



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04676/2015
HU/04684/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment
Tribunal
On 19th June 2018

Decision & Reasons Promulgated
On 03rd July 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AY AND FY
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain, Counsel instructed on behalf of the Appellants
For the Respondent: Ms H. Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any members of their family. This direction applies both to the Appellants and to

the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellants, with permission appealed the decision of the First-tier Tribunal who, in a determination promulgated on the 4th January 2017 dismissed their appeals against the decisions of the Secretary of State to refuse to grant leave to remain in the United Kingdom on Article 8 grounds.
2. In a determination promulgated on the 26th September 2017 the Upper Tribunal reached the conclusion that the decision of the First-tier Tribunal made an error on point of law and set aside the decision and gave directions for the re-making of the decision in the light of the errors identified and with certain of the findings, which were not the subject of error, to be preserved.

The background:

3. There is no dispute about the immigration history of the two Appellants. They are husband and wife and are both citizens of Libya.
4. The determination of the FTT set out the circumstances which had led to both Appellants being in the United Kingdom at paragraphs 37 –40. They entered the United Kingdom as visitors on 8 February 2015 along with family members who resided in the United Kingdom (their daughter and grandchildren). This followed an earlier entry as visitors shortly before. The Appellant were returning to Libya where they lived however their son-in-law died which caused them to return to the UK along with their daughter and their grandchildren. Apart from the two Appellants, the deceased and his wife and children are all British citizens.
5. The basis for their re-entry into the UK on the 8th February 2015, was pursuant to a visit visa valid until 4 June 2015, and was made clear to the immigration officer at the point of entry. The Appellant informed the I/O as the circumstances of the death of their son-in-law. They had been accompanied by their son, whose purpose was to accompany them as far as Tunisia and then to return back to the UK alone. Tragically he died en route to Tunisia and was buried there on 27 January 2015. Thus the Appellants were granted re-entry as visitors with advice that should they wish to stay beyond their permitted leave (which was to expire on 4 June 2015) they would be required to apply in time to extend their leave on human rights grounds.
6. Consequently, in an application made on 29 May 2015, they applied to the Respondent for further leave to remain in the United Kingdom on compassionate grounds under Article 8 of the ECHR.
7. In decisions dated 11 August 2015, the Secretary of State refused their applications for leave to remain on human rights grounds. Neither Appellant could meet the requirements of Appendix FM and it was further considered that neither could meet the requirements of Paragraph 276ADE, taking into account their length of residence in the United Kingdom having entered in February 2015 and that there were no very

significant obstacles to the integration into Libya in the light of their lengthy residence in their country of nationality and their social, cultural and linguistic ties.

8. As to Article 8 outside of the rules, the Secretary of State took into account the basis of the claim made that they were required to stay in the UK to support their adult daughter and four grandchildren since the death of their son-in-law. It had been stated by them that their adult daughter was not coping well with the loss of her husband had been diagnosed with depression and severe bereavement reaction. It made reference to medication and counselling and that they were providing comfort and support. The evidence was considered by the Secretary of State but it was considered that it had been seven months since the bereavement and whilst there was sympathy for the family members as a result of the circumstances, they had entered on a visit Visa which did not give any expectation of a long-term stay. It was considered that there were no reasons as to why they could not return home and apply for a further five-year visit and come back to stay with the family within a very short period of time. It was further considered that in the area where the family resided, there was support available of a professional kind which could be accessed by their adult daughter. Consequently the applications made by both Appellants were refused.
9. The Appellant appealed that decision and it came before the First-tier Tribunal on the 17th November 2016. The Judge heard evidence from the two Appellants and other members of the family, including their eldest grandchild and considered documentary evidence that had been submitted in the bundle. The Judge also heard the evidence of an ISW who had provided two written reports. The decision is set out at paragraphs 37 onwards and resulted in his overall decision in which he dismissed the appeals both under the Immigration Rules and on human rights grounds (Article 8).
10. The Appellant sought permission to appeal that decision by way of grounds submitted on the 20th January 2017. Permission was granted by First-tier Tribunal Judge Simpson on the 16th August 2017.
11. The Upper Tribunal set out its decision in determination promulgated on the 29th September 2018. The reasons for finding an error of law are set out in that decision as attached.
12. The remaking of the decision related to the issue of proportionality in which the best interest's consideration forms an essential part. In the light of the time that elapsed since the FTTJ hearing and on the basis that any assessment of human rights should take place on the evidence as at the date of the hearing, the hearing was to resume on later date when the family's circumstances had been updated. The circumstances of the children were likely to have changed in the interim in a number of respects and the court in considering any best interest assessment would have been required to consider them in accordance with the up to date evidence.
13. The findings that were preserved were as follows:

1. The Appellants factual immigration history at [37-[42].
2. The Appellants cannot meet the requirements of Appendix FM or paragraph 276ADE for the reasons set out at paragraphs [51]-[53] and [55 – 59].
3. Findings at paragraph [68]
4. The judge’s findings at paragraphs [70 – 74] that deal with the first four questions posed by Ranger.
5. Paragraph 78 – 79.

The re-making of the appeals:

14. Since the hearing there have been some relevant changes. At a hearing on the 30th April 2018 Counsel instructed on behalf of the Appellants sought to rely upon the CG of *ZZM (Article 15 (c) Libya CG [2017] UKUT 263*. The head note to that decision reads as follows: “The violence in Libya has reached such high-level that substantial grounds are shown to believe that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person.” As this was a “new matter” the Respondent would have to give consent for the matter to be raised.
15. In a letter dated the 9th May 2018, the Respondent indicated that he did give such consent for the matter to be raised.
16. Furthermore at the hearing before the Upper Tribunal on the 19th June 2018 Ms Aboni (Senior Presenting Officer) informed the Tribunal that the Respondent intended to grant the Appellants leave on humanitarian protection grounds in the view of the CG case and the circumstances in Libya. There has not yet been a grant of leave made although that is the stated intention of the Respondent and thus under the 2002 Act the appeal is not treated as abandoned.
17. Against that background it was submitted on behalf of the Appellants that it was still necessary for the Tribunal to consider Article 8 although it was common ground that there was no prospect of removal of the Appellants in view of the Respondent reaching the decision that they should be granted a period of leave.

The evidence:

18. For the purposes of the re-making hearing I was not provided with any updating statements from the parties as directed by the Tribunal but was provided with an addendum report from the ISW who had seen the family members.
19. The ISW was called briefly to confirm the contents of the addendum report and was asked some questions in chief. There was no cross examination on behalf of the Respondent.

20. Mr Hussain did not call the Appellants to give evidence or any of the family members who were present and stated that he relies upon their earlier statements and the ISW reports and addendums.
21. He made the following submissions:
- (1) He invited the Tribunal to make findings of fact and that given the circumstances of the type of family life enjoyed between the grandparents and the child F, any proposed removal even after a period of leave was granted would result in the child's best interests being "unduly prejudiced". He submitted that the present situation where F is dependent on his grandfather will be the same after a period of leave has ended and that the Secretary of State will have to take that into account.
 - (2) As to the role of the grandfather, he relied upon the evidence of the ISW that the grandfather is filling the role of a biological parent or is "in the shoes" of the biological parent.
 - (3) The evidence relating to the other siblings who are now over 18 demonstrates that the grandfather has had a positive effect on the grandchildren achieving their results and this should be taken into account.
 - (4) He invited the Tribunal to make a factual finding that if the grandparents were removed today apart from the Article 15 (c) risk, it would not be in the best interests of the child to be separated. He submitted that the circumstances in Libya may improve but as a result of the duty under section 55 in the best interests of F, it suggests a course that the grandparents should remain living with him until he achieves the age of 18. Therefore he submits, the section 55 finding cannot be limited to any time and will continue until he is 18 years of age.
22. Ms Aboni made the following submissions:
- (1) She confirmed that it was the intention of the Respondent to grant a period of humanitarian protection leave to the Appellants in view of the current situation in Libya and that in those circumstances it was not necessary to consider Article 8 as there was no interference with their family life.
 - (2) In relation to the best interests F, she accepted that there was a relationship between the Appellants and F and that was clear from the evidence before the FTTJ and the report from the ISW that the Appellants play a role in the family with regard to their grandson and provide support family. However there is no proposed separation and it has never been suggested that the child should live in Libya.
 - (3) The Article 8 assessment needs to be considered on the basis of the circumstances now and not at any future date. It will be open to them to make an application further leave at the conclusion of any leave granted by the

Respondent. F would still be a minor in the best interest would still be considered.

- (4) She submitted that there would be no prospective breach of Article 8 because there is no likelihood of any separation on the basis that the applicants are to be granted a period of leave. Thus she invited me to allow the appeal on humanitarian protection grounds.

Discussion:

23. The starting point are the preserved findings. In this case, it was not said that the Appellants could meet the requirements under the Rules under Appendix FM or Paragraph 276ADE. They cannot meet the requirements as a "parent" or as to private life; neither of lived in the UK for at least 20 years. As to paragraph 276 ADE (1)(vi) the finding was made at [58] that there were no very significant obstacles to their reintegration to Libya if required to leave the UK because they had both lived in Libya for all of their lives save for the short period in United Kingdom and had continued to maintain their cultural, social and language ties. It is not suggested that in the context of a hypothetical return they could meet this paragraph either.
24. It is set out in the skeleton arguments that the issue related to an assessment outside of the Rules. Ms Aboni on behalf of the Respondent does not seek to argue that family life is not engaged on the particular facts of this appeal; that was found by the previous judge and I am satisfied that there is family life between both Appellants and F and to some extent with F's mother, although she is an adult, given the nature of dependency that there is between them on the particular factual matrix that applies.
25. The issue raised by Ms Aboni is that because the Secretary of State intends to grant humanitarian protection to both Appellants, there is no interference with that family life because there is no removal. I would agree that whilst there is no interference with their family life at present as it cannot be said that there are imminent prospects of removal. Mr Hussain submits the Tribunal should consider Article 8 on the basis of a hypothetical return. His reason in this case for doing so is on the premise that it is important to assess the best interests of F because in the event of the periods of leave granted to the Appellants ending, F will still be a minor child and will require a stability of the presence of both grandparents.
26. It seems to me that any assessment that I make as to the quality of the family life between F and his grandparents and any assessment as to his best interests are made on the evidence that is before me at this hearing and cannot be predeterminative of the factual circumstances at any given time in the future. The best interests of a child are not static; they change and fluctuate according to their age, their needs and the particular circumstances that appertain to them at the time any assessment is undertaken. Therefore the assessment I make is based on the circumstances and the evidence as it is today.

27. I therefore consider the claim made on the basis of a hypothetical return, in the knowledge that it is accepted on behalf of the Secretary of State that both Appellants should be granted humanitarian protection based on the current circumstances in Libya and that a grant of leave should be given. As there has been no grant of leave given at the date of this hearing, I cannot treat the appeals as having been abandoned under the 2002 Act.
28. I am satisfied that Article 8 (1) is engaged as the Appellants hypothetical removal will interfere with the family and private life of the Appellants and that the decision is in accordance with the law. Their removal will be for the legitimate aim of effective immigration control.
29. Having found the first four limbs of the Razgar test are satisfied, the issue relates to that of proportionality. This required a fair balance to be struck between the public interest and the rights and interests of the Appellants and others protected by Article 8 (1) (see Razgar at [20]) which includes the Appellants, their daughter and F (see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43]).
30. When assessing the proportionality of the removal decisions I am required to consider the best interests of the child, F, who would be affected by the decision.
31. In making the assessment of the best interests of the child I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that "in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
32. The statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC).
33. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". Lady Hale stated that "any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of Article 8(2)". Although she noted that national

authorities were expected to treat the best interests of a child as "a primary consideration", she added "Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration."

34. In the assessment under Article 8, the best interests of the child must be a primary consideration. That meant that they must be considered first. They could, of course, be outweighed by the cumulative effect of other considerations.

35. I have therefore considered the best interests of F. There have been no further witness statements from the Appellants or their daughter or from F since the statements first provided before the First -Tier Tribunal. There has, however, been an addendum to the ISW report dated 14 June 2018. Since the last hearing it is common ground that there is only one minor child, F, whose interests are required to be assessed. His siblings are all over 18 years of age and have either gone on to higher education or presently undertaking exams. It is evident that despite the tragic events in 2015, all of the children have thrived academically, are a source of pride to the family members and there is no doubt that they have been assisted in their studies by having the support of their grandparents.

36. The present circumstances of F are that he lives with his mother and grandparents in the family home and sees his older siblings when they are present at the family home. The original ISW report was written in August 2015 and therefore was written only seven months after the loss of his father and the contents of the report deal with the difficulties faced by all the family members at that time which were entirely understandable. The addendum was written in 2016 some years ago but I have been provided with a further addendum report of June 2018 and have heard very brief evidence from the ISW. He was asked no questions in cross-examination.

37. The ISW confirmed the contents of his earlier reports and the more recent report. He used a genogram to establish the relationships of the child concerned with other family members and established that F had a strong relationship with his mother, grandfather, and grandmother and his sisters and brother (paragraph 8). He gathered information from F as to what was working well in his life, what he was worried about and what he enjoyed (see paragraphs 12 - 18). It was established that what was working well in his life was his school, friends, family made of his mother, grandparents and siblings and that he was worried about his grandparents leaving the family unit. It was recorded at [17] that F was well settled and was content with the current childcare arrangements whereby he lives with his mother and grandparents. At [18] he made reference to enjoying coming home from school with his grandfather, doing his homework, going for a walk and talking to his grandfather on topics which he says he does not feel confident and comfortable with to discuss with his mother. As to his grandmother, he enjoys the meals she

cooks and the stories that she tells him. At [31] the support and presence of his grandparents are acknowledged. His education is set out at paragraph 33 – 34 and identifies the support that he has his grandparents. At paragraph [46] the ISW makes reference to the family unit which now includes the grandparents and that it is his view that any separation from significant members of the family unit is likely to have an impact on his educational, social and emotional development. This is particularly so in relation to the events in 2015 (see 47 – 48). At paragraph [54] the ISW refers to any harm that F is likely to suffer and at paragraph 56 – 62 he sets out his conclusions. He concludes at [56] that F is currently settled in the care of his mother and maternal grandparents who were supporting F to meet his developmental needs and that as his mother is now working full-time, she shares childcare responsibilities with her parents. The current structure is of paramount importance in F's life and any breakup of unit is likely to have a negative impact. The presence of the grandparents have minimised any impact as a result of the events in 2015. He concludes that any removal would not be in F's best interest.

38. In his evidence he made reference to the attachment and bond that had been built up between F and his grandparents. He made reference to the strong bond and attachment that had been made and that was more important as it had occurred following the time that he lost his father. He made reference to his second report and that the grandfather had now filled in the shoes of F's father and was playing a parental role in supporting F's mother.
39. In the light of this unchallenged evidence I am satisfied that it is in the best interests of F that his grandparents remain in the United Kingdom. Whilst the FTTJ found it was in the best interests of F to remain with his mother, any assessment of a child's best interests does not preclude the position that it may be in their interests to remain with more than one family member. It is plain from reading the reports that in the light of the tragic events in 2015, the presence of his grandparents have been an important source of stability for the children as well as for their mother. The evidence before me makes reference to F's current needs and that his grandparents are playing their part in ensuring that he is meeting his social, educational and developmental needs.
40. Having made an assessment of his best interests I am required to carry out the balancing exercise and reaching a finding on proportionality, by having regard to the considerations set out in section 117B of the Nationality, immigration and Asylum Act 2002 (section 117A).
41. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under Section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in

section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

42. S117B Article 8: public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.

43. S117B(6) provides that 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.

44. There is relevant guidance in the Respondents IDI dealing with what constitutes a "genuine and subsisting parental relationship" for the purposes of Appendix FM of the Immigration Rules, in particular para EX.1 in respect of leave sought as a "partner" or "parent." I have not been provided with a copy of the guidance nor any specific submissions by either party by reference to the guidance or the relevant case law other than in passing.
45. No reliance is placed upon those Rules in this case as the Appellants cannot meet the requirements of a partner or parent, however, the guidance itself deals with the very same requirements in s.117B(6).

In para 11.2.1, the IDI provides as follows:

"11.2.1 Is there a genuine and subsisting parental relationship?

Where the application is being considered under paragraph EX.1.(a) in respect of the 10-year partner or parent routes, the decision maker must decide whether the applicant has a 'genuine and subsisting parental relationship' with the child. This will be particularly relevant to cases where the child is the child of the applicant's partner, or where the parent is not living with the child.

The phrase goes beyond the strict legal definition of parent, reflected in the definition of 'parent' in paragraph 6 of the Immigration Rules, to encompass situations in which the applicant is playing a genuinely parental role in a child's life whether that is recognised as a matter of law or not.

This means that an applicant living with a child of their partner and taking a step-parent role in the child's life could have a 'genuine and subsisting parental relationship' with them, even if they had not formally adopted the child, but only if the other biological parent played no part in the child's life, or there was extremely limited contact between the child and the other biological parent. But in a case where the other biological parent continued to maintain a close relationship with the child, even if they were not living with them, a new partner of the other biological parent could not normally have a role equating to a 'genuine and subsisting parental relationship' with them, even if they had not formally adopted the child, but only if the other biological parent played no part in the child's life, or there was extremely limited contact between the child and the other biological parent. But in a case where the other biological parent continued to maintain a close relationship with the child, even if they were not living with them, a new partner of the other biological parent could not normally have a role equating to 'a genuine and subsisting parental relationship' with the child.

In considering whether the applicant has a 'genuine and subsisting parental relationship' the following factors are likely to be relevant:

Does the applicant have a parental relationship with the child?

what is the relationship - biological, adopted, step child, legal guardian? Are they the child's de facto primary carer?

is the applicant willing and able to look after the child?

are they physically able to care for the child?

Unless there were very exceptional circumstances, we would generally expect that only two people could be in a parental relationship with the child.

Is it a genuine and subsisting relationship?

does the child live with the person?

where does the applicant live in relation to the child?

how regularly do they see one another?

are there any relevant court orders governing access to the child?

is there any evidence provided within the application as to the views of the child, other family members or social work or other relevant professionals?

to what extent is the applicant making an active contribution to the child's life?

Factors which might prompt closer scrutiny include:

the person has little or no contact with the child or contact is irregular;

any contact is only recent in nature;

support is only financial in nature; there is no contact or emotional support;

and/or

the child is largely independent of the person.

Other people who spend time with, or reside with the child in addition to their parents, such as their grandparent, aunt or uncle or other family member, or a close friend of the family, would not generally be considered to have a parental relationship with the child for the purposes of this guidance."

46. Para 6 of the Immigration Rules. First, para 6 has no direct application to Part 5A of the NIA Act 2002. Secondly, it defines a "parent" rather than what amounts to a "parental relationship" (see R (on the application of RK) v Secretary of State for the Home Department (s.117B (6); "parental relationship") IJR [2016] UKUT 00031 (IAC))
47. That case gave further guidance at paragraphs 41 and 42 as follows:

"41. I was also referred to the relevant guidance for Appendix FM in the Respondent's IDI. That no more than guidance in relation to the Rules and it cannot have any definitive role to play when interpreting s.117B (6). It is, nevertheless, a helpful document which, as I have already indicated, was relied upon by both parties to support their cases. It is recognised in the IDI that more than 2 persons may be in a "parental relationship" with a child. That, I apprehend, is not contentious. What is contentious is when and whether it is the case in the circumstances of this claim.

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 exist a "parental relationship," although whether or not that is the case will 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."

48. The case considered whether or not a grandparent who cared for her grandchildren, her daughter suffering from multiple sclerosis and Lupus, could be in a parental relationship for the purposes of section 117B (6). The judge considered that it was not necessary for an individual to show that they had parental responsibility before a parental relationship could be said to exist. What was important was whether they had taken on the role that a parent usually plays in the life of the child. He considered that in order to establish a parental relationship the individual must 'step into the shoes of the parent'. Where a non-biological parent caring for a child claims such a relationship its existence will depend upon all the circumstances including whether or not there are others (usually the biological parents) who have such a relationship with the child. He considered that it would be unlikely that that a person would be able to establish such a relationship where the biological parents continue to be involved in the child's life as the child's parents. In those circumstances it will be difficult, if not impossible, to say that a third party has stepped into the shoes of the parent.
49. I have carefully considered and reviewed the evidence that even taking into account the ISW evidence that there is a very strong bond and attachment between F and his grandparents and that he has "filled the shoes" of his father, I do not find that it has been established that the relationship is a "parental relationship" in the sense of how it is interpreted.
50. When applying the law to the facts of this particular appeal I am satisfied that the submissions made in the skeleton argument and orally and in the light of the evidence from the ISW both concentrate on the quality of the relationship rather than on the parental part of the phrase. Family units can comprise of a number of different people and can be involved in the upbringing of any relevant minor children. These may include family members such as grandparents, aunts and uncles, siblings and step siblings depending on the age difference, and others. It may also extend to others outside the family such as family friends or neighbours or other significant people and can include teachers. The strength of the relationships between such individuals and the child will vary greatly. On the facts of these appeal it is not suggested either by way of any submission or by any evidence that F's mother is not exercising parental responsibility or that she is exercising it jointly with either or both of her parents. There is no evidence either of them exercising any such responsibility by making any necessary decisions in respect of F. As set out in the decision of *RK* it will be very difficult to demonstrate the existence of a parental relationship when the biological parent is exercising parental responsibility on a day to day basis. I have taken into account the ISW report at paragraph 18 and I accept that F enjoys coming home from school with his grandfather, going for walks with him and enjoyed the conversation that they have (see paragraph 18) and also the time spent with his grandmother. I also accept what is set out at paragraph 17 and that given his mother is now in employment that the grandparents are assisting in some of the childcare arrangements (see paragraph 57). . His primary attachment is to his mother as can be

seen in the eco-map (paragraph 8 and 14). However the stability that the grand parents have provided to the family should not be underestimated (I refer to the contents of paragraph 56 of the ISW report). However I find that the evidence in the appeals falls some way short of establishing that F's relationship with his grandfather is a "parental relationship" and there is little evidence that relates to F's grandmother in this capacity.

53. Notwithstanding the conclusion tht I have reached above, the unchallenged evidence is that there is strong bond and attachment between F and both grandparents. As set out above it was not in issue that Article 8 is engaged in these appeals; it clearly is and it is based on the family relationship between F the grandparents set against the background of the tragic events in 2015. The Appellants live with their daughter, and F and his siblings (when they visit) in a family setting and the evidence before me is that they are involved in the care of F. His grandfather is described as helping him with homework, taking F to school and being a confidante when there are things that F cannot discuss with his mother (see paragraph 18). Both the Appellants have been an important stabilising influence and support in the lives of the family since the events in 2015.
54. The unchallenged evidence is that there will be detrimental effect upon F (and also likely to their mother) if the Appellants were to leave the family home. The potential impact upon F is set out and evidenced in the ISW report. I have already set out my best interest's assessment above. Whilst that the best interests of F are a primary consideration, such interests can be outweighed by other considerations. In my view it is necessary to consider the full impact of a decision which is not in accordance with the F's best interests, before concluding that they are outweighed by other considerations.
55. The central issue in considering the Appellants Article 8 claim is whether a fair balance has been struck between the personal interests of the family and the public interest in controlling immigration; see paragraphs 43 and 44 of the judgement in *MM (Lebanon)* drawing on *Jeunesse v The Netherlands* (2015) 60 EHRR 17.
56. In striking that balance it is necessary to consider the provisions of section 117B of the 2002 Act. I have no evidence before me that either appellant can speak English. However the FTTJ did find that the Appellant's were financially independent (see paragraph 89 of the FTTJ decision). It is also correct that the Appellants' private life in this country has been established while they were in this country at a time when their leave was precarious. They had entered as visitors for a limited time and did not have any expectation that they could remain in the United Kingdom indefinitely. However that is counterbalanced somewhat by the unusual circumstances which had led to them remaining in the UK. Accordingly, whilst applying subsection (4) that little weight should be given to this aspect, it is counterbalanced in my judgment by the particular circumstances in play here. I am also required to give weight to the public interest in maintaining effective immigration control.

57. These are therefore relevant factors in the proportionality balance and are to be taken into account in the overall assessment. However I do not find that they have the same weight that needs to be accorded the best interests of F. Despite the reference in the ISW report at paragraph 61 of F leaving the UK, or relocating, as Ms Aboni submits, it has never been the case that the Respondent considers it reasonable for F or his mother to leave the United Kingdom. F and his siblings and mother are British citizens. On the evidence before me, F (and the other grandchildren to a lesser extent based on their own circumstances) have a strong bond with the Appellants which goes beyond that which usually exists between grandparents and grandchildren given the loss of their father and the love and support and care that they have provided during what has been a very difficult period. The evidence before me is that there are still some concerns about F as outlined at paragraph 54 of the addendum.
58. The continuation of family life by way of visits is not possible in view of the agreed circumstances in Libya.
59. Therefore taking into account all of the factors I have identified and carrying out the requisite balance between the rights of the family and the public interest and on the particular factual matrix before me, I am satisfied that the balance is in favour of the Appellants remaining in the UK and that their (hypothetical) removal would be unlawful under Section 6 of the Human Rights Act 1988 and thus in breach of Article 8.
60. Even if I were wrong in that assessment, and also that it is not necessary to consider removal on a hypothetical basis, it is the Respondent's stated case that the Appellants should be granted humanitarian protection on the basis of the current circumstances in Libya and thus they would succeed in their appeal on that basis in any event.

Notice of Decision:

The decision of the First-tier Tribunal made an error on a point of law; it is set aside and remade as follows:

The appeals are allowed; the Appellants are entitled to a grant of humanitarian protection and leave on human rights grounds (Article 8).

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed, SM Reeds

Date: 27/6/2018

Upper Tribunal Judge Reeds