Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07363/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2021	**On 13 December 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J S F
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr M Karnik, instructed by Lei Dat and Baig, solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Veloso promulgated on 13 May 2021 in which she allowed the appeal of JSF against the decision of the Secretary of State to refuse him leave to remain in the United Kingdom on family and private life grounds, a decision made on 5 April 2019.

2. It is I consider important to set out perhaps unusually for a case like this a substantial amount of the background information to this case.

3. The respondent is a citizen of Liberia who in the past had had a protection appeal in the United Kingdom. In 2009 the First-tier Tribunal found he was excluded from protection of the Refugee Convention by operation of Article 1F of that Convention. Notwithstanding that finding, the Secretary of State granted him entry clearance to the United Kingdom as the partner of a British citizen and he returned here on 7 December 2012.

4. The appellant has three children. The oldest daughter although a minor at the date of decision by the Secretary of State is now an adult. The two younger children are and at all times have been minors. They are all British citizens. The appellant is no longer married to his wife and, to summarise, Southwark Social services became involved with the family owing to concerns as to the welfare of the children. Public law family proceedings ensued, resulting finally in an order made on 15 December 2016 in the Central Family Registry. The effect of that order was that the children were to spend alternate weeks with the appellant and his partner and Social Services were to remain in contact providing a supervisory role. These proceedings are so far as is relevant set out in some detail in the decision of the FtT and are known to both parties. Bearing in mind that this is a decision which will become public, and as the proceedings relate to children, I do not consider that it is in the interests of justice or the best interests of the children to set out further detail of the proceedings, save to observe that in 2017 as set out in the judge's decision at paragraph 62, Social Services did not apply to the court for an extension of the supervision order due to the excellent care the respondent has provided for his children.

5. The Secretary of State refused the application for a number of grounds. Primarily she was not satisfied that the respondent met the requirements of the partner route or the parent route, given that she was satisfied that he did not meet the suitability requirements, given the fact that he had been excluded from protection of the Refugee Convention. She did not consider either having had regard to the relevant case law that it would be a breach of Article 8 to remove the appellant from the United Kingdom.

6. There is a substantial prior procedural history to this case but I am only concerned with the decision of Judge Veloso. The judge heard evidence from the respondent. She also heard evidence from the respondent's older daughter and from his son. The judge concluded, having considered the evidence as a whole, that the children spent most of their time with the father, the ex-wife (their mother) spending a great part of her time outside the United Kingdom. The judge was satisfied that there was a genuine and subsisting parental relationship and having had regard to all the factors considered that the requirements of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 were met and that the respondent maintained a family life with his daughter, the elder daughter although she was no longer a minor. The judge concluded considering all the evidence in the round having had regard to Section 55 and Section 117B that notwithstanding the exclusion from refugee status, removing

the appellant would have unjustifiably harsh consequences and would therefore be unlawful.

7. The Secretary of State then sought permission to appeal on a number of grounds. In doing so she accepted at paragraph 7 of her grounds that it was unreasonable for the two younger children to leave the United Kingdom.

8. There then followed a number of grounds which need to be set out in some detail.

9. Ground 1: that the judge misdirected herself in law and failed to make adequate finding in respect of the appellant's private life, in particular finding that Article 8 was engaged.

10. Ground 2: that the judge had misdirected herself in line as to the effect of Section 117B(6) (which one might think somewhat immaterial in light of what has been conceded at paragraph 7 of the grounds), in that the judge's consideration of the evidence was flawed by failing properly to evaluate inconsistent evidence about where the children were living, in particular failing to give proper weight to a police officer's report supported by the two children, in failing properly to evaluate the Family Court orders conflating parental responsibility and unsupervised access; that the judge improperly inferred that because the father had joint parental responsibility, and that the court could have found that the best interests of the children lie in remaining in the United Kingdom with their mother, thus maintaining contact with their father from abroad, in failing to consider the children could remain in the United Kingdom with their mother and in effect failing properly to attach weight to the finding that the respondent fell to be excluded.

11. Ground 3, that the judge erred misdirecting herself in law in respect of the eldest daughter in failing properly to apply the decision in Kugathas [2003] EWCA Civ 31

12. Subsequent to the grant of permission by Judge Boyes the appellant served a detailed response pursuant to Rule 24 drafted by Mr Ell who represented the appellant at the hearing.

13. I heard submissions from both representatives and I am indebted to Ms Isherwood for being able to take this case at such short notice from her colleague and for being able to assimilate the material and also the Rule 24 response in short order.

14. I deal with the grounds in turn. With respect to the drafter of the ground 1 it is difficult to see how this is material. This case is concerned, fundamentally, with the accepted family life between the respondent and his minor children, not private life. Further and in any event, it is difficult to determine, even arguably, how the judge erred in concluding that a private life existed in this country such as to engage Article 8. Whilst it

may well be that if that were the only issue, there were issues about how much weight could be attached to that, that is something which weighs in the proportionality balance, not whether Article 8(1) is engaged in the first place.

15. There is therefore no merit in ground 1.

16. I turn then to ground 2. The judge is criticised for taking or attaching weight to a witness statement of the mother in which it was said that the father had full responsibility if she was away from the UK and she had provided the letter because she did not want the father to be removed. It is said that he was wrong, in that the mother had not given evidence and had neither updated her position since 2019 and had not given evidence or been cross-examined. It is said further that this is perverse because it undermines the weight given to the weight of an independent police officer supported by the oral testimony of two children. It is said also there are discrepancies between the mother's statement and the father's evidence she spent most of the time in Belgium with her new family. It is with respect to the judge that granted permission wholly unarguable that there was a failure to resolve any evidential conflict in this case.

17. It is evident from the decision that the judge was fully aware of the apparent inconsistencies in the evidence and he dealt with them. The most difficult point is set out at paragraph 45 where it is recorded that the police officer said that he attended the respondent's address, only the eldest child was present and added that no further dependants were there nor was there any indication of them residing at the address.

18. That was put to the respondent and his eldest daughter and they both stated the police attended on that week that the other two children were spending with their mother. It has to be borne in mind that this is a case in which the judge heard direct evidence from a witness, that is the respondent's daughter and him, as to what had happened but not direct evidence from the police officer. She heard evidence from the son and she heard evidence from the appellant. The judge clearly at paragraph 49 considered all the evidence on the round, finding that the appellant, his eldest daughter and son's evidence was credible and overall consistent. The judge had also noted that the involvement of the two younger children's life was supported from the school and it must also be borne in mind the position of Southwark Social Services is set out at paragraph 62.

19. Looking at the decision as a whole I find that the judge has adequately and sustainably reasoned why she accepted the evidence of the respondent, the respondent's elder daughter and son as to where the children were living.

20. What is averred at paragraph 20 of the grounds really bears little relation to reality. It is not arguable that the judge conflated evidence either. It is sufficiently clear from the order what the court decided. It is also sufficiently clear that the First-tier Tribunal properly considered the best

interests. It cannot be argued that the judge could have found that the best interests of the children did not lie in remaining in the United Kingdom given the unchallenged findings that she had in effect moved pretty much to Belgium as set out at paragraph 72 of the decision.

21. It is simply not arguable that the Tribunal erred in failing to consider that the children could remain with the mother as is averred at paragraph 24.

22. Regrettably, it is evident from the grounds that the Secretary of State has not properly understood the decision in Runa v the Secretary of State [2020] EWCA Civil 514 and the selective quotation from that case is of limited assistance. It is sufficiently clear reading Runa as a whole, as also approved in NA Bangladesh [2021] EWCA Civil 953 at 12.2, that the judge did take the correct approach in this case. Again it is difficult to understand how the Secretary of State could make this argument, given the concession that it is unreasonable to expect the children to leave the United Kingdom.

23. Turning to NA Bangladesh it is worth stating what was said by the Court of Appeal. It said Runa makes it clear that

> " Section 117B(6) is not an exhaustive statement of the effect of Article 8 and that if it is not satisfied it does not follow that a proportionality assessment is not required, rather it is a "benevolent provision" which has the effect in a case where it applies that the public interest is treated definitively as not requiring the parents' removal. It can only operate in one way potentially in favour of an appellant but never adversely to an appellant.

24. The sole point that the Secretary of State makes which I consider does have some validity is how, in the proportionality exercise, does one attach weight to the fact that the appellant has been excluded from the provisions of the Refugee Convention.

25. I consider that there is merit in Mr Karnik's observations that the Secretary of State was fully aware of that when granting entry clearance and in granting further leave and it is difficult to see how it can be factored in given the binding ruling in Runa and NA Bangladesh where it was held that if the requirements of section 117B(6) are met, then that is definitive of where the public interest lies.

26. It may theoretically have been open to the Secretary of State to seek to deport the respondent on the basis of that being conducive to the public but that is not what has occurred here, and she had already granted the respondent leave to enter and remain in the full knowledge of his exclusion. Further if it were not for Article 1F exclusion it is difficult to see how the appellant would not have met the suitability requirements in which case he would have met the requirements of the Immigration Rules. In which case it is difficult to see how there had been any public interest at all in removing him. But, in short, the judge did in any event consider

Article 1F and concluded properly in line with Runa and NA Bangladesh, concluding that once Section 117B(6) was met then in effect that was a sufficient basis to allow the appeal. It is also of note that the judge made findings as to the difficulty that the children would have in Liberia and for these reasons noting particularly what the judge said at paragraph 77 I conclude that ground 2 is not made out.

27. I turn finally to ground 3. I consider first that it is incapable of amounting to a material error given the sustainable finding that the respondent has a genuine and subsisting parental relationship and indeed a family life with his two minor children. Further and in any event given the age of the eldest daughter at the date of the decision by the Secretary of State and the fact she continued to live as part of the family unit in the same accommodation and was emotionally supported by her father and was only 18 at the date of decision, I do not consider that it could be argued that the judge came to a conclusion which was not open to him or misdirected herself in respect to **Kugathas**.

28. Accordingly and for all these reasons I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it

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 their 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 Date 3 December 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul