IN THE UPPER TRIBUNAL

R (on the application of RA (and by his litigation friend) and another) v Secretary of State for the Home Department IJR [2015] UKUT 00242 (IAC)

Field House
London

30 March 2015

BEFORE

MR JUSTICE CRANSTON

UPPER TRIBUNAL JUDGE REEDS

Between

RA (a child by his litigation friend) -1-

BF -2-

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

OFFICE OF THE CHILDREN'S COMMISSIONER

Intervener

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Stephanie Harrison QC and Kathryn Cronin, instructed by Bhatt Murphy appeared behalf of the Applicant.

Deok Joo Rhee and Isabel McArdle, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

Kate Gallafent QC instructed by Freshfields Bruckhaus Deringer LLP for the Intervener ('the Office of the Children's Commissioner').

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APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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Introduction

1. This application for judicial review raises the issue of when, on removal by the Secretary of State for the Home Department ("the Secretary of State") of a dependent child, born in the United Kingdom along with his adult parent, there needs to be an independent review of the merits of the child's distinct asylum and human rights claims. In this case the Secretary of State removed the mother, BF, who was unlawfully in the country, to Nigeria, along with her son, RA, aged 5, who was born in the United Kingdom when she had no leave to remain here. It is said that the Secretary of State acted unlawfully in removing mother and son, not considering RA's own position as a claimant in his own right or properly as a dependant within a fresh claim made by him and/or his mother, and without in his best interests planning for their reception and protective integration on return to Nigeria. RA, it is contended, has an in country right of appeal against the decision to remove him.

2. The application was expedited for a rolled up hearing. On 17 March 2015 UT Judge Storey and UT Judge Rintoul refused interim relief in the form of the immediate return of BF and RA from Nigeria. Specifically, the application challenges the Secretary of State's decisions of 22 and 23 January 2015 to refuse to treat further submissions as a first claim by RA or as a fresh claim under the Immigration

Rules. RA's litigation friend is Mrs KH, his foster carer in 2013 as we describe later in the judgment. The Children's Commissioner as Intervener has provided written and oral submissions as to what are said to be the general principles to be applied. During the course of the hearing we granted permission to apply for judicial review.

Background

3. BF is a citizen of Nigeria, presently 45 years old. She is of Yoruba ethnicity and has said that she last lived in Nigeria in Abeokuta, Ogun state. In various statements she has said that she worked as a prostitute in Nigeria, and later in the United Kingdom. She was encountered working illegally in a shop in London, using a false Dutch passport.

4. On 30 April 2007 BF made a claim for leave to remain in the United Kingdom on the basis of long residence: she said that she had entered the United Kingdom and had resided here since 1991. That was rejected and her appeal came before Immigration Judge McWilliam in January 2008, who found that she had not been continuously present since 1991. BF had not attended the hearing since at the time she was in prison for using the false Dutch passport, having been sentenced to 9 months imprisonment in October 2008.

5. RA was born on 28 August 2009. BF has stated that RA's father disappeared when she was two months pregnant and there has been no contact since.

6. On the 6 April 2010, BF made an application for asylum and humanitarian protection on the basis that she feared persecution and ill-treatment on return to Nigeria. On her account she lost her parents and siblings in a car accident and her father's relatives tried to get her to marry someone she did not love and who was older than she was. She had an uncle and aunt but they would not accept her with an illegitimate child. On one interpretation of what she said she had been educated up to her late teens. RA was named in the asylum application as BF's dependant.

7. The application was refused, the refusal letter containing a fleeting reference to BF having a son. The Secretary of State's section 10 notices of removal were served on both BF and RA, RA being said to have an out of country right of appeal.

8. The grounds of appeal were three: that she was a Nigerian national who had been outside her country for twenty years, that she had a valid fear to return to Nigeria and the Secretary of State had failed to take account of the objective information and the availability of protection or relocation, and that she had Article 8 rights with her length of residence in the United Kingdom (her long

residence). There was no reference made to any claim made on behalf of RA.

9. BF appealed unsuccessfully. No separate appeal was brought by RA, who was at that time only a year old and the determination records that BF had not made any separate statement of additional grounds under section 120. BF was present at the hearing, she gave oral evidence and was represented. In the determination of 18 August 2010 Immigration Judge Cope confirmed the earlier finding of Immigration Judge McWilliam and rejected BF's claim to having been in this country since 1991: the documents supporting the claim were in the main fabricated. Coupled with other matters (for example, clearly conflicting accounts of how she came to Britain and the length of time taken before making her claim for asylum) the judge said that BF could not be accepted as a witness of truth. Indeed he did not accept anything BF said about events in Nigeria. He considered the case advanced on Article 8 grounds and after conducting a proportionality assessment reached the conclusion that it was not a case where the interests of BF and her son outweighed the interests of society as a whole. As a result of the determination, BF became appeal rights exhausted.

10. On 24 August 2012 the solicitors who acted for BF until she and RA were removed earlier this year made further representations to the Secretary of State as a fresh claim

under the Immigration Rules. These made reference to the existence of RA and his wellbeing should they be removed. He was at a crucial stage of his development and the difficulties his mother would find in reintegrating into Nigerian society would have adverse implications for him. The Secretary of State refused to treat the further representations as giving rise to a fresh claim.

11. BF was now living in Gateshead with RA in accommodation arranged through the Secretary of State and in receipt of some £96.90 weekly (the rate at the point of departure). She was in the country unlawfully and liable to be removed. As such the Secretary of State had a continuing interest in her and she was obliged to report periodically. On 1 March 2013 the Secretary of State contacted the local authority's social services department in Gateshead to inquire if BF and RA were known to them. She was told that there had been two referrals to social services, one due to there being no answer when a health visitor called, the other from a nurse when RA was ill and taken to hospital. No further action had been taken in either case. Three days later, on 4 March, when reporting, BF stated that RA had speech and language problems and a sugar allergy. BF was advised to speak to RA to explain that he may not be able to remain in Britain and to inform RA's nursery. Barnardos leaflets about available assistance relevant for RA were given to BF.

12. On the 15 March 2013 the Secretary of State set removal directions for BF and RA. Appeal forms were served on both BF and RA, the one for RA stating that his right of appeal was out of country.

13. On 18 March 2013 BF's solicitors made what they asserted was "a fresh asylum and human rights application under the Refugee Convention, European Convention on Human Rights and the EU Qualification Regulations 2006". BF, they said, would be a lone woman returning to Nigeria without any family or support and destitution would be the result. To place a child into that situation would be contrary to his welfare. It was against his best interests to remove him when he was three and at a vital time in his development. He had a private life here.

14. As part of the representations there was an expert report of Professor Mario Aguilar dealing with BF and another Nigerian woman. He could not grasp how the two women or the children could reintegrate in Nigerian society when they had no welfare support there. He stated that single women on their own in Nigeria faced the risk of trafficking and being regarded as witches. Their children faced the same risks. The police were ineffective. We note that the expert Aguilar report also stated that their children faced these risks.

15. The Secretary of State replied on 23 April 2013. The letter referred to the solicitors' representations raising Article 8 ECHR issues for BF and that it would be in RA's best interests to remain here. The letter stated that there was no evidence that BF did not have extended family in Nigeria. RA was only young and could easily adapt to Nigeria. The representations were refused as a fresh claim.

16. When reporting on 27 March 2013 BF stated that RA was fine and at school. When BF became upset, she was advised to consider applying for Assisted Voluntary Return, to prepare her son for return and not to scare him. Early the following month, the Secretary of State received medical records from BF's GP. On 5 April 2013 BF telephoned that RA was in hospital on a drip with constant vomiting. When reporting five days later, BF brought RA. On inquiry, BF said that RA had been discharged from hospital, was drinking only water and eating little, but there were no further problems and his return to nursery on the Monday was expected. Social services were contacted but there had been no further referrals. On 17 April 2013, BF advised that RA was well and had returned to nursery. When reporting on 24 April 2013, BF stated that RA was OK and at nursery.

17. RA's school and a local MP became involved. BF had told the school that if they were returned to Nigeria BF would be forced into marriage and RA killed. The Secretary of

State's process for removal was explained to the school. On 24 April RA's head teacher emailed the local MP expressing grave concerns that BF might harm herself and RA if they were returned to Nigeria. The Secretary of State attempted to contact the school, telephoned social services, and prepared a safeguarding referral form and a letter to the MP. The following day, the Secretary of State contacted the head teacher and social services. The head teacher stated that the concerns were her own, not that BF had stated that she would harm herself or RA. She reported that RA was absent from school one day as BF reported feeling very weak, but he was now back in school, although unusually quiet and tearful at times. The head teacher said that she would advise social services of BF and RA's behaviour later in the week.

18. On 26 April 2013 the Secretary of State's officials contacted social services for an update. A social worker had not been allocated to the case but a duty social worker had spoken to the school and BF. BF had stated that she was extremely low but there was no risk to herself or RA.

19. BF and RA were due to be removed to Nigeria on 30 April 2013. They failed to show for a self check removal. That day the school reported that RA was away from school. BF could not be contacted. Social services were involved. On 3 May 2013 a local authority social worker advised the Secretary of State that BF had admitted herself to a

psychiatric ward due to her mental state and thoughts of drinking bleach.

20. For some time BF had received medical care for her mental health. In 2010 she was recorded as being depressed and suicidal and was prescribed medication for hypertension. There was continuing contact with the GP in the following years. In hospital BF's allocated nurse concluded that BF's condition was reactive to her current situation, not psychosis. The psychiatric assessment was that BF was not psychotic but had circumstantial depression. She responded well to treatment. The consultant said she had low mood/depression, no prominent problems or explicit suicidal ideations, and that her mental health issues related to her immigration status. She did not want to be discharged but the consultant told her that her treatment had been successful and she would be given a community psychiatric nurse. After seven weeks in hospital she was discharged.

21. At the time BF was in hospital, on the 3 May 2013, a social worker visited RA who had been placed with a friend of BF's. She was described as an unfamiliar adult who was struggling to care for RA as well as her own children. The hospital advised the local authority that at the time BF did not have the capacity to consent to RA being placed in voluntary foster care (as a placement under section 20 of the Children Act 1989) and therefore the local authority made a decision to issue care proceedings and seek an

interim care order. This order was made by Newcastle County Court on the 21 May 2013 to enable the local authority to complete assessments concerning BF's mental health and her parenting capacity. The interim care order was in force for 5 months until the 11 October 2013.

22. After BF was discharged from hospital RA was not returned to her care for some four months. An independent social worker engaged by BF's current solicitors opined in a report in March 2015 that this was a lengthy separation for such a young child and indicated the high level of safeguarding concerns. However, we note that in early July 2013 BF had stated to a social worker that she wanted RA to remain in foster care. The social worker thought someone had advised BF to say this and so asked BF if this would affect her immigration status.

23. When RA was placed in foster care the experienced foster carers, Kath and David Hayward, noted that his speech and language were delayed; his eating patterns and habits were abnormal; he had inappropriate trust in strangers; and his compliance and self-sufficiency suggested a lack of positive stimulation and interaction from his mother. RA did very well with his foster parents. BF in turn responded well with her supervised access sessions with her son. The Secretary of State had agreed to vary BF's reporting schedule so she could attend parental nurturing classes. RA expressed the wish to return to his mother.

24. On the 28 August 2013 a decision making meeting was held to discuss the progress made by BF, including her work with mental health professionals in which her issues were addressed. The meeting identified that any further mental health support would be available for BF from her GP. BF had also completed a parenting assessment which was described as positive. As a result a decision was taken that RA should return to the care of his mother under the auspices of a Supervision Order to provide support for BF's mental health and support for her parenting of RA.

25. On the 11 October 2013, a hearing took place at Newcastle County Court. Whilst this was prior to the legislative changes made in the guidance set out in Practice Direction 12A (Public Law Outline 2014) and the other relevant changes to Part 12 of the Family Procedure Rules 2010 (as now amended), an Issues Resolution Hearing("IRH") took place. Where it is possible for all the issues in the court proceedings to be resolved at the IRH, the court may treat the IRH as a final hearing and make orders disposing of the proceedings. This took place and a Supervision Order was made in favour of the local authority for one year's duration.

26. (We note that neither the applicants' legal representatives nor the Secretary of State have not sought to obtain disclosure of the documentation generated in the care proceeding, including the Guardian's report or a copy of

the care plan. As the hearing at the IRH was treated as a final hearing, the court would have recorded on the face of the order (or in a separate document attached to the order) how the threshold criteria were met under section 31(2) of the Children Act 1989, either by agreement between the parties or by the judge reaching a decision on the evidence. While we accept that it is only if the threshold is crossed that a supervision order could be made, we observe that we have not had sight of any such documentation. We note that the key distinction between a care and supervision order is that a care order gives parental responsibility for a child to the local authority and gives it power to determine the extent to which a parent may exercise parental responsibility: see section 33(3). Under a supervision order parental responsibility remains with the parent but the local authority have a duty to advise, assist and befriend the supervised child supported by the powers in Schedule 3, parts 1 and 2.)

27. The Secretary of State had decided in August 2013 not to remove BF and RA while any supervision order was in force.

28. On 19 March 2014 the solicitors acting for BF made further representations. There was substantial repetition of the representations of the previous year. Passages from the Country of Origin Information Report of 14 June 2013 were inserted in the letter. Mother and son were at risk. It was not in his best interests to be removed since he was at a

vital stage of his development. The letter did not refer to BF's admission to hospital, RA being taken into the interim care of the local authority or the circumstances leading to the making of the supervision order.

29. The Secretary of State rejected the 19 March 2014 claims on 25 September 2014. When doing so she referred to the representations being made on behalf of BF and her dependant son as a fresh asylum claim and as a claim under Articles 3 and 8 ECHR. Amongst other things the Secretary of State concluded that the risk of BF being forced into prostitution was speculative. Neither BF nor her son had demonstrated that there was a real risk to their Article 3 rights. As to the Article 8 rights of the two, they did not fall within the Immigration Rules. The letter referred to section 55 of the Borders, Citizenship and Immigration Act 2009. No reasonable circumstances had been adduced which would prevent RA's return to Nigeria with his mother. There was no evidence that he had developed any significant private life outside his family environment. Education and health services were available in Nigeria. It was in the best interests of RA to accompany his mother on her return to Nigeria.

30. During 2014 there were exchanges of information between the local authority and the Secretary of State. On 11 September 2014, the local authority was informed that the plan would be for BF and RA to be removed to Nigeria when the

supervision order expired in October but that BF was not to be told in advance because in the past this severely affected her mental health. On 29 September 2014, the local authority sent the Secretary of State its child in need assessment, the child in need plans and the care team minutes.

31. The supervision order expired on the 18 October 2014.It is recorded in the statement of Zoey Hughes dated 27 January 2015, to which we return later in the judgment, that after RA had been returned to her care in October 2013, and during the operation of the supervision order, BF had engaged in all necessary support , was aware of her Wellness Recovery Action Plan (if required) and had completed work with Children North East (dealing with issues of routines and boundaries) and also two programmes to develop her parenting skills, the Magic 123 programme and the nurturing programme.

32. When the Secretary of State contacted the local authority on 14 October 2014, it reported that BF was upset at the rejection of her latest submissions and appeared to need more contact. However, she was hopeful since her solicitor was looking for a loophole. The social worker reported that the supervision order was due to expire on 18 October, and that there was to be a meeting to downgrade RA from being a child in need and to end the involvement of the local authority children services department.

33. On 12 November 2014 the Secretary of State conducted a heath and welfare interview with BF. BF stated that her son was healthy but her own health was not good. That day the Secretary of State's family engagement manager spoke to the Office of the Children's Champion within the Home Office to discuss the case. A family welfare form was opened so that it could be provided to the Home Office Family Return Panel. The family welfare form provided a background to the case, including the psychiatric problems which BF had had, and the history of developmental problems of RA and the care history. The following week, a list of BF's medicines was sent to the Secretary of State's family team to consider.

34. The last of the local authority child in need meetings about RA was held on 26 November 2014. It identified a risk that RA might not be provided with a safe and secure environment at home due to BF's mental health. It could affect his health and well-being. The local authority considered closing the case but BF had requested that they remain involved because she felt incredibly low.

35. On 16 December 2014 the Home Independent Office Family Return Panel met. It was attended by a representative of the Secretary of State's Office of the Children's Champion. Its purpose was to make arrangements for the removal of BF and RA to Nigeria. It considered the history of the local authority's involvement, BF's history of mental illness,

RA's history of delayed speech, his schooling and the significant progress he had made when living with his foster parents. It noted that a child in need plan was in place and there were no immediate concerns regarding RA. BF had undertaken two parenting courses. BF had two bank accounts and a partner. The panel chair noted that the local authority would not have been "prepared to let them go if there was anything further that they could do for the family". The meeting also considered support on return. The record of the meeting was sent to the local authority.

36. BF saw her GP, Dr Rana, on 19 December 2014. The GP had recorded a series of depressive episodes in the past. On this occasion she recorded BF's low mood and increased her anti-depressant dose (Fluoxetine) to 40mg daily.

37. BF and RA were detained on 20 January 2015. Directions for removal had been issued again and appeal forms (with an out of country right of appeal in respect of RA) again served. A medic was present who assessed BF and approved the detention. RA's school was informed. The following day the family seemed to have settled into Cedars, the immigration centre, very well and there were no concerns. RA interacted well with the staff and Barnardos had planned activities for him for the day.

38. On 22 January 2015 BF advised Barnardos that RA had asked why they were at Cedars and she told him they were being

detained but nothing further. She would not agree to Barnardos talking to RA about their removal to Nigeria. RA continued to engage and interact well with staff at Cedars and had activities planned for the day. There were no issues with his eating or drinking. Barnardos had no concerns regarding BF's parenting capabilities.

39. That day, 22 January 2015, BF's solicitors made further representations on behalf of "our client", BF, as a fresh claim. The application began with BF's mental illness, the risk of deterioration if removed, the deficiencies in mental health care in Nigeria, and the consequent breach of her Article 3 and 8 rights on return. Secondly, BF would be unlikely to obtain employment in Nigeria with no childcare. The likely destitution "would provide an additional risk to the health and wellbeing of herself and her young child, and present an additional Article 3 breach."

40. Thirdly, the letter stated, BF and her son had built up a significant private life here. BF's strong links with the community were shown by the fact that 4,000 people had signed a petition opposing their removal. In respect of RA, he was at a vital time in his development and removal would have an extremely detrimental effect on his well-being. The law required that regard be had to RA's best interests. The family had nothing to return to and there was a risk of homelessness and destitution. It was in RA's best interests to remain here. It was likely that removal would exacerbate

BF's condition and RA needed a secure environment. Citing information from the Home Office Country of Origin Report, June 2013, the letter stated that Nigeria would not be safe for a child in the position of RA. He would face destitution, be unable to access education, and risked becoming a street child. He would be extremely vulnerable and it would be completely detrimental to his well-being.

41. Included with the letter were copies of BF's medical records and a letter from BF's GP, Dr Rana, dated 21 January, opining that removal would exacerbate her mental health issues.

42. Dated 22 January 2015 was a report from Zoey Hughes, one of the local authority's safeguarding and care planning social workers. After summarizing its intervention she wrote that BF and RA

> "have a lovely and warm relationship and [RA] appears happy in the care of his Mum…[RA] remains as a Child in Need, this is due to concerns regarding [BF]'s mental health difficulties [which] appear to centre around the possibility of her and [RA] being deported back to Nigeria. At present [BF] appears to be managing well with parenting… Despite [BF]'s low mood, [RA] has continued to present well; they (sic) have been no concerns from school… At the last care meeting on 20 November 2014, closing [RA]'s case was discussed, due to there being no further safeguard concerns. However [BF] felt concerned that her current low mood would impact upon [RA]'s well-being… Therefore, it was agreed to review the decision to close at the following Care Team Meeting."

43. The Secretary of State responded to these further representations the same day, 22 January, refusing to

accept them as a fresh claim. She referred to Zoey Hughes' positive report, while acknowledging Dr Rana's opinion that removal to Nigeria would exacerbate BF's mental health issues and that the treatment in Nigeria would not be comparable to what is available in the United Kingdom. However, that did not meet the high Article 3 threshold. The relationship between BF and RA was caring and positive and there was no reason to presume that this would change after they had left. Since February 2013 BF had been offered support to re-establish herself in Nigeria. BF's human rights would not be infringed by her removal. Family life could continue in Nigeria. There could be no private life claim under the Immigration Rules and no fresh claim. There was a reference back to the solicitors' previous representations and the Secretary of State's responses.

44. The next day, 23 January 2015, officials at the immigration centre noted:

> "No safeguarding concerns at present. Barnardos observed that [BF] interacted well with her son yesterday." Exceptionally the Secretary of State authorised a payment of £500 to cover hotel and immediate living expenses on return to Nigeria. BF had refused to administer anti-malaria medication to RA. Nets and medication were to be packed in their baggage."

45. The solicitors made further representations that day, 23 January 2015, asserting that the Secretary of State had failed to have regard to the previous day's representations "concerning the wellbeing and possible Article 3 breach upon return of our client and her son". The letter then extracted verbatim the previous day's representations, adding that the public support - a petition with 8000 signatures - gave rise to exceptional circumstances and warranted a grant of discretionary leave. With the letter were newspaper reports of the concern of RA's head teacher,

the progress he had made and the school's concern about his safety and emotional well-being. There was also a letter from MIND confirming BF's referral to counselling.

46. The Secretary of State replied the same day. "[You] have asked that further consideration is given to Article 3 of the ECHR in relation to [RA]…". BF had not been accepted as a credible witness by Immigration Judge Cope in 2010, who had found that she had probably arrived in Britain in 2006, which cast doubt on her assertions that she was completely without family and friends in Nigeria. The letter acknowledged that life for RA would not be the same in Nigeria, but that "it cannot be accepted that his changed circumstances will be such that they could amount to inhuman or degrading treatment such that the high threshold in Article 3 could be breached." BF would be given cash on departure and had been also given information in a resource pack about organisations to approach for assistance there. It was clear that BF would try to do whatever she could to safeguard her son and ensure his welfare, including his schooling. There was no fresh claim under the Immigration Rules.

47. Later that day, BF and RA were placed on a flight to Nigeria. On return to Lagos, for some reason BF could not access the £500 provided on the pre-loaded payment card the Secretary of State had provided. A Good Samaritan assisted and Mrs Hayward, the foster carer, contacted the Office of the Children's Commissioner who spoke to the British High Commission in Abuja. Following this the High Commission sent a driver to pay BF £350 in cash sufficient for two night's accommodation at a hotel. Subsequently, BF and RA have been provided with financial support by Mrs Hayward personally and from funds she has been able to raise from

the local Gateshead Community. Mrs Hayward has also arranged and paid for medical care for BF.

Post-removal evidence

48. Following the removal of BF and RA to Nigeria, the new solicitors acting for them have obtained a number of expert reports and additional materials.

49. The first expert report is by Carolyne Willow, an experienced social worker in both the public and NGO sectors, at local and national level. She was unable to interview BF and RA but on the basis of her review of the documents and experience has concluded that the Secretary of State should have conducted a 'best interests assessment' regarding RA. By the age of 4 or 5 a child will have developed significant attachments to other children and adults outside the family. In RA's case, he had strong attachments in the United Kingdom and no experience of Nigeria. The Secretary of State should have considered the likely effect on his being uprooted and removed to Nigeria.

50. Ms Willow states that the assessment would have covered a range of matters, including the relationship between BF and RA, the history of local authority intervention, the identification of risks to his welfare and his mother's capacity to care for him, an analysis of conditions and social provision for children in Nigeria, the likely immediate impact on his welfare of removal, and whether there were available substitute carers should BF require periods of hospitalisation once in Nigeria. When in the United Kingdom RA had been vulnerable and his needs had not been met by his mother. Considerable intervention from the local authority and other agencies had been necessary. It was of real concern that a vulnerable child had been forcibly uprooted without any detailed preparation by the

education and social care professionals working with him. If the local authority had been asked to provide an opinion on RA's needs and best interests, it would have been required to give due consideration to his own wishes and feelings. That could possibly have involved communication with him but also with others. Overall there was no adequate assessment of his best interests and human rights in relation to his removal.

51. Secondly, Dr Naomi Hartree, a GP with experience in the care of patients with mental illness, has also provided a preliminary medico-legal report dated 26 March 2015. That has involved an internet and a mobile telephone call, both lasting about one hour. Dr Hartree used a PHQ-9 questionnaire and assessed BF's depression as severe. That was in keeping with Dr Hartree's clinical impression. BF did not appear to have any constructive coping methods for dealing with her anxieties. Her symptoms suggested a possible diagnosis of post-traumatic stress disorder. She had reported suffering the loss of all her family and having a troubled past. Overall, she presented as someone having a severe level of mental ill-health, significantly affecting her functioning. Without treatment and support it was very likely that her mental health would relapse and deteriorate.

52. Dr Hartree saw little of RA in her internet communication with Nigeria. However, she did have significant concerns about BF's ability to parent RA adequately with her mental health issues. She thought BF was motivated to care for RA and was trying her best, but without support and treatment that was insufficient to overcome the effects of her depression and psychological distress. Overall, her opinion was that there was a high risk that significant neglect of RA may occur, if she lost support and failed to obtain

alternative community support, and that her mental health would relapse if she lacked treatment and support.

53. Thirdly, there is a report from Ms Adeagbo-Sheikh, an experienced social worker of Nigerian heritage. She spoke to BF and RA via the internet. As regards RA, she reports that she was not able to observe the quality of interaction between BF and RA but RA did state that he would like to return to the United Kingdom. When he was asked if he liked Nigeria he repeatedly stated that he did not like it.

54. Amnesty International has also prepared a special report as regards the current claim. Ordinarily it does not undertake this type of exercise but exceptionally has done so in this case. It sets out the high cost of housing in Lagos and describes the slums there. Abeokuta, Ogun state, does not have the same population pressures but is also developing slums. It will be extremely difficult for BF to find employment and there is the risk for her of prostitution and for RA of child labour. Child labour is a serious problem in Ogun state. RA will face difficulties in getting access to schools. Given BF's serious mental health difficulties she will be unlikely to receive the treatment and support she needs. BF and RA face substantial risks.

55. In a second witness statement, Mrs Hayward reports on the support she has been able to provide to BF and RA from the United Kingdom by use of contacts both here and in Nigeria. While she had no doubt about the love for each other between BF and RA, it was clear to her that RA insulated himself emotionally from his mother’s sadness and distress. She and her husband had already sent another £700 so that the hotel was paid for up to Easter.

56. Further, the local authority has confirmed to the applicants’ solicitors that it was never asked by the

Secretary of State to comment on whether there were concerns about RA being removed to Nigeria with his mother. The local authority adds, however, that at the time of removal RA did not have any unmet needs. If asked to comment on RA, the local authority would explain that he had no additional needs. The only comment to be made was that RA would be returning to a culture with which he was not familiar. The local authority was never in a position to give an informed opinion about the likely circumstances the family would face on return.

Statutory and policy framework

57. Section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") sets out the type of decisions which give rise to an appeal. At the relevant time (between 1 August 2008 and 19 October 2014 when it was amended) it provided:

> "(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
> (2) In this Part "immigration decision" means—
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a),(b),(ba) or (c) of the Immigration and Asylum Act 1999 (c.33) (removal of person unlawfully in United Kingdom…"

58. Section 10(1)(c) of the Immigration and Asylum Act 1999 ("the 1999 Act") provides that removal directions may be served on the United Kingdom born and non-British citizen children of those subject to administrative removal under section 10.)

59. Section 73 of the 2002 Act allows removal directions to be given to United Kingdom born children of illegal entrants.

60. The grounds of appeal in section 84 of the 2002 Act include that the decision is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's

Convention rights (s. 84(1)(c)) and that the removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the our obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights (s 84(g)).

61. A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which the section applies: s 92(1). Section 92(4) of the 2002 Act applies to an appeal against an immigration decision if the appellant "(a) has made an asylum claim, or a human rights claim, while in the United Kingdom".

62. Section 113 of the 2002 Act defines an asylum claim as a claim that to remove the person from or require him to leave the United Kingdom would breach the United Kingdoms' obligations under the Refugee Convention; a human rights claim means a claim that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

63. Section 92(4) of the 2002 Act is subject to section 94(2), which states that the person may not bring an appeal if the Secretary of State certified that the claim or claims "is or are clearly unfounded".

64. Whilst an appeal under section 82(1) of the 2002 Act is pending the Secretary of State is prohibited from removing the person from the United Kingdom: s. 78 of the 2002 Act. Section 104 (1) provides that an appeal is pending "during the period (a) beginning when it is instituted and (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99.

65. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55 of the Borders Act") provides in material part as follows:

> "(1) The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> (6) In this section-
>
> children" means persons who are under the age of 18;
>
> (7) A reference in an enactment (other than this Act) to the Immigration Acts includes a reference to this section."

66. Section 54A of the Borders, Citizenship and Immigration Act 2009 constitutes an independent family returns panel, which the Secretary of State is to consult in "family return cases".

67. Section 55 of the Borders Act 2009 was introduced into national law in order to reflect the content of Article 3.1 of the United Nations Convention on the Rights of the Child: ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166, [23], per Baroness Hale. Article 3.1 reads:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

legislative bodies, the best interests of the child shall be a primary consideration."

Paragraph 353 of the Immigration Rules provides:

> "When a human rights or an asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material which has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

68. The Secretary of State's Asylum Policy Guidance on Handling Claims, states in respect of the process of identifying protection claims that if a person expresses an unwillingness to return to their country of nationality or habitual residence because they believe they would be in danger, "we should assume that they are attempting to make an asylum claim". Paragraph 2.1 of Asylum Policy Instruction: Dependants and Former Dependants provides that family members "can simultaneously remain dependent on another person's claim whilst also making a claim in their own right". It adds that if an independent claim is made this must be considered individually in accordance with paragraphs 328 to 333B of the Immigration Rules". Paragraph 5.1 reads:

> "In the majority of cases, the principal applicant should be able to provide details of the asylum claim for the whole family unit… However, caseworkers must be aware that dependants may raise issues independent of the principal applicant which may give rise to a protection claim in their own right… Caseworkers must gather and assess all relevant information to fully

consider the protection needs of the family unit which may involve interviewing one or more dependants. Where necessary and bearing in mind the need to consider the best interests of the child to avoid putting children through an interview unnecessarily, where the child is of an appropriate age, caseworkers should consider whether hearing from the child is necessary."

69. The Asylum Policy Instruction: Processing Family Cases (1 March 2011) provides:

> "1.4 Involving children in decisions that impact on them
>
> "[The Secretary of State] should not assume that the best interests of a child, on the one hand, and those of its parents (or any other adult with parental responsibility for the child), on the other, will be the same. Where those interests are not aligned, appropriate steps must be taken to elicit and assess the child's views, as well as those of the parent(s) or any other adult with parental responsibility for the child."

Issue 1: Does RA have a separate claim?

70. The first issue is whether RA made a separate asylum and human rights claim apart from his mother and therefore had a suspensive in country right of appeal in accordance with section 92(4) of the 2002 Act.

71. Ms Harrison QC advanced the argument that RA had a separate asylum and human rights claim firstly as a matter of principle. There is, she submitted, strong authority that what constitutes a claim in section 113 of the 2002 Act is not to be construed narrowly or technically: R v Uxbridge Magistrates Court ex parte Adimi [2001] QB 667. Moreover, there are no written procedures or prescribed application forms for asylum or human rights claims. There is also the Secretary of State's own policy, quoted earlier in the judgement, which recognises that a purposive approach is required; that a family member can simultaneously remain dependent on another person's claim, while also making a

claim in their own right; and that case workers need to be sensitive to where independent claims are being made. Importantly, under the Secretary of State's guidance she must be astute when immigration decisions affect the rights and interests of children to ensure that their position is separately and distinctly considered from that of adults: see also SS (Sri Lanka) v Secretary of State for the Home Department [2012] EWCA Civ 945, [17]. In the circumstances of this case, Ms Harrison submitted, the Secretary of State should have recognized that the solicitors were advancing a separate claim on behalf of RA and on the facts his separate treatment was demanded.

72. Acting pro bono for the Office of the Children's Commissioner, Ms Gallafent QC reminded us that a child may be at risk of harm on return, contrary to the Refugee Convention, or to Article 3 or Article 8 the European Convention on Human Rights ("ECHR") in circumstances where a comparably placed adult would not be at risk. For example a child might be at risk of a form of harm that can only be inflicted on a child such as pre-puberty female genital cutting, or a child may apprehend a level of physical or psychological harm which would not reach the requisite threshold in the case of an adult: see R (SQ (Pakistan)) v Upper Tribunal [2013] EWCA Civ 1251, [17]. Secondly, Ms Gallafent made helpful submissions about what has been termed the invisibility of accompanied children: despite the fact that a child may have a stronger independent asylum or human rights claim than an adult, their claim is overlooked and treated as inseparable from that of an accompanying family member.

73. Mindful of these considerations we accept that, notwithstanding that no separate claim may be expressly advanced on behalf of a child, the circumstances may be

such as to warrant independent treatment. Whether the Secretary of State must identify a separate claim will be fact sensitive. There may be a clear, and obvious conflict between the interests of a parent and child to justify separate treatment. But that will be very unusual. Just because the interests within a family diverge does not mean that the child should be treated as having advanced a separate claim. Differences in matters such as the prospect of success of family members if they claimed separately can be accommodated within the one claim. Moreover, the child's interests will be protected as a result of a best interests inquiry through the operation of section 55 of the Borders Act.

74. The issue on judicial review is whether, on the facts of the particular case, the Secretary of State can be said to be in error in not treating a child in a family application as having advanced a separate claim. We put the matter that way, and not as Ms Harrison submitted, that the question is one of precedent fact. No authority was advanced to support that proposition; indeed such authority, as it exists, is against it: see Green J's review of the authorities in R (on the application of Khan) v Secretary of State for the Home Department [2014] EWHC 2494 (Admin); [2015] 1 All E.R. 1057, at [70].

75. In our judgment BF's then solicitors could not be said to be advancing a separate claim for RA in the annual representations beginning in 2012, nor was the Secretary of State in error in not treating RA as having made a separate claim. The representations in 2012 and 2013 mentioned RA, as a child born here for whom removal to Nigeria would be detrimental to his development, who would be subject to risks in Nigeria and who had a private life here. In relation to Article 8, and the best interests of her son,

the Secretary of State's response was that RA was in BF's care, she was fulfilling all his fundamental needs and it had not been demonstrated that it would be unreasonable for them to return as a family unit.

76. That approach was in line with the decision of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013]UKUT 197(where the Upper Tribunal held that the length of residence was an important factor and observed that seven years from the age four is likely to be more significant to a child than the first seven years of life and that very young children are focussed on their parents rather than their peers and are adaptable), and E-appellant (Article 8-best interests of a child) Nigeria [2011]UKUT 00315 (where the Tribunal stated that during the child's very early years, he or she will be primarily focused on self and the caring parent or guardian). By no stretch of the imagination could these representations be interpreted as advancing a separate claim for RA or that a separate treatment of RA was justified.

77. The representations of 19 March 2014 repeated much of what was contained in the 18 March 2013 letter. As regards RA, the representations made reference to him as "a dependent on her [BF's] asylum claim" and the representations repeated the point that removal would be detrimental to his development with a reference to his best interests. Nothing was said about what had happened to the family over the preceding year and no point was taken about how this might affect the position. On the face of the letter, there was no suggestion that those events had any relevance. The Secretary of State did not reply immediately, no doubt in part because she had decided to take no action until the Supervision Order in relation to RA had run its course. By this time, she had had periodic updates about the family.

When she did reply on 25 September 2014, she treated the 19 March representations as being made on behalf of BF and RA. There was also some discussion of RA's best interests, as we have described earlier. A challenge to the decision in the letter is well out of time so there is no need for us to canvas what legal avenues the solicitors could have taken. What we can say is that at this point there was no flaw in the Secretary of State's approach in considering RA' claim along with his mother's.

78. There were then the eleventh hour representations in January 2015 when BF and RA were about to be removed. Again, there is no need for us to explore what legal avenues were available but not pursued by BF's then solicitors as regards removal. The representations of 22 January 2015 focused on BF's claims with mention of the implications for RA. For the first time, RA's foster care in 2013 was mentioned and it was suggested (drawing on the GP's letter) that return would exacerbate BF's mental health issues 'and the child would need to be in a secure and comfortable environment'. That is hardly the language of a separate claim for BA. The letter of the following day did not take the matter further.

79. By this time, the Secretary of State had a wealth of information about the family including the Child in Need assessments. But there was also the advice to the Independent Family Return Panel on 16 December 2014, from its experienced chair, that the local authority would not be prepared to let them go if there was anything further they could do for them. (After the meeting of the Panel, the information was sent to the local authority which did not raise concerns.) Importantly, there was the positive summary of the position by the social worker, Zoey Hughes. In the Secretary of State's replies she referred to Ms

Hughes' assessment and concluded that the 'lovely and warm relationship' between BF and RA which Ms Hughes had identified was unlikely to change after removal. The Secretary of State acknowledged BF's mental health issues and Dr Rana's opinion about its exacerbation in Nigeria but did not accept that BF had no friends or family in Nigeria to assist. Against that background, we cannot conclude that the Secretary of State acted irrationally or otherwise unlawfully in not treating the representations as advancing a separate claim for RA. The interests of BF and RA were different but not in conflict. In our judgement at no point on the facts of this case did the Secretary of State err in treating RA's claim as running together with those of his mother.

Issue 2: Does RA have a separate in country right of appeal?

80. Since we have concluded that there was no error because the Secretary of State did not treat RA as having made a separate claim on asylum or human rights grounds for BF, he has no in country right of appeal. The only appealable decision with regard to RA is the section 10 decision made in 2010, which carries only an out of country appeal. No other immigration decision within the meaning of section 82 of the 2002 Act has been taken as regards him. Ms Harrison canvassed the legal and practical disadvantages of RA having an out of country right of appeal. However purposive the approach to construing the legislation, and however crucial is the principal of access to justice, the legislation simply does not give RA an in country appeal.

81. We would offer two comments. First, in an out of country appeal, RA will still be able to challenge his removal on the grounds, broadly stated, that the decision is unlawful under section 6 of the Human Rights Act 1998; that the

decision was not in accordance with the Immigration Rules or is not in accordance with the law; and that in taking the decision, the Secretary of State should have exercised her discretion under the Immigration Rules differently. Secondly, the grounds of appeal ably drafted by Ms Cronin for the out of country appeal cover the essentials of RA's complaints about his removal. The Secretary of State accepted before us that material after 2010 would be usable in RA's out of country appeal.

Issue 3: Fresh claim and best interests

82. Ms Harrison's alternative submission was that RA's asylum and human rights claims should have been accepted as giving rise to a fresh claim in his own right or as part of BF's fresh claim. Since RA has never made a claim, we cannot see how he can have made a fresh claim. Rather, the issue in our view is whether in considering the January 2015 representations advanced by BF's then solicitors, the Secretary of State rationally concluded that RA's asylum and human rights representations did not give rise to a fresh claim as advanced by BF.

83. There is no dispute as to the correct approach to be adopted when dealing with an application under paragraph 353 of the Immigration Rules. It is set out in the judgment of Buxton LJ in R (on the application of WM(DRC) v Secretary of State for the Home Department[2006] EWCA Civ 1495, [6]-[11]. The Secretary of State has to consider whether there is new material which is significantly different from that already submitted, and if so, whether that material, taken together with the previous material, creates a realistic prospect of success in a further claim. In doing so, the Secretary of State must be informed by anxious scrutiny of the material.

84. Ms Rhee submitted that in refusing to treat BF's representations as a fresh claim, the Secretary of State properly considered the best interests of her son, RA, pursuant to section 55 of the Borders Act. At all times she considered RA's interests lawfully, reasonably and sensitive to his needs. The Secretary of State's contacts with the local authority and RA's school illustrated her careful and proactive approach to discharging her best interests duty, consistent with her guidance and SS (Sri Lanka) v Secretary of State for the Home Department [2012] EWCA Civ 945, [17]. Those contacts informed her relevant decision making. Further, she postponed removal until the Supervision Order was discharged and until, at the last care meeting, there were no safeguarding concerns. The Office of the Children's Champion was involved. The Independent Family Return Panel carefully considered the mechanics of return but against the broader background. BF had refused Assisted Voluntary Return which would have meant more financial and other assistance on return, but exceptionally BF was provided with £500 as well as the resource pack. When the money could not be accessed, the British High Commission in Nigeria provided £350 in cash. In Ms Rhee's submission, a diagnosis of depression with a parent does not per se demonstrate a threat to a child's welfare.

85. Notwithstanding all this we have concluded that the Secretary of State's decisions of 22 and 23 January of this year do not evidence the regard to the best interests of RA as a primary consideration. We acknowledge that the representations which for the first time raised the issue of the potential risks for RA associated with BF's mental health arrived on the very eve of his intended removal along with the mother. We also acknowledge that the

Secretary of State drew on Zoey Hughes' conclusion that BF and RA had a lovely and warm relationship. However, the Secretary of State's letters did not address the risks associated with any decline of BF's mental health for RA's future in Nigeria. The local authority had never been asked to address those risks and would not necessarily have had the expertise to do so if it had been.

86. There can be no challenge to the Secretary of State's reasons for rejecting the representations as a fresh claim as regards BF on her own. In ordinary circumstances that would be conclusive with respect to RA's interests as well: young children like RA are removable with their parents and their best interests are served by being with them. But in the special circumstances of this case, in not taking into account the implications of BF's mental health for RA, and the risk of that degenerating in the Nigerian context, and the likely consequences on removal, the Secretary of State failed to have regard to RA's best interests as a primary consideration. We do not consider that the Secretary of State discharged that duty. By failing to take into account the matters we have set out, we have concluded that the Secretary of State did not take into account material considerations and thus did not employ the requisite anxious scrutiny required. Thus the decision that the representations did not demonstrate a realistic prospect of success before an immigration judge was in our judgment flawed.

Conclusion

87. For the reasons we have given we grant judicial review.