Neutral Citation Number: [2026] EWCA Civ 509

Case No: CA-2025-000911

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE LODATO
UI-2024-005333

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2026

Before:

LORD JUSTICE BAKER
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE LEWIS

- -

Between:

JAKIR AHMED	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik KC and Bronwen Jones (instructed by Morgan Hill Solicitors) for the **Appellant**
Marcus Pilgerstorfer KC and Émilie Pottle (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 16 April 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This an appeal against a decision of the Upper Tribunal dismissing an appeal from a decision of the First-tier Tribunal. That tribunal had, in turn, dismissed an appeal by the appellant, Jakir Ahmed, against a decision of the respondent, the Secretary of State for the Home Department, refusing leave to remain. At the time of the tribunal proceedings, the appellant had also made an application in the family court seeking an order for contact with his daughter. The principal issue in this appeal concerns the proper approach of the First-tier Tribunal to determining an appeal when there are proceedings in the family court running concurrently. In particular, the appeal raises the question of whether an appellant is entitled to be allowed to remain in the United Kingdom at least until the conclusion of the family court proceedings.

2. In brief, the appellant had initially come to the United Kingdom with leave to enter and remain until 2 October 2006. The appellant thereafter remained unlawfully in the country for about 16 years. He then married a British national. On 28 March 2020, he was granted leave to remain in the United Kingdom until 6 February 2023. The appellant and his wife had a child in June 2020. They separated in August 2021 and the appellant went to live in York (the wife and child remained in London). On 26 July 2022, the appellant applied to the East London family court for, amongst other things, a child arrangements order which, if granted, could provide for the appellant to have contact with his child.

3. On 30 December 2022 the appellant applied for leave to remain in the United Kingdom as the parent of a British-national child. That application was refused. The respondent considered that the appellant did not meet the requirements of the Immigration Rules as he had not provided evidence that he had direct access to his child or that he was taking an active role in the child's upbringing. Nor had the appellant demonstrated that refusal of leave to remain would be a breach of his right to respect for his family and private life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

4. The appellant appealed against that decision to the First-tier Tribunal. At the time that the First-tier Tribunal came to decide the appeal, the appellant, therefore, had two sets of proceedings outstanding: the immigration appeal, and the application in the family court for a contact order. A principal issue for the First-tier Tribunal to decide was whether the appellant had a right derived from Article 8 of the Convention to remain in the United Kingdom at least until the conclusion of the family court proceedings. The First-tier Tribunal determined that he did not have such a right as it believed the family court proceedings had been instituted to delay or frustrate the immigration process and not to promote the child's welfare. It reached that conclusion because, essentially, the appellant had not had any direct contact with his child in the three years since he had left the family home and had shown little interest in or had contact with the child, he lacked commitment to the progress of the family court proceedings, and the evidence available did not point to the welfare of the child requiring the issue of contact to be determined prior to the resolution of the immigration appeal. The Upper Tribunal dismissed an appeal against that decision on 19 February 2025.

5. The appellant appealed against the decision of the Upper Tribunal, contending that it had erred in upholding the First-tier Tribunal decision as that decision was wrong on three grounds:

(1) at paragraph 31(x) of its reasons, the First-tier Tribunal made a finding that the appellant was not committed to the family court proceedings and was using them to advance his immigration appeal when that finding was not available to it on the evidence;

(2) at paragraph 31(xiv) the First-tier Tribunal's finding that the child's best interest was to remain with her mother without contact with the appellant was impermissible on the evidence and also prejudged the fact-finding and welfare stages in the family court proceedings. It was said that that decision in effect determined the family court proceedings and rendered them academic and was inconsistent with the guidance at paragraphs 36 to 37 of the Upper Tribunal's decision in *RS v Secretary of State for the Home Department* [2012] UKUT 218 (IAC); and

(3) the First-tier Tribunal misinterpreted the purpose and application of the guidance in *RS* and lost sight of its role in protecting the Article 6 and 8 rights of the appellant in linked family and immigration proceedings.

6. The appellant also sought permission to introduce new evidence which consisted of orders of the family court made on 4 April 2025 and 9 October 2025. Those orders provided, amongst other things, for there to be supervised contact between the appellant and his daughter, that contact to be arranged and paid for by the appellant and for contact notes to be produced. The appellant did not seek to adduce any evidence of actual contact with the child in pursuance of those orders. There is no admissible evidence before this court as to whether or not the appellant has had contact with his daughter and, if so, when, or as to the frequency and duration of any such contact or the outcome of the supervised contact. Mr Malik KC, for the appellant, accepted that the evidence would not assist in determining the question of whether the First-tier Tribunal (or the Upper Tribunal) had erred. He sought to adduce the orders as evidence of the potential for a conflict between the decisions of immigration tribunals and family courts. Mr Pilgerstorfer KC, for the respondent, objected to the admission of the new evidence and submitted that it did not meet the test for admissibility of evidence on an appeal and presented a partial or incomplete picture.

7. I have read the evidence. I would refuse permission to adduce the evidence. That evidence is not necessary to establish the proposition that family courts may make different decisions from immigration tribunals. The evidence, as Mr Malik accepted, does not assist in the resolution of this appeal.

THE LEGAL FRAMEWORK

The scope of the Article 8 rights

8. Article 8(1) of the Convention provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". Article 8(2) provides that there will be no interference with that right by a public body unless it is necessary for one of a number of specified reasons.

9. The operation of Article 8 in a context where there are parallel immigration and family court proceedings was considered by the European Court of Human Rights in its judgment in *Ciliz v The Netherlands* (Application no. 2192/95). The applicant in that case was a Turkish national who had come to the Netherlands in 1998 and married later that year. He was granted a residence permit to live in the Netherlands with his spouse in March 1989. They had a son in August 1990 and the applicant, his wife and his son lived together for about 18 months before the applicant and his wife separated. The applicant applied to the regional court for an order establishing an arrangement for parental access to his son. The regional court asked a child care and protection board to investigate the position. Following a hearing in November 1994, the regional court decided on 19 January 1995 that, in view of the circumstances and the relationship of the parties, it was inappropriate to lay down a formal access arrangement. The regional court said it assumed that the contacts that the applicant had with his son would continue in future and observed that the wife should ensure that contacts between the applicant and his son took place. The applicant filed an appeal against the decision not to formalise the access arrangements. Meanwhile, the applicant had been refused an extension to his residence permit. He had appealed against that refusal. On 10 May 1995, a hearing of that appeal took place. The court decided the refusal to allow the applicant continued residence in the Netherlands was a justified interference with his right to family life. Meanwhile, on 1 June 1995, the appeal in the family court proceedings was adjourned to enable the child care and protection board to organise what were described as a number of supervised trial meetings. Those meetings were delayed because of the heavy-work load of the board. The applicant was then detained. The first supervised meeting took place on 7 November 1995 in the detention centre. The applicant meanwhile had requested a residence permit on 2 November 1995. That had been refused and the applicant appealed, contending that the proceedings concerning access to his son had not been concluded and the trial meeting ordered in June 1995 had not taken place until November 1995. The appeal was dismissed and the applicant removed from the Netherlands and sent to Turkey.

10. It was in that context that the European Court decided first whether there had been an interference with the right to respect for family life or a failure to comply with a positive obligation imposed by Article 8. It said at paragraphs 61 to 63 (references omitted):

> "61. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation…
>
> 62. In fact, the instant case features both types of obligation: on the one hand, a positive obligation to ensure that family life between parents and children can continue after divorce (see, *mutatis mutandis*, the Keegan judgment cited above, p. 19,

> § 50), and, on the other, a negative obligation to refrain from measures which cause family ties to rupture. The Court considers that the domestic authorities were in the process of acquitting themselves of the former obligation to the extent that in the proceedings relating to the establishment of a formal access arrangement the feasibility and desirability of access were being examined. It was, however, the decision not to allow the applicant continued residence and his subsequent expulsion which frustrated this examination. It is for this reason that the Court deems it most appropriate to view the case as one involving an allegation of an "interference" with the applicant's right to respect for his "family life".
>
> 63. This being so, the Court will next examine whether this interference was "in accordance with the law", had an aim or aims that is or are legitimate under Article 8 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims."

11. At paragraphs 67 and following, it considered the circumstances of the case. It noted that there were two sets of proceedings running concurrently. The regional court had not made a formal access arrangement but it had stipulated that the existing contacts between the applicant and his son should continue. Further, the appeal against the refusal to make a formal access arrangement was pending at the time that the appeal against the refusal to extend the residence permit was heard. Furthermore, the appeal in the access proceedings had ordered that there be supervised trial meetings but the Dutch authorities had detained the applicant before the first trial meeting had taken place. The delay in arranging the meetings was not the fault of the applicant (who had requested that the arrangements be expedited and arranged by a different body) but were the result of the workload of the child care and protection board. The European Court also noted that the applicant had not been convicted of any criminal offence barring his removal from the Netherlands. It also noted that the applicant was expelled shortly after the first trial meeting and was refused a visa to return to attend further trial meetings.

12. It was in those circumstances that the European Court found that the interference with the applicant's right to respect for his family life was not justified under Article 8(2) of the Convention as (citations omitted):

> "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 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. Accordingly, there has been a breach of that provision."

The domestic case law

13. The decision in *Ciliz* highlighted the possible need, depending on the circumstances of an individual case, to co-ordinate family court and immigration proceedings. An individual may, depending on the circumstances, need to be allowed to remain in the United Kingdom pending the conclusion of the family court proceedings if there is not to be a breach of Article 8 of the Convention. That could be achieved by allowing an appeal against a refusal to grant leave (so that the Secretary of State could grant leave for a limited period whilst the family court proceedings were concluded) or the immigration appeal proceedings may be adjourned pending the resolution of the family court proceedings.

14. The issue was considered by the Upper Tribunal (Immigration and Asylum Chamber) comprising McFarlane LJ (then a judge of the Court of Appeal with considerable family law experience), the then President of the Upper Tribunal (Immigration and Asylum Chamber) and an Upper Tribunal Judge in *RS*. RS was a national of India unlawfully in the United Kingdom. He married a British citizen. They had a daughter on 4 April 2005. RS was convicted of possession of a false passport (which he was using to obtain employment to get money to support his family) and sentenced to 12 months' imprisonment. As such, he was a foreign criminal within the meaning of the UK Borders Act 2007 and liable to deportation. While the applicant was detained, social services visited the family home as there were concerns about his wife's mental health and ability to cope alone with the child. The child had not been fed or properly clothed and the house was in a poor state of cleanliness. An emergency protection order was made and the child was taken into interim local authority care on 12 February 2010. Proceedings concerning the care of the child continued in the family court. RS also appealed against the decision to deport him. The matter ultimately came before the Upper Tribunal in May 2012. RS' position was that the most appropriate course was to adjourn the immigration appeal pending the outcome of the family court proceedings in June 2012 when it would be known if the child would be returned to the care of RS and his wife or placed for adoption or long-term foster care. The Secretary of State did not oppose that course of action. The Upper Tribunal considered the inter-relationship of care and immigration proceedings, and the decision in *Ciliz*. At paragraphs 36 to 37, it observed that:

> 36. Deputy Judge Woodcraft acknowledged the problem of 'who goes first' where there are parallel proceedings in immigration and family cases. The family court may well be assisted by knowing whether a person in the position of the appellant is likely to be able to remain in the United Kingdom and be an active presence in the child's life. The immigration court would be informed by the family court's assessment of the child's welfare.
>
> 37. Although both the Secretary of State and the judges of the First-tier Tribunal and Upper Tribunal have a duty to treat the child's best interests as a primary consideration in the application of administrative action including immigration action that is likely to affect the child, the Tribunal does not have any means of assessing these matters for itself, in particular: there is no local authority or children's guardian, no access to the service provided by CAFCAS, and no independent means of ascertaining the wishes, concerns and interests of the child. It is generally not considered desirable to hear oral evidence from a child of tender years (below the age of 12) when this is likely to be a source of stress, anxiety and possibly tension with any caring parent. It would be undesirable if the child felt responsible in some way for the removal of an offending parent.

15. The Upper Tribunal considered the decision in *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133 where this Court concluded that the issue could not be resolved by an undertaking from the Secretary of State that he would not remove the individual pending the outcome of the family court proceedings. Rather it was incumbent on the tribunal to determine the appeal and decide whether or not there would be a breach of Article 8 if a person was removed before the conclusion of the family court proceedings. The Upper Tribunal noted that there was no universal obligation to allow an appeal, so that a period of leave to remain could be granted, where family court proceedings remained unresolved (noting the decision to that effect in *DH (Jamaica*) [2020] EWCA Civ 207).

16. At paragraph 43 the Upper Tribunal set out the questions that should be considered in order to enable an immigration tribunal to determine the questions identified at paragraph 44. It is necessary to set out those two paragraphs in full:

> "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 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 interest 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 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?
>
> 44. Having asked those questions, the judge will then have to decide:-
>
> i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?
>
> ii) If so should the appeal be allowed to a limited extent and a discretionary leave be directed?
>
> iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?
>
> iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?"

17. The Upper Tribunal then made observations on the choice between the grant of discretionary leave and adjournment at paragraph 45. At paragraph 46 it noted that:

> "46. There is, however, a public interest that immigration proceedings be expeditiously decided and a right to remain on human rights grounds should not be created solely by reason of family links created or significantly developed during pending appeals".

18. At paragraph 47, the Upper Tribunal indicated that there will need to be informed communication between the judges deciding the immigration issues and those deciding the family issues. (I note that there is now a protocol governing communications between judges of the family court and the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal).

19. Applying those principles, the Upper Tribunal considered that there should be an adjournment of the appeal in Upper Tribunal for the short period that it was anticipated was necessary for the family court proceedings to conclude. It went on to express its likely view of the outcome of the appeal depending on the decision that the family court took about where the child's interests lay. If the family court decided to return the child to the care of her parents, the likelihood was, for the reasons given, that it would be disproportionate to remove RS to India (notwithstanding his criminal conviction). If the family court decided that the child should not return to her family, but should be placed for adoption or long term foster care, removal then would be likely to be compatible with Article 8 of the Convention.

20. The principles set out by the Upper Tribunal in *RS* have been endorsed by this Court in *Mohan v Secretary of State for the Home Department* [2012] EWCA Civ 1363; [2013] 1 WLR 922 at paragraphs 21 to 22. There has been a change in that the Upper Tribunal cannot now direct the grant of leave so, if it decides that compliance with Article 8 of the Convention requires the applicant to remain in the United Kingdom pending the outcome of family court proceedings, it will either allow the appeal (leaving the Secretary of State to grant limited leave for a period) or will adjourn the hearing of the immigration appeal: see *CJ (family proceedings and deportation South Africa)* [2022] UKUT 336 (IAC).

The Current Position

21. The current position therefore is as follows. First, the approach in *RS* and endorsed in *Mohan* applies to situations where there is an appeal against a decision which may lead to removal or deportation, or the refusal of leave to remain, and there are also family court proceedings in existence. The issue is how to deal with an immigration appeal in circumstances where there are also family court proceedings in existence. The fact that the decision in *RS* refers to deciding whether a person with a criminal record or adverse immigration history should be removed or deported reflects the facts of that case not a limitation on the relevance of the principles identified to those circumstances. The decision is of general application to cases where there are immigration and family court proceedings in existence. Factors such as criminal offending, or an adverse immigration history may, depending on the circumstances, be one of the factors relevant to the decision that the tribunal is called on to make but the guidance in *RS* is not limited to such cases.

22. Secondly the issue that the First-tier Tribunal (or Upper Tribunal, if relevant) has to determine is:

    (1) Does the individual have at least a right derived from Article 8 of the Convention to remain in the United Kingdom until the conclusion of the family court proceedings? and

(2) If so should (a) the appeal be allowed (with a view to the Secretary of State granting limited leave to remain for at least a limited period for that purpose) or (b) an adjournment of the tribunal proceedings be granted in order to enable the relevant decisions to be taken in the family court proceedings?

23. I reject the submission of Mr Malik that there is a hierarchy and that the primary position is that the appeal should be allowed but if that is not possible then there should be an adjournment. Each is a means of ensuring that the action taken is compatible with Article 8 of the Convention; there is no hierarchy between them. The question of which course of action is appropriate is a matter for the relevant tribunal to take.

24. Thirdly, the questions identified at paragraph 43(i) to (iv) in *RS* are questions to be considered as part of the process of deciding if a person has a right derived from Article 8 to remain in the United Kingdom pending the conclusion of the family court proceedings. They are not a checklist to be considered in the abstract. They should be understood in the context of the issue which the tribunal has to determine.

25. In that context, the question in 43(i) of *RS* may be relevant, for example, if the outcome of the family court proceedings could not be material to the immigration decision. If that were the case, that might well indicate that determining the immigration appeal will not involve a breach of Article 8. Conversely, if there is the possibility of it being material, that is a factor which may point towards the existence of such a right but again, the nature, relevance and extent of the materiality may need to be considered alongside the answers to the other questions in paragraph 43 of *RS*. Similarly, the question in paragraph 43(ii) of *RS* is focussing on whether there are compelling public interest reasons to exclude the individual from the United Kingdom irrespective of the outcome of the family proceedings (such as, to give just one possible example, particularly serious or persistent criminal behaviour). In those circumstances, again, exclusion from the United Kingdom may not be incompatible with Article 8 irrespective of the existence of family proceedings.

26. In paragraph 43(iii) of *RS*, the underlying question is whether the family court proceedings have been designed to delay or frustrate the immigration process and not to promote the child's welfare. The reference to delaying or frustrating "removal" again reflects the facts of *RS* and is not an indication that the question is relevant only to cases where a person faces imminent removal. It could also apply, for example, where an individual has limited leave to remain, that leave is about to expire (or has been continued by virtue of section 3C of the Immigration Act 1971) and the tribunal is dealing with an appeal against the refusal to vary that leave by extending it.

27. Finally, the matters referred to in 43(iv) of *RS* are matters that a tribunal will normally want to consider when addressing the questions in paragraph 43(i) to (iii). Care should be taken when considering the last factor mentioned in paragraph 43(iv). That involves consideration of "what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies". The tribunal is considering materials which point to where the child's welfare might lie as that may help in resolving the ultimate issue. By way of example only, if the facts were that there had been a period of caring for, or contact with, a child, that had been interrupted by prison (or separation), but there was some material indicating that the child was missing the father or some other reason why the father was, or should be involved in the child's life (as in *RS* for example, where the mother was unable to care for the child alone), that

may indicate the possibility that a family court might consider that the child's best interests lay in care or contact with the father. That may be a relevant factor in deciding whether the father should not be removed before the conclusion of the family court proceedings.

28. Conversely, if there has not been contact for some time, and there is no material indicating that the absence of contact is giving rise to welfare issues (or material indicating that contact might in fact be considered by the family court to be undesirable), that may be one of factors relevant to answering the questions in paragraph 43 of *RS* with a view to determining the ultimate question of whether it would be compatible with Article 8 to determine the immigration appeal before the conclusion of the family appeal. Care needs to be taken that the tribunal does not reach a final decision on what is in the best interests of the child in terms of the family issues: that is a matter, ultimately, for the family court to determine. The immigration tribunal is considering whether there is material pointing to where the welfare of the child lies as that may assist in addressing the question to be considered as part of the overall process of determining whether there is a right derived from Article 8 to remain in the United Kingdom pending the outcome of the family court proceedings.

THE FACTUAL BACKGROUND

The Background

29. The facts are fully set out in the decision of the First-tier Tribunal. The material facts for present purposes can be summarised as follows. The appellant is a national of Bangladesh. He says that he entered the United Kingdom on 13 October 2005 on a work permit which was valid until 2 October 2006. Thereafter he says he remained in the United Kingdom. Assuming he did so, he was in the United Kingdom unlawfully as he did not have leave to remain in the United Kingdom. He says that he married his wife, who is a British national, on 15 July 2019 when she was living in Bangladesh and he was living in the United Kingdom.

30. On 28 March 2020, he was granted leave to remain on the basis of his family and private life following his marriage. That leave was granted for period up to 6 February 2023. In June 2020, the appellant and his wife had a child. On 1 August 2021, they separated. The appellant went to live in York. The mother and child remained in London.

The Institution of Proceedings in the Family Court

31. On 26 July 2022, the appellant filed an application for a child arrangements order at East London family court. On 13 February 2023, an interim order was made which provided amongst other things that the appellant should have indirect contact with the child by sending child-appropriate and child-focussed letters, cards, gifts and/or photographs no more than once a month starting on 13 March 2023. The appellant was required to retain copies of items sent and to keep proof of postage or sending.

The Application for leave to remain.

32. Meanwhile, on 30 December 2022, the appellant had applied for leave to remain as the parent of a British-national child under the relevant Immigration Rules. As he had applied before the expiry of his existing leave, that leave continued until the

determination of the application by the respondent and any subsequent appeal against the decision: see section 3C of the Immigration Act 1971. On 28 February 2023, that application was refused. The decision records that the relevant paragraph of the Immigration Rules (paragraph E-LRPT 2.4) required the appellant to provide evidence (a) of sole parental responsibility or direct access as agreed or ordered by the court and (b) that the applicant is taking, and intends to continue to take, an active role in the child's upbringing. The decision records that the child lived with her mother in London and the appellant lived in York. No evidence of direct contact with the child had been provided. It recorded that the appellant's representatives had referred to an interim contact order on 13 February 2023 and had been asked to provide evidence of the arrangements. The representatives had replied that the final decision of the family court had not been made and as a result the appellant was unable to provide further information or documents. The decision letter stated that this was unusual in the circumstances. Ultimately, the decision was that the appellant had "not provided any evidence of a genuine relationship or contact with the child and [did] not meet E-LTRPT 2.4". The decision also considered whether the appellant should be granted leave to remain on the basis of respect for his right to family life. However, the decision letter concluded that the appellant had not shown that the appellant had contact with the child or evidence of steps taken to establish contact. Leave to remain on that basis was refused.

The Appeal to the First-tier Tribunal

33. The appellant appealed to the First-tier Tribunal against the decision refusing leave to remain. The appellant provided a short-written statement of 11 paragraphs dated 10 October 2023. The material part is paragraph 5 where the appellant said:

> "5. I understand that I have had no contact with our Child since 1 August 2021, when I was separated from my ex-partner…However, I used to be actively involved in our daughter's upbringings. I used to pay regularly for our child's maintenance directly to [the ex-partner] until I was prevented by her from making any contact with our daughter".

34. The appellant said at paragraph 6 of his witness statement that he had made an application to the family court, was maintaining the indirect contact order, and was awaiting the final order. He said at paragraph 7 that he had a very strong bond with his child as her father and that he missed her. He also gave oral evidence and was cross-examined and was also asked questions by the First-tier Tribunal. He also had the opportunity to put in documentary evidence. He was represented by counsel.

35. The First-tier Tribunal dealt with whether there was a genuine and subsisting parental relationship between the appellant and his daughter at paragraphs 15 and 16 of its decision where it said this:

> "15. It does not appear to be disputed that the Appellant is the biological father of a British citizen girl (whom I shall refer to as "K") who was born in June 2020. The Appellant had said in his witness statement that he had had no contact with K since 1 August 2021, following his separation from her mother (whom I shall refer to as AN) (see para. 5) In cross-examination

> he confirmed that that remained the position. He has not, then, had any direct contact with K for more than three years.
>
> 16. It is accepted by the Appellant that K does not live with him and, despite the plainly erroneous suggestion in the VAF to the contrary (SB:120), he does not, and did not, have sole parental responsibility for her. In fact, K lives in London with her mother, and the Appellant lives, by his own choice, 200 miles away in York. On the Appellant's own account he does not presently, and did not do at the time of the application, have direct access in person to care for K which is agreed by her mother or which is ordered by a family court. Whether or not he has been sending money to AN, or sending a birthday card or buying gifts for her (which is discussed below), does not change the fact that he has not had direct access to K for more than three years. In other words, the Appellant is permitted only to have indirect contact with K (in the form of a birthday card or through gifts) and he is not taking an active role in her upbringing."

36. The First-tier Tribunal then turned to the question of Article 8, and the decisions that it had drawn to the attention of the parties, namely, *RS* and *CJ*. The decision set out the details of the steps taken in the proceedings in the family court and in the First-tier Tribunal. It noted that an application for an adjournment had been made in writing before the hearing and that had been refused. It noted that counsel acting for the appellant at the hearing had not renewed the application for an adjournment. It recorded the submissions made by the appellant's counsel as to why the outcome of the family court proceedings was likely to be material and why the appeal should be allowed.

37. The First-tier Tribunal then set out its answers to the questions in paragraph 43 of *RS*. On the first question, it considered that the outcome of the family court proceedings could, to a limited extent, be material. If the family court ordered direct contact, that would be material because it would provide the foundation for the establishment of a family life and the appellant would then have to take steps to have, and to continue to have, the direct contact ordered. In relation to the second question, the First-tier Tribunal considered that that there was an obvious public interest in excluding the appellant from the United Kingdom because he did not meet the requirements for the grant of leave under the Immigration Rules (and the maintenance of an effective immigration system was in the public interest) and, on the appellant's own account, he had been in the United Kingdom for many years without leave to remain and without attempting to regularise his immigration status until 2020. Nevertheless, the First-tier Tribunal did not consider that it could be said that there were "compelling" circumstances, which would justify exclusion from the United Kingdom in event.

38. The First-tier Tribunal then turned to the third question. In view of the submissions of the parties, it is necessary to set out the question the First-tier Tribunal asked, and its response, in full.

> "**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?**

31. To answer this question, I have considered the sub-questions in [43(iv)]. I find that there is substantial evidence that the family proceedings were commenced to delay or frustrate removal. I say so for the following reasons:

i. The Appellant has shown very little interest in, or contact with, the child. She was born in June 2020 and in August 2020 the Appellant was granted leave to remain. In August 2021 the Appellant moved out of the family home. That is the last time he has had any direct contact with K. At the time they were living in London. The Appellant made the decision to move 200 miles to York almost immediately. He had acquaintances there, he said, and had lived and worked there for around five or six months immediately after AN arrived in the UK. He returned to York to work in a restaurant. I asked him why he did not stay in London and find work in the capital. He said he had wanted a job with accommodation and the restaurant in York had a flat above it. His decision is a long way removed from being child-focussed. I cannot accept that he could not secure employment in one of the numerous Bengali (or other) restaurants in London, whether with on-site accommodation, or otherwise. He must have realised that by moving all the way to York, the opportunities he would have to spend time with his daughter were drastically reduced and the logistics around any such contact were made extremely challenging.

ii. There are no photographs before me of the Appellant enjoying any direct contact with K prior to his leaving the marital home in August 2021.

iii. He claims in his statement that he used to pay regularly for K's maintenance which he clarified in oral evidence amounted to £50 per week by bank transfer. He said this began after he moved out. He had initially done "*the shopping*" and then when that stopped he started paying £50 per week. There are some bank statements of the Appellant's in SB running from 29 September 2023 to 9 October 2023 which do not show any transfers to AN. There is no other evidence of any financial support provided by the Appellant. In terms of gifts, there are some emails to indicate that the Appellant has sent some items of clothing from Next and some toys from Argos to his daughter. One of the gifts was sent in April 2023 … but the year of the other gifts is not easily discerned.

iv. He also claims to have tried, prior to the CAO application, to maintain contact with AN with a view to arranging contact with K but she refused to allow it. There is no evidence before me of that; be it call logs or text messages or any other form of electronic communication illustrating these attempts.

v. He has had no direct contact with K since he moved out of the family home in August 2021, a period of more than three years.

vi. All of the above points to the very minor degree of the Appellant's previous interest in, and contact with, the child.

vii. In terms of the timing of the contact proceedings, despite moving to York in August 2021, it took the Appellant almost a year to make the CAO application in question. He claims that he had financial difficulties and it took some time to arrange for a solicitor. I do not accept that that is a reasonable explanation if his asserted desire to spend time with K is genuine. I take judicial notice that the family court is well equipped to deal with litigants in person and the fact that his application was made only a few months prior to his application for leave to remain is particularly telling in my view. The proceedings were also instigated only three months' prior to the application he made to the Respondent in December 2022 for leave to remain.

viii. In terms of the Appellant's commitment to those proceedings, I consider it extremely telling that between the family court hearing of 21 August 2023 and the immigration appeal CMRH of 16 May 2024 the Appellant, via his representatives, took no steps at all to progress the CAO application. Mr Chowdhury confirmed this lack of action at that CMRH. I asked the Appellant to clarify what steps he had taken during this period. He said he done everything for the family court, they had given him indirect contact and there was an order that AN was to provide pictures and videos of K which she did only once. That did not answer my question, so I re-clarified by asking what steps he had taken to make sure the family court *did not forget about his application*. He said he had discussed with his solicitor and they advised him to wait for the court. But what the Appellant did, of course, was to wait 10-months without hearing from the family court. It is hardly the actions of a person who is as keen to instigate contact with his daughter as the Appellant suggests he is.

ix. Furthermore, I note that the Appellant did not even attend the hearing on 21 August 2023 which was set up to decide whether a fact-finding hearing was necessary. The order of that date does not include a recital that any explanation was provided for his non-attendance. Nor, in fact, did his representative attend (until, apparently, after the hearing had concluded despite an earlier email suggesting that "*the legal representative for* [the Appellant] *was sick*"). Although there were other reasons why DJ Landes was unable to decide whether a fact-finding hearing was necessary, it can hardly have assisted the judge's task in that regard for neither the Appellant, nor his representative, to have attended.

x. There is an unavoidable conclusion to be drawn about all of this and that is that the litigation strategy had been to deliberately avoid taking proactive steps to progress the CAO application. As Sedley LJ had identified in DH (Jamaica) [2010] EWCA Civ 207, where a person resists their removal from the UK because they wish to establish a right of contact with their child, "*an unfortunate game of cat and mouse…develops*" between proceedings in the family court and proceedings in the IAC which can lead to a "*stalemate…for years*" [10]. I say the conclusion is unavoidable because the same firm represent the Appellant in both proceedings, they took steps to contact the Tribunal about the progression of the immigration appeal but took no such steps about the progression of the CAO application despite their having made applications to adjourn, or to extend directions in the immigration appeal *because* the CAO application was proceeding and needed resolving. This is all in the context of an appellant who claims he has been in the UK continuously since October 2005 and who is therefore fast approaching the 20-year point that could substantiate a long-residence application.

xi. I do not accept that the Appellant was merely relying on what his solicitors told him that they had to wait for the family court to relist the hearing that had been adjourned in August 2023. A person with a genuine desire to pursue contact with their child by way of a CAO would not have permitted their solicitor to make no contact with the family court about the re-listing between August 2023 and May 2024. The Appellant has therefore shown very little commitment to the progression of his application.

xii. As to when a decision is likely to be reached, without belabouring the point, there has been significant delay in the progression of the CAO application, caused in material part by the Appellant's inactivity (but also by the failure within

the family court's administrative team to re-list the matter following the August 2023 hearing). The current position is this. A directions hearing is listed on 29 October 2024 at which the court will decide whether to hold a fact-finding hearing in respect of AN's allegations. If it decides to, the matter is likely to be adjourned for such a hearing, likely to be several months later. Once the court has found the facts, CAFCASS are likely to be directed to prepare a s.7 report which will take a number of weeks. There will then be a further hearing to hear whether the parties accept the facts found by the court and their positions in relation to the s.7 report. If there remains a dispute between the parties, a final hearing will be necessary. If the court decides not to hold a fact-finding hearing, CAFCASS will still be required to prepare a s.7 report and the subsequent steps identified above will also still be required. I can take judicial notice of the procedural steps because I sit in the family court with a private law ticket. The point is, that the CAO application is unlikely to be resolved, in my view, before the end of summer 2025, particularly given it is allocated to a busy urban court such as the East London family court.

xiii. <u>There is some material already available to identify pointers to where the child's welfare lies</u>. On 11 March 2021 the Appellant was cautioned for common assault against AN which had been committed two days' earlier. That is evidence of domestic abuse having been perpetrated by the Appellant against the mother of his child. The Appellant said in oral evidence that K was present in the house at the time, albeit she was asleep. That caution is likely to have some bearing on whether her best interests require direct contact with the Appellant. The safeguarding letter from CAFCASS states that K "*has been exposed to domestic abuse*" which would have been "*a scary experience*" and the initial advice was for the court to consider whether a fact-finding hearing was necessary given the allegations of domestic abuse perpetrated by the Appellant (beyond the incident leading to the caution) which included that he strangled AN until she passed out. The family court have yet to determine whether a fact-finding hearing is necessary, for reasons that I have outlined above. There is, then, some evidence that points away from the child's welfare being met by direct contact with the Appellant because of the potential risk of harm.

xiv. For the avoidance of doubt, I confirm that I have considered K's best interests as a primary consideration and, on the current evidence which demonstrates that she had been raised in a household where domestic abuse was perpetrated by the Appellant against K's mother and given

> that K has had no contact with him for more than 3 years, her best interests are to remain living with her mother without contact from the Appellant."

39. The First-tier Tribunal then went on to consider the issue that it had to determine in the light of the questions it had considered. Its conclusion comes at paragraph 32 of the decisions which says this:

> "I have considered the questions posed by RS (India) in [43] and I have reminded myself that in human rights appeals where an appellant has a pending CAO application "*it is usual for the appeal to be allowed pursuant to Article 8 ECHR*" (see headnote 4 of MH (pending family proceedings – discretionary leave) Morocco]2010] UKUT 439 (IAC)). However, the fact that an outcome is "usual" does not mean that the contrary can never materialise. Whilst the answer to the questions in [43(i)] and [43(ii)] are not adverse to the Appellant, in almost every respect the questions posed in [43(iii)] and [43(iv)] lead to an adverse conclusion for him. The cumulative weight of those adverse conclusions drives me to find that he does not have at least an article 8 right to remain until the conclusion of the family proceedings. There was no evidence before me that the Appellant would not be able to participate in the family proceedings by way of video link from Bangladesh. Nor would his being situated in Bangladesh mean that it would be impossible for him to develop a relationship with K (although it would make it more difficult than if he were in the UK) if the family court were to so order. That disposes of the requirement in [44(i)]."

40. Having decided that Article 8 did not require that the appellant continue to have leave to remain in the United Kingdom pending the outcome of the family court proceedings, the First-tier Tribunal considered the substantive appeal itself. It concluded that the refusal of leave would not be incompatible with Article 8. The appellant did not currently enjoy a family life in the United Kingdom. The appellant was likely to have established a private life but any inference with that private life was justified in accordance with Article 8(2). The appeal was therefore dismissed.

41. The appellant appealed to the Upper Tribunal but that tribunal dismissed his appeal on 19 February 2025. The appellant was then granted permission to appeal to the Court of Appeal on the three grounds set out at paragraph 5 above.

GROUND 1 – THE FINDING THAT THE APPELLANT WAS NOT COMMITTED TO THE FAMILY COURT PROCEEDINGS AND WAS USING THEM TO ADVANCE HIS IMMIGRATION APPEAL.

42. Mr Malik KC, with Ms Jones, submitted that there was insufficient evidence on which the First-tier Tribunal could find that the appellant was not committed to the family court proceedings and that its reasoning was inadequate. Mr Malik submitted that the First-tier Tribunal had not considered whether the proceedings were brought otherwise than to promote the child's welfare: that was omitted from paragraph 31 of the reasons.

Further, this was not a case where the appellant was delaying or frustrating removal as he had leave to remain which had been continued by statute pending the determination of the appeal. Mr Malik submitted that the First-tier Tribunal had not dealt with the appellant's evidence.

43. Mr Malik submitted that there was no proper evidential basis for the First-tier Tribunal to conclude that the family court proceedings were instituted to delay or frustrate removal. The appellant had begun them six months before applying for leave to remain. Whilst the appellant had not attended one hearing at the family court on 23 August 2023, he had attended all other hearings and the matter could not be dealt with at the one hearing that he missed because the wife had not provided the relevant schedule of allegations to enable the family court to determine whether a fact-finding hearing was necessary. Finally, he submitted that it was wrong to draw any inference from the fact that the appellant had not instructed his solicitors to take steps to chase the family court to deal with the matter. The East London family court was a busy family court. There was no obligation on parties to make requests to try and move proceedings along, nor would that be likely to achieve anything, and in any event, the appellant had followed his solicitor's advice to wait for the family court.

44. Mr Pilgerstorfer KC, with Ms Pottle, for the respondent submitted that the First-tier Tribunal had properly directed itself as to the law. It had a written statement from the appellant and had heard oral evidence and cross-examination. It was entitled to find the facts it did. Mr Pilgerstorfer made detailed submissions on the criticisms made by the appellant of individual aspects of the decision. He relied upon the decision in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26 at paragraph 114 warning of the dangers of an appellate court interfering with findings of fact, including findings of primary fact and the inferences to be drawn from those facts.

Discussion and conclusion

45. There is no proper basis for criticism of the facts as found, and the inferences drawn from those facts, by the First-tier Tribunal. First, it is clear that it did not fail to consider whether the appellant's proceedings in the family court proceedings were not made for the promotion of the welfare of the child. It set out the question it was asking, in bold, in the heading to paragraph 31 of its reasons. That asked whether there was reason to believe the family court proceedings had been instituted to delay or frustrate removal "and not to promote the child's welfare". Much of the substance of the following sub-paragraphs expressly dealt with that issue.

46. Secondly, the First-tier Tribunal did not fail to deal with the appellant's evidence. As a matter of fact (and as accepted by the appellant in his witness statement) he had not had direct contact with his child since August 2021 (when the child was about 14 months old) for over three years as at the date of the First-tier Tribunal hearing. He had moved to York, 200 miles from where his child lived. He was questioned as to why he did that and, as the First-tier Tribunal put it, his decision to move to York was "a long way removed from being child-focussed" and the appellant must have realised that that would reduce the opportunities for spending time with his child. As to paragraph 31(ii), the appellant had said in his statement that he used to be actively involved with his daughter's upbringing before he left the marital home. The fact is, however, that the appellant had not produced evidence before the First-tier Tribunal of photographs showing direct contact between the father and the daughter before he left the marital

home. The fact that he had sent photographs to the respondent with his application and the respondent had not put those photographs in the bundle is irrelevant. It was for the appellant to put forward his evidence to the First-tier Tribunal.

47. Similarly, the bank statements produced in evidence only covered a period of less than 3 weeks in the autumn of 2023 and did not show payments by the appellant to his wife. There was no other evidence of financial support whether before or after he left the marital home. In relation to the gifts, as the First-tier Tribunal noted, there was some e-mails to show that some items of clothing and toys were sent. One was sent in April 2023 but the year of the other gifts was not readily ascertainable. That is all factually correct. For what it is worth, the appellant included in a supplementary bundle provided to this Court the documents provided to the First-tier Tribunal. That showed that on approximately seven occasions he sent clothes or a toy to his daughter. The reference in paragraph 31(iv) is clearly a reference to the absence of corroborative evidence of his claim that the appellant had tried to maintain contact with his wife with a view to arranging contact with his daughter. As a matter of fact, there was no such corroborative evidence provided. The First-tier Tribunal was not ignoring or overlooking the evidence of the appellant: it was looking for corroborative evidence and there was none.

48. In all those circumstances, the First-tier Tribunal was entitled to find that all of those findings of fact "points to the very minor degree of the Appellant's previous interest in, and contact with, the child".

49. There was no other error in the findings in relation to the fact that the family proceedings were being used to delay or frustrate the immigration process. That can be seen, essentially, from three findings of the First-tier Tribunal. First, it took the appellant almost a year from leaving the marital home in August 2021 to making an application for a child arrangements order. The First-tier Tribunal considered the explanation for the time taken and did not believe it. It was entitled to infer that the time taken was not consistent with a desire to spend time with the child. Secondly, the appellant had not attended the 23 August 2023 hearing. That hearing had been ordered by the family court as appears from its order made on 13 February 2023. The family court order had made it clear in paragraph 22 of its order, under the heading "Attendance at next hearing", that the parties should attend an hour before the hearing to allow time for discussions. The First-tier Tribunal was entitled to draw an adverse inference from the non-attendance at the hearing when considering whether the appellant was committed to the family court proceedings.

50. Thirdly, the First-tier Tribunal considered it "extremely telling" that the appellant and his representatives took no steps between the family court hearing on 21 August 2023 and a case management hearing in the First-tier Tribunal on 24 May 2024 to progress the application for a child arrangements order. That reinforced the First-tier Tribunal in its view that the appellant was not committed to the family court proceedings as his inaction was not consistent with his being keen to instigate contact with his daughter. If that matter had stood alone, one might question whether or not that did provide a sufficient basis for the inference drawn. But first, it did not stand alone. It was a matter that fell to be considered with the other matters indicating an absence of commitment to the family court proceedings. Secondly, this occurred in a context where, we are told, the family court ordered at the hearing on 21 August 2023 that the next hearing should be listed on the first available date after 30 October 2023 (we were not provided with the order of 21 August 2023). That would have provided a reason for the appellant's

representative to take some steps before 24 May 2024 to see when the hearing was to be relisted. Thirdly, and perhaps more significantly, the First-tier Tribunal drew a contrast between the actions of the representatives to contact the First-tier Tribunal to deal with the immigration appeal but did not contact the family court. The representatives were the same firm of solicitors. In all those circumstances, the First-tier Tribunal was entitled to find the facts, and draw the inferences, that it did and to find as it said, that the appellant had shown very little commitment to the progression of his application for an order for contact with his child.

51. For those reasons, I would dismiss ground 1. There was ample evidence to justify the factual findings, and inferences drawn from those facts, that the appellant had very little previous interest in, or contact with, his daughter and had shown very little commitment to the progress of his application for contact.

GROUNDS 2 AND 3 – PREJUDGMENT OF THE CHILD'S BEST INTEREST AND FAILURE TO UNDERSTAND THE PURPOSE OF THE GUIDANCE IN *RS*

52. It is convenient to take these two grounds together. Mr Malik submitted that the First-tier Tribunal had erred in finding in paragraph 31(xiv) of its reasons that the child's best interests were to remain living with her mother without contact with the appellant. That, he submitted, prejudged the decision that was for the family court to take. It ran contrary to the guidance in paragraphs 36 and 37 of *RS* which emphasised that it was for the family court, with the procedures and assistance available to that court, to determine the welfare issues concerning the child. Further the First-tier Tribunal had based its conclusion, at least in part, on allegations that the appellant had strangled his wife which were allegations which had not been assessed by the family court. A tribunal had reason to be cautious about the weight to be given to such allegations before they were investigated by a family court. The burden of proving the allegations would be on the wife and there may be reasons, in the domestic context, where a party to family proceedings would exaggerate or invent allegations. Further, he submitted that the First-tier Tribunal was wrong to assume that the appellant could participate in an appeal from abroad or that it would, in practical terms, be possible to form a relationship from abroad if the family court ordered direct contact.

53. Mr Pilgerstorfer submitted that the decision had to be read as a whole. The First-tier Tribunal was well aware that there might need to be a fact finding hearing in the family court in relation to the appellant's ex-wife's allegations of domestic abuse. That was reflected again in paragraph 31(xiii) of the reasons. The First-tier Tribunal drew a distinction, on the one hand, between an assault committed by the appellant on the wife, where the appellant had accepted the assault had occurred and had been cautioned and, on the other, the (unproven) allegation of strangulation. The appellant had said that the child would have been in the house at the time albeit asleep. It was aware that the other allegation of domestic abuse, including the allegation of strangling, which went beyond the matters covered by the caution, might need to be the subject of a fact-finding hearing. The First-tier Tribunal considered that the evidence available pointed away from the child's welfare being met by direct contact with the appellant. That, he submitted was a perfectly permissible position for the First-tier Tribunal to take. It was required to have regard to the best interests of the child and it was consistent with paragraph 43 of the decision in *RS*.

54. He further submitted that paragraph 31(xiv) had to be read fairly, and as part of the decision as a whole. It confirmed that the First-tier Tribunal had considered the child's best interest and "on the current evidence" which demonstrated that the child had been raised in a household where domestic abuse had been perpetrated. That was not a finding or a decision; it was a view based on the current evidence. Further, the reference to domestic abuse was a reference to the assault which the appellant accepted had happened and did not include allegations such as the allegation of strangling. In relation to paragraph 32, he submitted that the First-tier Tribunal was correct in saying that evidence could be given from abroad and it would not be impossible, albeit it would be more difficult, to form a relationship from abroad if the family court were to order contact.

Discussion and Conclusion

55. I accept that, read in isolation, parts of paragraph 31(xiv) might indicate that the First-tier Tribunal had sought to reach a decision on whether the best interests of the child required contact with the appellant. That could be said to be the natural reading of the phrase that the child's best interests "are to remain living with her mother without contact from the appellant". Deciding that issue would not be the role of the First-tier Tribunal not least for the reasons given in paragraph 37 of *RS* set out above. Further, I am not confident that paragraph 31(xiv) can be read as limited to the admitted domestic abuse, i.e. the assault, and does not include the allegation of strangling.

56. Ultimately, however, I am satisfied that it would be wrong to read one phrase in isolation in paragraph 31(xiv) and it would be wrong to read one-subparagraph in isolation from the rest of the judgment. It is also necessary to bear in mind the purpose for which the First-tier Tribunal was considering the welfare of the child.

57. Paragraph 43(iii) of *RS* indicates that the First-tier Tribunal should consider, amongst other matters, "what materials (if any) are available or can be made available to identify pointers to where the child's welfare lies". That involves considering whether any evidence of where the child's welfare currently lies is such, that it indicates that the family court proceedings should be concluded before the immigration appeal is determined. Whether that is the case will depend upon a number of factors. At one end of the spectrum, there may well be cases where the father is a foreign national criminal liable to deportation or has an adverse immigration but has had (and has continued to have) contact with the child, and where there is evidence of a real bond between them or that the child is missing or suffering from the lack of contact with the father. At the other end, there may be cases where there has been little or no contact, and none of the evidence points in either direction as to whether or not future contact is in the child's best interests or which might point to contact not being in the child's best interests.

58. In the present case, the context was that the appellant had not had any direct contact with the child for over three years (i.e. from when the child was about 14 months old and the time of the hearing when the child was approximately four years and three months old). That was a point made in paragraph 31(xiv). In that context, the evidence did not currently point towards the welfare of the child being in renewed contact in future. Such evidence as there was, namely the admitted assault and the allegations recorded in the CAFCASS letter about other abuse, pointed, if anything, against that. Furthermore, paragraph 31(xiv) was intended to confirm that the First-tier Tribunal had considered the welfare of the child as appears from its opening words, and was not, in

reality a new, or separate, finding divorced from the earlier sub-paragraphs. Sub-paragraph 31(xiv) is inaptly worded, and parts (particularly the reference to living "without contact from the Appellant") are too strongly worded and, read in isolation, would suggest that the First-tier Tribunal had exceeded its role. Reading the judgment fairly, and as a whole, however, the First-tier Tribunal was not reaching a final conclusion on the child's best interest and was not prejudging the decision of the family court. It was following the guidance in *RS*.

59. Further, reading paragraph 32 as a whole, and in the light of the judgment, it is clear that the decision that the appellant did not have at least an Article 8 right to remain until the conclusion of the family court proceedings was driven by its conclusions on the questions identified in paragraph 43(i) to (iv) of *RS*. The references to the absence of evidence that the appellant would be unable to give evidence in the family proceedings or about the possibility of establishing a relationship from abroad if the family court ordered contact were additional reasons, or consequences, flowing from the finding that the appellant did not have an Article 8 right to remain in the United Kingdom until the conclusion of the family court proceedings. In any event, the observations are, strictly, correct.

60. Standing back from the details, the First-tier Tribunal had to determine if the appellant had a right derived from Article 8 to remain in the United Kingdom pending the conclusion of the family court proceedings. If so, it would either have to allow the appeal (so that the Secretary of State could grant limited leave to remain) or adjourn the hearing (although the appellant had not in fact applied for an adjournment at the hearing).

61. The First-tier Tribunal was aware that there had been no direct contact between the appellant and the child for over three years. It was entitled to find that the appellant had had little interest in contact with the child and was not committed to the family court proceedings, rather he was using them as a means to delay the immigration process. There was nothing in the evidence to indicate that the welfare of the child pointed to the renewal of direct contact; if anything it pointed against direct contact. In those circumstances, the First-tier Tribunal was not wrong in the decision it made, namely that the appellant did not have a right on the facts of this particular case to remain in the United Kingdom pending the resolution of the appeal. I would therefore dismiss the appeal.

Ancillary Matters

62. There is one ancillary matter. The First-tier Tribunal considered the substantive appeal against the refusal of leave to remain (as well as the question of whether the appellant had at least a right to remain at least until the family court proceedings were concluded). It found that the appellant had not established that he did at the material time enjoy any family life and the refusal of leave was a justifiable interference with any right to private life. There is no appeal against those aspects of its decision. I would also add that no justifiable criticism can be made of that aspect of its decision given the evidence before it.

63. We were told by Mr Malik that there is now evidence not only that an order for contact has been made (which would not, of itself, be likely to establish that the appellant was actually enjoying family life) but that he has, in fact, had contact with the child. We

have had no admissible evidence as to whether or not there has been any direct contact with the child, when any such contact took place, the extent or duration of any such contact, or the result in terms of any bond or relationship formed.

64. The appellant may if he wishes apply to the Secretary of State for leave to enter or to remain in the United Kingdom on the basis that he says that he is a parent of a British-national child who is entitled under the Immigration Rules to leave, or that to refuse leave would be incompatible with Article 8. I express no views on whether such an application will be made, or whether it would be successful. Mr Malik made submissions as why it would be preferable from his client's point of view for the appeal to be allowed and the matter remitted to the First-tier Tribunal to decide. That, however, is neither permissible nor appropriate. It is not permissible as the First-tier Tribunal has not erred in its conclusions on the evidence before it. If the appellant now has evidence that he says supports the grant of leave to remain, whether under the Immigration Rules or otherwise, the appropriate course of action is for the appellant to make the relevant application to the respondent supported by evidence. The respondent can then assess that evidence and reach a decision. If the appellant is dissatisfied with the decision, he can then appeal to the First-tier Tribunal.

LORD JUSTICE STUART-SMITH

65. I agree.

LORD JUSTICE BAKER

66. I also agree.