Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19869/2019**

THE IMMIGRATION ACTS

Heard at Manchester (via Microsoft Teams)	**Decision & Reasons promulgated**
On 22 September 2021	**On 11 November 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

WL
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkin instructed by Lambeth Solicitors
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge McCall ('the Judge') promulgated on 22 October 2020, in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Indonesia born on 17 March 1972.

3. The appeal before the Judge was against a decision made by the Secretary of State dated 13 November 2019 refusing the appellant's application for leave to remain in the UK on the basis of her private life.

4. It is not disputed the appellant entered the United Kingdom on 30 August 2016 lawfully with an Overseas Domestic Worker Visa (ODWV) valid for six months until 25 February 2017.

5. On 25 February 2017 the appellant applied for further leave to remain as an Overseas Domestic Worker (ODW), but that application was refused on 30 June 2017. The refusal was challenged by way of an application for judicial review. The Judge records not being aware of the outcome of those proceedings other than that the appellant agreed to submit a human rights application to the respondent in order to remain in the United Kingdom. That application was made on 19 August 2019 and it is the refusal of that application which was the subject of the appeal before the Judge.

6. The Judge records the appellant's claim in summary from [16] of the decision under challenge noting specifically between [18 - 20] the following:

> 18. The Appellant took employment with the BK family in 2018 Singapore as a "live-in" nanny and domestic worker. Mr and Mrs BK both have very busy lives operating their various business interests both in the UK and abroad. In addition to that Mrs BK's extended family members are located abroad, primarily in Indonesia. The BK family were well settled in Singapore and, as Mr BK put it in his evidence, they enjoy a very privileged lifestyle for which they are grateful but that brings with it a very hectic and busy business and private life, and "work schedule". Whilst living abroad the Appellant would return home to her family about two times a year and the rest of the time she would live and travel with the BK family and another nanny called DD. The Appellant first visited the UK on a "family visit" by the BK family on 23 July 2011.
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> 19. In his statement at paragraph 8 Mr BK explains that he and his wife and children visited the UK in August 2016 immediately after the birth of SB, … "but my business in the UK was growing, and my wife's father was unable to return to Indonesia due to his terminal cancer, the family decided to stay in the UK". Mr BK also explained that he also had elderly parents that he lives approximately thirty minutes away from in his current home, so the family and business demands led him to decide to remain here despite the generous lifestyle that was on offer to him and his family Singapore. Mr BK also explained that in 2020 his mother had received a cancer diagnosis and his father is unable to care for both her and himself without Mr and Mrs BK's support.
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> 20. The evidence produced on the behalf of the Appellant is that since arriving in the UK the Appellant has been integral to Mr and Mrs BK caring for their family and managing their businesses and meeting their community responsibilities on their estate. The evidence shows that Mrs BK father was extremely ill in Italy and following medical treatment in Milan he has sadly passed away. Her father had been a

successful businessman operating in Asia that he had spent his final months receiving medical treatment and living in Milan and Mrs BK would often travel to Milan to see him and she would also return to Indonesia to see her mother and other members of her extended family. Due to their busy work schedules and family commitments the Appellant was invaluable to Mr and Mrs BK and she has become to be seen as part of the family and is seen and referred to as an aunt or even a second mother to the children. Mr BK describes her as an "anchor in our family life" and refers to her as providing a "major source of stability and assistance for the family". Mr and Mrs BK speak of the Appellants Indonesian origins and how that has enabled Mrs BK and her children to maintain their cultural links and heritage and the importance of that to them.

7. The Judge was clearly aware of the factual analysis relied upon by the appellant in the appeal. The Judge sets out findings of fact from [27] of the decision under challenge the key points of which can be summarised in the following terms:

a. That the Appellant does not have a family member within the meaning of the Immigration Rules in the UK and that Appendix FM of the Rules does not apply [28].
b. The Appellant had not claimed there were insurmountable obstacles to her returning to her home state, and it was found no such obstacles exist [29].
c. The Appellant has been employed by the family since 2008 and entered the UK as an Overseas Domestic Worker in 2016, performs the same duties in 2020 she has always performed with Mr BK providing her with money if she asks for money. The mere fact the Appellant enjoys carrying out her duties and BK family feel they have somebody carrying out duties that nobody else could perform to the same standard and that they have accepted her into the family does not deviate from the fact that this is employment. The relationship between the Appellant and BK's is one of employer and employee [31].
d. The report of the psychologist Dr Middleton did not accurately reflect the situation [32].
e. The Judge accepts the point raised by the Presenting Officers that the psychologist's report was fourteen months out of date and the fact the situation in the household had altered since the report was written. The Judge also finds recent correspondence did not satisfactorily address the changes or deal with the issue of the impact on the children with just the Appellant being removed and a replacement nanny being employed or even DD remaining. The psychologist refers to the children, CB, AB and BB being in receipt of therapeutic intervention from the school counsellor but does not suggest it is associated with the Appellant's situation [33].
f. The child CB, (DOB 3 May 2006) had by the date of the hearing moved to Eton to commence his studies as a boarder and would therefore no longer have day-to-day contact at the

Appellant. The Judge finds the Appellant's removal and separation from CB would have an emotional impact on CB, as it must have done when he moved to Eton, but the Judge was not satisfied the impact will have the grave consequences referred to by Dr Middleton or the witnesses and finds that CB's parents must be of the same view as otherwise CB would not have been placed at Eton College [34].

g. In relation to the child AB, (DOB 25 June 2008) the Judge finds the Appellant's removal would have a strong negative emotional impact upon this child [35].
h. In relation to the child BB (DOB 20 May 2010) the Judge finds the Appellant's removal would have a strong emotional impact upon this child [36].
i. In relation to the two youngest children, EB (DOB 21 April 2015) and SB (DOB 19 July 2016) the Judge accepts that both nannies played a significant role in assisting the children and their parents through what had been a difficult time when Mrs BK's father was terminally ill and receiving treatment in Italy and accepts that the Appellant's removal would have a strong negative emotional impact upon both EB and SB [37].
j. The Judge rejects the suggestion by the psychologist that separation of the Appellant from the children will be the same as separating a child from their mother as the children's mother makes time for her children. The Judge finds the Appellant's removal will have an immediate detrimental impact on the four youngest children in terms of their emotional well-being although their physical well-being will be catered for as the family accept they can afford to replace the Appellant with another nanny. The children have their parents and paternal grandparents to turn to for emotional support. Whilst the Appellant, leaving the household will initially have a detrimental impact on the children it will not be long term and all of their needs will be met by family and friends in the UK [38].
k. The Judge finds the Appellant has strong family ties in Indonesia where her husband and daughter live within the family home, with her own mother being part of that family group, and that the Appellant misses them as they miss her [40].
l. The Judge accepts the children in the UK love the Appellant and that she loves them and that the Appellant has a strong sense of duty in respect of Mr and Mrs BK who have treated her well [41].
m. The Judge did not accept that the children in this case and parents were as dependent upon the Appellant in the same sense as the appellant in the case of Lama [2017] UKUT 00016 and if the Appellant was not there to support the children there will be alternatives which are well within the grasp of this family [44].

n. The Judge was not satisfied the Appellant is irreplaceable for the reasons given. The relationship with the children and the parents was not established in the UK as it was established in Singapore over many years before coming to the UK on what was for the Appellant a limited period of leave [47].
o. The Judge was not satisfied the relationship between the Appellant and members of the BK family amounted to family life for the purposes of Article 8 ECHR. It was found at the heart there remains a commercial agreement between the parents and the Appellant for financial reward. The relationship between the Appellant and the BK family members is a relationships of choice rather than necessity [48].
p. The Judge accepts the respondent's submission that Mr and Mrs BK have made no real concerted effort to find a nanny to replace the Appellant as they are satisfied with the current situation. A live-in nanny would undertake the duties that the Appellant currently carries out in terms of the physical needs of the children enabling Mr and Mrs BK to not be distracted from their employment and social commitments and that any impact on the business and local community will be limited and short-term and insufficient to outweigh the public interest and the need to ensure appropriate immigration controls [51].
q. Whilst the BK family claim they will not find a like for like replacement for the Appellant which Judge accepts may be correct, given the emotional bonds that have been established, the Judge did not find the Appellant was irreplaceable and found that there is an alternative in terms of employment, but that Mr and Mrs BK have chosen not to properly consider this avenue despite knowing that the Appellant only has six months leave when she entered the United Kingdom and will be expected to leave when such leave expired. There has been ample time and opportunity to prepare the children for the Appellant to leave the BK family home and return to her own family home in Indonesia [52].
r. The Judge accepts the Appellant provides a connection to the children's Indonesian heritage and culture but does not accept the Appellant is the only person capable of doing that, as it is found the children's mother is a very capable woman and that if she so wished she could provide any link to their heritage that the children require together with contact with extended family members and family visits to Indonesia when time permits. The Judge was not satisfied the decision would damage the children's ties and links to their heritage and Indonesian culture as argued by the Appellant [53].
s. The Judge rejects the Appellant's argument that her removal will bring to an end the BK family impact on the local communities and their tenants or workforce as they have managers and finances and influence to manage any situation.

No detrimental impact upon the community or persons associated with the BK family businesses was made out [55].

t. The Judge does not find the Appellant's circumstances amount to being exceptional, nor that any interference with any protected right will outweigh the public interest in maintaining appropriate immigration controls [57].
u. The Judge finds Article 8 ECHR engaged on the basis of the appellant's private life, and that the issue is that of the proportionality of the decision [58].
v. In relation to section 117B Nationality, Immigration and Asylum Act 2002, the Judge finds the Appellant's private life was established when she was lawfully in the UK with leave, although she has continued to perform her duties since her leave expired, for which she received financial reward and reward in kind such as to amount to working, which is not permitted, strengthening the public interest in effective immigration control being maintained. The Appellant has produced no satisfactory evidence of English language abilities and gave evidence through an interpreter. The Appellant has not been a burden on the UK taxpayer and if allowed to remain will continue to work and not be a burden on the UK taxpayer. The Appellant stated it is not her intention to remain in the UK and will return home to her family in Indonesia. On the facts the Appellant's removal from the UK is in the public interest [59].
w. In relation to section 55 Borders, Citizenship and Immigration Act 2009 the Judge accepts the best interests of the children are the primary consideration. The Judge accepts there will be an impact on the children both emotionally and to a lesser extent physically as their routines will change. The Judge accepts four the children have known the Appellant all of their lives and the eldest has known her since he was two years of age. The Judge accepts the children's parents remain in the UK as do the paternal grandparents who will help the children with their emotional well-being and development. The children appear to have normal active lives and so will have a support network of their own peers from school, nursery and other activities. The Judge was not satisfied the children will be harmed by the Appellant's departure and that their emotional needs will be addressed by family members and friends. The physical needs can be met by a replacement nanny or their parents and friends. The Judge rejects the argument that the Appellant is somehow a "mother" to the children and that the decision equates to separating a child from their mother. The Judge was not satisfied that any breach of the section 55 duties in relation to the best interests of the children is made out such as to make the decision disproportionate [66].
x. It [61] the Judge writes *"In light of the above conclusions, I find that the Respondent's decision is proportionate and that it*

would not cause the United Kingdom to be in breach of the law or its obligations under Article 8 ECHR."

8. The appellant sought permission to appeal, which was initially refused by another judge of the First-tier Tribunal but renewed to the Upper Tribunal. Permission to appeal was granted by a judge of the Upper Tribunal on 27 January 2021. The operative part of the grant being in the following terms:

1. It is arguable that the FTT's approach to Dr Middleton's report was procedurally unfair for the reasons advanced at grounds 2 and 3.
2. It is also arguable that the FTT failed to take into account relevant evidence as to the unsuccessful efforts to replace the Appellant, submitted at ground 5 – see in particular C26 of the HO bundle.
3. The remainder of the grounds are arguable, albeit they may not be as strong as the grounds I have identified above.

9. The Secretary of State filed a Rule 24 reply dated 15 April 2021 in which she opposes the appeal on the basis the Judge directed herself appropriately. It is stated the Judge carefully considered the expert reports and the opinion that removal of the appellant would have an impact on some of the children of the family, which was taken into account when reaching the overall conclusion, and that the grounds are in essence a lengthy disagreement with the findings of the Judge that their very length is highly indicative of the failure to actually identify a material error.

Error of law

10. The appellant as an Overseas Domestic Worker with a Visa conferring a right to remain in the UK for a limited period of six months, with the Judge noted expired on 25 February 2017.

11. The Secretary of State's published guidance relating to Overseas Domestic Workers in force at the relevant time states:

The applicant must:

- be aged 18 to 65 inclusive
- have been employed as a domestic worker for one year or more immediately before the application for entry clearance under the same roof as the employer or in a household the employer uses for themselves on a regular basis
- provide evidence to demonstrate the connection between employer and employee
- provide a letter from the employer confirming the domestic worker has been employed by them in that capacity for the 12 months immediately before the application

- provide one of the following documents covering the same period of employment as covered in the letter above:
  - pay slips or bank statements showing payment of salary
  - P60 form detailing earnings, tax and national insurance contributions paid
  - confirmation of health insurance paid
  - contract of employment
  - work visa, residence permit or equivalent passport endorsement for the country in which the domestic worker was employed by that employer
  - visas or equivalent passport endorsement to confirm the domestic worker has travelled with the employer
- intend to work for the employer while they are in the UK and intend to travel in the company of either:
  - a British or European Economic Area (EEA) national employer, or that employer's British or EEA national spouse, civil partner or child, if the employer's usual place of residence is outside the UK and the employer does not intend to remain in the UK more than 6 months
  - a British or EEA national employer's foreign national spouse, civil partner or child where the employer does not intend to remain in the UK beyond six months
  - a foreign national employer or the employer's spouse, civil partner or child where the employer is seeking or has been granted entry clearance or leave to enter under part 2 of the Immigration Rules
- intend to leave the UK at the end of six months or at the same time as the employer, whichever is the earlier
- have agreed in writing, terms and conditions of employment in the UK with the employer, including specifically, that the applicant will be paid in line with the National Minimum Wage Act 1998, and produces evidence of this in the form set out in appendix 7 of the Immigration Rules with the entry clearance application
- not take employment other than within the terms of paragraph 159A of the Immigration Rules to work full time as a domestic worker for the employer in a household the employer intends to live in and provides evidence of this in the form of written terms and conditions of employment in the UK as set out in appendix 7 of the Immigration Rules and evidence the employer is living in the UK
- maintain and accommodate themselves adequately without recourse to public funds
- hold a valid entry clearance for entry in this capacity

12. The appellant was therefore well aware that she only had a lawful right to remain in the United Kingdom for a period of six months and that her presence in the United Kingdom in the capacity for which she was admitted was of a very temporary nature. The appellant

must also have had a genuine intention to leave the UK at the end of the permitted period.

13. The Judge does not dispute the claim the appellant has fulfilled the tradition of the role of a nanny which is focused upon meeting the needs of the children of the family. It is not disputed that whilst Mr and Mrs BK will have been absent from the family home the appellant might have been the primary authority figure in the children's lives. What is not made out is that there is any merit in the suggestion made before the Judge or at the Error of Law hearing that the appellant had effectively stepped into the shoes of the children's mother within this family unit. The evidence clearly supports the finding of the Judge that both Mr and Mrs BK dearly love their children and would never abdicate their responsibilities for meeting the needs of the children to the appellant or anybody else on a permanent basis. The Judge's finding to this effect is unimpeachable.

14. In relation to the grounds upon which permission to appeal was specifically granted, Ground 2 asserted an unfounded criticism of the psychologist's report and Ground 3 asserts a flawed rejection of the Psychological reports conclusions.

15. As noted above, the Judge took into account the report of the psychologist, Dr Middleton, in which he stated that the appellant to become a primary attachment figure to Mr and Mrs BK's children and that separation from them will be equivalent to a full separation of the child from its parents. Dr Middleton went further in the report, claiming that could cause emotional harm, which could readily morph into mental health issues, bringing a higher level of risk for the children.

16. The Judge accepts that the separation of the appellant from the children will have a strong emotional impact upon certain of the children as noted in the summary of the findings set out above. What the Judge did not accept is that the evidence established that the impact upon the children was sufficient to make the decision disproportionate, either alone or in combination with all the other factors.

17. It must be accepted that if the appellant has to leave this family unit the impact upon the children will be shaped by the nature of their relationship with the appellant and the attitude of Mr and Mrs BK to the appellant's role. On the facts those issues were accepted by the Judge, including the relationship between the appellant, the children, and Mr and Mrs BK.

18. What was not made out before the Judge is that if the appellant has to leave the United Kingdom Mr and Mrs BK are not capable of meeting the needs of the children until alternative carers could be arranged. The Judge in fact finds that the needs of the children can be met by alternative resources. Even if, as advised by Mr Hawkins at the error of law hearing, there have been further bereavements within the family unit of senior members of Mr BK's family, this does not undermine the core finding of the Judge that the structure of the

family, the core of which is the children's mother and father, is as a whole capable of meeting the needs of these children without the appellant.

19. It was not established before the Judge on the psychological or other evidence that the children's parents will overlook the nuances of their children's emotional needs, especially as it is clear Mr and Mrs BK are clear in their own mind about the appellant's place in the children's emotional lives, as accepted by the Judge.

20. Although Mr and Mrs BK want the appellant to remain, as this will preserve the status quo and enable them to continue as normal with their family, business, and social commitments, it was not made out they will be unwilling or unable to prepare the children for the appellant's departure and to assist with any adjustment to a new nanny.

21. The evidence before the Judge did not support a finding that the dynamics of this family unit are such that the Appellant's departure from the United Kingdom would result in the type of harm to the children that would make the decision disproportionate. It was not made out that adequate preparation for the separation could not occur, involving Dr Middleton if necessary.

22. As noted by the Upper Tribunal at the error of law hearing, if the removal of the appellant is to be equated in a similar manner to a bereavement within this family unit, Dr Middleton's own psychological practice specifically advertises providing support counsellors to help those in such a situation. As Mr Tan submitted the mitigating factor of the support from the family and Dr Middleton's ongoing services, if required, mean that there will be assistance and support available for the children to meet their emotional needs in relation to both departure and readjustment to the appellant's replacement.

23. It was not made out on the evidence that there is any type of "unresolved baggage" within this family unit that could lead to unrealistic expectations or a disruptive transition if the appellant has to leave, such as would result in a disproportionate impact upon any member of this family unit.

24. It is clear the Judge took the report of Dr Middleton into account when assessing the merits of the appeal. I find no material legal error in the manner in which the Judge factored this aspect of the evidence into the decision-making process. Suggesting other finding the Judge may have made on the basis of this evidence does not establish such.

25. Ground 4 refers to a point that Mr Hawkins stressed repeatedly throughout his submissions that the Judge erred in law in finding that the relationship between the appellant and the children was not sufficient to satisfy the definition of article 8 ECHR family life.

26. The Judge specifically rejects this submission when, despite accepting the bond that exists between the appellant and the children, finds the relationship is one of employer and employee.

27. Not all relationships qualify as family life recognised by Article 8. In CO and NO (No protected family life) Nigeria [2004] UKIAT 00232 the Tribunal noted that there was a distinction to be drawn between family life in the colloquial sense (now often referred to as family ties) and family life within the meaning of Article 8(1).

28. In S v UK [1984] 40 DR 196 Sedley LJ made it clear that "Neither blood ties nor the concern and affection that ordinarily go with them are, by themselves altogether, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we have a family life with them in any sense capable of coming within the meaning and purpose of Article 8".

29. In WAAAW (Somalia) [2003] UKIAT 00174 the Tribunal said that Strasbourg jurisprudence makes it clear that the existence of family life without more is accepted only in the case of the relationship of husband and wife and parent and dependent infant child. In other more remote relationships the existence of family life depends upon special dependency requirements.

30. It is clear that the appellant does not fall within the definition of a husband, wife, parent, or that the children are the dependent infant children of the appellant. The appellant was therefore required to show the special dependency requirement element had been satisfied on the facts.

31. Whether family life recognised by Article 8 exists is a question of fact. A de facto relationship can give rise to family life and there can be family life between a parent and a child even where there is no biological relationship, see X, Y and Z v United Kingdom at para [37] in which it was found:

> 37. In the present case, the Court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's "father" in every respect since the birth (see paragraphs 14 - 16 above). In these circumstances, the Court considers that de facto family ties link the three applicants.

32. The situation in X, Y and Z was therefore one where X and Y fulfilled the role being the caring parents of the child Z, rather than one in which the parents were present in the family home taking an active role in the care of their children, assisted by a paid nanny.

33. The Judge was not referred to any Strasbourg jurisprudence defining what is meant by family life or setting out any minimum requirement that must be shown if family life is to be held to exist. That is not surprising as the question of whether there is family life will differ depending upon the relationships and factual situations in any specific case.

34. It was not made out before the Judge that the appellant was in loco parentis other than in specific situations where the parents may not have been present and the day-to-day care was delegated to her.

35. Although the Judge refers to the appellant having entered the United Kingdom in 2016, it is clear her involvement with the children has been since 2008 and that she has been a figure in the children's lives for a substantial period of time.

36. As noted by the Upper Tribunal at the hearing, even if family life recognised by Article 8 does not exist between the appellant and the children the relationship between them and other family members will form a very strong element of their private life, which the Judge did accept exists, and which require consideration of the proportionality of the decision.

37. Although Mr Hawkin seeks to attack the steppingstones relied upon by the Judge in coming to the conclusion that the decision is proportionate and, therefore, that the appeal should be dismissed, the question is whether that final decision is infected by legal error of a material nature such that it cannot stand and that the matter needs to be looked at afresh, in part or as a whole.

38. Mr Hawkin' attention was drawn to the decision of the European Court of Human Rights in AA v UK, which discussed the principle that whether family or private life was engaged did not matter as the assessment of the proportionality will be the same in either case. In Vikas and Manesh Singh (2015) EWCA Civ 630 the Court of Appeal said the factors to be examined in order to assess proportionality were the same, regardless of whether private or family life was engaged. To that extent the debate in this case as to whether there was family life was described as academic.

39. Mr Hawkin' made reference to the family life and private life of other individuals in the grounds but all the challenges to the respondent's decision arise out of the same factual matrix and it was not made out that any individual's rights have any material impact upon the decision of the Judge. It was not made out all such relationships were not considered sufficient to establish material legal error.

40. Mr Hawkin' submission that judges of the First-tier Tribunal seek to define the nature of the protected rights may be correct but no material advantage is established for the appellant even if the Judge had found that the relationship was sufficient to engage family life, especially as in Agyarko [2017] UKSC 11, the Supreme Court referred to the judgment in Jeunesse v Netherlands and said that the fact that family life had been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affected the weight to be attached in the balancing exercise. Circumstances could be envisaged however "in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate" (para 53). Nevertheless, in general, in cases concerned with precarious family

life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

41. It is important to note there is no finding by the Judge that the children are dependent upon the appellant as clearly their dependency is upon their parents, Mr and Mrs BK, who are assisted by the appellant.

42. In relation to the efforts made by the parents to replace the appellant; the Judge is criticised for relying on an unsupported assumption that others can somehow "make up for" the loss the children's emotional relationship with the appellant and that their physical needs could not be replaced.

43. It is not disputed that a number of advertisements have been placed by Mr and Mrs BK in an attempt to find a replacement. There is specific reference in the grant of permission to appeal to page C26 of the Secretary of State's bundle in which there is a list of what is said to be recruitment activities since August 2016. These refer to adverts being placed on Gumtree advertising, a website where jobs can be advertised (as can people selling properties, cars or other related items). There is also reference to Facebook advertising, Care.com advertising, and a recruiter named 'Little Ones'. The document at C27 contains a list of enquiries from August 2016 to August 2019, and states that although fifteen offers were made and eight staff accepted and started "none had been able to sustain a position even close to the role of the Appellant and DD from a practical level, let alone possess the specialist skills, knowledge and relationship they have". There is no indication of ongoing enquiries since.

44. The finding of the Judge that the appellant is replaceable for the reasons given has not been shown to be a finding infected by material legal error. The Judge accepts that efforts have been made but does not find they are real concerted efforts. Comparing any potential candidate to the appellant and then rejecting them on the basis that they do not meet the appellant's standards or Mr and Mrs BK's expectations they should, does not mean that the candidates who they have interviewed and are available are not capable of meeting the needs of the children with the assistance of their parents, to an objectively acceptable standard.

45. It was not made out before the Judge that there is anything so exceptional about the care given to the children by the appellant that if this was taken away from them it could not be replaced in similar terms or that the consequences will be so severe as to make the decision disproportionate.

46. Mr and Mrs BK are fortunate to have substantial wealth and are clearly able to afford to employ one or more nannies from sources within the United Kingdom if they so require. As the post is for a 'live-in' nanny originating from the immediate locality in Cheshire does not prevent such an appointment.

47. The grounds also assert the Judge mischaracterised the appellant's relationship with the BK family, but even if following the appellant's

leave expiring she has no longer been formerly employed by Mr and Mrs BK (as to do so would be illegal) she still undertakes the same duties as she did while she was formerly employed, a fact noted by the Judge. There is no suggestion on the evidence that Mr and Mrs BK have done anything illegal.

48. The existence of the appellant's family in Indonesia is not the core issue in the appeal. The Judge noted their presence and the appellant's ties to that country and lack of insurmountable obstacles to the appellant being able to re-establish herself in her home state which is an unchallenged finding.

49. Ground 7 asserts a failure by the Judge to consider the wider impact on public interest by reference to the impact upon Mr and Mrs BK's business and social commitments. It is not disputed that the BK family have substantial business interests and a number of people involved with their businesses, and other contacts, gave evidence at the hearing. No material legal error is made out in the Judge's finding that any impact upon the business or social activities will be limited and short-term. Mr and Mrs BK have been able to create the lifestyle they have as the day-to-day needs of the children have been delegated to the appellant and the other nanny DD. This is in accordance with the normal practice of families who are sufficiently affluent such that they can afford to employ live-in nannies. This does not mean that if the nannies were not present or if the personnel changed that they could not continue with their chosen lifestyle. It may be necessary for them to make other arrangements such as to delegate commercial activities to those they employ to run their business for them or for meetings to be conducted remotely form home as will have occurred during the Covid-19 pandemic.

50. The Judge does not dispute that there will be an impact upon Mr and Mrs BK's business interests, what is not accepted is that any impact will be sufficient to outweigh the strong public interest. No material error is made out. The Judge finding the current arrangements are a matter of choice is sustainable.

51. Ground 8 asserts a failure to properly consider compelling circumstances against the public interest but this is, in reality, a challenge to the Judge's conclusions on the proportionality of the decision.

52. The Judge clearly considers the best interests of the children and although is criticised for arriving at the conclusion in the decision under challenge in Ground 10, it was not made out that the best interests of the children are the determinative issue in this appeal or that taken on their own or collectively with the other issues is sufficient to make the decision disproportionate.

53. The Judge considers section 117B of the 2002 Act when undertaking the proportionality exercise which is clearly set out in a structured manner in which the competing interests are balanced against each other.

54. The case of GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 set out from [26] some helpful principles arising out of those and other Supreme Court judgments:

> (i) the rules and section 117B had to be construed to ensure consistency with Article 8 ECHR;
> (ii) national authorities have a margin of appreciation but section 117B must have a limited degree of flexibility so that the end result is always compatible with Article 8 ECHR;
> (iii) the test for an assessment outside the rules is whether a fair balance has been struck between the public and private interests. That is a proportionality test and although policy and rules may refer to an exceptionality test that must be construed as not imposing any incremental requirement such as a unique or unusual feature;
> (iv) the proportionality test has to be applied bearing in mind individual circumstances and in a "real world" sense;
> (v) proper evidence rather than mere assertion necessary;
> (vi) there is no limit to factors which could potentially be relevant; in addition to those raised by the appeal personal conduct, the extent of social and economic ties to the UK, prolonged delay during the course of which strong family and social ties are developed are all relevant.

55. It is not made out the Judges approach to the assessment of the evidence is contrary to such guidance or that the overall conclusion is not compatible with Article 8 ECHR.

56. The government of the United Kingdom has a margin of appreciation in relation to those who should be allowed to remain within its territory, as demonstrated by the specific provision in the rules relating to Overseas Domestic Workers that their lawful leave is only limited to a period of six months. It is clearly not the intention of the UK that those entering with such status should be allowed to settle or remain beyond this period.

57. In R (on the application of Mahmood) v Secretary of State for the Home Department [2001] INLR 1 Lord Phillips of Worth said "The state has a right under international law to control the entry of non-nationals into its territory subject always to its treaty obligations. Article 8 does not impose on the state any general obligation to respect the choice of residence of a married couple".

58. The above statement applies not only to married couples but to individuals such as the appellant to is seeking to use article 8 ECHR as a means to allow her to remain in the United Kingdom when she is unable to establish any right to do so under the Immigration Rules or on any other basis.

59. It is only after considering the factual matrix, making findings upon the evidence, and setting out and weighing against each other the "pros" and "cons" that the Judge came to a reasoned conclusion

as to which way the balance tips, which on the facts of this appeal was found to be in favour of the Secretary of State.

60. The Judge recognises the strength of the desire of all the parties involved to preserve the status quo, as that has served them well and enabled Mr and Mrs BK them to enjoy the lifestyle they have, but in an appeal where the Judge clearly considered all the evidence with the required degree of anxious scrutiny, has set out findings of fact which are supported by adequate reasons, balanced the competing interests, properly considered the expert report, and the grounds are in essence a disagreement with the findings of the Judge and an assertion that the outcome of the balancing exercise should have fallen in the appellant's favour, it is necessary for the appellant to do more than express disagreement or suggest alternative findings that the Judge could or should have made.

61. There was some discussion concerning the second nanny DD. It is accepted the respondent has also refused her application for leave and that the decision may also be subject to an appeal. This is not an appeal against the decision of DD and even if DD fails in her appeal and is removed it is not made out the findings of the Judge are unsustainable. Although loosing both nannies may be more upsetting for the children the findings of the Judge relating to the ability of the parents to meet the children's needs, with assistance if required, their financial resources and ability of find replacements (if they are realistic in relation to what is available i.e. not expecting a new nanny to be the same as the appellant and DD), are relevant and establishes the decision is not irrational on the facts.

62. It is not made out the Judge's conclusions are outside the range of those reasonably available to the Judge on the evidence. It is not made out there is anything perverse or irrational or unreasonable in law in the Judge's decision to dismiss the appeal.

63. I find the appellant fails to establish legal error in the decision to dismiss the appeal. Accordingly, there is no basis for the Upper Tribunal to interfere any further in relation to this matter.

Decision

64. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

65. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

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Signed…….
Upper Tribunal Judge Hanson

Dated 5 October 2021