Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09273/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th March 2019	**On 03 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

BLESSING [E]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. T Lay, Counsel instructed by TRP Solicitors
For the Respondent: Mr. D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. She has visited the United Kingdom on a number of occasions. Most recently she was granted a multiple entry visit visa that was valid until 3rd April 2015. On 20th January 2015, the appellant entered the UK lawfully, but remained in the UK unlawfully, when her multiple entry visit visa expired in April 2015. In November 2016, the appellant applied for leave to remain in the United Kingdom on Article 8 grounds. The application was refused by the

respondent for reasons set out in a decision dated 15th August 2017. The appellant's appeal against that decision was heard by First-tier Tribunal *(*"F*t*T") Judge O'Hagan, and dismissed for the reasons set out in a decision promulgated on 22 May 2018. It is the decision of the F*t*T Judge that is the subject of the appeal before me.

2. The F*t*T Judge sets out the background to the appeal at paragraphs [3] and [4] of his decision. At paragraph [5] of the decision, he summarises the matters referred to by the respondent in the decision of 15th August 2017. At paragraphs [7] to [9] of his decision, the Judge summarises the case advanced on behalf of the appellant. The appellant's case is a simple one. She remained in the United Kingdom following her arrival in January 2015 because of the significant role that she has played in the care of her grandchildren. She claimed that in any assessment of an application for leave to remain in the United Kingdom, she should be treated as having a genuine and subsisting parental relationship with her two grandchildren, both of whom were born in the United Kingdom, and both of whom are British citizens. In the alternative, she claims that it would not be reasonable to expect her to return to Nigeria, because of the health of her daughter and the impact that is capable of having upon the care of her grandchildren.

3. The Judge sets out at paragraphs [11] to [17] of the decision, the evidence given by the appellant and he sets out at paragraphs [18] to [25] of the decision, the evidence given by the appellant's daughter.

4. At paragraph [34], the F*t*T Judge correctly noted that the appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. The Judge's analysis of the evidence, his findings, and conclusions are to be found at paragraphs [36] to [72] of the decision.

5. In considering whether the respondent's decision is unlawful under s6 of the Human Rights Act 1998 on Article 8 grounds, the Judge adopted the

step by step approach referred to by Lord Bingham in Razgar -v- SSHD [2004] UKHL 27. At paragraphs [39] to [41], the Judge referred to the evidence and found that the appellant enjoys family life with her daughter and grandchildren. The Judge found that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8(1). At paragraph [42] of his decision, the Judge found that the interference is in accordance with the law, and pursues the legitimate aim of maintaining proper and firm immigration control.

6. The issue in the appeal, as is often the case, was whether the interference is proportionate to the legitimate public end sought to be achieved. At paragraph [44] of the decision, the Judge considered whether the application for leave to remain could succeed under the rules since that is a relevant factor in assessing proportionality. The Judge noted the submission made on behalf of the appellant that the requirements set out in the paragraph EX.1 of Appendix FM are met by the appellant. The Judge set out the test at paragraphs [45] of the decision. At paragraph [46], the Judges states:

> "It is not in dispute that the appellant's grandchildren are under the age of 18, in the United Kingdom and are British citizens. The issue is whether the appellant has a genuine and subsisting parental relationship with them. If, and only if, she does, then I must consider whether or not it would be reasonable to expect them to leave the United Kingdom."

7. At paragraph [47], the Judge records that he has considered whether the appellant has a parental relationship with the children. He accepted that it is not necessary for an individual to be a parent, in order to enjoy parental relationship. He noted that there is no reason, in principle, why a grandparent cannot have a parental relationship with his or her grandchild. The Judge goes on to state as follows:

> "47. … That said, the starting point has to be to recognise that it is not unusual for a grandparent to play an important part in a child's

> upbringing, including supporting the child's parents in meeting the child's physical, emotional and educational needs. It does not happen in every family, but it happens with sufficient regularity in many families for it to be regarded as a normal part of a grandparental relationship. To treat that as giving rise to a parental relationship would, in my view, be to distort our basic understanding of normal familial relationships."

8. At paragraph [48] of his decision, the Judge notes that the question whether or not there is a parental relationship, is a matter of fact to be determined having regard to all the circumstances of the case. The Judge states:

> "48. … the argument rests, in brief, on the following factors: the appellant lives in the same household as the children, she takes them to school, she provides leisure activities for them such as going swimming and to the park, she feeds them, and she provides them with love and emotional support. I acknowledge that all of these things are true. The appellant has, in my view, been commendable in the love and care that she has afforded to her grandchildren. I do not wish to diminish the importance of that to her, to her daughter and, most importantly, to the grandchildren themselves."

9. At paragraph [49] the Judge considers the significant countervailing factors and at paragraph [50], he states:

> "50. Whilst I recognise that the appellant lives in the same household as the children, that household is not her household, but her daughter's. I am mindful of the fact that, prior to the appellant's arrival in 2015, Ms Cahill cared for the children without any input from her. More significant still, in my view, is to consider what would happen if the appellant were to return to Nigeria. There is no suggestion that the children would do other than remain in the care of their mother. She retains both the legal responsibility for them, and, in the final analysis, the practical responsibility for their welfare and upbringing. The evidence does not support finding that she has relinquished the role, or that her mother has assumed it, whether exclusively or jointly with her. It is not uncommon for a grandparent to live with her child and

> grandchildren. In such circumstances, a grandparent will, understandably, be more involved than would otherwise be the case. So it is here. The appellant has been actively involved in meeting her grandchildren's' needs. Whilst I acknowledge that is so, having regard to all the circumstances of the case, I do not consider that I should characterise the relationship by treating it as a parental relationship. In my judgement, it is not. It is a close and loving grandparental relationship."

10. The Judge states, at [51], that *"..For the same reasons, I do not accept that this case can succeed under s117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended)* ("the 2002 Act"). For the reasons set out by the Judge at paragraph [52] of his decision, the Judge considered, but was not satisfied that the private life requirements set out in paragraph 276ADE(1) (vi) can be met by the appellant.

11. Having found that the requirements of the rules cannot be met, the Judge continued in his assessment of whether the refusal of leave to remain is proportionate to the legitimate aim sought to be achieved. He kept in mind throughout, as he was required to, the public interest considerations set out in s117B of the 2002 Act.

12. At paragraph [57], the Judge states that he has had regard to what is said about the appellant's daughter. The Judge refers to the psychological difficulties that the appellant's daughter has experienced because of an abusive relationship. The Judge refers to the evidence set out in the report of Dr Hull, and in the report of the Independent Social Worker at paragraphs [57] to [64] of his decision. At paragraphs [66] to [67] of his decision, the Judge considered the evidence of Dr Markantonakis. At paragraphs [68] to [69] of his decision, the Judge states:

> "68. Looked at in the round an element of the appellant's wish to remain with her daughter and grandchildren is the desire to stay with them for the simple reason that they love one another, and do not want to be apart. That is an entirely understandable and natural desire. I do not doubt that the appellant would miss them, and they her, but that is something which many, if not most, families have to deal with at

> some stage in their lives when they relocate because of their relationships, work or any of the multitude of reasons for which people do relocate. In the alternative, Ms Cahill and her children could choose to move to Nigeria so as to enjoy her life with the appellant there. Article 8 does not confer upon individuals the right to insist that they should be allowed to enjoy their family life in one country rather than another. Again in the alternative, they can continue to enjoy their relationship through visits with telephone calls in between.
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> 69. I have noted the practical issue of the support that the appellant gives in caring for the children. I was told that she helps with homework, cooking meals, and taking the children to school and collecting them from there. I recognise that such help is valuable to Ms Cahill and the children. She is, I accept, a much loved grandmother. It is not sufficient to lead to the conclusion that she should be allowed to remain. Other sources of support are available, however. It may well not be the same as that is provided by the appellant, but most families do not have a live-in grandmother to help, but manage nevertheless."

13. Having regard to all the circumstances of the case, the F*t*T Judge concluded that the public interest outweighs the private interests of the appellant, and he dismissed the appeal.

The appeal before me.

14. Four grounds of appeal are set out in the grounds of appeal dated 5th June 2018. First, the Judge erred in his approach as to whether there is a parental relationship between the appellant and her grandchildren. Second, in reaching his decision, the Judge failed to consider the best interests of the children and the duty under s55 Borders, Citizenship and Immigration Act 2009. Third, the Judge erred in his approach to the consideration of the evidence of the independent social worker, and the weight attached to that evidence. Fourth, the Judge failed to have regard to the impact the appellant's removal from the UK would have upon the family, as referred to in the report of Elizabeth Stevens.

15. Permission to appeal was granted by F*t*T Judge Mailer on 23rd July 2018. In granting permission, the Judge observed that:

> "It is arguable that there may have been contradictory findings as to whether there is a parental relationship regarding the appellant's grandchildren. It is also arguable that their best interests have not been properly considered."

16. In his submissions before me, Mr Lay did not seek to persuade me that the Judge erroneously concluded that the applicant does not have a genuine and subsisting 'parental relationship' with her grandchildren. There can in my judgement be no doubt that the Judge very carefully considered the nature of the relationship between the appellant and her grandchildren in particular, and that following a careful analysis of the evidence, was entitled to conclude that he should not characterise the relationship by treating it as a parental relationship. It was open to the Judge to find that it is not a parental relationship but a close and loving grandparental relationship, in circumstances where the appellant lives in her daughter's household, and provides support.

17. There is in my judgement, no inconsistency between a finding that there is an element of dependency such that there exists family life, and a finding that the appellant does not have a genuine and subsisting 'parental relationship' with the children. The two findings address two separate issues. In addressing whether the appellant has a genuine and subsisting 'parental relationship' with the children, the Judge was addressing the requirements of Appendix FM of the Immigration Rules and s117B of the 2002 Act. The question for the Judge under each of those provisions was whether there is a 'parental relationship'. When considering whether the modest threshold was met to establish a 'family life' for the purposes of Article 8, the Judge was not constrained to considering whether there is a 'parental relationship'. Where, as here, there is undoubtedly a close relationship between the children and their grandmother, the modest threshold for establishing an Article 8 claim based upon family life between children and grandparent, is capable of being overcome notwithstanding the lack of a 'parental relationship'. A finding that there is family life, is not to elevate that relationship to a 'parental relationship'.

18. Mr Lay submits that it is far from clear whether the Judge found there to be a 'family life' between the appellant and her grandchildren so as to engage Article 8. The Judge addresses the issue at paragraphs [39] to [41] of his decision. I am quite satisfied that the Judge found there to be a family life not only between the appellant and her daughter, but also between the appellant and her grandchildren. At paragraph [39] of his decision the Judge states *"It is not in dispute that the appellant and her daughter and grandchildren are biologically related, and nor is it in dispute that they love each other".* At paragraph [40], the Judge noted that before the appellant last came to the United Kingdom "*.. She and her daughter and grandchildren had lived apart in separate countries..."*. The Judge noted in the same paragraph that the position had changed when the appellant returned to the UK in January 2015, noting that since then the appellant *".. has lived with her daughter and grandchildren.."*. The Judge accepted that the appellant has become part of their household and lives. At paragraph [41] of his decision, the Judge found that the situation which developed after the appellant arrived in January 2015 has been "*.. such as to give rise to the "something more" described by Sir Stanley Burnton in Singh -v- SSHD."*. It is in my judgement clear that in reaching his decision, the Judge had in mind throughout, not only the relationship between the appellant and her daughter, but also the relationship between the appellant and her grandchildren. The "something more" applied as much to the relationship between the appellant and her grandchildren as it did to the relationship between the appellant and her daughter.

19. The focus of Mr Lay's submissions before me, was the second ground of appeal. That is, the failure to consider the best interests of the children. He submits that the Judge erroneously focused upon the question of whether there is a parental relationship between the appellant and her grandchildren, and having rejected the 'parental relationship', the Judge failed to consider the best interests of the children, in the wider context. He submits that there was evidence from the Independent Social Worker, the psychologist, Dr Hull, and Elizabeth Stevens, the HIV specialist occupational therapist that highlighted the vulnerability of the appellant's

daughter. He submits the Judge failed to adequately address that evidence of vulnerability, and how that would impact upon the care of the appellant's grandchildren in the absence of the appellant.

20. Mr Clarke submits that a careful reading of the decision establishes that in reaching his decision, the Judge had in mind all the evidence before him, including the evidence of Ms Stevens, and the weight to be attached to that evidence, was in the end, a matter for the Judge. He accepts, however, that the judge did not consider the best interests of the children in the context of the diagnosis that the appellant's daughter has a mental illness of moderate severity. To that extent, the respondent concedes that there is an error of law in the decision of the F*t*T Judge that was capable of affecting the outcome. Mr Clarke accepts that the error was capable of impacting upon the overall assessment of proportionality.

21. In light of the concession made by the respondent, I find that the decision of the F*t*T is infected by a material error or law, limited to the Judge's consideration of the best interests of the children, and whether the removal of the appellant is proportionate to the legitimate aim of immigration control.

22. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. That is unfortunate as Mr Lay submits that the assessment of a human rights claim such as this is always a highly fact sensitive task and that the remaking of the decision should be completed with the most up to date evidence. Mr Clarke accepts that it would only be fair and appropriate, once the decision of the F*t*T Judge is set aside, to have up to date evidence, particularly with regard to the best interests of the children.

23. As to disposal, notwithstanding the failure to prepare for the hearing as directed, with some reluctance, because the issue is concerned with the bests interests of the children and an assessment of proportionality, it is appropriate to remit this appeal back to the F*t*T for hearing afresh, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. The nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

24. I have carefully considered the decision of F*t*T Judge O'Hagan and it is appropriate to preserve the following findings:

a. The appellant does not have a genuine and subsisting parental relationship with her grandchildren for the purposes of Appendix FM of the Immigration Rules and s117B(6) of the Nationality, Immigration and Asylum Act 2002;

b. The appellant cannot satisfy the requirements of Appendix FM and paragraph 276ADE(1) of the Immigration Rules.

c. The appellant has established a family and private life with her daughter and grandchildren such that Article 8 ECHR is engaged;

d. The refusal of leave to remain in the UK interferes with the appellant's Article 8 sufficient to engage Article 8;

e. The respondent's decision is in accordance with the law;

f. The respondent's decision pursues the legitimate aim of maintaining proper and firm immigration control.

25. It should be sufficiently clear from the matters set out above that the issue before the F*t*T will be whether the decision to refuse the appellant leave to remain in the UK, is disproportionate to the legitimate aim, having regard to the best interests of the children.

Notice of Decision

26. The appeal is allowed. The decision of F*t*T Judge O'Hagan promulgated on 22nd May 2018 is set aside, and I remit the matter for re-hearing in the

First-tier Tribunal, with the findings set out at paragraph [24] above, preserved.

Signed Date 1st April 2019

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

27. I make no fee award as I have remitted the matter to the F*t*T for hearing afresh.

Signed Date 1st April 2019

Deputy Upper Tribunal Judge Mandalia