain amount of bravery. I therefore find X's evidence to be persuasive and I accept the evidence where it is consistent with that of the appellant.

I am satisfied on this basis that the appellant is the biological father of the appellant. I find that until X went into foster care, the appellant made all the decisions in respect of X. He decided where his son would live and he paid for the foster care arrangements. He saw X on a regular basis. He decided which school X should attend. He applied for X to go to primary and secondary school.

The appellant also provided financial and emotional support for his son as best as he was able and undoubtedly encouraged him in his education. The appellant used to take X to school when he was younger, took him to the library in Canary Wharf and Woolwich and to football practice at [~] college. He ensured that his son had school uniform and equipment and he assisted to arrange for X to go on a school trip.

There seems to have been difficulties in 2014 around the time that the local authority became involved. Both the appellant in his evidence and X in his account to the Guardian refer to the appellant being no longer able to pay for the informal fostering arrangement and it seems that at this time there was a period of instability. Certainly, when X went to his first foster placement in December 2014 he was said to be unsettled defiant and troubled.

Although Ms Isherwood submitted that there was little evidence of current contact between X and his father because there was a lack of photographs and WhatsApp messages, there was sufficient evidence from the appellant, from X and from the social services report to indicate that the appellant has continued to see X on a regular basis since he has been in foster care.

The Social services case summary report dated 17/09/18 reports that X has no attachment with his father but in the same document refers to X having contact with his father once a fortnight in the community. In the position statement dated 17 September 2018 the Solicitor for the child reports that;

> "X has not reported any problems or concerns in respect of contact with either parent. X has reported having contact with his father approximately once every fortnight in his current placement. RA and X communicate by WhatsApp and RA sees X in placemen and in community. Contact with both parents is flexible. X has reported a lack of connection with his mother, with who he has not been able to have face to face contact since he was 13-year-old."

In the position statement of the 8 November 2018 the Solicitor for the child indicates that;

> "X and the Guardian are satisfied with contact arrangements for X with his parents. No orders are sought for contact matters."

I also give weight to the comments in the Guardian's report which state that the foster parents have generously treated the appellant as family and welcomed him into their home. The Guardian comments that contact with X is flexible and arranged between themselves. Sally Sesay the social worker comments that the father continues to have contact with X both in her letter in support of the previous appeal and in her more recent letter of 19 August 2019.

I give weight to this evidence because it is prepared by experts based on their own observations and was presented to the court. The latest 16+ plan also confirms that contact continues to take place on a fortnightly basis between X and the appellant.

Both witnesses gave consistent evidence that prior to the Covid lockdown the appellant saw X every other weekend although contact now takes place once a month because of the restrictions in place. The appellant also speaks to his son regularly by WhatsApp and over the phone.

It cannot be said that the appellant is an exemplary parent. Although it appears to be his subjective view that he brought his son to the UK in order for him to have a better life, things have often been very difficult for X. Certainly his social worker and the guardian were concerned about the instability he has experienced in his life and his problems in forming attachments including with the appellant himself and certainly with his mother as a result of his experiences. The appellant has never provided X with a stable home, rather he left him in the care of a succession of different individuals because of the appellant's own inability to provide financial support for his child. Indeed in 2017 when he was offered accommodation by the local authority for he and X to live in, he refused to take it. His evidence was that the accommodation was in a bad condition and in a poor location and not suitable. There is reference in the reports to the appellant failing to set appropriate boundaries for X and concerns about him purchasing expensive gadgets for his son. It is also the case that since X has been in foster care, the foster parents have taken over his day to day care including, encouraging him to learn to cook and be independent, attending parent's evenings and social services meetings. X also attends church with his foster parents. X is close to his foster parents and considers them to be family. When asked who his family was in the UK he stated 'his dad and his foster parents'.

What is apparent from the reports, however is that since X has been in foster care he has continued to have unsupervised contact with his father and that the view of social services is that X should continue to have contact with his father and there is no concern about neglect or any other such issue.

From the evidence, it appears that X has matured a lot in the last few years and that this is primarily down to the input of his foster parents, the security of having a fixed place to lives as well as the involvement with social services who have regular meetings about him. On the other hand, I also find that it has been beneficial for X to have regular contact with his father and to have his involvement in his life. X speaks of his father setting a good example to him by demonstrating politeness and respect for others and talking to him about the importance of education. He also gave the strong impression that he believes that his father has done his best for him in difficult circumstances. He confirmed that the letter in the bundle was in his own words and I find that this letter reflects his attitude towards the appellant. X wants his dad to remain in the UK because otherwise he would be left with no family here. I note and take into respect that although X is living with foster carers, he has not been adopted, this arrangement will not continue for ever and the foster carers refer in the papers to having a new foster placement.

I accept the consistent evidence that the appellant provides X with financial assistance and purchases items for him including trainers, clothes, shampoo and body cream. The appellant will pop over to X's home to provide him with

items he needs as well as coming for longer contact sessions which might last up to two hours. During contact X and his father normally go out either to eat, or shop or go to the barbers or stay at the foster parents home and chat. They have attended Notting Hill Carnival together and the appellant has introduced him to other people in the community. During contact sessions the appellant has the care and control of X. Miss Isherwood submitted that the WhatsApp messages indicated that X only contacts his father when he needs something, but I find that the messages are more loving and that X and his father also speak on the telephone. In any event X's behaviour is age appropriate for a young person approaching 18. I am satisfied that X and his father contact each other regularly by WhatsApp as well as having face to face contact and that the appellant offers guidance and an example to his son.

I accept the appellant's evidence that it was he who organised for X to be issued with a Nigerian passport and paid for the application to regularise he and X's stay. X remembered attending the Nigerian High Commission with his father and the social services reports refer to the appellant making an application on behalf of X and concerns about the failure of the representative to pursue the application.

I accept Miss Isherwood's submission that the application also benefitted the appellant but nevertheless he sought to include his son on the application, informed social services of the steps he was taking and paid the fees himself. I do not find that the application was entirely self-serving and that he it was also undertaken from a wish to ensure X's future in the UK.

Although Miss Isherwood submitted that the appellant does not make any decisions on the part of X, I am satisfied from X's evidence as well as that of his father, that they did discuss which college X should attend and that this was an input into the final decision that X made by himself with the help of the career's advisor.

In summary, I find that the appellant is X's father and that he has had contact with his son for all of his life even though he has never lived with him in the UK. I find that he made decisions on behalf of his son when he was younger including where he has lived and which school he attended. When X was younger the appellant decided where X would go and took him to school football and libraries. Since social services have been involved the appellant has had to take more of a back seat in terms of day to day care and decision making, but he has shared legal parental responsibility with the foster carers, has very regular contact with X by WhatsApp and telephone, as well as regular face to face contact with X when they spend quality time together. The appellant also sees his son on other occasions. He provides money to X and buys him items. The fact that he has been welcomed by the foster carers into their home indicate that they believe he has a good positive relationship with his son. I find that he does have an influence on his son's behaviour and aspirations and has a good relationship with him.

I am satisfied that the relationship between the appellant and X is more than that of a benevolent uncle as suggested by Miss Isherwood. Although the foster

parents may have taken the role of primary carer, I am satisfied on the balance of probabilities that the appellant, despite his shortcomings as a parent, does have a longstanding relationship with his son. He has had frequent and regular contact with him, takes care and responsibility with him when they have contact, and influences him with regard to his future. I find that the relationship is akin to a relationship where a parent has separated from the primary carer of a child. In the unique and fact sensitive circumstances of this case, I find that the appellant has a genuine and subsisting parental relationship with X.

On this basis I am satisfied that the appellant meets the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and the public interest does not require his removal from the UK.

It is worth repeating the words of Elias LJ who stated In MA (Pakistan) & Ors v Upper Tribunal [2016] EWCA Civ 705 at 36 that this provision may result in some cases in undeserving applicants being allowed to remain and the subsequent comments in JG that;

> "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

The appeal is allowed on human rights grounds.

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

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

Signed R J Owens Date 25 September 2020

Upper Tribunal Judge Owens