IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004098

First-tier Tribunal Nos: HU/55145/2023
LH/03795/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 5th of December 2024

Before

UPPER TRIBUNAL JUDGE RASTOGI

Between

GE
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Singh, Counsel, instructed by One Immigration Ltd
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

Heard at Field House on 4 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and her family members are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant or her family members, likely to lead members of the public to identify the appellant or her family members. 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 Robertson ("the judge") who, in a decision dated 21 July 2024

("the decision"), dismissed the appellant's appeal against the respondent's refusal of her human rights claim made by way of fresh submissions on 28 October 2022. The respondent's refusal was dated 22 March 2023.

2. The background to the claim is that the appellant had been in the United Kingdom since 2012 supporting her daughter and grandchildren. The appellant initially arrived after the birth of the first child because of domestic abuse in her daughter's relationship. In 2008 the appellant returned to Ghana with that child until shortly after the birth of the second child in 2010 when she again provided support to her daughter and the children. She returned to Ghana once thereafter but re-entered the United Kingdom on 6 July 2012 and has been here ever since. The appellant claimed asylum unsuccessfully in 2015. The present refusal was founded on the basis that the appellant was unable to meet the requirements of the Immigration Rules on either family or private life grounds. The respondent did not accept that removing the appellant to Ghana would be unjustifiably harsh upon her or any of her family because the evidence did not show that the ties between the appellant and her family members went beyond normal emotional ties. The respondent decided family life was not made out.

3. Judge Robertson assessed the situation for himself and concluded there was no family life between the appellant, her daughter or any of her grandchildren so removing her from the United Kingdom was lawful and did not represent a breach of the appellant's Article 8 rights.

4. In the grounds, the appellant argued that the judge erred in law because he applied the wrong test, looking for some evidence of exceptionality rather than considering whether there was real or committed or effective support between the appellant and any of her family members (*Rai v Entry Clearance Officer New Delhi* [2017] EWCA Civ 320 applies) (Ground 1).

5. The appellant further argued that the judge failed to give adequate reasons when assessing the best interests of the appellant's grandchildren, particularly at [17] and [18], and that the judge's assessment contained inadequate analysis of the facts relevant to what was in the children's best interests (Ground 2).

6. First-tier Tribunal Judge Monaghan granted permission on all grounds.

7. The error of law hearing came before me. Both representatives appeared via CVP. Although Mr Singh stated that his instructing solicitors had submitted a consolidated appeal bundle in compliance with directions on 31 August 2024, that bundle had not made its way to the tribunal via CE file or indeed to the Home Office. Nevertheless, having discussed the content of the appeal bundle and cross-referenced that with the documents both Mr Diwnycz and I had obtained individually, it was agreed that all relevant papers were before the tribunal and the respondent. At the hearing I heard submissions from both representatives and at the end of the hearing I reserved my decision. It is to that I now turn.

The Decision of the First-tier Tribunal

8. The judge's assessment of family life and the consideration of what was in the grandchildren's best interests starts primarily at [10] where the judge confirms that he is mindful of the obligations to consider the best interests of the child pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"). The judge found the witnesses' evidence to be consistent and

credible [11]. The judge noted at [13] that when the appellant and her eldest grandson were in Ghana it was the appellant who would have been responsible for his day-to-day needs. The judge accepted at [15] that during the period where the appellant's daughter's marriage broke down, the appellant provided both emotional and practical support and stability throughout that period for both her daughter and her grandchildren.

9. At [16] the judge found:

> "*It has been submitted that the support that the appellant has provided in helping her daughter to raise the children amounts to parental responsibility. I do not agree, rather I find normal emotional ties.* In reaching this decision I have considered the facts before me, and I find no reference in the evidence of the appellant taking responsibility for the children other than their day-to-day care while the sponsor worked. No reference is made to her making decisions as to their education, health or welfare, nor has she provided any financial support. She has been what her daughter describes as a 'rock' to the family, which is to be commended, but I do not find any ensuing dependency to be unusual or exceptional. Many grandparents step up to support their children in raising their family, as in this case, but I do not find that this amounts to acquiring parental responsibility, rather it reflects the bonds of a loving family. I do not accept that the appellant stepped into the shoes of the absent father as submitted, rather I find that she has been a supportive mother to her daughter, caring for her children to enable her to work."*(my emphasis)*

10. At [17], the judge considered what was in the children's best interests. Although the judge said in the decision "I am mindful that the sponsor has been present throughout their lives but both older children are now in their teens and growing in independence", it is possible that is a typographical error and the judge may have meant that he was mindful that the 'appellant' had been present throughout the children's lives. Either way, having regard to the fact that the appellant's daughter may have to give work to care for the children if the appellant were removed, the judge concluded that puts her in no different a position to many other single parents. At [18], the judge accepted the appellant has provided emotional support to the children but did not find that had to be in person and instead modern means of communication could be relied upon. As for the youngest child, born after the date of the respondent's refusal, the judge decided the child's father (estranged) could maintain contact and provide support in the future. At [19] the judge concluded:

> "I am not satisfied that the appellant has evidenced anything beyond normal emotional ties. It is in the children's best interests to remain with their mother. I accept that the appellant's return to Ghana will have an impact on the family, but their relationships can continue with social media contact and visits."

11. The judge proceeded to consider the appellant's circumstances on return to Ghana [20], the fact that the Immigration Rules are not met [21] and confirmed at [23] that "in the light of the above I have not found family life". The judge then undertook a proportionality balancing exercise in relation to the appellant's private life (noting at [23] that he did not find family life). He did not expressly consider factors relevant to the appellant's daughter and grandchildren, but at [24] said, "I find that any interference with the appellant's right to family life is proportionate".

12. At the hearing, Mr Diwnycz only made limited submissions, namely that the judge considered all issues in relation to the factual matrix and that, nowadays, means of communication are sophisticated and better than they previously had been. He conceded that another judge may have come to a different conclusion but in his submission, this judge dealt with the matter appropriately.

Discussion and Errors of Law

13. In my judgment, the judge made material errors of law in his assessment, firstly in how he dealt with the question of whether or not a family life existed (ground 1) and, secondly, in his assessment of what was in the children's best interests (ground 2). I say that for the following reasons.

14. Dealing with ground 1, as a general rule family life cannot be presumed to exist between a mother and an adult child and between a grandmother and grandchildren. Therefore, the judge was correct to assess the specific circumstances of the relationship between the appellant and her daughter and grandchildren when deciding whether or not an Article 8 family life existed.

15. However, when the judge's analysis is looked at more carefully, the judge appears to have fallen into error by considering the wrong test by conflating the assessment of whether or not the appellant had acquired parental responsibility or developed a parental relationship with the children as opposed to whether there were features of dependency that went beyond normal emotional ties as interpreted through case law. The question of parental responsibility of course does not determine whether or not an Article 8 family life exists.

16. Insofar as the law on that is concerned, the appellant relied on *Rai* which considered the well-known decision in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 [17] in which Sedley LJ said:

> "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies."

17. He continued at [19]:

> "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."

18. As recognised in *Rai* [17] it was held in *Patel and Ors v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17 that "what may constitute an extant family life falls well short of dependency"; the authorities all highlight the need for a careful analysis of the specific facts of any given case; there is no requirement for exceptionality [18]-[20].

19. I remind myself that, as a judge of a specialist tribunal, the judge is assumed to know the law and authorities and that they will be applied even if not specifically referred to. The exception of course is where it is clear from their language that

they failed to do so *(AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 [34]).

20. Nevertheless, I am satisfied the judge here lost sight of the test. In my judgement, the judge's analysis of whether or not a family life existed was linked to his analysis of whether or not the appellant could show parental responsibility for the children. Returning to [16] of the judge's decision, particularly the italicised section (see [19] above), the link between the two appears inextricable. The appellant could not show parental responsibility and therefore all she could show was normal emotional ties. What the judge was required to do was evaluate whether in the context of this family's circumstances, there was evidence of real or effective or committed support sufficient to show something beyond normal emotional ties. Whether or not a 'parental' role had been shown is not relevant to that test.

21. There is no challenge in this appeal to the facts as the judge found them to be. Applying those facts, there are features of the appellant's case which feed into the question of whether or not there is real or effective or committed support between the appellant and her family. In particular, the appellant has been living in her daughter's house on and off from 2008 but continuously since 2012. Therefore, her daughter has accommodated and financially supported her and continues to do so. The appellant has provided free childcare to all three of the grandchildren, and that includes providing them all with day-to-day care and emotional support throughout their lives.

22. It is probably sufficient to say at this juncture that, had the judge applied the correct test, it is probable the judge would have found there to be features of real or effective or committed support flowing both between the appellant and her family members and from them to her such that, properly directed, the threshold of family life could be said to exist in this case.

23. I also find that the judge's error in this part of his decision infected his decision about what was in the children's best interests. Having not found an Article 8 family life to exist would, in my judgement, necessarily skew the assessment of whether or not the children's best interests required the appellant to remain in the UK. Returning to [19] of the decision (see [17] above), the judge immediately proceeded from his conclusion about the appellant not meeting the test for family life to his conclusion that the children's best interests are served by remaining with their mother. Having not found there to be a family life, the judge was not likely to find the children's best interests also served by the appellant remaining in the UK. It cannot be said the outcome of the best interests of the child assessment would be the same if family life was found to exist. Finally, the error regarding the assessment of family life meant that the judge's proportionality assessment was considered through the lens of private life not family life as the judge made clear again at [23] that family life was not engaged.

24. For these reasons, I am satisfied that, on ground 1, the judge made an error of law which was material to the outcome of the appeal. Whilst it is not therefore necessary for me to expressly consider ground 2, I am nevertheless satisfied the judge fell into legal error in his assessment of what is in the children's best interests. In brief, I say that as the judge conflated what was in their best interests with the proportionality assessment at [17] and he took into account irrelevant factors (the position of other people). At [17] the judge said:

> "17. In considering the best interests of the children I am mindful that the sponsor has been present throughout their lives but both older children are now in their teens and growing in independence. It was submitted that without the appellant the sponsor would have to give up work in order to care for her children, which would have a detrimental impact on them all. However, I find that the sponsor would be in the same position as many other single parents who have to make childcare arrangements for their children. Although this would be a change for the family it does not place them in a disadvantageous position to others."

25. I am satisfied the judge further erred in law by failing to have regard to evidence in the bundle which was material to the evaluation of what was in the children's bests interests. I deal with that evidence in the re-making part of this decision. Suffice to say, the judge's analysis did not include any meaningful reference to that evidence and in my judgement that was because he was viewing the children's best interests through the lens of his finding that there was no Article 8 family life.

26. Therefore the judge's decision is to be set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and remade. Whilst there is no challenge to any of the findings of fact the judge made and they should be preserved, that does not extend to the judge's conclusions on either family life and the engagement of Article 8, the best interests of the child assessment or the conclusions on Article 8, all of which are infected by the legal error.

27. It was agreed at the hearing that I could remake the decision in the Upper Tribunal pursuant to section 12(2)(b)(ii) of the 2007 Act. Mr Singh did not propose to call any additional evidence. He placed reliance on the entirety of the evidence on the children's best interests and the family's situation as contained within the bundles originally before the First-tier Tribunal. On that issue, he drew to my specific attention the evidence of the grandchildren directly, together with the evidence about the third child.

The Remaking Decision

Does family life exist?

28. When considering the legal framework set out at [16]-[18] above, I return to the family's circumstances which were not really in dispute and which the judge accepted. Applying those facts to the legal framework, I am satisfied that it is more likely than not there is real or effective or committed support between all the separate members of this family unit so that family life exists between them all. I rely in particular on the length of cohabitation as a family unit; the emotional support the appellant provides to her daughter and the grandchildren particularly against the backdrop of the break-up of the relationship between their parents in circumstances characterised by domestic abuse including to the children (applying the findings of fact of Leicester Family Court); the practical support the appellant has provided whilst her daughter works; and the fact that A has been accommodated and financially supported by her daughter for at least 12 years.

29. Article 8 is therefore engaged in this case. Applying the remaining structure set out in *R(on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, the respondent's decision is otherwise lawful and it

is taken to pursue the legitimate aim of the economic well-being of the country through effective immigration control.

30. That means that a balancing exercise is required in order to assess whether or not the respondent's decision is proportionate to the legitimate aim, treating the best interests of the appellant's grandchildren as a primary consideration in the balancing exercise and having regard to the factors contained within section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

The Best Interests of the Children

31. It is trite law that the tribunal is obliged to identify what is in the children's best interests as a distinct factor and then treat them as a primary consideration (*ZH (Tanzania)* [2011] 2 AC 166) in order to be compliant with the Article 8 regime. Whilst it is right to say that Section 55 of the 2009 Act does not apply to the tribunal it is incumbent on the tribunal to decide matters pertaining to the children's best interests for itself (see [46] of *CAO (Respondent) v Secretary of State for the Home Department (Appellant) (Northern Ireland)* [2024] UKSC 32 remembering of course that it is for appellants to make good their case, including when they rely on the best interests of a child ([47] *CAO*).

32. Albeit there is a nexus between what is in the child's best interests and the Article 8 balancing exercise, they are distinct considerations ([50] *CAO*). At [51] of *CAO*, the Supreme Court set out part of its decision in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 in which it said at [10]:

> "it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play".

33. There is a significant amount of evidence in the First-tier bundles relevant to the issue of the children's lives and their best interests, including the children's own views. There are also unchallenged findings of fact relevant to the issue.

34. Applying that evidence including from the schools (RB89-116), at the date of the hearing before me the children are 16, 14 and 1 years old respectively. The eldest (K) was at Castle Mead Academy although there is no updating evidence as to whether that has not changed as he is nearly 17 and presumably completed his GCSEs in the summer. The middle child (A) was also at Castle Mead Academy and unless she has changed schools, may still be there. She has not yet reached school leaving age. The evidence about their education in the RB reveals that they are doing well (up to 2022 which was when the bundle was compiled). There is no evidence that the children are in anything apart from good health. The judge accepted the evidence that the appellant had effectively been present throughout their lives [17] and that included a period of time during the first eighteen months of the eldest grandchild's life whereby the appellant was his primary carer [13]. Of course, it follows that as the appellant had been living in the United Kingdom with her daughter and grandchildren since 2012, the appellant had also lived with the youngest grandchild throughout her life.

35. The sponsor was given permission to disclose the judgment of the Leicester Family Court dated 17 September 2014 following a fact-finding which took place there in 2014 (AB9-25). Those findings included that the children's father had

used physical force against the children, and against their mother in their presence and engaged in controlling behaviour on various occasions in 2010-2013.

36. The appellant relied on a supporting later dated 24 May 2018 from the sponsor's outreach worker from an organisation called LWQ (Living With Abuse). The outreach worker considered the impact upon the children (then) of the appellant leaving (AB27-28). The letter included the following assessment:

> "the removal of Grace could potentially impact Dorcas's mental health and well-being due to Grace being an important support network for her and the children.
>
> Dorcas explains the children have no other contact with family members and thus they would potentially lose contact with an essential individual in their lives, that may cause developmental and identity needs.
>
> There is also is potential of risk to children's safety if Dorcas is without support to adequately take care of the children by Dorcas' perpetrator.
>
> I would strongly urge that Grace Eshen is considered as a highly influential aspect of Dorcas and the children's lives and without her support there would be significant disruption and lack of support systems within the family home."

37. This letter is now of significant age. Inevitably that reduces the weight to be attached to it as does the fact that the letter's author does not set out their credentials although it is clear they have personal knowledge of the family and they work within a sector providing support for victims of domestic abuse. Nevertheless, I do not find those factors to extinguish any weight to be attached to the letter. I am satisfied the letter represented the position in 2018. Since then, the status quo has not changed save there has been an additional 6 years of cohabitation. It is likely that the impact on the children, if their grandmother had to return to Ghana, still risks the destabilising influences referred to in the letter, notwithstanding that K in particular is of an age where they are likely to be more independent of their nuclear family.

38. Both K and A wrote to the respondent setting out the appellant's role in their lives. Both letters were written on 29 June 2022, some 4 years after the date of the outreach worker's letter. K spoke more about the practical help that the appellant has played in their lives, but particularly referred to the fact that it is she who is at home with them most of the time making them feel safe. He attributed his success at school (and that of his sister) to the appellant's help and support and he said "we still need her more than ever considering we do not have a father in our lives and she is the only family member we know in the UK apart from my mum". He ended by expressing his view that he feels the appellant has the right to stay because of everything she has done for them.

39. A wrote of her feelings about the appellant. Some of page 2 is missing but the gist of the letter can still be understood. She referred to the appellant being her 'best friend' as well as her "inspiration .. role model and the best grandmother". She said the appellant gives her advice and protects here and "if not for my grandma … here I don't know where we'd be".

40. Finally there is updating evidence to show that the appellant's mother secured a new position as a support worker from 1 January 2023 working 37.5 hours per week as opposed to the 30 hours per week she was previously contracted to do [AB6].

41. Having considered all of the above evidence, I conclude that the children's best interests are served by the status quo remaining as it is. Of course, they are primarily served by remaining with their mother. However, I also find that their best interests require the appellant to remain in the UK to avoid the risk of emotional harm to K and A, particularly when considered alongside the absence of a father in their life (and the circumstances giving rise to that); the fact that the appellant has been in their lives throughout the whole of their lives; the extent of the role that she has played and that A at least is approaching a critical stage in her education where stability is likely to benefit her.

The Proportionality Assessment

42. The primary factor for me to consider and to which I attach considerable weight (on the appellant's side of the scales) is what I have found to be in the children's best interests. The respondent's decision does not remove the children from their mother so there is an aspect of the respondent's decision which does not interfere with part of what is in the children's best interests. Nevertheless, removing the appellant would. It is trite that those best interests can be outweighed by factors on the respondent's side of the scales. It is to those factors I now turn, starting with the matters contained within section 117B of the 2002 Act.

43. Section 117B(1) reminds us that the maintenance of effective immigration control is in the public interest. That is an important factor on the respondent's side of the balance sheet and attracts significant weight. That is all the more as the appellant has been an overstayer for a great many years, only once trying to regularise her status before this present application when she claimed asylum unsuccessfully in 2015. Furthermore, the appellant is unable to meet the requirements of the Immigration Rules. There was no challenge to the judge's findings at [20] that there were no significant obstacles to her return.

44. The appellant gave evidence before the judge using an interpreter. The judge noted the appellant does not speak English and that was not challenged. It follows that applying section 117B(2) of the 2002 Act, the appellant's presence here is contrary to the public interest on language grounds.

45. There does not appear to be any reliance on public funds as the appellant is supported by her daughter, so this is a neutral factor (section 117B(3)). Section 117B(4) is not engaged as the appellant is not in a relationship with a qualifying partner. 117B(6) is not engaged as there is no finding that the appellant enjoys a parental relationship with qualifying children (that part of the judge's decision was not challenged).

46. Sections 117B(5) is engaged as the appellant's private life in the UK has at all times been enjoyed whilst her stay here has been precarious. It follows that I can only attach little weight to it (although I note little is not no weight). The little weight that does attach is placed on the appellant's side of the balance sheet (see below).

47. I have not identified any other factors on the respondent's side of the balance sheet.

48. On the appellant's side, I take into account the following.

49. The circumstances the appellant will return to is a factor of the appellant's side of the balance sheet which is not captured by section 117B of the 2002 Act. Notwithstanding that there may not be significant obstacles to her return and that she has 3 adult children there, she will nevertheless be returning to Ghana after a gap of 12 years and at the age now of 71. It will be a significant change for her and returning will have some impact on her. I attach some weight to this factor.

50. The appellant's family relationships are not ones captured by the provisions of section 117B so there is no statutory requirement to only attach little weight to those relationships. Whilst I accept the appellant's stay here has been precarious throughout, that is not a factor for which the children can be blamed albeit that neither the appellant nor her daughter should have expected her to stay beyond the expiry of her visa. I reduce the weight I attach to the relationship between them as a result but, in light of the particular circumstances which brought and kept the appellant in the UK, I do not reduce it to nil and I still place some weight on it.

51. In particular I attach weight to the impact upon her daughter of the appellant having to the leave the UK and the disruption that will cause her both in terms of the loss of emotional and practical support. Whilst the loss of practical help is mitigated by the fact that K and A are now older, in the context of the background for this family, I am satisfied the appellant's daughter will feel the loss of her mother's presence fairly keenly. I remind myself of the judge's note of the daughter's evidence that her mother is the family's 'rock'.

52. I also place weight on the fact that the appellant will lose the day to day proximity of her daughter and grandchildren in the UK which, whilst not lost completely given the various ways of keeping in touch, will no doubt still be a significant change for her. I attach some weight to that.

53. I remind myself that for someone who does not meet the requirements of the Rules, the respondent's decision is only likely to be disproportionate if it leads to unjustifiably harsh consequences for the appellant or a family member such that the refusal is not proportionate.

54. I return to what I have found to be in the children's best interests. I have considered whether or not the weight to be attached to the factors on the respondent's side of the balance sheet outweigh the weight attached to those best interests (either alone or in conjunction with the other factors on the appellant's side of the balance sheet). Whilst, of course, people should not be permitted to benefit from unlawful residence because to do so risks damaging the efficacy of immigration control, I am satisfied in this case that the respondent's decision has unjustifiably harsh consequences for this family unit particularly in light of what I have found to be in the children's best interests, in the context of the appellant coming to and remaining in the UK in the first place and the strength of family ties.

55. It follows that I am satisfied that the respondent's decision is a disproportionate interference with the appellant's right to respect for her family life and that of her

family members and therefore unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

1. The decision of the First-tier involved the making of an error on a point of law so it is set aside.

2. The decision is re-made in the Upper Tribunal and the appeal allowed.

SJ Rastogi
Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 November 2024