IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000348

Extempore

First-tier Tribunal No: HU/52981/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

19th October 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

S P
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Rehman, Counsel, instructed by London Imperial Immigration Services Ltd
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 4 October 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge L Murray promulgated on 19 December 2022 dismissing the appellant's appeal against a decision of the Secretary of State to refuse her leave to remain in the United Kingdom and to refuse her human rights claim.

2. The circumstances of the appellant are unusual as is clear from Judge Murray's decision. She is a citizen of India born in 1961 and she has for the past few years lived in the United Kingdom with her son, AP, daughter-in-law, LP, and her granddaughter, VP. In summary, the appellant's daughter-in-law has significant and serious learning difficulties to the extent that her own mother has a power of attorney over her. This was an arranged marriage between AP and LP and there is a child of the marriage, VP. As LP was unable to cope with looking after a baby, VP was taken at a few months old by her grandmother, the appellant, to live with her in India. She was educated there in English language schools and returned to the United Kingdom at the age of roughly 9. Other than a year's gap when the appellant remained in India and as the granddaughter VP was living with her parents alone she has been part of the same family unit.

3. The case put to the First-tier Tribunal was that the appellant could not return to India and that there were significant obstacles for her doing so such that she met the requirements of paragraph 276ADE of the Immigration Rules. It was also argued that there are exceptional circumstances within GEN.3.2 of Appendix FM; and, that for the purposes of assessing proportionality and the application of Section 117B(6) of the 2002 Act, there was a genuine and subsisting parental relationship with VP. I pause to observe that the Secretary of State did not accept any of that.

4. The appeal before Judge Murray heard evidence from the appellant, her son AP and another witness PP, a family friend. There was also before her an appellant's bundle and three supplementary bundles including amongst other matters a report from an independent social worker Diana Harris. The judge considered first whether there was a parental relationship between VP and LP having directed herself at paragraph 27 in line with the decision R (on the application of RK) v Secretary of State for the Home Department [2016] UKUT 31. The judge observed that there was no medical evidence in respect of LP, no capacity assessment and no assessment of her best interests although that had been recommended by a social worker. She noted the evidence regarding VP having been in mainstream school with support although that now appears to have been changed, and deals extensively with the evidence from the education

authorities in the form of an education health and care plan and associated documentation. The judge noted that the appellant lives with the family and provides substantial help and she noted the circumstances in which VP and the appellant had lived that I have already referred to.

5. The judge observed [34] that she was not directed to any independent evidence save for that of the social worker which was based on information from the family which showed that VP was detrimentally affected by the appellant's year long absence but she did accept that she would miss her after living with her for so long and find her absence difficult. The judge finally having concluded that there was no parental relationship observed at [35] that her best interests were to live with her parents in the United Kingdom, took account of the findings of the social work report and accepted it was in the best interests for the appellant to live with her but was not satisfied that this was overwhelmingly so. The judge then applied the requirements of Section 117B concluding that (6) was not met and considering that although there was a level of dependence and accepting that there was family life, nonetheless weighing all the matters in the balance there would not be unjustifiably harsh consequences for VP.

6. The appellant sought permission to appeal against that decision, the renewed grounds averring that there had been a failure to make a decision conforming to the best interests of VP. It is said that the judge found it was in VP's best interests to live with both parents and that her best interests could only be met by allowing the appellant to remain with her and that the decision was contrary to the decision of the Supreme Court in ZH (Tanzania) [2011] UKSC 4. It is also submitted that the judge erred in effectively concluding that the requirements of the Immigration Rules were determinative of the appeal and that the judge failed properly to weigh up the various factors in the appellant's favour and against that the factors in favour of the public interest to reach a lawful determination of where the final balance lay.

7. I heard submissions from both representatives. I accept at the outset that Mr Rehman was in some difficulty in that he had not drafted the grounds and there were points that he may wish to have raised which were not within the grounds. I do not however consider that those were Robinson obvious or otherwise should be admitted, nor was there any application made to amend the grounds for permission.

8. Amongst the matters that Mr Rehman sought to raise were that the judge did not deal with the live evidence and say why it was or was not accepted. It is also submitted that the reasoning at paragraph 35 was inconsistent with the evidence and that the judge had erred in saying that the best interests were not overwhelmingly such that the appellant should be allowed to stay. Another matter that was raised was that the judge failed to attach proper weight to the report from the independent social worker but the core of the submission is in effect that the judge failed properly to accord weight or deal sufficiently with the finding that although

there was no parental relationship between the appellant and VP, nonetheless a family life existed.

9. Mrs Nolan for the respondent relied on the Rule 24 response submitting that the judge was clearly fully aware of all the circumstances in the case as could be seen from paragraph 10 of the decision, and from paragraph 33 that she was aware of the history of VP and the appellant, and importantly found that there was family life. This, it is said, was clearly taken into account in the balancing exercise but that the judge had for good reasons found that the effect on the appellant's granddaughter VP or on the appellant would not be unjustifiably harsh. It was submitted that in any event it was unclear that the judge did not properly take into account the witness evidence.

10. In analysing the grounds I bear in mind what was said in HA (Iraq) at paragraph 72. An Appellate Tribunal should be cautious before interfering with the findings of fact reached by a First-tier Tribunal or to assume that matters have not been taken into account or that evidence has not been properly considered. In this case the grounds are narrow. They are in effect focused on the best interests of the child and whilst there is no doubt that those are important and a primary consideration, they are not a paramount consideration; the best interest are a matter to be weighed with other factors in assessing proportionality.

11. There is no effective challenge to the judge's finding that there was not a parental relationship between VP and the appellant. That in any event was in my view a finding open to her and she dealt with the evidence on this point in significant detail before reaching a conclusion that was open to her. That it might have been otherwise because other evidence could have been produced is not a relevant consideration but lack of relevant evidence was something which troubled the judge.

12. The judge noted [34] that there was a lack of evidence of detrimental effect on VP after the year's absence between the appellant and her. She was entitled to consider that was a relevant and important factor. It is sufficiently clear from what the judge says that she was fully aware of all the facts of the case; it is clear also that she took into account the witness evidence. What concerned her, and this is a matter which goes to weight which is a matter for the judge, is the lack of objective evidence regarding the exact difficulties that LP faces and the lack of any evidence as to the effect on VP of that year's absence which was relevant in assessing the effect of the appellants removal.

13. Having found that this was a case where Section 117B(6) of the 2002 Act was not met, and having given cogent and sustainable reasons for so finding, the judge was entitled and did go on to consider the other factors bearing in mind that the test in this case, as she said (and this is not challenged), is whether there would be unjustifiably harsh consequences for VP, her parents or the appellant if the appellant were removed. That assessment involved a balancing exercise which the judge undertook.

What the judge sets out at paragraph 35 is in fact a summary of what she took into account, and must be seen in the context of the preceding paragraphs.

14. Whilst I note the submission that insufficient weight was attached to the fact that there is a family life between the appellant and VP and that there are unusual factors in this case, it cannot properly be said that the judge did not take those into account in assessing proportionality. There is no proper indication that she did not do so. Further, it is evident from the phrases sed [35] that she applied the other sub-sections of section 117B finding that no weight could be attached on private life. She clearly did take into account the family life between the appellant and VP. It is also clear that she took into account the best interests of the child.

15. It is established law that the best interests of a child whilst an important consideration are clearly not determinative of an Article 8 proportionality exercise. Given what I have said already, I consider that the judge was entitled to reach the conclusion she did, on the evidence before her which she found for good reason to be limited in terms of detriment to the appellant and VP; she was entitled to and gave good reasons for concluding that removal of the appellant would not amount to unjustifiably harsh circumstances.

16. Accordingly and for these reasons, I find that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Addendum

17. There are a number of matters in this appeal which do cause me concern. There is a vulnerable child in this case, VP, and there is also the possibility of a vulnerable woman, LP, who does not appear to have been given the correct level of support, for whatever reason, and it is not at all clear why her mother retains a power of attorney over her. This may well be a case in which further submissions could be made supported by more and better evidence as to the condition or circumstances of LP whose cognitive ability ought to be assessed. It may also be the case that further evidence from those conducting the reviews leading to the EHCP and other associated documentation as to the support that the appellant does give to her granddaughter. It is understandable that in the way that an EHCP is put together that the focus is primarily on the birth parents but it may well be that there is involvement between the appellant and the school of which they were aware and may also be factored into the assessments which were made in the ongoing EHCP

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 11 October 2023

Jeremy K H Rintoul
Upper Tribunal Judge
Immigration and Asylum Chamber