OUTER HOUSE, COURT OF SESSION

[2018] CSOH 92

P1085/17

OPINION OF LADY WISE

In the Petition of

M S A

Petitioner

against

THE RIGHT HONOURABLE THE LORD KEEN OF ELIE QC

Respondent

for

Judicial review of a decision of the Secretary of State for the Home Department to refuse to grant the petitioner leave to remain in the UK

Petitioner: Caskie; Drummond Miller LLP
Respondent: Pirie; Office of the Advocate General

5 September 2018

Introduction

[1] The petitioner is a 66 year old citizen of St Lucia. She arrived in the United Kingdom on 13 April 2009 on a six month visitor's visa. She overstayed and on 6 July 2016 papers were served on her indicating that she was liable for removal from the UK. On 6 September 2016 she submitted an application to be permitted to remain on the basis of her private and family life in the UK. The Secretary of State decided, on 23 August 2017, to refuse her

application for leave to remain. The petitioner's case was also certified as clearly unfounded at that time. The present petition seeks reduction of that certificate as otherwise any appeal against the substantive decision must be brought from outside the United Kingdom – Nationality, Immigration and Asylum Act 2002, section 92(1)(b).

Factual background

[2] The petitioner has lived with her daughter and son-in-law (who have indefinite leave to remain in this country) since her arrival in the United Kingdom in 2009. On 12 September 2013 the petitioner's grandson (B.J.G.P.) was born. The petitioner's daughter is in full time employment and her husband serves in the Armed Forces. The petitioner acts as primary carer for the child while his parents are working. She enjoys a very close relationship with her daughter and son-in-law and with her grandson with whom she lives in a core family unit. This was the primary basis for her claim for leave to remain, although some health and financial issues were also raised.

The decision under challenge

[3] In the decision letter of 23 August 2017 the petitioner was informed that her application did not fall within the family life rules under Appendix FM of the Immigration Rules as her claim did not involve a partner, parent or dependent children in the United Kingdom. There is a further narration of why the petitioner does not fall within the Immigration Rules on private life. None of that is contentious in the current petition. The part of the decision relative to the challenge in this petition is contained under the heading "Exceptional Circumstances" which is a discussion of the proportionality considerations that require to be taken into account when considering whether removal of

the petitioner would constitute an unjustified breach of article 8 ECHR. The relevant passages of the decision letter are in the following terms:

> "**Exceptional Circumstances**
>
> We have considered whether there are exceptional circumstances in your case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for you, a relevant child or another family member. In so doing we have taken into account the best interests of any relevant child as a primary consideration.
>
> Based on the information you have provided we have decided that there are no such exceptional circumstances in your case that would warrant a grant of leave to remain outside the Immigration Rules.
>
> You have told us that you care for your grandchild while their parents are at work, that you share a close relationship with your daughter who is settled in the UK and provides you with financial support and that you suffer from high blood pressure.
>
> We have reached this decision because, while you may provide care for your grandchild while their parents are at work, you have provided no reason why this could not be done by the parents by adjusting their work patterns or by using the services of a nursery or childminder etc. Consideration has also been given to Section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). The duty to have regard to the need to safeguard and promote the welfare of children requires us to consider the effect on any children of a decision to exclude, or deport, against the need to maintain the integrity of immigration control. Our aim is always to carry out enforcement of the Immigration Rules with the minimum possible interference with a family's private life, and in particular to enable a family to maintain continuity of care and development of the children in ways that are compatible with the immigration laws. It is generally accepted that the best interests of a child are served by them remaining with their parent or parents. This represents the centrality of a child's relationship with their parent in determining their wellbeing. It is submitted that you do not have parental responsibility of B. J. G. P., since they reside in the United Kingdom with their biological parents. It is therefore noted that if you were to leave the United Kingdom, they could continue to reside here. The refusal of your application does not separate any children from their biological parents, and does not obligate B. J. G. P., to leave the United Kingdom. It has therefore been decided that it is both reasonable and Section 55 compliant for B. J. G. P., to remain in the United Kingdom with their biological parents. Additionally, you may have a close bond with your daughter, however, this can be maintained from St Lucia using modern means of communication. Also, while you receive money from your daughter to contribute to your maintenance you have stated that you receive a pension from St Lucia. Your daughter could continue to provide financial assistance upon your return to St Lucia. Furthermore, your sister still lives in St Lucia and could help and support you on

> your return. You claim to be suffering from high blood pressure, for which you receive treatment in the UK. Your condition does not appear to be life-threatening and St Lucia has a health-care system, which we consider to be capable of assisting you if necessary.
>
> You can remain in contact with your family and friends by modern ways of communication and visits. It is noted from your grandson's passport that he visited St Lucia on 05 December 2013.
>
> For the reasons set out above we do not consider that these constitute exceptional circumstances."

The following reasons are also given as justification for the certification decision:

> "This is because you do not meet under Private Life as you have only been in the UK since 13 April 2009 and have spent the majority of your life in St Lucia. Therefore, it is deemed reasonable to expect you to reintegrate back in to the culture there. There is nothing preventing you from seeking employment in St Lucia, this does not have to be in the UK. You can keep in touch with your family and friends by modern ways of communication from outside the UK. Therefore, your claim is clearly unfounded."

Submissions for the petitioner

[4] Mr Caskie conceded that, notwithstanding the terms of the petition, nothing turned on the labelling of the petitioner's circumstances as private life rather than family life. The distinction was a narrow one which, on the authority of *Pun (Nepal)* v *SSHD* [2017] EWCA Civ 2106 was "arid and academic". However, it had still been incumbent upon the Secretary of State to consider the facts carefully and decide what weight should be given to a relationship that on the face of it justified article 8 protection. The essential question for determination was whether the decision in this case was outside the range of reasonable responses that could have been given to the petitioner's claim. If the issue of proportionality could have been decided in the petitioner's favour that was enough. It was also accepted that, even if an error could be identified, the question had to be asked whether the Secretary of State would still have been bound to certify the petitioner's claim as clearly unfounded.

[5] In applying the test of whether a claim was clearly unfounded the Secretary of State must take the human rights claim "at its reasonable height" – *EM (Eritrea)* v *SSHD* [2014] 2 AC 1321. This effectively required an acceptance of the petitioner's submissions at almost the highest they could be. Mr Caskie relied on the decision of Lord Malcolm in *AH (Pakistan)* v *SSHD* [2011] CSOH 7. Albeit that was a case involving paragraph 353 of the Immigration Rules (fresh claims) the test for that was marginally more stringent under that rule than for certification. Importantly, Lord Malcolm had emphasised (at paragraph 33) that a distorted view is likely to emerge if the decision maker places emphasis on almost everything that might be said against a petitioner's claim but does not give any consideration of factors that might be prayed in aid in support of it. It was indisputable that section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") applied such that the decision must have as a primary consideration the need to safeguard and promote the welfare of any children in this country. In the case of *JO & Others* v *SSHD* [2014] UKUT 00517 the Upper Tribunal President McCloskey J had confirmed that a decision maker in this context must conduct a careful examination by identifying a child's best interests and then balancing them with other material considerations. The leading authority on the approach to section 55 was that of *Zoumbas* v *SSHD* [2013] 1 WLR 3690 and the seven principles enunciated there by Lord Hodge and repeated at paragraph 9 of *JO*. Accordingly there was clear authority that when the Secretary of State considered this case the requirement was to analyse all of it, not just to cherry pick the adverse factors in looking at what the child's best interests required and ask whether those requirements were outweighed by the legitimate aim of immigration control. It was wrong to approach the matters as if immigration control was more significant than the interests of the child. Mr Caskie relied on a decision of the European Court of Human Rights (third section) in *GHB* v *UK* [2000] App No 42455/98 involving the relationship

between grandparents and grandchildren. He acknowledged that the court had there accepted that such a relationship generally calls for a lesser degree of protection than that between natural parents and their children. However, he submitted that where a child lives with a grandparent that would be a significant marker in favour of establishment of the kind of family life that it may be disproportionate to interfere with. In *Principal Reporter* v *K* [2011] 1 WLR 18 at paragraph 38, the UK Supreme Court had drawn a distinction between wider family ties and the core family unit. In the present case the petitioner was clearly part of the core family unit with the child. The European Court of Human Rights had also described as an interference with article 8(1) rights the interruption of the enjoyment of family life between a child and his grandparent with whom the child had lived for a time – *Bronda* v *Italy (1998)* 33 EHRR 4 at paragraph 51. The burden was clearly on the Secretary of State in a case like the present to establish that the interference with the rights of the petitioner was justified. That was the position taken by the UK Supreme Court in *R (Quila)* v *SSHD* [2012] 1 AC 621 at paragraph 44, an approach that was equally applicable here. The task for determination of the petition was to decide whether an immigration judge could reach the decision that the interference with the petitioner's private and family life were she removed is disproportionate. It was accepted, under reference to *Rhuppiah* v *SSHD* [2016] 1 WLR 4203 that normally little weight was given to private life created when the person's immigration status was precarious, and so compelling reasons would have to be given as to why it was not appropriate to move that person. Effectively what this means is that there must be something that places the case "out of the ordinary" but it should be noted that the test amounted to one of compelling circumstances and not very compelling circumstances. The issue was whether the Secretary of State in this case had given the appropriate weight to the petitioner's family life with her daughter and particularly her grandson.

[6] Mr Caskie submitted that it mattered that many years had passed with the petitioner living in this country and creating family life. Delay was a factor in enforcing immigration control regardless of whose fault it was. The passages in *R (Agyarko)* v *SSHD* [2017] 1 WLR 823 at paragraphs 52 and 53 were apposite in this context. What the court required to look at was the nature of the relationship in question, its length, strength and depth. On any view fault could not be attributed to the child who has article 8 rights in relation to his grandmother, the petitioner, who is a significant carer in his life. In the article 8 assessment in relation to the child the reason for delay is irrelevant. So it may be in relation to the petitioner, but the Secretary of State must have regard to the need to safeguard and promote the welfare of the child. A First-tier Tribunal would also require to apply that principle. While it was anticipated that the respondent would rely on paragraphs 54 and 57 of *Agyarko* and focus on the negative aspects of the petitioner's claim, Counsel stressed that the need to look at both sides of the equation remained. In the case of *R (MM Lebanon)* [2017] 1 WLR 771 at paragraph 41, the UK Supreme Court reiterated that exceptional circumstances were required if relationships were formed knowing that the person's immigration status was precarious. While that had to be accepted, Mr Caskie's position was that the article 8 assessment of a four year old child could not be affected by that. In any event, it was noteworthy that in that case, it was emphasised that not everything in the Immigration Rules should be treated as "high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight".

[7] Turning to the decision letter No 6/1 of process, Mr Caskie pointed out as there was no provision within the Immigration Rules for someone in the petitioner's situation, it could hardly be taken as a point against her that she did not qualify within the Rules as she could never have done so. In contrast, if someone was capable of qualifying under the Rules, for

example as a spouse, but did not meet the specific requirements of the Rules, then that could be held against him at a later stage. But in the petitioner's case it had to be assumed that an immigration judge would not include as a factor against her that she did not qualify in terms of the Rules. In essence, the decision had to show that the decision maker had undertaken a proper full assessment of the petitioner's claim under article 8 ECHR. The available material on that (No 6/2 of process) included a detailed covering letter which states in terms that the petitioner is the main carer for her grandson "as if he was her own child". The address at which the couple, their son and the petitioner all live together in family is given. There is considerable detail about the nature of the relationship between grandparent and grandson. Details of the petitioner's financial circumstances are then given. In the large volume of paperwork provided there was a statement from a friend who states in terms that she has known the petitioner and her daughter for about 10 years. That witness states that she is aware that the petitioner plays a huge role in her grandson's life as "grandmother and nanny". As the financial circumstances of all those living in family in this case were known to the respondent it was self-evident that the petitioner's daughter could only work in a moderately well paid job with her mother here looking after her son. More importantly, the respondent gave no consideration to the fact that the decision would mean taking a four year old's granny away from him, someone who has cared for him since birth. The year during which the Secretary of State took to issue a decision had resulted in a further year of attachment of the child to his grandmother.

[8] The problem with the Secretary of State's decision was that it ignored a number of factors. First, the petitioner's son-in-law is often away serving in the Armed Forces for the UK including in Afghanistan. Secondly, no emphasis was placed on the less suitable form of paid childcare for a four year old child attached to his grandmother. Thirdly, having set an

appropriate standard consistent with section 55 of the 2009 Act in the decision letter the reasons given for not following a route that would be best for the child are that the petitioner does not have "parental responsibility". If that expression was meant in a factual sense then it was plainly wrong standing the material before the respondent. If it was being used in a technical sense, then that was irrelevant as the discussion was outside the Rules. The important thing was that the decision letter appeared to attach no weight to the petitioner's important role in the child's life. Accordingly, the child is effectively invisible in the decision and the requirements of section 55 have not been complied with. It is noteworthy that the certification section complained about in the petition makes no reference at all to the child or the important issue of what an immigration judge might do to assess this case outside the Rules. Accordingly the child was invisible in the certification decision also. The decision letter failed to adequately explain a reason why it was that the petitioner would not even have a chance of success before an immigration judge. The child was still pre-school age at the time of the decision. The Secretary of State could have taken into account that only limited leave to remain might be granted. The petitioner might require to apply again once he is older. The errors on the part of the respondent that mattered were in relation to the treatment of the article 8 claim. While it might be accepted that the proportionality assessment made by the Secretary of State fell within the reasonable range of responses for a decision maker to reach, it was not accepted that the conclusion was inevitable or was the only conclusion that could have been reached by a reasonable decision maker considering the evidence before them. It was for that reason that the petition sought only reduction of the decision to certify the case as clearly unfounded.

Submissions for the respondent

[9] Mr Pirie accepted that there was no real doubt that on the material provided to the Secretary of State the petitioner had shown that she had a private life in the United Kingdom and so any removal would have to be proportionate. He submitted however that the Secretary of State had not erred in the decision to certify the petitioner's claim as clearly unfounded. Even if it could be said that there was any error, it was immaterial as the outcome would be the same – *Ashiq* v *Secretary of State for the Home Department* 2015 SC 602. Counsel made a number of propositions none of which was ultimately controversial. These were:

1. Regard must be had to the consideration that the maintenance of effective immigration control is in the public interest.
2. Regard must be had to the consideration that it is in the public interest that persons who seek to remain in the United Kingdom are financially independent.
3. There is no general obligation to respect a person's choice of country in which to reside or to authorise family reunion.
4. Weight attaches to the United Kingdom's right to control its borders as an attribute of sovereignty.
5. Considerable weight attaches to the Secretary of State for the Home Department's policy expressed in the Immigration Rules on when leave to remain should be granted on the ground of family life – *R (Agyarko)* [2017] 1 WLR 823 at paragraphs 46-47.
6. In cases involving a family life established when the immigrant is in the United Kingdom unlawfully or temporarily, a "very compelling" claim is required to outweigh the public interest in immigration control.

7. Removal in accordance with the Immigration Rules is likely to be disproportionate in only a "very small minority" of cases (*Agyarko*).

[10] Counsel contended that against the background of those propositions, it was even harder for someone such as the petitioner to succeed outside the Immigration Rules now that following amendment, those rules are designed to cover all article 8 cases. The petitioner did not benefit from being included in any category of person who should be given family life protection. The Immigration Rules provide which types of relationship should give rise to leave to remain and so, if a notional First-tier Tribunal was looking at the petitioner's circumstances it would have to balance any factors in favour of the petitioner against the legitimate aims of immigration control. In that balance it was significant that the Secretary of State had decided in terms of the Immigration Rules who should qualify for leave to remain. In other words, in deciding whether someone should exceptionally be given leave to remain outside the Immigration Rules, considerable weight can still be attached to those rules. A First-tier Tribunal would require to take into account that the policy of the Secretary of State and Parliament as guardians of immigration policy had decided that grandparents did not qualify for leave on a family life basis. The absence of a grandparent from those qualifying for leave under the Rules reflected that policy.

[11] The petitioner had relied on decisions in the family law context including *GHB* v *UK* [2000] App 42455/98 and *Principal Reporter* v *K* [2010] UKSC 56 as support for the proposition that there were circumstances in which family life between grandparents and their grandchildren should be recognised and where interference with that could be unlawful. However the former case was one of adoption and the latter one involved a parent's right to participate in the Children's Hearing process. Those were proceedings in which the overriding requirement for the courts was the child's best interests. The immigration context

is different. In any event, the decision of the Secretary of State in this case was not founded on any intention to sever the tie between grandparent and grandchild and that was clear from the letter no. 6/2 of process. Reference was made to the decision of the Court of Appeal in *Rhuppiah* v *SSHD* [2016] EWCA Civ 803 and the court's categorisation of a precarious immigration status there. In the present case it should be noted that the petitioner was only given entitlement to be in the UK as a visitor for six months in 2009. For the whole period since then her immigration status has always been precarious or unlawful. In relation to *JO (section 55 duty) Nigeria* [2014] UKUT 00517 (IAC), it was acknowledged that in that case McCloskey J had reiterated that the correct approach to section 55 of the Borders, Citizenship and Immigration Act 2009 and its interaction with article 8 ECHR was as set out in *Zoumbas* v *Secretary of State for the Home Department* [2013] 1 WLR 3690 by the UK Supreme Court. It was noteworthy, however, that in the *Zoumbas* case, Lord Hodge had made clear that the Secretary of State did not have to record and deal with every piece of evidence in circumstances where the undisputed facts about the children involved in the immigration decision were known to the decision maker (paras 22 and 23).

[12] Turning to the factual material that had been before the Secretary of State in this case, the petitioner's immigration history was known to the decision maker and it was undoubtedly precarious. Accordingly compelling circumstances would be required before it could be said to be disproportionate to remove her from the UK. Close attention should be paid to what material was actually put before the decision maker. The focus of that material was the petitioner's relationship with her daughter and grandson. There was a considerable amount of information about the benefit that the petitioner's daughter received from her mother's company when she was pregnant and her husband was away serving in the Armed Forces. However that was in the past. The material did include a statement

confirming the close relationship of the petitioner and her daughter and a letter (No 6/5 of process) from the petitioner's son-in-law. The evidence relating to the petitioner's grandson was said to be short, sparse and abstract. It amounted to no more than references that the petitioner had bonded deeply with him, that she provided assistance in his upbringing by taking care of him while her daughter was at work, that she has a huge role as a grandmother and a nanny and that she had cared for her grandson since birth. Accordingly, the only specific example of anything the petitioner does presently for her daughter or her grandson is looking after the child while his parents are at work. There was no detail of how she spent time with her grandson and an absence of any suggestion of a decision making function in relation to the child's education or welfare. Further, there was nothing in the material suggesting what the impact on the child would be if the petitioner was removed from the UK and so there was nothing to contradict that telephone, electronic communication and visits would not be sufficient to maintain the relationship. There was no information about who else might take care of the child during the day if the petitioner was not there. Accordingly, the petitioner could not criticise the Secretary of State if there was material that might have been helpful to the decision that was not made available. In relation to the issue of financial assistance provided by the petitioner's daughter and son-in-law, there was no information to suggest that this could not continue on her return to St Lucia. Accordingly, the "reasonable height" of the petitioner's claim was that she had a typically good cohabiting relationship with her daughter and grandson and that she carried out a childcare function during working hours for her daughter's young son. In the absence of any information that such childcare had to be provided by the petitioner or that there were problems in organising alternative childcare this was not enough. Attention was drawn to a letter from a local school (No 6/2 at page 86) illustrating that an afternoon nursery

place had been offered for the petitioner's grandson from October 2016. In short there were no particular features of a compelling nature to take this case into the category where removal might be disproportionate on article 8 ECHR grounds.

[13] So far as the decision letter itself was concerned, a practical approach should be taken as, even in the field of human rights, a document of this sort should not be subjected to the same type of interpretation as a statute. It was clear from the decision letter that certain express findings had been made including that the best interests of a child lie with living with his parents and so removal of the petitioner would not compromise those best interests. There is express consideration of the whole family's interests and under the heading "Exceptional Circumstances" there is reference to the grandson having visited St Lucia in December 2013. It is clear enough that the Secretary of State contemplated that such visits could continue if the petitioner was returned to St Lucia. In the certification section, when the decision letter refers to there being nothing preventing the petitioner keeping in touch with family and friends, that could be taken to include the grandson on whom so much emphasis is now placed. There was some discussion about the expression "it is submitted that you do not have parental responsibility of [the child]…" Mr Pirie submitted that the decision maker was correct if this meant that the petitioner has no parental responsibilities and rights within the meaning of the Children (Scotland) Act 1995, however the expression should be read as and meaning an absence of parental responsibility in a looser sense. As it was known from the material that the petitioner carried out childcare this does not amount to a conclusion that the petitioner does not carry out any functions also carried out by parents. What is meant by the statement is that the carrying out of those functions does not give the petitioner equal status or standing to a parent. It is not a situation where the grandparent has replaced the parent because the child's parents are also living with him. In

the case of *R (RK* v *SSHD)* [2016] UKUT 0031 the Upper Tribunal had construed the words "parental relationship" in the context of section 117B(6) in the particular situation of a grandparent. At paragraphs 42-44 of the decision the Upper Tribunal judge (Grubb) confirmed that if a non-biological parent caring for a child claims to have a parental relationship its existence will depend on all the circumstances which include whether there are others (usually the biological parents) who also have such a relationship with the child. The decision goes so far as to state that it will be "difficult if not impossible" to say that a third party has "stepped into the shoes" of a parent. Translating that to the present case in the absence of evidence of any role of the petitioner in her grandson's life other than that of loving grandmother and providing care, the Secretary of State's use of the expression in a non-technical way was entirely correct.

[14] Accordingly the decision maker in this case did not misdirect herself by failing to consider whether there was family life outside the rules and it could not be said that no reasonable decision maker could have certified as clearly unfounded the petitioner's claim. In any event, even if some sort of error of law could be identified, there was no material error and so the petition should in any event be dismissed.

Discussion

[15] The petitioner's aim in this case is to appeal the Secretary of State's decision refusing her leave to remain in the United Kingdom. She can only do that while remaining in this country if the decision on certification is reduced. That decision is to the effect that the petitioner's article 8 claim is "clearly unfounded". The issue, then, is whether the Secretary of State erred in the approach taken to the petitioner's article 8 claim and if so, whether any such error is material, such that the outcome could have been different had the error not

been made. The petitioner's application raised a number of issues, but only those relating to her private and family life are relevant to the question of whether her claim is clearly unfounded and so whether the certification decision can stand.

[16] It may be convenient first to consider the characterisation of the petitioner's claim as one of private life or family life. While the petitioner initially complained about the decision maker's alleged failure to acknowledge that the petitioner had established family life in this country, it was ultimately accepted that it did not matter that the claim had been characterised as one of Private Life rather than Family Life. In *Pun (Nepal)* v *SSHD* [2017] EWCA Civ 2106 the Court of Appeal, under reference to *AA* v *United Kingdom* [2012] Imm AR 1, accepted that any debate about whether someone has family life rather than private life in this context is academic because *"…the factors to be examined in order to assess proportionality are the same regardless of whether family life or private life is engaged"*. Accordingly, what is important in the present case is whether the Secretary of State has identified and taken account of the relevant factors, not what label has been placed upon them. I accept Mr Caskie's submission that the approach must be to consider the facts carefully and then decide what weight should be given to a relationship falling within a category normally protected by article 8 ECHR. While there must be something compelling to allow an article 8 claim outside the Rules, I agree also with the submission that, as the petitioner could never place herself in one of the categories afforded protection by the Rules, it cannot be regarded as an adverse factor in assessing her article 8 claim that she does not qualify within them. It is not in doubt, as a matter of law, that grandparents with whom a child has lived in family can engage the rights protected by article 8 – *Bronda* v *Italy (1988) 33 EHRR 4* and *Principal Reporter v K [2011] 1 WLR 18* at paragraph 38. The sharp issue is whether, the petitioner's grandson having been identified by the decision maker as a

relevant child for the purpose of her article 8 claim outside the Rules, there was then a material error in failing to consider that child's particular needs and best interests.

[17] The first point of note in the part of the decision under challenge is that the decision maker appears to accept that consideration has had to be given to section 55 of the Borders, Citizenship and Immigration Act 2009. That provision requires the Secretary of State, in exercising various functions in the field of immigration, to discharge those functions having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The most authoritative statement of the legal principles applicable to cases where a child or children are relevant to an immigration decision is that enunciated by Lord Hodge in *Zoumbas* v *SSHD* 2014 SC (UKSC) 75, who paraphrased those principles as follows;

> " (1) The best interests of a child are an integral part of the proportionality assessment under Art 8 ECHR; (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration; (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other considerations can be treated as inherently more significant; (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play; (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interest are outweighed by the force of other considerations; (6) To that end there is no substitute for a careful examination of all relevant factors when the interests if the child are involved in an Art 8 assessment; and (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

[18] Turning to the reasons given in the decision letter, having acknowledged that this was a situation that invoked the requirement to consider the best interests of the child, there is a general statement about the centrality of a child's relationship with his parents and that living with one's parents normally serves a child's best interests. That cannot be taken to be an assessment of the particular circumstances of the child involved in this case, but as a

statement of very general child welfare principles. There follows the statement about the petitioner not having parental responsibility in relation to the child, an issue which I address in more detail below. The decision maker then makes a number of statements that are indisputably accurate. For example, it is noted that the petitioner's grandson could continue to reside in the United Kingdom after her removal and that no issue of separation of the child and his parents would arise. The decision then states that "it has therefore been decided that it is both reasonable and section 55 compliant for.." the petitioner's grandson to remain in the UK with his parents and that the close bond between grandmother and grandson can be maintained from St Lucia using modern means of communication. Accordingly, the article 8 assessment and decision insofar as it related to the relevant child amounted to (i) a statement of general principles about children's welfare, (ii) a statement that there is no parental responsibility and (iii) a note of undisputed facts about where and with whom the child will live if the petitioner is removed from the family and returned to St Lucia. The petitioner asserts that this is insufficient to comply with the *Zoumbas* principles.

[19] While there is no obligation on the Secretary of State to record and address in the decision letter every piece of evidence provided (*Zoumbas, supra,* at para 23), it is difficult to find the necessary careful assessment of the child's particular circumstances and associated best interests in the decision under challenge. In the particular circumstances of this case, the relevant child will continue to live with his parents regardless of the decision made in relation to his grandmother and so statements about it being generally best for children to live with their parents are not entirely in point. The issue is whether this child's best interests have been identified and then taken account of as a primary consideration. His current circumstances include that he lives in a family unit with his parents and his grandmother, with whom he has a close bond and who looks after him while his mother is

at work and his father is serving in the army. Those circumstances were known to and identified by the decision maker. It is clear that the child's best interests are served by his current situation. The next stage is for the decision maker to consider whether those interests are outweighed by the force of other considerations, such as the legitimate aim of immigration control. On any view the care arrangements for this child will be altered by the removal of the petitioner. However, there is no mention of the petitioner's removal being contrary to the child's best interests or even something that will be disruptive for him. The criticism in the decision letter that it has not been explained why the parents could not adjust their work patterns or use a nanny or childminder seems to overlook that the peittioner's daughter's income is modest and that as a serving soldier her husband is unlikely to be in a position to provide regular child care. Again it is something of a general statement about how working parents might organise child care, rather than an assessment of the material provided about this child. It does little more than record that it is not known whether or not on a practical level other child care arrangements could be made and so no assumption could be made by the decision maker that it would be possible to do so. Any possibility of a part time nursery place would not alter that.

[20] A central part of the reasoning for refusal of the petitioner's article 8 claim so far as her grandson is concerned was stated as being that she did not have parental responsibility for him. Mr Caskie's position was that if that was a statement of law it was technically correct but not relevant and if it was intended to be a statement of fact it was untrue. Mr Pirie suggested that the expression should be read in a looser sense than the technical meaning given to parental responsibilities and rights in the Children (Scotland) Act 1995 and that seems to me to be correct. However, the information given to the Secretary of State was that the petitioner did have sole responsibility for the child on a daily basis so that his

mother could work. In my view it overstates matters to suggest that specific examples of decisions made for the child would have to be given before the petitioner's position could be regarded as one of *in loco parentis.* The information provided in support of the petitioner's claim described her as the child's "…main carer, with whom she resides permanently" (No 6/2 of process, page 3). The clear information was, therefore, that the petitioner is more than just a close relative of this child and is one of his primary carers. I conclude that the statement that the petitioner does not have parental responsibility for the child is at best inaccurate and misleading and fails to address the particular role played by her in the life of a child whose interests are specifically recorded as relevant to the immigration decision. In my view it was an error to place reliance on that inaccurate and misleading statement in concluding that the petitioner's removal was not disproportionate on article 8 grounds.

[21] I consider also that there is some force in the criticism made by counsel for the petitioner that the decision letter lacks balance by emphasising only what might be regarded as adverse factors, rather than weighing up the circumstances that might invoke the protection of article 8 against those adverse factors. As Lord Malcolm pointed out in *AH* v *SSHD* [2011] CSOH 7 (at para 33) concentration only on factors adverse to a claim is likely to lead to the emergence of a distorted view. In the present case, had the petitioner's daily child care responsibilities of a child with whom she has an undisputed close bond been acknowledged as something patently promoting the interests of that child, the appropriate balance between that and the adverse factor of that family life having been created when her immigration status was precarious coupled with the state's legitimate aim of immigration control would be more visibly drawn. The lack of acknowledgement of the petitioner's significant role in the child's life feeds into the question of whether, had the emphasis been on the facts, as opposed to a misleading characterisation of "parental responsibility", the

decision maker would have been bound to reach the same conclusion. The context is of course restricted to the decision on certification.

[22] Counsel were agreed that the decision on certification can only stand if, regardless of any error in approach to the article 8 claim, the peititoner's claim would be bound to fail. This involves looking at the claim its reasonable height, as it would be presented to an Immigration Judge. The extent to which the petitioner has "stepped into the shoes" of the parents in the care of her grandson, at least during the working week, would require to be scrutinised carefully by an Immigration Judge and it is not for me to express a view on the ultimate outcome. What I do and can conclude is that, on the face of the material presented, the outcome is not so certain that I can be sure that the petitioner's claim simply could not succeed. There is a good argument that the particular child involved has become lost in the midst of general statements by the decision maker which, while probably correct, distract from one of the clearly identified issues in the article 8 claim being made. That issue was whether the loss of one of this child's primary carers is something that, when balanced against other factors, nonetheless renders a decision to remove the petitioner from the United Kingdom a proportionate one. I conclude that even reading the decision letter as a whole it does not address that issue in a way that faces up to the peititoner's central role in the child's life. Had the petitioner's role as primary carer to the child since his birth been properly factored in, it might have led to a different conclusion. Accordingly, the error identified is sufficiently material to vitiate the decision to certify the claim.

Disposal

[23] For the reasons given, I will sustain the petitioner's plea in law and reduce the decision to certify as clearly unfounded the petitioner's application for leave to remain in the United Kingdom, reserving meantime all questions of expenses.