Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/50939/2021
HU/50941/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd May 2022	**On 15th June 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MARY BISIERI OMBUI
RAYMOND JOHN OMBUI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Harper, instructed by Central England Law Centre
For the Respondent: Ms Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Kenya born on 17 September 1946 and 25 June 1948 respectively. They appeal against the decision of First-tier Tribunal J K Thapar, dated 19 September 2021, dismissing their appeals against the refusal of leave to remain on human rights grounds.

Appellants' immigration history

2. The first appellant entered the UK in 2003 with entry clearance as a work permit holder valid until 9 October 2008. Her husband, the second appellant, entered the UK in 2006 as her dependant. On 6 October 2008, the appellants applied for indefinite leave to remain. The applications were refused and the appellants' appeals dismissed in May 2009. The appellants have remained in the UK without leave since 16 June 2009.

3. The appellants have made six further applications for leave to remain in the UK in June 2010, March and December 2013, September 2015, November 2016 and 16 July 2020, the subject of this appeal. The appellants applied for leave to remain on the basis of their family life with their adult daughter (CK) and granddaughter (BI), a British citizen born in 2009.

4. The respondent refused the applications on 17 March 2021 on the grounds the appellants could not satisfy Appendix FM or paragraph 276ADE of the immigration rules and there were no exceptional circumstances under paragraph GEN. 3.2 (taking into account the best interests of the child as a primary consideration: GEN. 3.3). The respondent concluded the appellants' removal would not breach Article 8. The appellants appealed.

First-tier Tribunal decision

5. First-tier Tribunal Judge Thapar ('the judge') found there were no very significant obstacles to re-integration in Kenya and it was accepted the second appellant's health conditions did not meet the Article 3 threshold. The appellants could not satisfy the immigration rules and the judge went onto consider Article 8 outside the rules. She answered the first four questions of Razgar in the affirmative and then went on to consider proportionality at [39] to [48].

6. At [46], the judge concluded:

> "I bring forward my findings above and find that the Appellants do not have a parental relationship with their granddaughter. Additionally, I do not find nor has it been suggested that [CK] or her daughter would be required to leave the UK. The best interests of the Appellants' granddaughter are met by her remaining with [CK] who has always taken an active role in her care."

7. The appellants applied for permission to appeal on four grounds:

   (i) The judge failed to assess the best interests of the child and therefore failed to consider the child's best interests as a primary consideration;

   (ii) The judge failed to give reasons for disregarding the Independent Social Work (ISW) report;

(iii) The judge failed to give adequate reasons for finding the appellants' granddaughter would be able to visit them in Kenya;

(iv) The judge considered the wrong test for a parental relationship and failed to consider relevant case law.

8. Permission was granted by First-tier Tribunal Judge Hollings-Tennant on 13 October 2021. In her rule 24 response dated 22 November 2021, the respondent submitted the judge gave full consideration to the child's best interests and it was open to the judge to find that the child's best interests were to remain in the UK with her mother. The judge gave adequate reasons for finding there was no satisfactory evidence to suggest removal of the appellants from the UK would have a detrimental impact on their granddaughter's education or emotional welfare.

Submissions

9. Ms Harper submitted the appellants had significant responsibility for BI who was born when CK was 18 years old. The judge failed to assess BI's best interests as a primary consideration. There was no assessment of BI's best interests or the impact of the appellants' removal. The judge failed to adequately consider the ISW report and carry out a careful assessment.

10. In response to a question from me, Ms Harper submitted the judge dismissed the evidence of Ms Brown in the ISW report at [33] but failed to make clear findings on the impact on BI. Ms Harper submitted the judge should have made positive findings on paragraphs 5.13, 5.14 and 5.17 of the ISW report. BI have lived with the appellants since birth and they had made a significant contribution to her life in the absence of her father.

11. Ms Harper submitted the judge accepted the evidence of Ms Begum (senior social worker) that there would be a severe emotional impact on BI and the appellants' removal would disrupt her schooling. The judge failed to consider this and made no positive findings.

12. The judge also failed to have regard to BI's letter in which she described the appellants as 'like a mother and father'. There was no reference to the loss caused to BI and whether her best interests could be outweighed by the public interest. The judge had not taken into account BI's best interests as a primary consideration. Had she done so it could have affected the proportionality balance and therefore the error was material.

13. Ms Harper submitted the judge failed to properly consider the evidence in the ISW report given the impact of separation was within Ms Brown's expertise. There were no sound reasons for rejecting her opinion which was supported by Ms Begum. The appellant's removal was not in BI's best interests and it would be cruel to separate the family. The judge failed to properly consider this expert evidence and there were no good reasons for rejecting it.

14. In relation to ground 3, Ms Harper submitted there was ample evidence in the appellants' bundle to show that the family were in regular receipt of food parcels and the respondent had accepted the application for fee waiver. The judge's finding that face to face visits could continue was unrealistic notwithstanding there was no evidence of CK's employment and income before the judge. The appellants' removal would dismantle the family.

15. Ms Harper submitted the appellants had stepped into the shoes of a parent and had a genuine parental relationship with BI. The appeal succeeded under section 117B and no separate proportionality assessment was required.

16. Ms Ahmed relied on the rule 24 response and submitted the grounds were disagreements with the judge's findings and an attempt to relitigate the appeal. The judge considered BI's best interests in advance of her conclusion at [46]. There was extensive reasoning and the judge was plainly alive to the family circumstances. The judge carried out the assessment of Article 8 in a reasoned and balanced way from [28] onwards.

17. The judge's finding that the appellants had not established a role beyond that of carers was open to the judge. She made positive findings at [37] and found there would be significant disruption to strong family bonds at [42] and [43]. The judge considered all relevant circumstances and concluded BI's best interests did not tip the balance in the appellants' favour.

18. In response to a question from me, Ms Ahmed submitted the judge was entitled to reject the opinion of Ms Brown in the ISW report. The judge's decision was a balanced assessment of BI's best interests and it could not be said the judge disregarded the expert evidence. There was no specialist evidence on the impact of removal on BI. It was open to the judge to find that the impact on BI was not akin to bereavement. Ms Brown was not an expert on 'educational impact'. Her conclusions at 5.14 were unsubstantiated and beyond her remit. The ISW report was insufficient to establish unjustifiably harsh consequences. Ms Ahmed submitted the judge considered the impact on BI of the appellants' removal. The judge considered all relevant matters, including the letter from BI (see [12]). Ms Brown had spent a limited amount of time (four hours) with the family.

19. In relation to ground 3, there was insufficient evidence to show that visits to Kenya were not possible and the appellants could keep in contact with BI. The appellants did not have a parental relationship with BI. The judge's findings were consistent with relevant case law. On the facts, the appellants were carers and had not stepped into the shoes of a parent. Section 117B(6) did not apply and BI did not have to leave the UK in any event. The judge had properly conducted the balancing exercise and there was no material error of law.

20. Ms Harper submitted Ms Brown was qualified to comment on the impact of separation. The judge failed to give proper consideration to the expert evidence and her reasons were inadequate. It was clear from the ISW report that the appellants' removal was not in BI's best interests. On the facts, BI's best interests outweighed the public interest and the judge erred in law in concluding otherwise.

Conclusions and reasons

Ground 1

21. There was no challenge to the judge's finding at [26] that there were no insignificant obstacles to re-integration in Kenya. The appellants cannot satisfy the immigration rules. The judge's assessment of Article 8 outside the immigration rules started at [27] where the judge properly directed herself following Razgar.

22. At [28], the judge acknowledged the appellants have lived with CK as a family since 2006 and BI has lived with them all her life. The judge considered the ISW report of Ms Brown at [30] to [33] and the significant level of care the appellants provide for BI. The judge considered the evidence from Ms Begum at [34] to [36] and the appellants' length of residence in concluding there were strong family bonds between the appellants, CK and BI. The judge answered the first four questions in Razgar in the affirmative. The remaining issue to consider was proportionality.

23. The judge commenced this assessment at [39] where she considered CK's parental role and the appellants' care for BI while CK is at work [40]. At [42] the judge found that separating BI from the appellants would be a 'significant disruption in a relationship which is enriching'. The focus of the decision at [39] to [46] is the effect of the appellants' removal on BI. Any failure to specifically refer to BI's letter was not material because it was apparent from [12] the judge considered all the documentary evidence.

24. I find that the judge has considered BI's best interests as a primary consideration and she has taken into account all relevant circumstances from [28] onwards. When the decision is read as a whole it is apparent that BI's best interests were at the forefront of the judge's mind and she considered the impact on BI of the appellants' removal in the balancing exercise.

25. At [46], the judge summarised her earlier findings and it was open to her to conclude that BI's best interests are to remain in the UK with CK, her mother. There was no material error of law in respect of Ground 1.

Ground 2

26. It cannot be said the judge failed to consider the evidence from the social workers given her numerous references to the evidence of Ms Brown and Ms Begum throughout the decision. At [32], the judge quoted Ms Brown, stating that BI will "enter into a state of despair akin to a bereavement and loss, changing all key areas of her life." The judge then set out Ms Brown's opinion of the relationship between BI and the appellants and the effect of removal.

27. The judge is not bound to accept the opinions of the social workers and she properly considered this evidence in the round. I find the judge gave adequate reasons at [32] for rejecting Ms Brown's opinion that the appellants' removal would be akin to bereavement. The judge noted there was no evidence from an educational psychologist to show that appellants' removal would significantly impact on BI's education and emotional advancement and there was still the possibility of face to face visits and video calls.

28. Contrary to Ms Harper's submissions, it was apparent the judge considered paragraph 5.13, 5.14 (quoted at [32]) and 5.17 of the ISW report and the judge was not obliged to make positive findings. The judge adequately considered the evidence of Ms Begum at [35] and [36] and it is apparent on a fair reading of the decision that the judge relied on this evidence in support of her Article 8 findings. There was no material error of law as alleged in Ground 2.

Ground 3

29. The judge was entitled to take into account the lack of evidence of CK's employment and income in concluding the appellants' had failed to show that BI and CK would not be able to visit them in Kenya. This finding was open to the judge on the evidence before her. The evidence in the appellants' bundle referred to in the grounds was insufficient to undermine this conclusion. There is no material error of law in Ground 3.

Ground 4

30. The judge's finding that the appellants had not 'stepped into the shoes of a parent' was open to the judge on the evidence before her and was consistent with relevant case law. The judge gave adequate reasons for the weight she attached to the social workers' evidence. I am not persuaded the judge applied the wrong test. The judge found that CK was actively involved in BI's care, notwithstanding parts of that care had been delegated to the appellants. There was no suggestion CK was unable to continue caring for BI if the appellants are removed to Kenya. Section 117B(6) does not assist the appellants. There is no material error of law in Ground 4.

Summary

31. On the facts of this case, the judge properly attached significant weight to the public interest. The appellants could not satisfy the immigration rules and they had remained in the UK without leave for over 12 years. The judge's finding that the public interest outweighed BI's best interests and the appellants' Article 8 rights was open to the judge on the evidence before her.

32. Accordingly, there was no material error of law in the decision of the First-tier Tribunal dated 19 September 2021 and I dismiss the appellants' appeals.

J Frances

Signed Date: 27 May 2022

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal, we make no fee award.

J Frances

Signed Date: 27 May 2022

Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.