**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/52818/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 03 June 2015** | **On 09 June 2015** |

**Before**

**UPPER TRIBUNAL JUDGE ESHUN**
**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**EVADNE HARRIS**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Turnbull, counsel, instructed by Highland Solicitors
For the Respondent: Mr Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Easterman who, in a decision heard on 24/07/2014 but not promulgated until 25/11/2014, dismissed the appeal of Ms Evadne Harris, a 76 year old national of Jamaica, against a decision of the respondent to refuse

to grant her further leave to remain as a dependent relative of her adult children present and settled in the United Kingdom (UK).

2. The appellant entered the UK as a visitor in June 2012. She made an in-time application to vary her leave to remain on the basis that she was dependent on her two daughters in the UK for financial, emotional and practical support. The appellant also claimed to have a strong relationship with her grandson, for whom she cared since he was a month old. She had two children with whom she previously lived in Jamaica, a son and daughter, but, so the appellant claimed, the son was not in a financial position to assist her and the daughter was handicapped. The respondent considered the application under the immigration rules relating to adult dependent relatives, and also considered the appellant's application under paragraph 276ADE. Consideration was also given as to whether the appellant's removal would breach Article 3 ECHR with respect to her medical condition. The respondent refused the application on all bases.

3. On appeal the Judge properly noted that the appellant could not succeed under the immigration rules, namely paragraph ILRDR.1.1. of Appendix FM, as she did not have valid leave to remain as an adult dependent relative. The Judge then considered whether the appellant's removal would breach Article 8 ECHR, both in respect of the appellant's private life and in respect of any family life she enjoyed with her family in the UK. The Judge concluded there would be no breach of Article 8 and dismissed the appeal.

**Whether the First-tier Tribunal made a material error of law**

4. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Judge failed to properly consider material facts including the appellant's frailty, age, the true relevance of her children in Jamaica, and that the Judge failed to consider the best interests of the appellant's grandchild. At the permission stage the appellant sought to adduce fresh evidence with her application including a medical report dated 04/12/2014, and, at the Upper Tribunal hearing, produced a bundle that contained a number of documents post-dating the date of decision. The Upper Tribunal is not however entitled to consider post-decision evidence when determining whether the First-tier Judge made an error of law unless that new evidence is being used to identify a material error of law on the basis of a mistake of fact and the concomitant requirements have been met. It was not argued by Ms Turbull that this was the case. We have therefore not considered the evidence adduced by the appellant that post-dates the date of the First-tier Tribunal hearing.

5. Deputy Upper Tribunal Judge Chapman granted permission on the basis that it was arguable the First-tier Judge failed to consider section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act) with respect to the appellant's grandson, whom she cared for, alongside his

parents, since he was a month old. It was on this basis that the oral submissions before the Upper Tribunal were made.

6. Ms Turbull submitted that the First-tier Judge failed to identify or consider section 55 in respect of the relationship between the appellant and her grandson, failed to make any findings in respect of the impact on the grandson of the appellant's removal, and erred in finding that the appellant's removal would not amount to 'exceptional' or 'compelling' circumstances sufficient to render the decision disproportionate under Article 8 ECHR.

7. Section 55 requires a Judge to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. In *ZH (Tanzania) v SSHD* [2011] UKSC 4 the Supreme Court held that, "*In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means that they must be considered first*." What is required by consideration of the best interests of a child is an "*overall assessment*" and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment (*MK (best interests of child) India* [2011] UKUT 00475). *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 315 (IAC) indicated that the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of the child to live with and be brought up by his or her parents.

8. In the instant appeal the grandchild lived with both his parents, who were employed. The evidence before the Judge was to the effect that the appellant looked after the child when his parents were working. It remains the case however that the grandchild's primary support relationship was that between him and his parents. Although a child may develop a strong substitute relationship with grandparents in the absence of one or either parent, or if parents were unfit or incapable of properly caring for a child, it would otherwise require strong evidence to show that the child-grandparent relationship is as strong or significant as that between a child and their parents. Family life in Article 8 (1) is certainly broad enough to include the ties between grandparents and grandchildren (see *Marckx v. Belgium* [1979] ECHR 2). However, the relationship between grandparents and grandchildren by its very nature generally calls for a lesser degree of protection than that between natural parents and their children (*G.H.B. v UK* Application no. 42455/98). We note that there was little in the way of independent evidence before the First-tier Tribunal relating to the appellant's relationship with her grandson or relating to the impact of the appellant's removal on the child's physical or emotional well-being.

9. Although the First-tier Judge did not specifically refer to section 55 his decision does make clear that he had the relationship between the appellant and her grandchild well in mind (paragraphs 14, 18, 24, 31, and 35). Given that the child was living with both his parents, in what one must reasonably suppose to be a warm and supportive family unit,

there was no evidential basis before the Judge upon which he could have concluded that the grandchild's best interest were not served by having him remain with his parents. In so concluding we remind ourselves that the onus rests on the appellant to show there has been a breach of the section 55 duty (*MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC)).

10. Even if it were found that the grandchild's best interests entailed the appellant remaining in the United Kingdom, it does not necessarily follow that removal would be disproportionate (*Gayle v Secretary of State for the Home Department* [2015] UKUT B3 (IAC)). The best interests of a child is a primary consideration, but it is not a paramount consideration.

11. In the present case the Judge considered the evidence that he heard in respect of that relationship (paras 51, 52) and noted that the appellant was "… *very useful for the purpose of looking after their child*" (para 54). On the evidence before him the Judge was entitled to find that the appellant was used primarily to provide childcare. There was nothing in the evidence before the Judge as to why childcare could not be provided by a child minder or in a pre-school. That was the choice of the child's parents. The Judge found it would be possible for the grandchild and his family to make visits to Jamaica and enjoy family life through periodic visits. This was a conclusion properly open to the Judge. We are not satisfied that any failing by the Judge in his assessment of the best interests of the grandchild could have possibility resulted in a finding that the decision to remove the appellant was disproportionate under Article 8. We are consequently satisfied that Judge Easterman did not make a material error of law.

12. We finally note that a complaint was lodged by the appellant against the respondent in respect of advice they received relating to the appellant's application and relating to confusion concerning the fee. We are not however in a position to comment on the merits of this complaint.

**Decision:**

**The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.**

08 June 2015

Signed: Date:
Upper Tribunal Judge Blum