Neutral Citation Number: [2012] EWCA Civ 1363

Case No: C5/2011/2561

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
REF: DA0/0558/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2012

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division

LORD JUSTICE STANLEY BURNTON
and
SIR STEPHEN SEDLEY

- -

Between :

RHOMAINE MIYANDO MOHAN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Adrian Berry (instructed by **Messrs Wilson Barca**) for the **Appellant**
Miss Deok Joo Rhee (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 17 July 2012

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Approved Judgment

Lord Justice Maurice Kay :

1. The issue on this appeal is the relationship between the "automatic deportation" of a foreign criminal pursuant to section 32(5) of the UK Borders Act 2007 and Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), particularly where the Secretary of State seeks to deport at a time when the deportee is engaged in family proceedings in this country concerning the best interests of his child. A brief exposition of the facts will illustrate the problem. Rhomaine Mohan is a Jamaican national, now aged 32. He first arrived in the United Kingdom on 18 May 2000 when he was granted leave to enter as a visitor for one month. Thereafter he remained as an overstayer and he has been in this country without status at all times, apart from a period of three months in 2006. His then partner, Colleen Martin, gave birth to their daughter, Taylor-Lei ("Taylor") on 29 August 2001. On 11 November 2004 Mr Mohan applied for leave to remain on the basis of his marriage to Colleen but this was refused. His relationship with Colleen came to an end and he commenced a relationship with his current partner Nadine. On 17 November 2005, Nadine gave birth to Mr Mohan's second child. However, on 3 June 2006 he was removed to Jamaica as an overstayer. Three months later he returned to this country using a false passport and he has been here ever since. On 22 August 2006 he was imprisoned for 10 weeks for driving offences and illegal entry. On his release from prison he applied for leave to remain on the basis of his relationship with Nadine. That was refused on 10 January 2008 which decision was confirmed notwithstanding legal challenges. On 25 May 2008 Nadine gave birth to Mr Mohan's third daughter, Tahlia. On 24 July 2009 he was convicted at Croydon Crown Court of possession of a class A controlled drug with intent to supply. He was sentenced to 30 months imprisonment with a consecutive sentence of 16 weeks, being the activation of a suspended sentence which had been imposed previously for further driving offences. He thus became liable to automatic deportation and an order was made against him to that effect on 16 June 2010. He appealed against it but the First-tier Tribunal dismissed his appeal on 13 October 2010. Following the identification of an error of law in the decision of the First-tier Tribunal, the Upper Tribunal reheard the appeal but dismissed it on 15 August 2011. The appeal to this Court is against that decision.

2. It is now necessary to weave the history of the family proceedings into the immigration history. On 11 June 2008, that is to say shortly after the birth of Tahlia, Mr Mohan applied for a residence order in respect of Taylor in family proceedings arising out of his marriage to Colleen. Those proceedings remained extant when he was arrested for the drugs offence in June 2009. Soon after he received the sentence of imprisonment, the County Court adjourned the family proceedings generally with liberty to restore. By that time, Mr Mohan was serving a prison sentence and was not in a position to pursue an application for a residence order. Notwithstanding his lamentable immigration history and the seriousness of his criminality, the Upper Tribunal accepted that he is a caring and loving father to all three of his daughters. It also accepted that Colleen is an irresponsible and selfish mother who puts her own interests and enjoyment above the needs and welfare of Taylor. The Upper Tribunal also formed a very favourable impression of Nadine, referring to "a generosity of spirit which may fairly be regarded as remarkable" in that she has displayed "a commendable degree of concern and care for Taylor which appears on the face of it to be sadly lacking in Taylor's own mother". Although Taylor continues to live with her

own mother, there has been regular contact between the child, Mr Mohan, Nadine and their two children. In the words of the Upper Tribunal:

> "…they are all on close and affectionate terms even though they do not actually live together, and have never lived together in the same household."

3. The family proceedings concerning the welfare of Taylor, who is now aged 10, remain unresolved. This gives rise to the tension between automatic deportation and Article 8 rights which are sought to be raised in the family proceedings. If he is deported at this stage, Mr Mohan will undoubtedly be disadvantaged in his pursuit of those proceedings. Moreover, Nadine and Mr Mohan's second and third daughters would remain in this country.

The decision of the Upper Tribunal

4. The Upper Tribunal considered Mr Mohan's appeal on three grounds. Because of the structure of the decision, it is necessary to describe its elements sequentially. First, consideration was given to the question whether removal from the United Kingdom would involve a breach of Mr Mohan's Article 8 rights, ignoring the complication of the family proceedings. As to this, the Upper Tribunal set out the approach enjoined by *R (Razgar) v Secretary of State for the Home Department*, [2004] UKHL 27, [2004] 2 AC 368 took account of the later decisions in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] 1 AC 39 and *ZH (Tanzania) v Secretary of State for the Home Department*; [2011] UKSC 4, [2011] 2 AC 166 set out the various factors favouring and weighing against deportation and concluded:

> "36. It is impossible not to have a considerable measure of sympathy for the appellant's children, particularly Taylor who has exhibited behavioural difficulties … and who has had an unhappy upbringing to date, partly because of her father's law breaking and partly because of her mother's feckless and irresponsible behaviour. The effect of the appellant's removal on his other two children and on his partner must also be taken into account, albeit that they do not exhibit the same degree of concern as that relating to Taylor.
>
> 37. Nevertheless, when the best interests of the appellant's children are taken properly into account together with the other factors weighing in his favour …, and when those factors are balanced against the legitimate and weighty public interest …, I am satisfied that on the facts of the appellant's case, the balance comes down against him. I therefore find against the appellant in relation to his Article 8 claim."

5. Secondly, the Upper Tribunal addressed a submission that to remove Mr Mohan from the United Kingdom would constitute a breach of EU law in the light of the judgment of the Court of Justice of the European Union in *Zambrano v Office National de*

L'Emploi (2011) CJEU Case C-34/09. This submission was rejected by the tribunal and it is no longer an issue before this court.

6. Thirdly, the Upper Tribunal considered as a separate issue the question whether deportation would infringe Mr Mohan's Article 6 and Article 8 rights, having regard to the unfinished family proceedings and the welfare of Taylor. The Upper Tribunal concluded:

> "47. …I am not persuaded that the appeal should be allowed under either Article 6 or Article 8 pending the outcome of the Children Act proceedings which the appellant has initiated. The evidence shows that those proceedings were started as long ago as June 2008. They were then allowed to remain dormant for some three years. It is only now that the appellant has belatedly taken any steps to revive them, clearly with the intention of delaying or preventing his removal from the United Kingdom. He had ample opportunity to do so previously, not withstanding the practical difficulties which his imprisonment and detention have no doubt caused in that respect. His prospect of succeeding in those proceedings would clearly be enhanced significantly if he were now allowed to remain in the United Kingdom, particularly if he were allowed to do so on an indefinite basis. Conversely, his prospects of success would be reduced considerably, if not indeed extinguished altogether, if he were to be deported to Jamaica instead. However, that is a matter for the court dealing with the Children Act application to take into account when reaching its decision. The fact that the appellant did not pursue his application for the last three years, but to allow it to remain dormant instead, is not in my assessment sufficient to show that it would constitute a breach of his human rights, either under Article 6 or Article 8 to remove him from the United Kingdom now even though the outcome of those proceedings remains unresolved. Even if I were persuaded to allow the appeal so as to enable a short period of discretionary leave to be granted by the respondent … , the reality remains that that would be likely to prove no more than a short term relief from the appellant's point of view. The court considering the application would undoubtedly have to made aware, if indeed it has not already been made aware that the appellant is still facing the real prospect of deportation from the United Kingdom with the concomitant inability to return, at least legally whilst the deportation order remains unrevoked for a substantial period, and would no doubt

> regard that as a significant consideration when reaching its decision."

That substantial period would be at least 10 years. Although reference was made to Article 6 and Article 8, it is common ground in this Court that Article 6 does not avail Mr Mohan.

The statutory framework

7. Automatic deportation was introduced by section 32 of the UK Borders Act 2007. The material provisions are as follows:

> "(1) In this section 'foreign criminal' means a person –
>
> (a) who is not a British citizen
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3) Condition 2 is that –
>
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and
>
> (b) the person is sentenced to a period of imprisonment.
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

8. Section 33 then contains exceptions, Exception 1 of which is defined by section 33(2) as

> "where removal of the foreign criminal in pursuance of the deportation order would breach –
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention."

"Convention rights" are those set out in the ECHR.

9. In the present case it is plain that Mr Mohan is a foreign criminal in respect of whom the Secretary of State was obliged to make a deportation order, subject to his right to challenge it by reference to his Convention rights.

10. As regards the family proceedings, by section 1(1) of the Children Act 1989,

> "When a court determines any question with respect to –
>
> (a) the upbringing of a child … the child's welfare shall be the court's paramount consideration."

11. Section 8 provides for residence (and contact) orders. By section 10, Mr Mohan is an eligible applicant for such an order in relation to Taylor.

The case for Mr Mohan

12. In his skeleton argument, Mr Adrian Berry synthesises his ground of appeal as follows:

> "The Tribunal misdirected itself in law in its approach to the inter-relationship between the family proceedings and the immigration proceedings and misapplied the law to the facts of the case, so as to occasion a violation of rights protected by Article 8 ECHR."

In a nutshell, he submits that Article 8 rights were violated because, by dismissing Mr Mohan's appeal, the Upper Tribunal has impermissibly pre-empted and, by implication, prejudged the family proceedings.

The authorities

13. Mr Berry puts at the heart of his submissions the Strasbourg case of *Ciliz v The Netherlands* (29192/95, 11 July 2000), which arose out of a contact dispute and had no criminal connotation. The Court said:

> "66. In determining whether an interference was 'necessary in a democratic society', the Court will take into account that a margin of appreciation is left to the Contracting States. It recalls that the Convention does not in principle prohibit Contracting States from regulating the entry and length of stay of aliens … Nevertheless, the Court also reiterates that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8:
>
> What … has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken,

> the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (see *W v United Kingdom*, 8 July 1987, … and *McMichael v United Kingdom*, 25 February 1995).
>
> ….
>
> 71. In the view of the Court, the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant of all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance. It can, moreover, hardly be in doubt that when the applicant eventually obtained a visa to return to the Netherlands for three months in 1999, the mere passage of time had resulted in a *de facto* determination of the proceedings for access which he then instituted … The authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed.
>
> 72. In sum, the Court considers that the decision-making process concerning both the question of the applicant's expulsion and the question of access did not afford the requisite protection of the applicant's interests as safeguarded by Article 8. The interference with the applicant's right under this provision was, therefore, not necessary in a democratic society."

14. *Ciliz* was cited in and informed the subsequent domestic authorities of *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133 and *MH v Secretary of State for the Home Department* [2010] UKUT 439 (IAC).

15. In *MS*, the Asylum and Immigration Tribunal had dismissed a deportation appeal at a time when there was an outstanding contact application in the family court. This Court held (at paragraph 69):

> "In our judgment, the AIT did not decide the hypothetical question it was incumbent upon it to decide, namely whether the appellant's Article 8 rights would be violated by a removal when the case was before it, ie when the contact application was outstanding."

The case was a difficult one for the appellant. She had served a lengthy prison sentence for the physical abuse of her children. Nevertheless, her appeal was allowed with the result that she was given a short period of discretionary leave to remain, extendable if appropriate, to enable her to participate in the family proceedings.

16. Shortly before the hearing of the present appeal in this Court, the Upper Tribunal promulgated two decisions of relevance to it: *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC) and *Nimako-Boateng (residence orders – Anton considered)* [2012] UKUT 00216 (IAC). In both cases, the Upper Tribunal comprised McFarlane LJ, Blake J (President) and Upper Tribunal Judge Martin. *RS*, in particular, contains the Upper Tribunal's most considered guidance on the approach to be taken in cases such as this, that is to say where the "automatic deportation" procedure arises in the context of an Article 8 claim which is also in the course of consideration in family proceedings. The conclusion of the Upper Tribunal on the facts before it was (paragraph 18):

> "Since in our view [the child's] best interests were likely to play a decisive role in the outcome of the deportation appeal, we concluded that we had no alternative but to adjourn those proceedings until the family court had examined all the information available to it and determined where those best interests lay."

17. This is not to say that the hands of the Secretary of State and the First-tier and Upper Tribunals will be tied by the outcome of family proceedings. The two jurisdictions apply different tests. In *Nimako-Boateng*, the Upper Tribunal explained the position as follows (at paragraphs 31-33):

> "Both the Home Office and the immigration judiciary <u>are</u> concerned with an assessment of the best interests of the child affected by an administrative decision to remove either the child or a parent or other person providing care or support to the child. This is made clear by the terms of s55 of the UK Borders Act 2009, the decision in *ZH (Tanzania)* [2011] UKSC 4 and the Strasbourg case law on Article 8 such as *Maslov v Austria* [2009] 1 NLR 47 stating that immigration decision-making affecting children under 18 has to be consistent with the terms of Article 3 of the UN Convention on the Rights of the Child 1990. However, whereas in family law proceedings the welfare of the child is the paramount consideration, in immigration proceedings it is 'a primary' rather than 'the paramount' consideration and can be outweighed by other compelling rights-based factors. These include those set out in Article 8(2) ECHR, namely the prevention of disorder and crime, the promotion of the economic well-being of the country and the protection of the rights of others by the maintenance of a system of immigration control …
>
> Further, the family court is best placed to evaluate the best interests of the child in proceedings brought before it. Both the decision itself and the reasons for the outcome are material to

> the consideration of the Article 8 balance to be conducted by the immigration judiciary and may be a decisive consideration. Reasoned decisions of such courts are not to be ignored in immigration appeals. Indeed the problem facing immigration judges is that, although they must attach weight to the best interests of the child, in many cases they will often not be able to assess what those interests are without the assistance of a decision of the family court. The family court has, amongst other things, procedural advantages in investigating what the child's best interests are, independent of the interests of the parent, as well as the necessary expertise in evaluating them.
>
> An informed decision of the family judge on the merits and, in some cases at least, the material underlying that decision, is likely to be of value to the immigration judge"

It seems to me that that analysis, which comes from a Tribunal including not only the President of the Immigration and Asylum Chamber but also a Lord Justice with enormous experience of child welfare law, is undoubtedly correct. It lies behind the guidance to which the Tribunal proceeded in *RS*.

18. The material parts of that guidance are to be found in the following extracts:

> "43. In our judgment, when a judge sitting in an immigration appeal has to consider whether a person with a criminal record or adverse immigration history should be removed or deported when there are family proceedings contemplated by the judge should consider the following questions:
>
> (i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
>
> (ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child?
>
> (iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?
>
> (iv) In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of the contact proceedings and the commitment with which they have been progressed, when a decision is likely to be

> reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?"

19. The Tribunal then went on to identify issues which would require resolution in the light of the answers to those questions, including whether the claimant has an Article 8 right to remain until the conclusion of the family proceedings and, if so, whether he should be granted a limited discretionary leave to remain or, alternatively, whether it is more appropriate for a short adjournment of the immigration case to be granted "to enable the core decision to be made in the family proceedings" (paragraph 44). It also emphasised the need for "informal communication" between the family and immigration judges, stating that it is "important that a system be established so that both jurisdictions can be alerted to proceedings in the other and appropriate relevant information can be exchanged, without undermining principles of importance to both jurisdictions" (paragraph 47).

20. Again, I consider that this Court should endorse this approach. It is appropriate to record that, factually, while the adjournment option was taken in *RS*, in *Nimako-Boateng* the appeal was dismissed notwithstanding orders in family proceedings in favour of the appellant because

> "there was no useful material in the family court decisions to inform the immigration judge." (Paragraph 34).

The appellant had lied about her identity, immigration status and marital history and the timing of the orders in the family proceedings gave rise to the reasonable suspicion that they were obtained primarily for the purpose of production in the immigration appeal. Ultimately, there was "no evidence" that separation of mother and child by the removal of the former would deprive the latter of a valuable source of parental contact and support that she presently enjoyed (paragraph 42).

Discussion

21. As I have indicated, I accept that the general approach of the Upper Tribunal in *RS* and in *Nimako-Boateng* represents the correct reconciliation of the conflicting concepts of automatic deportation and Article 8 in immigration and family proceedings. The issue on this appeal therefore becomes: did the Upper Tribunal fall into material legal error when it dismissed Mr Mohan's appeal, rather than granting him a limited period of discretionary leave or adjourning the appeal pending resolution of the family proceedings? I have referred to the possibility of the Tribunal granting discretionary leave rather than leaving it to the Secretary of State to do so because that was the course taken in *MS*, pursuant to section 87 of the Nationality, Immigration and Asylum Act 2002.

22. The case for the Secretary of State is that the Upper Tribunal found, and was entitled to find, that in this case, whatever conclusion might eventuate in the family proceedings, the outcome of the immigration appeal would inevitably be its dismissal. Although, when considered in isolation, Taylor's best interests would be served by Mr Mohan remaining in this country (as the Tribunal accepted at paragraph 35), when the case is considered by reference to the full range of factors relevant to an immigration

appeal, this is plainly a case in which deportation is appropriate. The Tribunal had express regard to *MS* and committed no legal error in applying it.

23. The strength of the Secretary of State's case is based on three main factors: Mr Mohan's immigration history; the seriousness of his criminal behaviour; and the finding that he had only taken steps to revive the family proceedings "belatedly" and "clearly with the intention of delaying or preventing his removal from the United Kingdom" (paragraph 47). It cannot be gainsaid that the first and second factors were present and material.

24. As to the third factor, the legal principle espoused by the Tribunal is unobjectionable. Indeed, it was subsequently embraced in *RS*, where the Tribunal identified as relevant the question whether "there is any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare". On behalf of Mr Mohan, Mr Berry does not dispute the relevance of the question. His submission is that there was no evidence to support the finding of an affirmative answer to it. In my judgment, there is force in this submission. The residence application was lodged in Lambeth County Court in June 2008, long before his arrest on 17 June 2009. It was in the following terms:

> "I ask that the court make a residence order in my favour for Taylor to live with my family and I during the week so that we can ensure that she attends school, with [Colleen] to have staying contact at weekends … "

25. The critical finding of the Upper Tribunal was that Mr Mohan had allowed those proceedings "to remain dormant for some three years" and that "it is only now that [he] has belatedly taken any steps to revive them, clearly with the intention of delaying or preventing his removal from the United Kingdom".

26. It is true that progress with the residence application was desultory between June 2008 and Mr Mohan's arrest a year later. However, there is some evidence that he was attempting to progress it at that time but Colleen was being uncooperative.

27. What cannot be said (and was not found by the Tribunal) is that the inception of the application was a cynical ploy or an attempt to thwart removal by reference to a crime he had not yet committed. From June 2009 until October 2011 he was in custody – first on remand, then as a sentenced prisoner and finally in immigration detention until a successful bail application on 18 October 2011, some two months after the hearing in the Upper Tribunal. It seems to me that it was unfair of the Tribunal to describe the revival of the residence proceedings as having been made "belatedly". In view of the fact of continuing custody, it is hardly surprising that he had been advised by his solicitors that he could not sensibly pursue them at that time. Eventually and, according to his evidence, "in view of the serious situation that has now arisen with Taylor", he had, prior to the hearing in the Tribunal, instructed his solicitors to pursue the application. Plainly, its prospects of success would become realistic only if and when he obtained bail.

28. The question that arises is whether the Tribunal was justified in concluding that the revival of the residence proceedings was done "clearly with the intention of delaying or preventing his removal". The answer to that question has to be assessed in the context not only of the removal direction but also with regard to the facts that (1) the inception of the proceedings in June 2008 had not been tarnished by such an ulterior motive; and (2) the Upper Tribunal made very positive findings in favour of Mr Mohan and Nadine and against Colleen when considering the best interests of Taylor. Thus, Mr Mohan has "a caring and loving relationship with all three of his children and they feel the same way about him". Nadine had shown "a generosity of spirit which may fairly be regarded as remarkable, … a commendable degree of concern and care for Taylor which appears on the face of it to be lacking in her … own mother … [She] has given money to Taylor's mother towards the cost of Taylor's maintenance, bought Taylor clothes, given her presents at Christmas and on her birthday and generally displayed a genuine concern for her well-being". Colleen, on the other hand, was characterised (albeit in her absence) as "feckless and irresponsible". All this tends, at the very least, to call into question the finding that the revival of the residence proceedings was the product of an ulterior motive.

29. However, in my judgment, the real legal flaw in the determination of the Upper Tribunal is to be found in its treatment of the relationship between the deportation appeal and the family proceedings. The Tribunal stated (at paragraph 47):

> "Even if I were persuaded to allow the appeal so as to enable a short period of discretionary leave to be granted by the respondent … the reality remains that that would be likely to prove no more than a short-term relief from the appellant's point of view. The court considering the [residence] application would undoubtedly have to be made aware … that the appellant is still facing the real prospect of deportation … with the concomitant inability to return … for a substantial period and would no doubt regard that as a significant consideration when reaching its decision."

30. That, it seems to me, discloses an approach at variance with the one prescribed by *RS*. The submission on behalf of the Secretary of State is that, in the present case, the determination of the Upper Tribunal, when read as a whole, amounts to a finding that this is an "only one possible outcome" case. In other words, it is inevitable that, whatever findings the family court might make about Mr Mohan, Nadine, Colleen and the best interests of Taylor, Mr Mohan's offending and his immigration history are such that, in immigration proceedings, his deportation would be found to be proportionate.

31. I do not accept this submission. There was sufficient material before the Upper Tribunal to compel the conclusion that the family court could come to the conclusion that it is contrary to Taylor's best interests to reside with Colleen and emphatically in accordance with those interests for her to reside with Mr Mohan, Nadine and her half-sisters. As the Tribunal said in *Nimako-Boateng*, the family court is best placed to make the necessary evaluation. I do not doubt that there will be cases in which the material before a Tribunal will justify the conclusion that to delay determination of the deportation appeal in order to await the judgment of the family court is not necessary because the material in favour of the appellant lacks substance and the

public interest in deportation is overwhelming. Indeed, *Nimako-Boateng* was just such a case. The present case is not. The judgment of the family court, with all the tools at its disposal (including the assistance of CAFCASS and the opportunity to assess all the adults, including Colleen), could and should inform the decision-making of the Tribunal on the issue of the proportionality of deportation, in relation to the best interests of Taylor.

32. Accordingly, I would allow this appeal and remit the case to the Upper Tribunal, which should approach its task broadly in the manner prescribed by *RS*. However, although the Tribunal in *RS* considered (at paragraph 44(iii)) that it should consider whether it is likely that the family court would be assisted by the expression of a provisional view of the likely eventual outcome of the immigration appeal, I take the view that that will usually be inappropriate in an apparently finely balanced case. Moreover, it does not live easily with the principle that, when the Tribunal proceeds to its ultimate decision, it must do so on the basis of the material before it at that time.

Lord Justice Stanley Burnton:

33. I agree.

Sir Stephen Sedley:

34. I also agree.