



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-000741
First-tier Tribunal No:
PA/01445/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 April 2023

Before
UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

B A

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Shah, solicitor, Taj Solicitors

For the Respondents: Ms A Nolan, Senior Home Office Presenting Officer

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. Although his identity was not anonymised in the First-tier Tribunal, the appeal involves protection issues, and it is therefore appropriate to make an anonymity order. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

Heard at Field House on 22 February 2023

DECISION

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Coll promulgated on 22 September 2021 (“the Decision”) dismissing the Appellant’s appeal against the Respondent’s decision dated 30 January 2020 refusing the Appellant’s protection and human rights claims.
2. The Appellant is a national of Bangladesh. He came to the UK in August 2011 with entry clearance as a spouse. He had entered into an arranged marriage in Bangladesh to his cousin. The Appellant’s marriage broke down. He sought leave to remain outside the Immigration Rules (“the Rules”) which was granted until November 2014. He made an in-time application for further leave which was refused. His appeal against that decision was dismissed and on 12 May 2017, he had exhausted his appeal rights.
3. The Appellant made another application for leave to remain outside the Rules on 31 May 2017 and claimed asylum on 14 September 2017. His claims were refused by the decision under appeal.
4. The Appellant’s Article 8 claim relies principally on his relationship with his daughter, [A], born on 25 September 2009. The Appellant’s relationship with [A]’s mother came to an end following allegations of domestic abuse. Following the breakdown of his marriage, the Appellant initially had some direct contact with [A] for a matter of months. He had direct access albeit remotely for the last time in 2014 via Skype. He has brought proceedings in the Family Court in relation to contact. We will come to the detail of those, and the orders made below. We record that the Family Court has given its consent for documents in relation to those proceedings to be disclosed and referred to in the Appellant’s immigration appeal.
5. Following consideration of the evidence, the Judge concluded that the Appellant was unlikely to be given any more than indirect contact to [A]. She concluded that the Appellant could continue to exercise the contact he had with her from Bangladesh. She therefore concluded that removal would be proportionate.
6. The Appellant’s protection claim relies on his membership of and activities for the Bangladesh Nationalist Party (BNP). The Judge concluded that the Appellant was an ordinary member of the BNP in Bangladesh and the UK. Although the Appellant had attended some demonstrations in the UK, he had no social media presence and held no position of any profile. His attendance at BNP events would not be noticed by the authorities. The Judge did not accept the credibility of the Appellant’s claim to have been threatened or attacked in Bangladesh. She found that the Appellant did not have a well-founded fear of persecution on return to Bangladesh.
7. The Appellant’s grounds challenging the Decision encompass both the protection and human rights grounds. For reasons we come to below, we can deal shortly with the protection case. The Appellant asserted that the Judge had applied the wrong standards, had failed

to consider the entirety of the claim when considering credibility and had failed to apply the Rules in relation to asylum.

8. In relation to the Article 8 case, the Appellant asserted that the Judge had failed to have regard to section 55 Borders, Citizenship and Immigration Act 2009 ("Section 55"), had failed to have regard to the potential access rights which the Appellant might have to his daughter in the future and had failed to apply section 117B(6) Nationality, Immigration and Asylum Act 2002 ("Section 117B(6)").
9. Permission to appeal was refused by First-tier Tribunal Judge Martin on 1 February 2022 in the following terms so far as relevant:

"... 3. The grounds are wholly unmeritorious.

4. The Judge carefully assessed the evidence from the asylum interview, the oral evidence, cross examination and the documents. He explained in detail why the documents were unhelpful or carried little weight. The Judge found, and the appellant agreed, [48], [49] and [50] that he was only an ordinary BNP member. The Judge noted that while he had attended events in the UK, he did no more than attend. I can discern no arguable error of law in the Judge's approach, reasoning or conclusion.

5. With regard to the appellant's daughter, he separated from her mother many years ago and had only indirect contact, and that very infrequently. He had been found to have abused both his former partner and the child and was prevented from making any further applications to the Family Court unless there was a change in circumstances. On those facts it was unsurprising that the appeal on Article 8 grounds failed.

6. Neither the grounds nor the Decision and Reasons disclose any arguable error of law."

10. Following renewal on the same grounds to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Sheridan on 29 April 2022 in the following terms so far as relevant:

"1. The Judge ...arguably erred by failing to have regard to the consideration set out in s117B(6)(a) of the NIAA 2002 Act, as required by s117A (2) of that act. It may be that this arguable error of law is immaterial given the facts of this case. However, having regard to what is said in para 111 of *Secretary of State for the Home Department v AB (Jamaica) & Anor* [2019] EWCA Civ 661 about direct contact not necessarily being required for there to be a genuine and subsisting parental relationship – and that the appellant has been granted parental responsibility (see para. 80 of the decision) – I cannot exclude that this arguable error might have been material. I have therefore granted permission.

2. I have not restricted the grounds that can be pursued, but make the observation that I cannot see any arguable merit to the arguments in the grounds concerning the judge's assessment of the appellant's protection claim."

11. The appeal came before us to determine whether the Decision contains errors of law. If we conclude that it does, we then have to decide whether to set aside the Decision in consequence of those errors. If we set aside the Decision, we then have to go on to either re-make the decision or remit the appeal to the First-tier Tribunal.
12. We had before us the Appellant's and Respondent's bundles of documents for the First-tier Tribunal hearing to which we do not need to refer, and the Appellant's supplementary bundle also produced to the First-tier Tribunal ([ABS/xx]). Having heard submissions from Mr Shah and Ms Nolan, we reserved our decision and indicated that we would provide that in writing which we now turn to do.

DISCUSSION

Error of Law

Protection Claim

13. Mr Shah appeared to be unaware that it remained open to him to argue the grounds challenging the Decision in relation to the protection claim. His ability to do so arises following this Tribunal's guidance in EH (PTA: limited grounds; Cart JR) Bangladesh [2021] UKUT 0117 (IAC) which reads as follows:

“(2) Rule 22(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 has the effect that in the absence of any direction limiting the grounds which may be argued before the Upper Tribunal, the grounds contained in the application for permission are the grounds of appeal to the Upper Tribunal, even if permission is stated to have been granted on limited grounds.”

14. We drew Mr Shah's attention to this and pointed out to him that Judge Sheridan had expressly not limited the grant of permission. We therefore asked him to confirm whether he was pursuing the grounds relating to the protection claim. He confirmed that he did not wish to do so. Given Judge Sheridan's comments in this regard, with which we concur, we consider that Mr Shah was right not to pursue those grounds. The grounds are merely a disagreement with the Judge's findings and conclusions in relation to the protection claim.

Human rights Claim

15. We turn then to the human rights grounds. At [69] to [84] of the Decision, the Judge set out the salient facts of this case regarding contact between the Appellant and his daughter. In short summary, those are that the Appellant had direct contact with [A] supervised by his ex-wife's father at his father-in-law's house for “10-11 months post separation” ([73]). The Appellant has been found to have abused both his ex-wife and his child. Those findings were made in 2013 and the Judge concluded that it was likely that the Appellant separated from his ex-wife in 2012-13. It had therefore been about

“8 or 9 years” since the Appellant last lived with [A] (who was aged eleven at the time of the hearing before Judge Coll) ([74]). The Appellant last had direct contact with [A] in 2014 but that was via Skype and therefore remotely ([76]).

16. The Judge reviewed the evidence from the Family Court. She noted that the Court had granted the Appellant indirect access to [A] in November 2018 (“the 2018 Order” – [ABS/29-34]). However, even that contact was to be infrequent. The Appellant was not permitted to decide when he could have such contact ([77]). The Appellant was at that time prevented from making any further application absent a change of circumstances. However, in April 2021, the Family Court recorded that the Appellant had parental responsibility and his ex-wife was ordered to send school reports and medical evidence in relation to [A] to him ([80]) (“the 2021 Order” – [ABS/24-28]). We note that the 2021 Order provides that the Appellant was to be consulted in relation to decisions “of sufficient gravity” made in relation to [A]. However, that was to be via his legal representatives. There is no evidence in the bundle that the Appellant has ever exercised any right to have a say in relation to his daughter’s upbringing. The evidence shows merely that he has been sent some documents as directed by the Court. The Judge records at [81] of the Decision, that the Appellant accepted that he needed the permission of the Family Court to make any new application.
17. The Judge recorded at [71] of the Decision that she had practised as a barrister in this area of family law. She indicated that she would be drawing on her own knowledge in this regard. There was no objection to that course. The Appellant has not challenged the Judge’s entitlement to rely on her legal experience when assessing the evidence.
18. Having set out what the documents and oral evidence showed, the Judge made the following observations in that regard:

“83. I have experience of family proceedings in which contact is sought by a parent against whom findings of fact have been made concerning domestic abuse and that parent has attended a recommended domestic abuse course. I am aware from this that the appellant is likely to have a number of hurdles to satisfy before he can gain more access. Depending on the reports made by the Change Project, on what the school and doctor say about the daughter’s reaction, on how the mother and the appellant act during cross examination (and even the daughter’s own views, given that she is 12 and may be considered old enough to send in written views), a range of outcomes are possible.

84. I remind myself also that generally, after successful indirect access for a number of years, following established findings of domestic abuse, attendance on a suitable course and demonstrated progress after attendance, the parent might be progressed to a more immediate form of indirect access (e.g.

telephone or video calls) and then onto face to face supervised contact.”

19. The Judge then went on to make findings in relation to the Article 8 claim. In so doing, she referred correctly to the date of assessment being the date of hearing. She found at [85] of the Decision that it was “not possible to say that the appellant will be granted face to face access or when”. At the date of hearing, she could “only go on the access regime” which the Appellant had at that time.
20. Having concluded that the Appellant could not meet the Rules based on his relationship with [A] for the reasons which she had set out at [67] and [68] of the Decision (as to which there is no challenge), the Judge moved on to consider the Article 8 claim outside the Rules. There is no challenge to the Judge’s self-direction in relation to the assessment generally. She properly referred to the balance sheet assessment and five-stage “Razgar” test. She also referred to Section 117B in general terms.
21. The Judge then considered the factors under three separate headings – potentially neutral factors, those factors in the Appellant’s favour and those against. Under the first heading, she referred to the Appellant’s ability to speak some English. She had no evidence about the Appellant’s financial support and could not reach a view whether he was financially independent. Those factors reflect consideration of Section 117B (2) and Section 117B (3). There is no challenge to those findings.
22. In relation to the factors for the Appellant, the Judge referred to the Appellant’s private life. She accepted that he would have formed a private life in the ten years he had been in the UK but since his status was always precarious or unlawful, and the Appellant could not meet the Rules, it was not a factor which weighed strongly in his favour. Again, this is a reflection of Section 117B (4) and Section 117B (5). Again, there is no challenge to these findings.
23. The Judge then turned to factors against the Appellant. She considered under this heading the situation which the Appellant would face in Bangladesh where he still has family. He had worked there before he came to the UK and could do so again. He had some skills which would assist in finding work in Bangladesh. There is no challenge to these findings.
24. The Judge then considered the Appellant’s relationship with his daughter. We accept that this perhaps should have appeared under the heading of factors in the Appellant’s favour rather than against him. The findings made are the subject of the Appellant’s challenge and so we set those out:

“[32] (wrongly numbered) ... He last had direct access over Skype with his daughter in 2014. There was a period of no contact. Since 2018, he has had, under a court order, indirect

access. He has sent cards, letters and money and he can continue to do this if returned to Bangladesh. It cannot be said that it is more likely than not that he will get direct in person access.”

25. There can be no challenge to the first part of that extract. It simply records the position as to contact (although we observe from all the evidence that it might not be right to say that the Appellant had no contact after 2014 and until 2018). Nor can it sensibly be said that the Judge was wrong to find that the Appellant could continue with the indirect contact he has from Bangladesh. We will come back to the final sentence with which Mr Shah took issue in his submissions.
26. We begin however with the grounds as pleaded. As we have already noted, those are that the Judge failed to take into account [A]’s best interests under Section 55. In this context, the drafter of the grounds asserts that the Judge failed to have regard to the evidence about the Appellant’s access rights with [A] or to [A]’s Article 8 rights. It is asserted that “[t]he prime question is why the Family Court granted the A an indirect contact order and whether or not there is any possibility of granting any direct contact order”. It is said that this should be capable of a “yes/no” answer and “if the answer is ‘yes’ then the best interest of [the] child must be considered against this”.
27. We consider that there are the following difficulties with that submission. The task of the Family Court in child access proceedings is self-evidently to consider the best interests of the child who is the central focus of those proceedings. The order made must therefore be taken to have that child’s best interests at heart. The Judge quite clearly recognised that indirect access might at a later stage lead to direct access. She expressly considered this at [84] of the Decision. She was not however required to speculate. She had to assess the Article 8 claim at the date of the hearing. She made a very clear finding in the final sentence cited at [24] above that the Appellant would be unlikely to be given direct access.
28. Mr Shah in submissions asserted that this was not a finding open to the Judge. His submission appeared to be (and he confirmed) that the finding was perverse in light of the evidence. That is to say this is a finding that no Judge properly directed could reach. We pointed out to Mr Shah that this was not a point taken in the pleaded grounds.
29. Even if the point had been taken in the pleaded grounds, we reject it. The Judge very clearly set out the evidence about the level and extent of contact which had continued over a number of years.
30. After a period of indirect contact, the Appellant was permitted by the 2021 Order to have access to his child’s educational and medical records and to be consulted about any decisions of “sufficient gravity” in relation to [A] via his legal representatives. There was no

evidence that the Appellant had been consulted or tried to participate in decisions made in relation to his daughter. As we have already pointed out, the evidence which the Judge had was only that some reports had been provided to the Appellant as directed. The position as set out in the 2021 Order was the latest evidence before the Judge. Although the Judge did not have any final order in that regard (as noted at [83] of the Decision), the Appellant confirmed that he had to have permission to make a new application.

31. That then was the evidential basis against which a finding had to be made. The Appellant had limited indirect contact until 2021 before being given some very limited say in relation to decisions regarding his daughter. That latter position had subsisted for only about six months at date of hearing. The Judge noted from her own experience that the Appellant would face a number of hurdles in obtaining any increased access. She pointed out that the Appellant had no direct contact with [A] since 2014 when she was about five years old, and she was now about twelve years old. Those were all factors relevant to the issue whether the Appellant was likely to obtain more contact than he had at the time of the hearing.
32. We do not therefore consider that there is any error disclosed by the Judge's finding that the Appellant would not be likely to be given direct access to his daughter.
33. If we were guided by the pleaded grounds, that would be the end of the Appellant's first ground in relation to Section 55. The Judge has found that the Appellant would not get direct contact. We do not consider that the approach as set out in the grounds is the correct one. However, whatever approach is adopted does not lead to any different answer in relation to error.
34. We asked Mr Shah to explain why the Judge had to consider the best interests of the Appellant's child given that the Family Court had already done so and had pronounced that those interests were to have only indirect contact which contact could be continued from Bangladesh. Mr Shah submitted that the best interests' analysis had to be considered in the immigration context and not the family context. However, we fail to understand how that produces any different result. The best interests of the child in relation to contact with the Appellant have been found by the Court with the responsibility to determine that to be to have only indirect contact. That is the starting point for determining what is in the best interests of the child in relation to removal of the Appellant. The contact which the Appellant has, and which is in [A]'s best interests is indirect only. Removal of the Appellant has no impact on those interests because the contact he has can continue, as the Judge found, from Bangladesh.
35. Insofar as the Judge failed expressly to refer to Section 55 and even if the failure to do so is an error, it could not possibly be material in

light of the findings made which were open to the Judge on the evidence before her.

36. The second ground is that which found favour with Judge Sheridan when granting permission. That is that the Judge failed to have regard to Section 117B (6).
37. The following parts of Section 117 are or are potentially relevant to this case:

“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

...

(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 ...

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.

38. At this stage, we are concerned only with Section 117B (6). However, we also draw attention to Section 117A which requires the Tribunal to have regard to the factors which follow when determining whether a decision to remove is proportionate. We accept that a Judge does not have to expressly cite Section 117B. It is sufficient for a Judge to make reference to the factor(s) which apply. Thus, in this case, as we have already observed, the Judge had regard to the Appellant's ability to speak English and whether he was financially independent but did not expressly refer to Section 117B (2) or (3). Her consideration of those issues was sufficient.
39. In relation to Section 117B (6), Ms Nolan accepted that the Judge had not referred to that sub-section either expressly or implicitly. She submitted however that the error in that regard was not material as the outcome would be the same if the Judge had referred to it. On the facts as found and evidence, the Judge could not have found that the Appellant satisfies that sub-section because he does not have a genuine and subsisting parental relationship with his daughter.
40. We accept as Mr Shah said, that Judges are mandated to consider all Section 117B factors and therefore a failure to consider one which might be relevant is an error. It matters not whether consideration of the factor would lead to a conclusion that it does not apply. If it is potentially relevant, it should be considered. There is therefore an error in the Judge's failure to consider Section 117B (6). However, whether the factor could apply and whether consideration could affect the outcome may be relevant to whether we should set aside the Decision in our discretion. We therefore turn to the Appellant's case in relation to the "genuine and subsisting parental relationship" issue and the relevant case-law.
41. The Appellant's grounds as pleaded made no reference to the case of Secretary of State for the Home Department v AB (Jamaica) and

AO (Nigeria) [2019] EWCA Civ 661 (“AB (Jamaica)”). AB (Jamaica) was first mentioned by Judge Sheridan when granting permission to appeal. We accept however that the judgment is relevant to the Appellant’s ground as pleaded. Both representatives made reference to it in their submissions. The relevant passage is at [108] to [111] as follows:

“108. The recognition of the importance to a child of contact with a parent with whom he is not living is also reflected in the terms of section 117B(6)(a).

109. In order to demonstrate a genuine and substantial parental relationship, it is common ground that it is not necessary for the absent parent to have parental responsibility and, in my judgement, it is hard to see how it can be said otherwise than that a parent has the necessary ‘genuine and substantial parental relationship’ where that parent is seeing his or her child in an unsupervised setting on a regular basis, whether or not he has parental responsibility and whether or not by virtue of a court order. Equally, the existence of a court order permitting direct contact in favour of the absent parent is not conclusive evidence of the necessary parental relationship. It may be that a court would conclude that there is no ‘genuine and substantial parental relationship’ where, for example, a parent has the benefit of a court order but does not, or only unreliably and infrequently, take up his or her contact.

110. So far as indirect contact is concerned, it should be borne in mind that the Family Court typically strives to promote regular, unsupervised, face to face contact between a child and his or her parent. If a court limits that contact to indirect contact only, that is because the court, in a decision making process in which the child's welfare is paramount (Children Act 1989, section 1) has decided that such a significant limitation on the parental relationship is in the best interests of the child in question and the reasons for such a decision having been reached by the judge will be highly relevant to the tribunal's consideration of section 117B(6)(a).

111. Having said that, whilst perhaps more likely, it is by no means inevitable that a tribunal will conclude that a parent has no ‘genuine and substantial parental relationship’ absent direct contact. It may be that there has been a long gap in contact and that indirect contact marks a gentle re-introduction, or that a parent has to show (and is showing) commitment to indirect contact before direct contact can be introduced. Where however a Family Court has made a final order limiting contact to indirect contact, particularly when there is no provision for progression to direct contact, the tribunal should look closely at the reasons which led to the court making such a restrictive order.”

42. Section 117B (6) requires as a starting point that there be a genuine and subsisting parental relationship. As the Court of Appeal there makes clear, whether there is a genuine and subsisting parental relationship is a question of fact. Mr Shah placed emphasis on the

fact that the Appellant has parental responsibility by reason of a Family Court order. However, as this passage makes clear that is not determinative either way of the question whether there is a genuine and subsisting parental relationship.

43. Ms Nolan placed reliance on the fact that the Family Court had refused the Appellant any direct contact. She said that in the context of what is said at [110] of the judgment, the Family Court will generally seek to promote direct contact. The fact that it has not done so in this case is relevant. She also submitted that Judge Coll had in fact done what the Court of Appeal advocated at [111] of the judgment. She had looked at whether indirect contact may eventually lead to direct contact. She also accepted that the Court of Appeal had said that it was “by no means inevitable” that there would be a finding of no genuine and subsisting parental relationship even absent direct contact but submitted that it was clear from what was there said that such a finding would be less likely. She made reference to the final sentence of the passage cited.
44. Mr Shah pointed out that the Family Court order to which Judge Coll made reference was not a final order (as Judge Coll recognised in the Decision) but we do not consider that to be material to the Court of Appeal’s reasoning. Absent a final order which the Family Court had given permission to disclose, Judge Coll had no option but to consider what might be the outcome in due course.
45. We have carefully considered whether the Decision should be preserved notwithstanding the Judge’s error in failing to refer to Section 117B(6). That depends, in large part, whether the outcome of the Article 8 assessment would be the same.
46. We have concluded that the issue at the heart of the error which has been identified and which the Respondent accepts exists is whether there can be said to be a genuine and subsisting parental relationship between the Appellant and his child. Although much of what Judge Coll says points in the direction of a finding that no such relationship exists, we cannot be confident that there is any implied conclusion on that question which can be discerned from the findings. We have therefore reached the conclusion that the Decision should be set aside to a limited extent.
47. We preserve all the findings and the conclusion in relation to the protection claim. As we have previously noted, Mr Shah did not pursue the Appellant’s grounds in this regard and we, as Judge Sheridan, have concluded that they lacked any arguable merit. We preserve therefore [22] to [66] of the Decision.
48. There is no challenge to the chronology at [16] to [21] of the Decision. We preserve those paragraphs. As we have already noted, there is no challenge to the summary of the evidence at [69] to [84] of the Decision nor to the finding at [85] and [86] of the

Decision that the Appellant does not meet the Rules based on his relationship with his child. We therefore preserve those paragraphs.

49. Although there is no challenge to the findings at (the second) [30] to [32] of the Decision (which should be numbered [90] to [92]), we need to conduct our own balance sheet assessment taking into account in particular Section 117B (6). We adopt those paragraphs insofar as they summarise the facts and evidence in relation for example to the Appellant's situation in Bangladesh. However, we do not find the headings under which the assessment has been conducted to be helpful and we do not preserve those paragraphs. Since we have to conduct our own assessment, we also set aside (the second) [33] to [34] of the Decision (which should be numbered [93] and [94]) and the conclusion at (the second) [38] (which should be numbered [98]). We preserve (the second) paragraphs [35], [36], [37] and [39] (which should be [95] to [97] and [99]). We have preserved the dismissal of the protection claim (to which the Article 3 conclusion is relevant) and we have already noted that there is no challenge to the finding that the Appellant cannot succeed under the Rules in relation to his Article 8 claim.
50. Given the limited fact-finding which is required on the issue which remains and that this turns on assessment rather than credibility, having regard to the Practice Statement, we conclude that it is appropriate for the decision to be re-made in this Tribunal. Neither representative sought to persuade us that remittal to the First-tier Tribunal was either necessary or appropriate.

Re-Making

Evidence and Findings

51. We turn then to re-make the decision. The Appellant has made no application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence. The directions sent with the permission grant make clear that there is a presumption that, if a decision is set aside at error of law stage, the Tribunal will go on to re-make the decision on the same occasion and that if an appellant wishes to have further evidence considered, an application must be made to adduce it. Mr Shah confirmed that there was no application in this case nor any further evidence which the Appellant wished to produce.
52. We were conscious that it has been well over a year since the Decision and that, at the time of that hearing, there was no final Family Court order. We asked Mr Shah therefore whether there had been any further order which we should seek to obtain from the Family Court. He confirmed that there was none. Mr Shah confirmed that he was not the Appellant's Family Court lawyer. He said that proceedings were "progressing" but that the Appellant would need the permission of the Family Court to make an application for direct

contact and he had not sought that permission. There was therefore no pending application for direct contact.

53. We invited Mr Shah's views about re-making if we were to find an error of law. Having confirmed that there was no further evidence which the Appellant wished to adduce, he submitted that the decision could be re-made on the papers, based on the evidence before us. Ms Nolan did not object to that course. We therefore turn to the evidence.
54. We have preserved Judge Coll's analysis of the evidence in relation to the Family Court proceedings. We do not need to repeat what is said at [77] to [82] of the Decision but we have regard to it in what follows.
55. We have before us two orders of the Family Court. The 2018 Order is at [ABS/29-31]. The 2021 Order is at [ABS/24-28]. The 2018 Order provides for the Appellant to be able to send letters and cards to his child every three months and to be able to give her small gifts on celebratory occasions. The 2021 Order continues the indirect contact. It records that the Appellant has parental responsibility and "as such, any decisions of sufficient gravity in respect of [A] shall be taken in consultation with him (via legal representatives)". It orders that school reports should be made available to the Appellant along with letters from professionals (GP and school) in relation to any additional needs and, in summary, views about the impact which the Appellant's introduction to [A] might have. It appears from the 2021 order that the Appellant has engaged with a Domestic Abuse Perpetrators' Programme, the outcome of which was awaited from the "Change Project" (see further what is said at [83] of the Decision).
56. The Appellant provided a witness statement dated 13 September 2021 at [ABS/6-20]. The bulk of that statement is concerned with the Appellant's protection claim and we do not need to consider that part of the statement. In relation to his relationship with [A], he confirms indirect contact. He last sent his daughter a card and £100 for her birthday in late September. He deals with his access rights in more detail at [44] to [47] of his statement. He says that he "regularly monitor[s] her progress at school and her ongoing health condition". He does not say that he has had any input in making decisions in that regard. He says he "regularly maintain[s] contact" with his daughter (although even indirect contact is limited by the 2018 Order). He says that when [A] becomes a teenager "she would look for her father" (she is now aged nearly fourteen years). He asserts that he would not be able to maintain indirect contact from Bangladesh without explaining why.
57. The Appellant also says that he would like to apply for direct contact in the future. As is noted at [81] of the Decision, he confirmed in oral evidence that he would need the permission of the Family Court

to make such an application. He also says that he would not be able to pursue the Family Court proceedings from Bangladesh. He has legal representatives and has not explained why he could not pursue those proceedings via those representatives from abroad. He has not provided any further statement well over one year later setting out the stage which the Family Court proceedings have reached or why his presence in the UK is required.

58. The Appellant also says that he provides financial maintenance for [A]. We have no evidence about the extent of that maintenance. He also says that he plays “a significant role in [his] child’s upbringing by way of indirect contact” without providing any detail about how that role arises and to what extent.
59. The other documents provided by the Appellant relating to this aspect of his case aside the Family Court orders are as follows:
- (1) Letter from the headteacher of the child’s school (undated but from context around 2019/2020) [ABS/32]: this confirms that the child has been diagnosed with global developmental delay. The letter also indicates that the Appellant’s child “does not respond well to people she is not used to” and “does not respond well to any change at all”.
 - (2) Primary school report 2020/21 [ABS/33-36].
 - (3) Primary school report 2015/16 [ABS/37-41].
 - (4) Letter from Primary School headteacher dated 19 April 2017 [ABS/42]: this confirms the child’s additional needs and that she has an Educational Health Care Plan. The letter notes the progress which the child has made supported by a “consistent home life”. It also notes concern “that an upheaval in [the child’s] home life which would cause her anxiety would lead to her falling behind in her learning and also undo the gains she has made in terms of her confidence and levels of engagement.”
 - (5) Primary school report 2016 [ABS/43].
 - (6) Psychotherapist letter – updated with previous letter dated 20 November 2016 [ABS/44-45]: although a crucial part of the update is missing, the psychotherapist makes the point in common with the school letters that the Appellant’s child does not cope well with change. In particular, in the previous letter, under the heading “Recommendations” the psychotherapist says this:

“I would be concerned at any changes made to her family life as [A] is deeply impacted by change and transitions. If contact with her father is to be re-introduced I would strongly

recommend that all the professionals involved in her welfare are consulted.”

The previous letter is replicated at [ABS/52-53].

- (7) GP’s letters dated 27 April 2021, 26 April 2017 [ABS/46], [ABS/54].
 - (8) Ophthalmologist’s letters dated 31 October 2015, 30 January 2015, 7 October 2016 [ABS/47-50].
 - (9) “Afraid list” (undated) [ABS/51].
 - (10) Medical records [ABS/55-56].
 - (11) Greetings cards, letters and cheques – September 2021 [ABS/57-59], August 2021 [ABS/61], July 2021 [ABS/62], May 2021? [ABS/63], undated [ABS/64], [ABS/84-101], [103-109], [ABS/111-115], [ABS/117], [ABS/119-129], September 2020 [ABS/65], July 2020 [ABS/66], January 2017 [ABS/102], October 2016 [ABS/110] .
 - (12) Photographs (presumed of Appellant and child when young) [ABS/60].
 - (13) Certificates of posting – 2021: February, April, May, July, August; 2020: February, June, July, September, December; 2019: March, June, September; December 2018; 2017: January, February, March, April, May; 2016: April, May, July, August, September, October, November, December; 2015: January, February, April, May, June, July, August, September, October, November; 2014: July, August, September, October, December [ABS/67-83].
 - (14) Envelope and posting certificate – December 2014 [ABS/116], January 2018 [ABS/118]
60. In relation to the letters, greeting cards and cheques, we are prepared to assume in the Appellant’s favour that those have indeed been sent to his child (although we do not know why he would have kept copies). We recognise that we have not seen the Appellant give evidence. We also recognise that the Appellant will be unable to obtain any supporting evidence from the child’s mother to show that those have been sent. In spite of the absence of any supporting evidence in the Appellant’s statement as to what was sent when, we have therefore been prepared to accept as credible the underlying evidence that the Appellant has maintained some contact with his child indirectly and at quite regular intervals.
61. We do not have any Family Court order prior to the 2018 Order. We note that submissions made on the Appellant’s behalf indicate that, at first following the separation, the Appellant was permitted to have

indirect contact on a more regular basis (monthly) and that is consistent with the underlying evidence. We do have regard though to the fact that the 2018 Order thereby represents a restriction on the right of access which the Family Court considered appropriate at that time.

62. There are very few copies of cheques other than quite recently. We accept that the Appellant does send cheques from time to time by way of gifts to his child. There is however no formal document that we have seen which confirms that the Appellant pays regular maintenance for his child. There is no underlying evidence to that effect in the form of bank statements or the like. We do not for that reason accept the assertion in the Appellant's statement that he pays regular maintenance. There is no mention of this in the Decision.
63. As we have already noted, we have no final order from the Family Court to indicate what has been the outcome following the 2021 Order. Whilst we had Mr Shah's assertion that the proceedings were "progressing" we have no updated evidence from the Appellant in this regard. If an order had been made permitting direct contact in the nearly two years since the 2021 Order, we would have expected an application to be made for disclosure of it to be given to us.
64. We therefore proceed on the basis of the access rights which the Appellant had following the 2021 Order. He has indirect contact by way of letters to his child every three months at intervals which are imposed on him. He is permitted to send greetings cards and small gifts on celebratory occasions. He is accepted to have parental responsibility. He is the child's biological father and we do not therefore find that to be surprising. The Appellant receives documents in relation to the child's educational and medical needs. We have only limited documents in that regard. In any event, none show that the Appellant has any participation in decisions made in that regard. It is recorded in the 2021 Order that he has the right to be consulted about "decisions of sufficient gravity" in relation to [A] (although only via his legal representatives). There is no evidence either from the Appellant directly or via other evidence that he has ever sought to exercise any such right.

Legal Framework

65. We turn then to the legal framework. We do not need to repeat what is said in AB (Jamaica) which is set out at [41] above. As that case makes clear, whether there is a genuine and subsisting parental relationship is a matter of fact to be assessed on the evidence. We accept that the 2021 Order is not a final order. However, we consider the comments of the Court of Appeal at [111] regarding indirect contact to have some bearing nonetheless.
66. We also have regard to the outcome of the appeals before the Court of Appeal in those cases. The facts of AO (Nigeria) (the appeal

linked to that of AB (Jamaica)) are similar to this Appellant's case. AO was permitted indirect contact via letters, cards and gifts which were sent via grandparents so as not to disclose the address of the mother and child. Although it is not entirely clear to us how this Appellant sends correspondence to [A], we note that the terms of the 2021 Order provide that the address of mother and child have to be redacted from school and medical reports before they are sent to the Appellant, and we assume therefore that the Appellant's correspondence with [A] also has to be via indirect means.

67. The appeal in AO (Nigeria) was brought by the Respondent against the First-tier Tribunal and Upper Tribunal who had allowed AO's appeal. Singh LJ recorded the terms of the Family Court order at [23] to [29] of the judgment. The child's mother in that case agreed to provide the appellant with school reports and photographs. The appellant was permitted to have indirect contact every month. Face to face contact was denied. Although this was a final order, it is not distinctly different from the 2021 Order in this case. It is worthy of note that Singh LJ held that the conclusion of the Tribunal allowing the appeal was not reasonably open to it on the undisputed facts of that case. We note however that there is no mention of any order regarding parental responsibility in that case.
68. We next turn to the case-law which is referred to in AB (Jamaica) on the question of what constitutes a genuine and subsisting parental relationship.
69. We refer first to the case of SR (Subsisting Parental Relationship - s117B(6)) Pakistan [2018] UKUT 00334 (IAC) ("SR") since that is a case on which the Appellant has placed reliance in written submissions before the First-tier Tribunal. We take into account what is said by the Court of Appeal about the guidance there given at [90] to [97] of the judgment in AB (Jamaica) but we do not consider that this impacts on the headnote in SR which reads as follows:

"If a parent ('P') is unable to demonstrate he / she has been taking an active role in a child's upbringing for the purposes of E-LTRPT.2.4 of the Immigration Rules, P may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The determination of both matters turns on the particular facts of the case."

In spite of the guidance, however, the facts of that case were very different from this case. The appellant had direct contact albeit that was supervised and had only recently re-started. There had been a recent order of the Family Court determining that it was in the child's best interests to have regular, direct contact with her father.

70. At [89] of the judgment in AB (Jamaica) the Court of Appeal referred to R (RK) v Secretary of State for the Home Department [2016] UKUT

00031 (IAC) ("RK") which had also been cited with approval by this Tribunal in SR. We consider the following passage to have some relevance to this case:

"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.'"

71. We have regard to what Upper Tribunal Judge Grubb said about parental responsibility in that case. However, as he made clear, parental responsibility may be a relevant factor but is not the determinative one. The important factor is the role that the individual plays in the child's life.
72. Ultimately, as Singh LJ made clear at [98] of the judgment in AB (Jamaica), the words "genuine and subsisting parental relationship" "are words of the ordinary English language" and no further gloss is required. The assessment of the facts of the particular case is "a highly fact-sensitive one".

Assessment

73. We turn then to assess whether the Appellant has a genuine and subsisting parental relationship with his daughter.
74. We begin by making reference to the case-law as cited above. We recognise that each case turns on its own facts. However, the Appellant's case here is closer factually to that in AO (Nigeria) than

to the case of SR. The part which the Appellant plays in [A]'s life is very much at the lower end of the spectrum.

75. The high points of the Appellant's case in his favour are that he has parental responsibility, that he has the right to be consulted in relation to decisions regarding his child albeit indirectly and only where those decisions are "of sufficient gravity" and that he might at some point in the future be given direct contact even if he does not have that now.
76. Taking those issues in turn, we do not find that the according of parental responsibility bears any significant weight. As UTJ Grubb said in RK, the absence of a parental responsibility order does not mean that a parent cannot establish that he/she has a parental relationship with a child. The converse must also be true. The fact of a parental responsibility order does not mean that the parent has a parental relationship. It is a factor but ultimately, whether there is a genuine and subsisting parental relationship turns on the facts taken as a whole.
77. We accept that the Appellant receives school and medical reports about his child. We accept that he is entitled to be consulted about some decisions concerning [A]. However, when considering the weight to be given to that factor in the overall analysis, we bear in mind that we have limited evidence about the extent to which he has received such reports. Certainly, if he has received them, he either has not kept them or has not thought it relevant to produce them. In any event, he has the right to be consulted about decisions concerning his child only where those are "of sufficient gravity" and then only indirectly via his legal representatives. We have no evidence that he has ever been consulted about decisions concerning his child nor that he has ever tried to be involved in such decision making. His witness statement is silent about this.
78. We recognise that the circumstances of this case may make it difficult for the Appellant to take any active role in decision-making in relation to [A]. The child's mother is opposed to the Appellant having any contact with [A]. The Family Court is not prepared to allow direct contact and has ordered that contact in relation to decision-making is limited and indirect. However, the evidence in the Appellant's witness statement about the substance of the relationship which he has with [A] as her father is very limited. The letters and greeting cards which he has sent state continuing love and affection for his child as would be expected. He says that he thinks of her all the time. However, they do not disclose any interest in the child's life such as might be expected of a father. It may be that this is because [A] is not permitted to respond. However, we can give little weight to the substance of the Appellant's relationship with his child as a parent on the evidence we have.

79. We also recognise that the Appellant might in due time wish to increase his contact. However, in that regard we concur with Judge Coll's conclusion that it is not likely that the Appellant will be given direct access at any point in the near future. We note that the 2021 Order was made nearly two years' ago. As we have said, if a final or indeed any subsequent order had been made in the Appellant's favour in relation to direct or even increased access, we would have expected to be told that it would be necessary to obtain further disclosure from the Family Court. That is not the position. Indeed, Mr Shah told us that although the proceedings were "progressing" and therefore might not yet have concluded, he said that the Appellant would need the permission of the Family Court to make any further application for direct contact.
80. We also have regard to the letters from [A]'s Primary School and psychotherapist about any increased contact. It is not of course for us to assess whether the Appellant should be given direct contact. That is a matter for the Family Court. However, we note the views of the professionals involved with [A]'s educational and medical care that she does not respond well to change or to contact with those she does not know. She has not seen her father for about ten years. Whilst she is now of an age where her views might be taken into account if direct contact is sought, there is no evidence to suggest that she wishes to have any contact with the Appellant.
81. It is not for us to speculate about what might happen in the future. However, assessing matters at the date of the hearing and having regard to the evidence we have seen, we consider that it is unlikely that the Appellant will be given direct access to his child.
82. Taking all those findings together and assessing the evidence we have about the relationship between the Appellant and [A] as a whole, we conclude that, whilst the Appellant has a genuine and subsisting relationship, it is not one of parent and child. He does not have a genuine and subsisting parental relationship with a qualifying child.
83. We do not for those reasons need to go on to consider whether it would be reasonable for the Appellant's child to leave the UK. On the facts here, it goes without saying that we would not have found it reasonable for [A] to leave the UK. She is a British citizen, born in the UK and living here for nearly fourteen years. She lives with her mother who is separated (and we assume divorced) from the Appellant. There are findings of domestic abuse perpetrated by the Appellant against his ex-wife and child. It would therefore not be reasonable to expect either [A] or her mother to leave the UK with the Appellant. However, we repeat that Section 117B (6) is not met because the Appellant does not have a genuine and subsisting parental relationship with his child.

84. We remain unpersuaded that it is for us to consider the best interests of [A] and Section 55 in circumstances where the Family Court has already assessed what those interests require in terms of a relationship with her father. However, in case we are wrong about that, we make the following findings.
85. As we find above, [A] is British, was born in the UK and has lived here for nearly fourteen years. Her best interests are strongly to remain in the UK. She lives with her mother and has done so since birth. She has had no direct contact with her father for nine or ten years (and the last contact in 2014 was via remote means). [A]'s best interests are strongly in favour of the status quo, that is to say to remain living with her mother alone. That is particularly so given the finding about domestic abuse perpetrated by her father against her and her mother. We also have regard to the educational and medical evidence which suggests that [A] does not cope well with change or exposure to relationships with those she does not know. That includes in our view her father. Indeed, the psychotherapist goes so far as to express concerns about any changes in [A]'s life which would involve more contact with her father.
86. We accept that the Family Court has found it to be in [A]'s best interests to have some albeit limited indirect contact with the Appellant. The Appellant is entitled to be kept abreast of educational and medical developments in relation to [A] and to be consulted where any decisions are to be taken "of sufficient gravity" albeit indirectly. However, that contact can be maintained from Bangladesh. We therefore accept that it is in [A]'s best interests to maintain the indirect contact which she has presently with the Appellant, but we find that such contact can be continued as it is currently if the Appellant is in Bangladesh.
87. We do not accept the Appellant's case that he will be unable to continue to progress the Family Court proceedings if he is in Bangladesh. He has legal representatives who will be able to continue to pursue those proceedings. If he needs to provide evidence he can do so in writing or, with the necessary permissions, via video-link. In any event, we are far from persuaded that having increased contact with the Appellant would be in [A]'s best interests for the reasons we have given. Ultimately, whether that remains the case is a matter for the Family Court, and we are not required to speculate.
88. Turning then to the Article 8 assessment, we conduct a balancing exercise between the interference with the Appellant's family and private life against the public interest.
89. Dealing first with the Appellant's family life, we accept that the limited relationship he has with his daughter does constitute family life albeit there is no genuine and subsisting relationship which is of a parental nature. The Appellant is the biological father of the child

and as such family life would generally be accepted to exist. However, we do not consider that there is interference of sufficient gravity to require justification. We have already explained that the relationship as it stands can be continued from Bangladesh. Even if we are wrong about this, the interference is not a weighty factor for the reasons we have given.

90. Turning then to the Appellant's private life, we accept he will have formed a private life. He has been here for over eleven years. However, his status has always been precarious or unlawful. He is unable to meet the Rules in relation to his residence. He has had no leave to remain since March 2017 (therefore about six years). Applying Section 117B (4) and (5) the Appellant's private life can be given little weight.
91. We recognise that "little weight" does not mean no weight. However, the weight which can be given depends on the evidence there is about the extent of private life and interference with it which would follow from removal. Here, that evidence is virtually non-existent. We have already concluded that removal would not interfere to a sufficient extent with the relationship which the Appellant has with his daughter. He would have to send letters, cards and gifts from Bangladesh rather than from the UK. He would have to continue to engage lawyers to pursue Family Court proceedings if he wished to increase contact. None of that demonstrates any weighty interference. There is no evidence showing that he has worked or established other relationships within the UK other than perhaps with those within the BNP in the UK and even then, the evidence about such relationships is limited and mainly concerns his protection claim.
92. Turning then to the position in Bangladesh, we have preserved the finding that the Appellant is not at risk on return to Bangladesh and would not face very significant obstacles to his integration. We refer to the facts and evidence recorded at (the second) [32] of the Decision. The Appellant has family members in Bangladesh. He is "relatively young and in good health". He would be in a position to find work. He has not been able to work for some time in the UK.
93. We have regard also to the other factors in Section 117B. We have explained why Section 117B (6) does not avail the Appellant. We have also dealt with the weight which can be given to his private life applying that section. We do not have evidence about his English language ability or financial independence. Even assuming those matters in the Appellant's favour, we adopt Judge Coll's reasoning that they are neutral.
94. Balanced against the interference with the Appellant's private and (if any) family life, we have to assess the public interest. That is a strong factor. The Appellant has lived in the UK without leave for about six years. He has no right to remain under the Rules. The

maintenance of effective immigration control counts against him and is we find a strong factor.

95. Balancing the interference with the Appellant's private and (if any) family life which we find on the evidence is weak against the public interest factor which is a strong one, we conclude that removal of the Appellant would not be disproportionate. Removal would not breach his rights under Article 8 ECHR. We have preserved the conclusion of Judge Coll when dismissing the appeal on protection grounds that removal does not breach the Refugee Convention or the Appellant's Article 2 or 3 rights.
96. For those reasons, we dismiss the Appellant's appeal on all grounds.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Coll promulgated on 22 September 2021 involves the making of an error of law on limited grounds. We set aside that decision whilst preserving the conclusion in relation to the protection claim and the findings of the Judge at [16] to [86] and (the second) [35] to [37] and [39] of the Decision. We therefore set aside only the findings in (the second) [30] to [34] and [38] whilst preserving the summary of the facts and evidence there recorded.

We re-make the decision.

The Appellant's appeal is dismissed on all grounds.

Signed: L K Smith

Dated: 27 February 2023

Upper Tribunal Judge Smith