IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001402

First-tier Tribunal No: HU/53677/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th September 2023

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE SILLS

Between

NIKISHA DANIELA COOPER
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr G Symes, Counsel, instructed by Ackroyd Legal LLP

Heard at Field House on 14 August 2023

DECISION AND REASONS

1. This is an appeal against the decision issued on 14 March 2023 of First-tier Tribunal Judge Adio which allowed the appeal of Ms Cooper under Article 8 ECHR.

2. For this purposes of this decision we refer to the Secretary of State for the Home Department as the respondent and to Ms Cooper as the appellant, reflecting their positions before the First-tier Tribunal.

Background

3. The appellant was born on 7 September 1986 and is a citizen of Trinidad and Tobago. She met her current partner, Mr Marlando Vassell in Jamaica in 2004. Mr Vassell was born on 25 October 1981 and is a citizen of Jamaica. The appellant and Mr Vassell formed a relationship in 2004 but this was short-lived and the appellant returned to Trinidad and Tobago. They remained in contact via the internet.

4. The appellant and Mr Vassell went on to form new relationships and had children. The appellant has four minor children still living in Trinidad and Tobago with their fathers. Mr Vassell joined the British Army and has lived in the UK since 1999. He has limited leave to remain until 12 June 2023. Mr Vassell has seven children living in the UK, all of whom are British. Three of his children live with him. They are Enrique Vassell born on 19 December 2001, Denique Vassell born on 28 October 2005 and Dominic Vassell born on 14 September 2007.

5. In 2021, Mr Vassell's long-term relationship with the mother of two of his children broke down and his ex-partner and the two children from the relationship moved out. The appellant and Mr Vassell became closer during this time, communicating via the usual remote methods. They discussed the appellant coming to live in the UK with Mr Vassell. On 4 March 2022 the appellant came to the UK as a visitor and went to stay with Mr Vassell. On 20 April 2022 she made an application for leave to remain on Article 8 ECHR grounds outside of the Immigration Rules.

6. The respondent refused the application in a decision dated 8 June 2022. The respondent maintained that the appellant could not meet the provisions of Appendix FM of the Immigration Rules. The appellant had not lived with Mr Vassell for two years in a relationship akin to marriage prior to the application. Mr Vassell did not have the requisite immigration status. The appellant also did not have the requisite status. Her status and the short period of cohabitation with Mr Vassell meant that she was excluded her from the benefit of paragraph EX.1.. The appellant had not shown that the financial requirements were met. There could not be very significant obstacles to reintegration in Trinidad and Tobago given she had lived there most of her life. It had not been shown that Mr Vassell's children were reliant on the appellant. They would not face significant difficulties and their best interests would not be significantly harmed were she to leave the UK.

Decision of the First-tier Tribunal

7. The appellant appealed against the respondent's decision. At the hearing before Judge Adio on 15 February 2023, it was conceded for the appellant that she could not meet the Immigration Rules. It was submitted that the appeal should be allowed on the basis of Article 8 ECHR outside the Immigration Rules. The appellant and Mr Vassell were in a genuine and subsisting relationship. If the appellant left the UK she would not be able to

meet the Immigration Rules so would not be able to return. Mr Vassell could not go to Trinidad and Tobago because of his parental responsibilities in the UK and because his British children needed to maintain contact with their mothers in the UK.

8. It was also submitted that the appellant had established a genuine and subsisting parental relationship with Mr Vassell's three British children with whom she was living. It would not be reasonable for the minor children, Denique and Dominic, to be expected to leave the UK and the appellant therefore came within the provisions of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

9. It is expedient to set out the provisions of paragraph 117B(6) here:

> "117B **Article 8: public interest considerations applicable in all cases**
>
> …
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where–
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom".

10. In paragraphs 11-14 of his decision, Judge Adio accepted that the appellant and Mr Vassell were in a genuine and subsisting relationship. He did not accept that the appellant had entered the UK as a genuine visitor and found that she and Mr Vassell had intended to start living together as a couple when she arrived. As the appellant's immigration status was precarious, Judge Adio placed little weight on the appellant's private life.

11. Judge Adio went on in paragraphs 15-17 to consider the appellant's relationship with Mr Vassell's children and the provisions of s.117B(6). He found that the appellant did have a genuine and subsisting parental relationship with the children for these reasons:

> "15. I bear in mind that the Sponsor had a very difficult time having come out of a relationship with his fiancée which broke down in 2021 after fifteen years. The Sponsor stated this was a very tragic moment for himself and badly affected him and the Appellant helped him to heal. The Sponsor has three children who live with him, Enrique, Denique and Dominic. He has seven children in total, two children who are daughters live with his previous fiancée. The remaining children live with their mothers. In deciding the matter I take into account Section 117B(6). I take into account the guidance in the case of **AB (Jamaica)**. The issue I have to consider is whether the Appellant has a genuine and subsisting parental relationship with the three children who live with her who are the children of Mr Vassell. In the case of **AB (Jamaica)** Lord Justice Singh stated at paragraph 89 agreeing with

Upper Tribunal Judge Grubb in the case of **R (RK) v SSHD [2016] UKUT 00031 (IAC)**:

> '42. Whether a person is in a 'parental relationship' with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have 'parental responsibility' in law for there to be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child.
>
> 43. I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not per se 'parents'. A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship'".

16. Applying the above to the facts of this case I find as a fact that the Appellant has stepped into the role of mother to Mr Vassell's three boys who live with her, in particular Denique and Dominic. Although she is not their biological mother they are settled and living together with their father as a family unit under the same roof. I accept that they spend every day together and the Appellant is a critical feature of their lives. The Appellant stated that the children in particular enjoy her making food for them. She stated they keep her very busy. They go for fun parks, they like that she cooks traditional Caribbean food. The Sponsor, Mr Vassell also stated how the children were quite affected by the fact that his fiancée, who lived with them for fifteen years particularly living for nine or ten years with the children, were affected by her suddenly leaving. Mr Vassell stated that the Appellant is naturally a mother, she plays a vital part in Enrique's life, he has sickle cell, they gravitate naturally and the relationship is good. He has long hair and she combs his hair. They do not follow a regime. They go for funfair, bowling, zip wiring. As the Appellant herself has a broken home she is the emotional maternal figure of the family. His kids depend on her emotionally particularly after the person in their lives had left them suddenly. She provides a caring nature. Her children ask

how someone who was with them could just have left them so suddenly. The Sponsor described the Appellant as an amazing mother who cooks very well.

17. Bearing in mind the balancing factors I have to take into this account although the weight on the part of the Secretary of State is the maintenance of immigration control and the fact that it is proper and right to expect the Appellant to have come into the UK with the proper visa, I take into account the fact that she has a genuine and subsisting parental relationship under Section 117B(6) and I place relevant weight on this. I find she satisfies the Section. It would not be reasonable for the children to leave the UK and relocate to Trinidad and Tobago if the Appellant is removed. She spends more time in the life of the three children now than their biological mother. They live together under the same roof. In view of the Section 117B(6) wording that the public interest does not require the Appellant's removal where she has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK, I find that the appeal is allowed both on these grounds and on grounds of proportionality in view of the circumstances of the Sponsor and the children he lives with. Although the issue of finances and language is a neutral factor, there is no indication the Appellant is on public funds".

12. Judge Adio proceeded to allow the appeal under Article 8 ECHR.

Grounds of Appeal

13. The respondent set out three grounds of appeal but, on analysis, they are all a challenge to the findings of the First-tier Tribunal on parental responsibility and the finding that s.117B(6) was met. The respondent referred to the appellant's evidence in paragraph 8 of her witness statement that Mr Vassell's three children with whom she lived continued to have contact with their British mothers. Where that was so, the First-tier Tribunal had failed to apply the guidance from Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC) which stated in paragraph 3 of the headnote:

> "3. As stated in paragraph 44 of R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship") IJR [2016] UKUT 31 (IAC), if a non-biological parent ("third party") caring for a child claims to be a step-parent, the existence of such a relationship will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents".

Judge Adio had not identified how the appellant had taken on the role of a parent when this was unlikely where the children's biological parents were still involved in their lives.

14. Further, despite citing the relevant extracts in paragraph 15 of the decision, the First-tier Tribunal had failed to follow the guidance from paragraph 43 of Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661. The involvement that the appellant had with the children was that of a carer or friend but not that of a parent. Even if there was an element of dependency, that did not give rise to a parental relationship. Nothing showed that the appellant was responsible for the important decisions made concerning the children. The evidence of the appellant and Mr Vassell was that he was responsible for the children with the appellant looking after them when he was at work. Mr Vassell's witness statement dated 21 August 2022, for example, indicated in paragraph 7 that he was the carer for the children with no reference to the appellant. The finding that the appellant had a parental relationship with the children given the short time that she had lived with them, given that they had lived most of their lives without knowing her, their having relationships with both biological parents and Mr Vassell stating that he was responsible for them was irrational. The finding that the decision was a disproportionate interference with Article 8 ECHR had to be in error as it was based on the irrational and unlawful finding that the appellant had a parental relationship with Denique and Dominic.

Discussion

15. We found that the respondent's grounds had merit. The First-tier Tribunal did not consider the guidance in Ortega on it being unlikely that the appellant could show that she had established a parental relationship where they had relationships with their biological parents. As above, in her witness statement dated 21 August 2022 the appellant referred in paragraph 8 to the children continuing to have contact with their British mothers. This statement was made in order to show why Mr Vassell could not take the children away from the UK. The relationships with the children's mothers were clearly substantive and important, therefore. However the Judge did not consider the nature of the relationship that the relevant children had with their biological mothers.

16. Further, the evidence on which the appellant relied at the hearing did not refer to her acting as a parent to the children but to her caring for them whilst Mr Vassell was at work and to her role being that of a caring partner of their father, not a parental figure. The First-tier Tribunal sets out the correct guidance from AB (Jamaica) but does not apply it to the material evidence that was provided. In his witness statement dated 21 August 2022 Mr Vassell stated:

> "7. ... My 3 boys live with me, and I am their carer. I have a business in the UK and employ six staff. Nikisha and I want to be together. I love her very much and want to share my life with her. My boys know that she is my partner and are happy to accept her in the family".

The statement of Denique Vassell dated 19 August 2022 stated:

> "2. The family call her Nick-Nick. She cooks nice Trinidad food and plays games with me and my brothers. It is fun having her in the house with us. My dad is so happy when they are together. She is also good at domino's. I cannot believe the way she plays that game; my brother Dominic find it unbelievable that she just keeps on winning.
>
> 3. My little sister Ariella loves Nick-Nick because she is always doing her nails in different colours. She is a very important part of our family now. I do not want Nick-Nick to leave our family. If she leaves us the family will be upset as we have now got used to having her with us".

The statement from Enrique Vassell dated 19 August 2022 states as follows:

> "2. Since Nikisha (Nick-Nick) has been living with us it has been wonderful. She is truly amazing. She has been so supportive especially when my dad is always on the road and busy working. She is very caring towards me. I have a blood disorder – sickle cell and was admitted to hospital 3 weeks ago. She is always here looking after me.
>
> 3. I do not want Nick-Nick to leave us now as we are all very fond of her. My dad is so happy since she has been with us, and it is really nice to see him this way. She cooks for us, and her food is lovely".

17. These descriptions of the appellant's involvement with the children appeared to us to be very similar to the description in paragraph 43 of AB (Jamaica) of the role of a carer or family friend rather than showing someone who had established a parental relationship with a child.

18. For these reasons we found that the Judge's finding that the appellant had a genuine and subsisting parental relationship Mr Vassell's British children failed to take material matters into account, and was inadequately reasoned. The decision of the First-tier Tribunal therefore disclosed a material error on a point of law such that it had to be set aside to be remade. We announced our error of law decision at the hearing and canvassed the views of the parties on the appropriate disposal for remaking the appeal.

19. The parties were in agreement that the remaking of the appeal was limited to a decision on whether the appellant had established a parental relationship with Mr Vassell's children as this would dictate the outcome of the Article 8 ECHR assessment outside the Immigration Rules.

20. The Senior President's Practice Direction indicates that the presumption is for an appeal to be re-made in the Upper Tribunal. The Practice Direction that went out with the grant of permission in this appeal set out that this was the position and that the parties should come to the error of law hearing prepared for the appeal to be re-made and that a Rule 15(2A) application should be made if evidence that was not before the First-tier Tribunal was to be relied upon. No Rule 15(2A) application was made so there was no new evidence. The appellant and sponsor did not attend the hearing. Mr Symes submitted that it was not fair to proceed to re-make the

appeal in their absence. We ascertained that the directions that the parties should come to the error of law hearing ready for the appeal to be remade had been issued. Where that was so and given the limited scope of the remaking, it was our view that it was appropriate and just and fair to proceed to re-make the appeal; AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512 and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC).

21. We heard submissions from both representatives and then reserved our decision on the remaking of the appeal.

Decision Remaking the Appeal

22. As before, Mr Symes and Ms Nolan helpfully agreed that the appeal turned on the sole issue of whether the appellant had established a parental relationship with Mr Vassell's minor children, Denique and Dominic.

23. We referred to the guidance in the case of Ortega and in AB (Jamaica), discussed above and applied it to the evidence provided. We did not find that the appellant had shown that she had a genuine and subsisting parental relationship with Mr Vassell's children.

24. As above, the evidence shows that the children retain a relationship with their biological mothers. That is stated to be one of the reasons for Mr Vassell being unable to leave the UK as the children needed to continue their relationships with both biological parents. However, there is very little evidence before the Tribunal about the nature of that relationship. In the absence of significant evidence about the children's relationships with their biological mothers, it is difficult for the Appellant to establish that she has 'stepped into the shoes' of a parent. Further, given the children have relationships with both parents, it was unlikely that the appellant could have taken on the role of a parent.

25. We did not find that the evidence of the appellant's involvement with the children could show that the appellant had established a genuine and subsisting parental relationship where they had relationships with both biological parents and because the evidence of her involvement with the children was that of a carer or family friend and not a parent. We accepted that the appellant most likely spent more time with Denique and Dominic than they did with their biological mothers as they appear to live most, if not all, of the time with Mr Vassell. As his partner the appellant inevitably spends time with them, more so where Mr Vassell works and she does not. We did not find that the evidence showed that the appellant's involvement with the children went beyond that of a carer or family friend, however. Nothing in the evidence showed her making important decisions

for them or doing anything for them that would not be expected from a carer, friend or caring relative.

26. We also did not find that a genuine and subsisting parental relationship could have been established where there was a relationship with both biological parents and the children had not met the appellant until they were 16 and 14 years old. That was additionally so where the appellant has lived with them for only for a year and four months.

27. We therefore did not find that the appellant could meet the provisions of paragraph 117B(6). As above, it was conceded for the appellant that she could not show that the decision refusing leave was disproportionate on any other basis.

28. For all of these reasons we found that the appeal under Article 8 ECHR outside of the Immigration Rules should be refused.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.

The appeal under Article 8 ECHR is dismissed.

S Pitt
Upper Tribunal Judge Pitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated 3 2023