IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003798
First-tier Tribunal No: HU/54691/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 May 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KIMBERLEY ANN LOUISE CARD
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Helen Foot, instructed by Goldsmith Bowers, Solicitors. For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 13 March 2023

DECISION AND REASONS

1. The appellant, a citizen of the United States of America (USA) born on 5 August 1988, appeals with permission a decision of First-tier Tribunal Judge Mensah ('the Judge') promulgated following a hearing at Bradford on 17 June 2022, in which the Judge dismissed the appellant's appeal against the refusal of her application for leave to enter and settle in the UK under the Immigration Rules ('the Rules') and/or on human rights grounds.
2. There is a tragic element to the factual matrix applicable to this appeal which was not disputed by the Judge.
3. The appellant met a UK citizen, Christopher Gregory ('Christopher') in 2009 whilst he was in the USA. The couple came to the UK together in 2011 and visited Christopher's family nearly every year thereafter staying for approximately three weeks at a time. Christopher's mother, Denise Frost, is the in-law referred to by the appellant in her evidence who lives in the UK with her partner, Grant, and a son John.
4. On 16 February 2013 the appellant gave birth to a son Jack at the Hull Royal Infirmary in the UK. It was said that during that visit the appellant and Christopher decided they wished to remain in the UK and made an application for leave to remain, although that application was rejected on

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the basis the appellant, as a non-UK national, needed to make the application from outside the UK rather than in-country. The appellant and Christopher returned to the USA but continued to visit. On 10 December 2015 the appellant gave birth to a daughter, Juliet, in Oregon (USA). The appellant in her evidence stated that the couple planned to marry and to live in the UK.

5. The tragic event occurred on 20 November 2019 when Christopher, despite being an innocent bystander, was shot and later died of his wounds. The appellant's evidence was that a murder investigation undertaken by the police in the USA remains ongoing.

6. On 21 December 2020 the appellant made an application for entry clearance to the UK under Appendix FM, in order to relocate to the UK to live with Denise Frost and her husband who live in Yorkshire, both so they could emotionally support each other more directly and because it was said to be in the best interests of the children who would benefit from a role model in the form of Denise's partner Grant, and John. That application was refused on 14 July 2021 against which the appellant appealed. It is that appeal which came before the Judge.

7. The application under Appendix FM was made on the basis of family life between the appellant and her son Jack.

8. It was accepted by the Secretary of State that the application for entry clearance under Appendix FM did not fall for refusal on grounds of suitability under section S-EC of Appendix FM but it was not accepted that the appellant met all the eligibility requirements of section E-ECPT. The decision-maker noted that in order to meet E-ECPT.2.2 the child of an applicant must be (a) under the age of 18 years at the date of application, (b) living in the UK, and, (c) a British citizen, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3(d). As the appellant lived in the USA with Jack the decision-maker was not satisfied Jack was living in the UK, leading to the refusal by reference to EC-PT.1.1(d) of Appendix FM.

9. The decision-maker also found the appellant did not meet the eligibility financial requirements of paragraph E-ECPT.3.1 to 3.2 as the appellant claimed she receives $5000 per month from a family trust but did not provide evidence of that, as required. Although the decision-maker notes a degree of evidential flexibility it was not felt that it was appropriate to exercise that on this occasion as the application was being refused for other reasons which would not be resolved through the use of evidential flexibility. The decision-maker found that the appellant had chosen to provide no personal documentation or evidence of how she will be able to adequately maintain herself and her child without recourse to public funds, leading to refusal pursuant to paragraph EC-PT.1.1(d) of Appendix FM too.

10. There was no issue with the appellant's English language ability, a requirement which was clearly met.

11. In relation to exceptional circumstances, the decision-maker wrote:

> We have considered, under paragraphs GEN.3.1. and GEN.3.2. of Appendix FM as applicable, whether there are exceptional circumstances in your case which could or would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for you or your family. In so doing we have taken into account, under paragraph GEN.3.3. of Appendix FM, the best interests of any relevant child as a primary consideration. I have considered your rights under Article 8 of ECHR. Article 8 of the ECHR is a qualified right,

proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be compliant with human rights legislation.

I have taken into consideration the fact that your child's father was deceased in November 2019 and that you currently reside with your child in the United States of America. Therefore I am satisfied that the decision to refuse your application causes no interference with your family life than has existed since 2019. I am satisfied the decision is proportionate under Article 8(2). I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control.

12. Having considered the documentary and oral evidence the Judge sets out her findings of fact from [9] of the decision under challenge. The Judge took as a starting point the eligibility and financial requirements of Appendix FM noting at [10] that it was accepted in the appellant's skeleton argument that the appellant could not meet the eligibility requirements under section E-ECPT of Appendix FM because they are designed to accommodate a situation where a parent is separated from their child or children and wishes to join them in the United Kingdom. In this appeal the children have always lived in the USA with the appellant and no separation issues arose.
13. The Judge records the submission being made by the appellant's representative that the appellant could have sought to circumvent the refusal by intentionally sending her children to the UK before applying to join them, and that she should be given credit for not doing so but, as the Judge noted, it would not be in the best interests of the children to be artificially separated from their mother, and was an event that had not occurred in any event.
14. The Judge addresses the appellant's financial circumstances from [11]. The Judge had the benefit of considering additional material and concludes that the appellant had shown that her available funds are more than sufficient to meet the financial threshold of Appendix FM.
15. The Judge then went on to consider Article 8 ECHR outside the Immigration Rules.
16. The Judge does not doubt that the death of Christopher has brought the family closer together as they share the grief of losing a loved one, that they speak on a regular basis, that Mrs Frost feels very strongly for her grandchildren and their loss, that Mrs Frost explained that the children are her flesh and blood and how she would wish to be there for them more often, which would be possible if the children were in the United Kingdom [14].
17. The Judge records Mrs Frost's claim to have a deep emotional dependency and that she and the appellant rely on each others support and contact to manage the grieving process, and the appellant's evidence of having a strong relationship with her mother-in-law who she describes as being a mother figure. The evidence was that they go through the grieving process together. The appellant claims that there is regular contact two or three times a week between her and Mrs Frost and that Mrs Frost visited her and the children again in December 2021 in the USA [15].
18. The Judge refers to a number of authorities considered when deciding whether the relationship between the appellant and Mrs Frost or Mrs Frost and the children had reached the legal threshold of establishing family life recognised by Article 8 between [16 – 21]. The Judge notes at

[22] that she had not been shown any of the communication but did not doubt that they had been supporting each other emotionally because they are both going through the grieving process. The Judge however concludes that there was nothing in the evidence before her to demonstrate anything beyond normal emotional ties one would expect between loving family members, and that even though the death of a loved one could bring family members together who may be living entirely independent family lives to grieve together, that of itself did not mean they have emotional dependency beyond normal emotional ties in this case, on the facts. The Judge notes the immigration rules and case law does not simply acknowledge a bereavement is enough without more.

19. At [23] the Judge writes:

> 23. I have considered whether the evidence shows that emotional support has gone beyond normal emotional ties and I find it has not. I cannot extract from the evidence as presented emotional support going beyond normal emotional ties. The relationship is between two adults who I recognise are grieving and who are supporting each other in that process, but there is no substance in the evidence upon which I feel able to support they give each other is beyond normal emotional ties. They assert it is, but they haven't in my view evidence it in their documents or witness evidence.

20. In connection with the relationship to the children the Judge writes at [24]:

> 24. I have almost nothing regarding the relationship between Mrs Frost and each of the children and in my view it is not enough to simply assert that the bond is beyond the norm. What I do have in my view and I accept is Mrs Frost is a mother in grief, and a grandmother who has a strong desire to spend more time with her grandchildren. This desire to spend more time with them is heightened now she has lost her son, but again I do not find this is evidence the relationship is beyond normal emotional ties.

21. The Judge finds that the best interests of the children are being met by the appellant in America who has sole responsibility for their care, with no evidence the refusal will cause them emotional harm or seriously inhibit their development. The Judge finds the children appear to have a stable and secure family life in the USA with the appellant with no suggestion she is not meeting all of their needs or is unable to provide for their care [25]. In this paragraph the Judge deals with a point raised in the appellant's skeleton argument that denying the children's right to assert their nationality is not in their best interests, but they are dual nationals asserting their rights as American citizens as they have done all their lives, showing they are able to exercise some fundamental right in USA that they will be unable to exercise in the UK [25].
22. The primary finding of the Judge at [27] is that the appellant had failed to show family life exists recognised by Article 8 between herself and Mrs Frost or the children and Mrs Frost.
23. The Judge's findings from [28] are in the alternative, had family life been found to exist, are therefore *obiter* comments.
24. In that scenario the Judge did not find the appellant had established unjustifiably harsh consequences as she and the children will continue their lives in the USA with Mrs Frost and her partner in the UK

maintaining contact as before. The Judge noted the appellant had moved with the children from the place where Christopher was shot to be near her family in Virginia, where it was stated she has a large extended family and nieces and nephew she has a degree of contact with, and that her evidence confirmed contact with family there [29]. The Judge finds the children will continue their family life in America with there being nothing to show they cannot do so as they have done already.

25. At [30 – 31] the Judge writes:

> 30. Whilst the Appellant and Mrs Frost have a desire to live together and they may feel it is harsh they cannot do so in the United Kingdom, it is not and does not, in my view, reached the legal threshold of harsh, never mind unjustifiably harsh. Personal choice or desire does not make the circumstances unjustifiably harsh.
>
> 31. The loss of Mr Gregory is clearly a compassionate factor in this case, but given all of my findings as above, I find the Appellant has now (sic) shown there are compelling compassionate factors which would make refusal disproportionate. Overall, whilst the Appellant has failed to establish the first question in the Razgar test, I also find it is proportionate to refuse the appeal under Article 8.

26. The appellant sought permission to appeal which was granted by another judge of the First- tier Tribunal, the operative part of the grant being in the following terms:

> 2. It is arguable that the judge erred in her assessment of proportionality in failing to conduct a balancing exercise and failing to take account of the statutory public interest considered in section 117 B of the Nationality, Immigration and Asylum Act 2002 (ground 7).
>
> 3. The other grounds go to weight and the judge's consideration of the evidence and have less merit, however they overlap with ground 7 and permission is granted on all grounds.

Discussion

27. The first issue to note is that the Judge's proportionality assessment is, as noted above, a finding in the alternative. The first finding of the Judge is that the appellant could not succeed under the Immigration Rules, which is a sustainable finding, and secondly that the appellant had not established that family life recognised by Article 8 ECHR existed on the evidence.

28. Whilst Mrs Frost in her witness statements repeats on a number of occasions that she wants the appellant and the children to be able to come to the UK to live with her and her family, for understandable reasons, Article 8 does not guarantee the right to found a family life. For example the right to respect for family life does not safeguard the mere desire to found a family as it presupposes the existence of a family or at very least the potential relationship between members of the family. Mrs Frost's desire to develop a family life that will be recognised by Article 8 when on the evidence it was found that same did not exist is outside the scope of family life protected by Article 8 – see Lazoriva v Ukraine (Application no. 6878/14).

29. The Judge noted that the application under Appendix FM was unsuitable as it provided for family members such as the appellant who wish to join her children in the UK but that the relevant child was still in the USA

living in the family home with her. The Judge was therefore required to consider whether family life recognised by Article 8 ECHR existed between the appellant and Mrs Frost or other family members in the UK or between those family members and the children. That is what the Judge did, and no procedural structural error is made out in the manner in which the Judge determined the appeal.

30. It is settled law that whether family life within the meaning of Article 8 exists is a question of fact, depends on the circumstances of the case, and requires the person claiming the same to establish close personal ties. This is the approach adopted by the Judge. The decision of the House of Lords in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 38 found that consideration must be given to the effect of the decision on all family members. The appellant's application was made on the basis of the relationship between her and her son Jack. There was no evidence of any breach of the family life that it was accepted existed there and the focus of the appeal therefore moved to the relationship between the appellant and her children and Mrs Frost and family in the UK, an approach adopted by the Judge.

31. The Judge considered a number of cases as noted in the determination including Kugathas v Secretary of State the Home Department [2003] EWCA Civ 31 in which it was found that to establish family life it was necessary to show real, committed or effective support or relationship between adult family members, and that normal emotional ties would not, without more, be enough. In PT (Sri Lanka) v Entry clearance Officer, Chennai [2016] EWCA Civ 612 it was found that in undertaking the required assessment a fact sensitive approach is required, which is the approach adopted by the Judge.

32. Ground 1 of the application for permission to appeal asserts the Judge misapplied the guidance provided in Kugathas and Dasgupta another case referred to in the decision. The appellant asserts the Judge's direction in relation to these cases was erroneous as a matter of law as Kugathas is concerned with whether family life could be said to exist between a young adult living with his parents or siblings, absent something more than a normal emotional ties, which it is claimed was a test which did not apply where the relationship was one between a grandparent and grandchild.

33. The Court of Appeal in Kugathas noted at [3] that the appellant was at the time probably 38 years of age. At [16] the Court referred to a number of authorities, including Marckx v Belgium [1979] 2 EHRR 330 which in its judgement the full Court used adjectives such as "real" and "normal" to characterise family life if it was to come within Article 8. They also refer to the decision in Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471 where the Court again used the phrase "committed relationship". At [19] the Court state:

> 19. Returning to the present case, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, 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 share a family life with them in any sense capable of coming within the meaning and purpose of Article 8.

34. The test at [19] is that the Judge applied. I do not find it made out that the Judge misapplied the guidance provided in Kugathas when considering the adult relationships. The Judge clearly accepted that the

nature and degree of the relationship, including the ability of the appellant and Mrs Frost to share their grief together, was as claimed but was not satisfied that that, taken as a whole, was sufficient to cross the threshold of family life recognised by Article 8.

35. Christopher died on the 20 November 2019. The application for entry clearance was made on 21 December 2020 and refused on 14 July 2021. The date of hearing before the Judge was 17 June 2022 and the decision promulgated thereafter. A theme running through the appellant's appeal is the fact Christopher was killed and the resultant grief and interaction between the appellant and Mrs Frost and the claim that took matters beyond the normal emotional ties and relationships which will exist between respective members of this family unit. It is not, however, the fact of the death the Judge was required to focus upon but the consequences of that and the related interaction between the parties in the same way that length of time does not automatically confer a right under Article 8, the assessment being dependent on any ties or bonds formed flowing from that. There was insufficient medical evidence before the Judge from a psychologist or otherwise that may have assisted in relation to this issue. There was insufficient evidence of any vulnerability within the appellant or the children. There was insufficient evidence before the Judge to allow a finding that the refusal had a negative effect upon the appellant or the children's physical or moral integrity such that Article 8 was engaged on this basis.

36. There is no general rule as to how long grief lasts in individual circumstances. It was accepted that both the appellant and Mrs Frost had a bond with Christopher and they may never stop missing him, but there was insufficient evidence before the Judge to show that after the initial shock the pain of the situation for Mrs Frost and the appellant had not become more manageable, with them spending less and less time hurting and more and more time being able to proceed with their normal lives with the benefit of the communication through telephone calls and visits and the normal type of communication enjoyed between family members. Studies have shown that for most people the worst symptoms of grief, depression, sleeplessness, loss of appetite, peak at six months and that the feelings will slowly ease although may be resurrected on special occasions. Although the evidence before the Judge refers to conversations between Mrs Frost and the appellant, which both confirm have assisted them with the grieving process, the evidence available to the Judge at the date of hearing did not establish that some 18 months after Christopher's death the nature of the interaction and the relationship was other than as found by the Judge and, in particular, did not establish the required degree of emotional dependency.

37. As noted by Lady Justice Arden at [24] of Kugathas *"there is no presumption that a person has a family life, even with the members of the person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life".*

38. The key finding of the Judge is that whatever had occurred in the past in relation to this family, and however they support each other, the relationship was not integrally a dependent one on the facts. Whilst the appellant disagrees with that and seeks to reargue her case to the contrary,

it has not been established that is a finding outside the range of those reasonably open to the Judge on the evidence in relation to the dependency between the appellant, Mrs Frost, and other adult family members in the UK.

39. In relation to the relationship between Mrs Frost and the children, her grandchildren, the Judge clearly considered the best interests of the children as noted in the decision. Reliance is placed on the grounds of appeal on the decision in Marckx v Belgium where it was held by the European Court of Human Rights (ECHR) that family life within the meaning of Article 8 includes at least the ties between the relatives, for instance, those between grandparents and grandchildren. The Judge does not dispute this legal principle.

40. The Judge refers to the decision of the Upper Tribunal in Dasgupta (error of law- proportionality- correct approach) [2016] UKUT 28. This was a dependent relative case in which the First-tier Tribunal judge found there was family life between an 85-year-old and his daughter and two grandchildren aged 17 and 16 on the facts. The appellant in that case had visited his daughter's family in England almost annually since 2007 and stayed for between three and five months and had developed a strong close relationship with his grandchildren. It was held that the question of whether there is family life in a child/grandchild context requires a finding something over and above normal emotional ties and will inevitably be intensely fact sensitive. This is the approach adopted by the Judge.

41. A further decision of the Upper Tribunal is Thakrar (Cart JR: article 8: value to community) [2018] UKUT 336 in which the President commented at [59] that as a general matter, the relationship between grandparent and grandchild, beneficial though it may be, is unlikely to carry material weight in terms of Article 8, unless the grandparent has stepped into the shoes of a parent. In that case the grandparent did not live in the household and visited on alternative weeks. In the current case the children live in the USA with their mother with occasional contact by way of visits and other communication with Mrs Frost and the family in the UK.

42. The ECHR have stated that family life includes at least the ties between relatives, which can include those between grandparents and grandchildren since such relatives may play a considerable part in family life. The Court has accepted, however, that the relationship between grandparents and grandchildren is different in nature and degree from the relationship between parent and child and thus by its very nature generally calls for a lesser degree of protection. The right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparents/grandchild relationship through contact between them – see Kruskic v Croatia (dec) (Application 10140/13) [111], Mitovi v the Former Yugoslav Republic of Macedonia (Application No.53565/13) at [58] and Q and R v Slovenia (Application No.19938/20) at [94]. In Kruskic the Court also considered that contact between grandparents and grandchildren normally took place with the agreement of the person who has parental responsibility which means that access of the grandparent to his or her grandchild is normally at the discretion of the child's parents. There is no suggestion that the contact between Mrs Frost and her grandchildren has been denied or will in any way be interfered with as a result of the decision under appeal. This is not a case in which the grandchildren have lived with Mrs Frost as

they have always lived with their mother in the USA unless visiting family in the UK. Even if family life was found to exist between Mrs Frost and her grandchildren, in accordance with European law, it is not made out on the evidence that there will be any interference with that family life the consequences of which will be sufficient to engage Article 8 on the facts of this appeal. No material legal error is made out on Ground 1.

43. Ground 2 asserts the Judge failed to find family or de facto family life existed. The Judge does not find there is no familial relationship between the appellant , the children, and Mrs Frost as she accepts the same does exist between the appellant and her children in the USA and Mrs Frost and the family members in the UK, but not de facto family life sufficient to engage Article 8. It was not made out on the evidence that this is a case where family life exists which the UK has failed to provide appropriate legal recognition of, or one in which the parties will face difficulties in continuing to enjoy the family relationship as it currently exists.

44. In CO and NO (Nigeria) UKIAT 00232 (Ockelton) 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). 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*". No legal error is made out in relation to Ground 2.

45. The reference at [4.5] of the grounds that the Judge failed to give any or proper reasons as to why she did not consider that family life was established has no merit as a reader of the determination is clearly able to understand the Judge's findings and the reasons for the same. The reference in Ground 4 to an alleged failure to take account of material considerations is not made out. The Judge clearly took into account the evidence that had been provided. The Judge was not required to set out each and every piece of evidence or source, and the issues the Judge is accused of failing to take into account were clearly factored into the decision- making process.

46. The reference to the appellant not having a support network in the USA was not made out on the evidence, as the appellant clearly has contact with her extended family in the USA and, as the Judge noted, there was no evidence that refusing the application would result in unduly harsh consequences, or even harsh consequences for either the appellant or the children, indicating they must have a stable life that meets their needs.

47. Article 8 ECHR does not give a person the right to choose where they wish to live. It is about protecting unwarranted interference with an identified protected right. Article 8 taken alone cannot be considered to impose on a Higher Contractor State a general obligation to respect an individual's choice of country for residence or to authorise family reunion on its territory.

48. Whilst Mrs Frost may wish to have her grandchildren living with or near her in the UK, that was a factor taken into account by the Judge. The claim Mrs Frost was the only living grandparent of Jack and Juliet may be so, but whether family life recognised by Article 8 exists requires more than the blood relationship, as identified in the case law.

49. It is not disputed that Mrs Frost has visited the appellant and the children

in the USA but there was no evidence she could not do so in the future or the appellant, is funds allow, visit Mrs Frost in the UK as she has previously.

50. The claim that the appellant, through no fault of her own, is now a single parent is factually correct, but does not establish the appellant's case. The nature of the relationship between the appellant and Mrs Frost and the grandchildren and Mrs Frost was the key element of properly considered by the Judge. A census in the USA showed 15.6 million single mother headed households in 2019 with there being no evidence that that status alone will cause harm to the appellant and the children, especially where the appellant has an independent source of income, there was no evidence of harm to her or the children, or anything to suggest the appellant is anything other than a good mother to her children.

51. There is merit in the paragraph in the grant of permission to appeal that all bar Ground 7 is a challenge to the weight the Judge gave to the evidence when weight was a matter for the Judge. It has not been made out the weight given was irrational.

52. Ground 5 challenges the findings in relation to E-ECPT Appendix FM, but no material legal error is made out. The appellant was unable to satisfy the eligibility requirements of Appendix FM of the reasons set out in the refusal and as held by the Judge. The Judge took into account that the children are entitled to live in the United Kingdom because they are British citizens, the reason they had not done so, and the concession that as a result the appellant was unable to meet the eligibility requirements. The children, as dual citizens, have a right to come to the United Kingdom and settle here which the decision has no impact upon. The facts before the Judge were that the children had not exercised that right, nor had it been exercised on their behalf, and so they continue to reside in the USA with their mother. The Judge properly assessed whether on the factual matrix that found the eligibility requirement could be met, which they could not, and so no legal error arises.

53. Ground 6 asserts the Judge failed to provide proper or adequate reasons for finding in the circumstances there were not compelling and compassionate reasons or that there are no unjustifiably harsh consequences for the appellant and asserts a failure to conduct the proportionality balancing exercise. This ground is without merit in establishing material legal error. The Judge clearly considered the evidence that was provided as to the impact of Christophers killing and the best interests of the children but found that the appellant could not satisfy the requirements of the Immigration Rules or that family life identified by Article 8 existed. As the requirements of Article 8 (1) had not been shown to be met on the basis of family life, there being no private life element as this is an out of country application, and on the facts, there was no requirement for the Judge to go on to consider the proportionality of the decision pursuant to Article 8(2), although she did in the alternative. The Judge made specific reference to the Razgar criteria which poses the following questions:

    1. Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    2. If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

    3. If so, is such interference in accordance with the law?

4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

5. If so, is such interference proportionate to the legitimate public end sought to be achieved?

54. The addition of the words "if so" at the beginning of the second of the questions clearly shows that it is only if a protected right exists that the other questions become relevant.

55. The grounds make reference to the tragic loss as recorded above when referring to compelling compassionate factors but in MG (Serbia and Montenegro) [2005] UKAIT 00113 the tribunal stated that sympathy for an individual did not enhance a person's rights under Article 8. In that case, at [20-22], the Tribunal wrote:

20. The effect of Huang was recently considered by the Immigration Appeal Tribunal (chaired by its President, Ouseley J) in MB (Croatia) [2005] UKIAT 00092. At paragraphs 32 and 33, the Tribunal found as follows:-

"32. Where a Rule or extra-statutory provision covers the sort of circumstance upon which an individual relies, e.g. entry for marriage, study, medical treatment or delayed decision-making, but the individual falls outside the specific requirements or limits of the otherwise applicable Rules or policy, that is a very clear indication that removal is proportionate. It is not for the judicial decision maker, except in the clear and truly exceptional case to set aside the limitations set by the executive, accountable to Parliament, and, in the case of the Immigration Rules, approved by Parliament.

33. Where Rules or extra-statutory provisions do not make provision at all for circumstances which an individual may rely on for the purposes of overcoming [...] the qualification to an ECHR right which is provided by the legitimate interests of immigration control, his case cannot rationally be considered more favourably than one whose circumstances are covered in principle by some provision of the Rules or of an extra-statutory policy but whose circumstances do not meet the detailed requirements of the Rules or policy".

21. At paragraph 35, the President had this to say about the relevance of "compassionate circumstances" in an Article 8 case:-

"35. Compassionate circumstances are often invoked in Article 8 cases, though they may involve in reality no significant aspect of family or private life. A removal decision may be harsh. There are Rules and policies which deal with a variety of compassionate circumstances for entry or remaining in the United Kingdom. If a particular case does not fall within them, the normal conclusion of an assessment of proportionality should be that those circumstances mean that the legitimate interests of immigration control favour removal. A truly exceptional case would have to be made out. Article 8 is not a general provision justifying the overriding of immigration control on general compassionate grounds or where there may be harshness and misfortune from removal. It is a provision which creates rights on specific grounds and only applies where those rights

exist; it only precludes the effectiveness of immigration control, as embodied in the rules and extra-statutory policies or concessions, where the individual circumstances are so powerful and exceptional that those considered provisions should not be allowed the effect which would normally be afforded to them".

22. What the President of IAT said in relation to Article 8 is underlined by the opinion of Lord Hope in N [2005] UKHL 31. At paragraph 21 of the opinions, Lord Hope made the following important statement about the task of determining whether the removal of a person with HIV/AIDS, to a country where advanced medical care is not available, would violate Article 3:-

"The function of a judge in a case of this kind, however, is not to issue decisions based on sympathy. Just as juries in criminal trials are directed that they must not allow their decisions to be influenced by feelings of revulsion or of sympathy, judges must examine the law in a way which suppresses emotion of all kind. The position that they must adopt is an austere one. Some may say that it is hard hearted.''

56. The appellant also asserts that it was not clear what legal threshold the Judge applied when assessing the evidence. The Court to Appeal have repeatedly stated that judges of the immigration tribunals, having considerable experience in a specialist jurisdiction, can be taken to have understood and applied the law. There is insufficient in the grounds to indicate that the Judge did otherwise. The Judge was not required to set out the minutiae of an explanation of how she arrived at the decision and a reader of the determination is able to understand the decision made and the reasons for it which, are adequate. If the grounds are seeking such a degree of legal analysis beyond that that is required no legal error arises. The reasons only need to be adequate, not perfect.

57. Having considered the evidence, the decision under challenge, written pleadings, and all submissions made at the error of law hearing, I find that although the appellant disagrees with the Judge's finding and would prefer a more favourable outcome to enable her to move to the UK with the children, the grounds fail to establish a failure of the Judge to consider the evidence with the required degree of anxious scrutiny, to establish that the Judge misapplied relevant legal principles, that the Judge failed to provide adequate reasons in support of the findings made, and fail to establish that the decision is outside the range of those reasonably open to the Judge on the evidence. The Judge determined the relevant legal questions having made the factual findings recorded in the determination. There is no merit in the challenge to those factual findings on the evidence. Suggesting alternative findings the appellant would have preferred the Judge to make is not sufficient. On that basis, whilst there is great sympathy for the appellant who has lost her partner who is the father of the children, and Mrs Frost who has lost her son, the appeal must be dismissed.

Decision

58. No material error in the determination of the First-tier Tribunal is made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 April 2023