Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13834/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 April 2019 and 15 July 2019	**On 31 July 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E K
(ANONYMITY DIRECTION MADE)

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify E K or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms S Panagiotopoulou, Counsel, instructed by Yemets Solicitors

DECISION AND REASONS

Introduction

1. For the sake of continuity and ease of reference, I shall refer to the appellant in these proceedings as Secretary of State and to the respondent as the claimant.

2. This is the remaking of the decision in the claimant's appeal following my error of law decision, promulgated on 8 April 2019, in which I found that the First-tier Tribunal had materially erred in law. My error of law decision is appended, below. In summary, I concluded that the First-tier Tribunal had, in light of relevant case-law, been wrong to have found that the claimant had a "genuine and subsisting parental relationship" with her granddaughter, V, within the meaning of section 117B(6)(a) of the Nationality, Immigration and Asylum Act 2002, as amended ("NIAA 2002").

3. I set the decision of the First-tier Tribunal aside, retained the appeal in the Upper Tribunal, set the matter down for a resumed hearing, and, on 3 June 2019, issued directions to the parties.

4. By way of very brief background, the claimant is a dual US/Russian national. She has resided in the United Kingdom since August 2011. That leave expired on or about 20 March 2017 and she has been in this country unlawfully ever since. Her article 8 claim is, and always has been, predicated upon a close relationship with V (now aged 8 ½), one that has developed in the context of what can properly be described as at the very least a "complicated" set of familial circumstances.

The issues in this case

5. As matters now stand, the relevant issues in the claimant's case can be summarised as follows:

   i. does the claimant have a "genuine and subsisting parental relationship" with V within the meaning of section 117B(6)(a) NIAA 2002, and, if she does, would it be unreasonable to expect V to leave the United Kingdom;

   ii. if section 117B(6) NIAA 2002 does not apply, can the claimant succeed on article 8 grounds in any event.

6. In light of the findings of the First-tier Tribunal, there is no dispute that the claimant has family life with V.

7. It is accepted by the claimant that she cannot satisfy the requirements of the relevant Immigration Rules.

The evidence before me

8. In remaking the decision, I have had full regard to the following sources of evidence:

i. the Secretary of State's original appeal bundle, under cover of front sheet dated 15 October 2018;

ii. the claimant's original appeal bundle, indexed and paginated 1-20;

iii. the claimant's supplementary appeal bundle, served preparation for the resumed hearing, indexed and paginated 1-50;

iv. oral evidence from the claimant, a full note of which is contained in the record of proceedings.

9. The substance of the claimant's written evidence is contained within three witness statements, dated 21 April 2017 (the Secretary of State's bundle), 15 January 2019 (claimant's original appeal bundle), and 12 June 2019 (claimant supplementary appeal bundle).

The parties' submissions

For the Secretary of State

10. Mr Whitwell relied on the Secretary of State's reasons for refusal letter, dated 14 June 2018. In respect of section 117B(6)(a), both of V's parents had parental responsibility for her and provided relevant care. There was no evidence from V's mother. The mother was clearly involved in her daughter's life. Notwithstanding any difficulties that the mother might be facing, she maintained a genuine parental relationship with V. V's father was involved in her life. Although his circumstances were complicated, he nevertheless provided care for his daughter. Mr Whitwell posed the rhetorical questions of why an order of the Family Court had not been varied if the mother's circumstances were as bad as claimed, and why V's father had not sought to have her live with him in Surrey.

11. Outside the context of section 117B(6), the existence of family life between the claimant and V was confirmed. However, the Secretary of State's decision was in all the circumstances proportionate. The claimant had been in the United Kingdom on a precarious basis before her leave to remain ended. She has not been in this country for a particularly long period of time. She cannot meet any of the relevant Immigration Rules or the requirements of section 117B(6). It was noted that the psychologist's report on V does not mention that the mother has problems with alcohol. The reference in that report to "immediate family" suggests that V would have support from family members beyond simply the claimant. In respect of the possibility of V developing Separation Anxiety Disorder, it was noted that the author used speculative terms in her report.

For the claimant

12. Ms Panagiotopoulou relied on her skeleton argument. She noted the positive findings made by the First-tier Tribunal. She acknowledged the absence of the order from the Family Court, but relied on the evidence that had been provided. It was

submitted that V lived within what was described as a "dysfunctional" family setting. The mother was unable and/or unwilling to provide real emotional care for a daughter. V clearly spent a lot of meaningful time with the claimant. With reference to R (on the application of RK) (section 117B(6): "parental relationship") IJR [2016] UKUT 00031 (IAC), there were distinguishing features in the present case, namely that V's parents had divorced years ago. V was not part of a functioning family unit in a normal sense. V was about to move school in September 2019. This, combined with the circumstances in which she currently found herself, would create turmoil for her. Reliance was placed on the psychological report. V's best interests clearly required the presence of the claimant.

Findings of primary fact

13. It is right to say that some aspects of what is on any view a complicated set of familial circumstances are not entirely clear-cut. However, I do not have to be sure about the evidence, only satisfied on the balance of probabilities that it is essentially reliable. The First-tier Tribunal found the evidence before it to be credible, noting that much of that evidence had not in fact been challenged by the Secretary of State (see, for example, [41]). In addition, the Secretary of State's challenge to the decision of the First-tier Tribunal was not based upon the findings on the evidence, but focused instead on a misdirection in law as regards the effects of those findings.

14. With these points in mind, and having regard to the updated written and oral evidence before me, I find that I have been presented with a reliable and truthful account of all relevant circumstances pertaining to claimant and, importantly, V. Consistency and plausibility run through the evidence as a whole. Whilst it certainly would have been better if I had received additional evidence from V's mother and/or father, and if I had been provided with the order of the Family Court (subject to any relevant disclosure issues), these omissions do not materially undermine the evidential picture.

15. I find that V is a dual British/US national and has lived her entire life in the United Kingdom. V is the daughter of the claimant's own daughter. I find that the claimant established a close bond with her granddaughter from the point of her arrival in 2011. It is clearly the case that this close bond has, over the course of time, strengthened significantly as result of the factual circumstances I now set out.

16. V's parents separated soon after her birth. I am satisfied that mother suffered from post-natal depression and, as the claimant has put it, she "did not take to motherhood". I accept that the claimant took the decision to remain in the United Kingdom (lawfully at that stage) to help with her granddaughter's care in what were even at that early stage, difficult circumstances. I find that the claimant took an active role in V's life.

17. I find that in early 2012 the claimant and V, who had been living together in London, moved, with V going to live with her father in Surrey whilst the claimant went to

Hampshire. It appears as though V spent the weekdays at school there, living with her father, and went back to London to spend weekends with her mother. I find that the claimant was seeing V regularly during this period. At some point, the claimant moved into a lodge in the grounds of V's father's property. The claimant has resided there ever since.

18. V's father divorced her mother. I find that in June 2014, V's father married again. His new wife moved into the Surrey property. I find that the father and his wife had two children together.

19. At some point, and I cannot be sure as to when this was, an order was obtained from the Family Court concerning V's living arrangements. On the evidence as a whole, it is more likely than not that V was to spend 50% of the time with her mother and 50% with her father. However, I am also satisfied that V was not to live with her mother alone, but required the presence of additional adult in the household. I am satisfied that this was an account of the mother having what must have been relatively significant difficulties in respect of her parenting ability. These cannot have been so serious as to warrant V's removal from that setting. However, I am willing to accept that at least part of another's problems arose from misuse of alcohol to a greater or lesser extent. I accept the claimant evidence that in 2012 a nanny, L, lived with V and her mother in London, where V was then going to school. In January 2018, L left her position. I find that the claimant moved into the London address in place of L and undertook a good deal of responsibility for V's emotional and practical well-being. I accept the claimant evidence that the mother was not always present and would on occasion be out all night or even out of the country for short holidays abroad.

20. The question of the mother's parenting ability is a consistent thread in the claimant's evidence. It is of course possible that the claimant has significantly exaggerated what she has said about her own daughter. However, taking the evidence as a whole, including that tested by cross-examination at the hearing before me, I regard what she has said is being essentially truthful. The tenor of her evidence has reflected a genuine desire to have helped her daughter, but at the same time a resignation that matters simply have not improved over time and are, in her view, unlikely to do so in the future. I do accept that V's mother has limited parenting skills and that assistance from the claimant (whether this has been asked for not) has been very important, if not essential.

21. A specific example of the mother's difficulties with alcohol has been given in the most recent witness statement from the claimant. This was also highlighted in the oral evidence. I accept that a recent incident occurred in which the mother failed to pick V up from school. I find that when the claimant contacted the mother, the latter was intoxicated. The claimant believes that the mother may be seeking help with her alcohol dependency, but this is unclear.

22. I find that the claimant's relationship with her own daughter has to all intents and purposes, broken down. This is, I accept, due in part to a belief on the daughter's part that the claimant has sided with V's father, and also due to the claimant's desire to

produce the psychologist report in this appeal, something strongly objected to by V's mother.

23. I find that a housekeeper has now been employed by the mother in the London property.

24. As matters stand, V resides in London during the week because she attends a local school.

25. I accept that V will be moving school in September 2019. That school is also in London.

26. I turn now to the father's circumstances. I accept that he is currently going through a protracted divorce with the wife that he married in 2014. It would appear as though the divorce is proving to be acrimonious in many respects. I accept that there is an order of the Family Court preventing V's father from living in the Surrey property whilst his wife and their two children are staying there. V is not permitted to reside at that property whilst the wife is there. I accept that the wife then moves out of the house and resides elsewhere whilst the father comes back in and stays there for a limited period. I fully accept that V does not have a good relationship with the wife or her step-siblings.

27. To further complicate matters, I find that V's father is in a new relationship and that he has a new baby with his current partner. I find that the father stays at a London property when he is unable to reside in Surrey due to his wife's residence and the requirements of the court order.

28. I accept the claimant's evidence and that provided previously by V's father in his statement, that the latter is often out of United Kingdom on business.

29. I find that V has been generally living with her father at the London property when she is not residing with her mother.

30. I accept that V's father would like her to live with him on a permanent basis and perhaps attend school in Surrey. On the evidence before me, that is a decision that would be taken by the father if he considered the circumstances were appropriate and subject to what may well be objections by the mother.

31. During this time, I find that it has been difficult for the claimant to spend as much time with V as she had in the past and as she and her granddaughter would like. I accept her oral evidence that at the moment V is spending every weekend with her and half height-term holidays as well. These are temporary arrangements, which, in all the circumstances, are in my view entirely credible: V's parents are both experiencing problematic issues of their own, in one way or another.

32. I turn to the psychological report by Dr Tamara Licht, dated 12 January 2019 and included in the claimant's supplementary appeal bundle. I find that the author is suitably qualified and has expertise in respect of the matters on which she has

provided her opinion. I place significant weight upon her evidence. On the basis of the report I find that V does not currently suffer from any mental health problems. I appreciate Mr Whitwell's point on the use of certain speculative terms such as "if" and "may" in the report. To this extent, the expert is having to look into the future when giving a prognosis. I bear that in mind in my assessment of the report as a whole. However, at page 25 of the bundle, Dr Licht does conclude that V's attachment to the claimant is "secure" and that it is "highly likely that if [V] was to no longer be able to have physical contact with her grandmother, as a result of [E K] potentially leaving the UK, [V] could develop symptoms related with Separation Anxiety Disorder". Thus, speculation is tempered by the use of the phrase "highly likely".

33. Mr Whitwell is also correct to note that the author refers to V depending on her "immediate family". On the face of it, that would appear to refer to a wider circle than simply the claimant. I find that it is more likely than not that this phrase was used intentionally and that V's mother and father do play meaningful parental roles in her life, subject to what I say about their limitations

34. Finally, under the sub- heading of "prognosis", Dr Licht states that V if were to develop Separation Anxiety Disorder, certain therapies may be able to assist her. I find that to be the case.

Conclusions on section 117B(6)(a) NIAA 2002

35. Section 117B(6) NIAA 2002 provides:

> "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."

36. In [43]-[44] of RK, Upper Tribunal Judge Grubb provided the following guidance:

> "43. I agree with Mr Mandalia's formulation that, in effect, an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental relationship" with the child. It is perhaps obvious to state that "carers" are not *per se* "parents." A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of

> dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a "parental relationship."
>
> 44. If a non-biological parent ("third party") 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 biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent.

37. This view was essentially approved in the context of a statutory appeal at [55] of Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC).

38. There is now the judgement of the Court of Appeal in AB (Jamaica) [2019] WLR(D) 227. The Court emphasised the point that cases involving questions of parental relationships are highly fact-sensitive. The paragraphs from RK, quoted above, were approved. The Court also found that there was no requirement for "direct parental care" to be given by the individual claiming to have a genuine parental relationship with the relevant child.

39. As I mentioned in my error of law decision, there may be circumstances in which a grandparent can be said to have stepped into the shoes of a parent where the two biological parents are involved in the child's life, although examples of this will be exceptional.

40. For the reasons set out below, I conclude that the claimant does not have a "genuine parental relationship" with V. I emphasise the fact that these reasons are to be viewed cumulatively.

41. First, it is undoubtedly the case that the claimant has provided consistent and strong emotional support for her granddaughter during what has been a life made more difficult for her (the granddaughter) because of the circumstances of her biological parents. In short terms, whilst much around has been uncertain inconsistent, claimant has stood as a constant source of love and uncomplicated devotion.

42. In addition, the claimant has, through the time spent with V over time, provided something of a haven. In addition to the emotional importance of this, mentioned above, there has been a practical side, namely a physical space in which V has been able to reside at fairly regular intervals and get away from what must have been difficult (or at least at times uncomfortable) circumstances in the other locations at which she has lived.

43. Second, it is case that the claimant has not made the important decisions in V's life, whether that is in respect of schooling or indeed where she has in fact resided over the course of time. It is clear that these matters have been in the hands of her mother

and father, notwithstanding disagreements between them as to what might be best for their daughter.

44. Third, the claimant does not have parental responsibility by virtue of an order from the Family Court. That is not decisive, but it is relevant.

45. Fourth, despite the shortcomings of the mother and the complicated personal life of father, they have both maintained a parental relationship with V. Both have been involved in important decision-making (see above). Both have accommodated and maintained their daughter. When the evidence before me, cannot properly be said that they have abdicated their parental responsibilities towards V. I note that despite the mother's problems, there has been no order from a court preventing her from caring for V at all. The claimant is not the primary carer of V.

46. Fifth, the report of Dr Licht did not go so far as to indicate that the bond between the claimant and V is so strong as to effectively constitute a parent/child relationship. There is no other expert evidence, such as a report by an Independent Social Worker, which would support the existence of such a relationship.

47. Sixth, I acknowledge Ms Panagiotopoulou's point concerning RK and the fact that in the present case the parents are divorced. This would in principle count in the claimant's favour. However, I note the observation of Upper Tribunal Judge Plimmer at [39] of SR (Subsisting Parental Relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC), in which she said:

> "There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other."

48. Thus, the breakup of the family unit, whilst potentially of relevance, may not, on the particular facts of the case, represent a matter of real significance. In light of my findings and other conclusions, the fact that V's parents are divorced and do not have an amicable relationship, has a limited bearing on their subsisting parental relationships.

49. Bringing all of the above together, whilst for reasons that I shall come to in due course, there are compelling features of the claimant's relationship with V, this is not one of those exceptional cases in which it can be said that the claimant has effectively stepped into the shoes of a biological parent.

50. The claimant cannot therefore succeed by reference to section 117B(6) NIAA 2002.

Conclusions on the wider article 8 assessment

51. I turn to a wider assessment of the claimant's article 8 case.

52. It is accepted that the claimant has family life with V. Even if this issue was in dispute, I would unhesitatingly conclude that such a relationship existed. On the evidence before me, the bond between the claimant and her granddaughter has, if not since birth, then clearly over the course of time, gone significantly beyond the sense of love that would ordinarily be expected between two such individuals.

53. The claimant has a private life in the United Kingdom, although seen in isolation from her relationship with V, this must be said to be fairly tenuous.

54. The decision of the Secretary of State to refuse the claimant's human rights claim constitutes an interference with family life and, albeit by a narrow margin, the private life.

55. The Secretary of State's decision is in accordance with the law and pursues the legitimate aim of maintaining effective immigration control.

56. In undertaking the proportionality exercise, I set out the factors weighing in claimant's favour, and those counting against her.

Factors in the claimant's favour

57. V is a child affected by the decision under appeal. I therefore make a best interests assessment. As is, I trust, clear from my findings and previous conclusions, V has found herself in a very difficult set of familial circumstances, none of which are of course of her own making. On the one hand, her mother has fairly significant problems with alcohol misuse and has struggled to provide stable support to her daughter. There has been animosity from the mother towards the father, and it is likely that this will continue. On the other hand, her father has created (if that is the correct term) a very complicated personal life for himself. His unsuccessful marriages, current relationship, and the other children arising therefrom, together with his business activities overseas, have combined to remove stability from this side of V's life.

58. In the midst of this, is a young girl who, whilst not wanting for material possessions, undoubtedly has all the emotional needs of an 8 ½ year-old.

59. A, if not the, constant in her life has been the claimant, particularly in respect of emotional support and a person to whom she turns for fun and stability. V's current circumstances, with her father's divorce not yet finalised and his commitment to a new partner and their baby, combined with the fact that she is due to change school in September of this year, enhances the reliance she places on the claimant.

60. The report of Dr Licht provides an important perspective as to what the future for V might hold. The report is in no way decisive, but it does provide a sufficiently solid platform upon which I am able to conclude that a rupturing of the relationship between the claimant and V is likely to have adverse consequences for the young girl. Those consequences may well be mitigated by treatment, but my view the avoidance of such problems arising in the first place is a very important factor. The

claimant's presence in V's life is, at least as matters currently stand, a significant means of providing the child with at least part of the support mechanism she needs during the difficult familial scenario which surrounds her.

61. I conclude that it is very strongly in V's best interests for her to have the claimant in her life on as constant a basis as possible.

62. I also take into account the fact that the claimant as sacrificed a good deal on her part in order to provide the care to V that she has. There is no question of the claimant wishing to reside in the United Kingdom simply because she prefers it. She has the nationality of two other countries and there is nothing to suggest that she could not live a relatively comfortable existence in either of them.

Factors in the Secretary of State's favour

63. The public interest in maintaining effective immigration control is, in and of itself, strong.

64. In this case, the claimant cannot meet the requirements of any of the relevant Rules, nor has she been able to rely on section 117B(6) NIAA 2002. I place additional weight on this.

65. The claimant's private life has been established and conducted during a period of precarious status and then unlawful status. Leaving her relationship with V to one side, I would significantly reduce the weight attributable to her private life in the United Kingdom.

66. In respect of the family life she enjoys with V, whilst not specifically addressed in section 117B, the precarious/unlawful status is nonetheless a relevant consideration. However, as Rhuppiah [2018] WLR 5536 indicates in respect of private life, a reduction in weight may be mitigated where there are compelling features of the protected right in question. In this case, for reasons set out above, there are strong compelling features of the family life such that significant weight is still attributable to it.

Neutral factors

67. The claimant speaks excellent English and she is clearly financially independent. These factors are of neutral value to the article 8 claim.

Final evaluative judgment

68. Having weighed up the competing factors, I conclude that the balance tips in favour of the claimant. In light of the strength of V's best interests, in particular as they currently stand, removal of the claimant in consequence of the Secretary of State's refusal of her human rights claim would be disproportionate. The margin of success is not wide, but it very rarely would be.

69. I have emphasised the importance of V's current circumstances. This is because they are at present particularly difficult and unsettled. However, it may be that matters relating to her father's circumstances are resolved in due course. It may be that her mother obtains effective treatment for her problems. This is a case in which there is a realistic prospect of V's situation improving. This in turn may well have an impact on the claimant's ability to obtain further leave to remain in due course. She should not be under the misapprehension that her success in this appeal will inevitably lead to settlement in the United Kingdom.

70. The claimant succeeds on article 8 grounds.

Notice of Decision

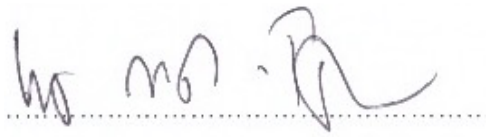
The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I have set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing E K's appeal on human rights grounds.

Anonymity direction

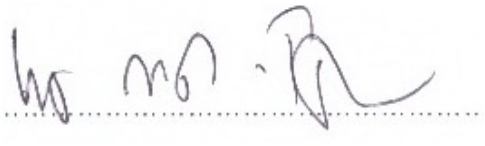
A direction was made by the First-tier Tribunal and in all the circumstances, including in particular the fact that a child plays a central role in this appeal, I maintain that direction in the Upper Tribunal.

Signed  Date: 23 July 2019

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00. E K has succeeded in her appeal and there are no sound reasons for me to reduce the fee award.

Signed  Date: 23 July 2019

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13834/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 April 2019	**On 8 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E K
(ANONYMITY DIRECTION MADE)

Respondent

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

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

Representation:

For the Appellant:	Mr Whitwell, Senior Home Office Presenting Officer
For the Respondent:	Ms S Panagiotopoulou, Counsel, instructed by Yemets Solicitors

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant ("the Secretary of State") against the decision of First-tier Tribunal Judge Oxlade (the judge), promulgated on 30 January 2019, by which she allowed the appeal of Miss E K ("the Claimant"), a dual national of the USA and Ukraine. The appeal was against the decision of the Secretary of State, dated 14 June 2018, refusing the Claimant's human rights claim, which had in turn been made on 27 April 2017.

2. In essence, the Claimant's case was as follows. Having arrived in this country in August 2011 as a Tier 2 migrant, she became heavily involved in the life of her granddaughter, V, who was born in 2010. V's family circumstances were complicated. Her mother (the Claimant's daughter) had suffered from post-natal depression and had separated from V's father when the child was still a baby. The Claimant had taken an active role in V's life, providing emotional and practical support. V's father remarried and had children with his new wife. During this period V was living with both her mother and her father, the majority of the time being spent with the former. However, the Claimant continued to see a lot of V. The family's dynamic was further complicated when the father separated from his new wife and began a relationship with another woman who, at the time of the hearing before the First-tier Tribunal, was pregnant. The Claimant's case on appeal was essentially that she had become a very important part of V's life to the extent that her removal from the United Kingdom would violate protected Article 8 rights.

The judge's decision

3. The judge had to deal with a difficult preliminary issue. A report had been commissioned from a psychologist in respect of V's wellbeing. Initially V's mother had consented to this report being produced. However, upon reading it she changed her mind and objected to it being put in evidence for the purposes of the Claimant's appeal. Ultimately, the report was not adduced in evidence (see [10]-[13] of the decision).

4. Having described the evidence that was before her in some detail, the judge sets out her findings and conclusions at [39]-[49]. She notes the absence of any provisions within the Immigration Rules ("the Rules") relating to relationships between grandchildren and grandparents. That relationship in the present appeal was, concluded the judge, of singular importance given the very close bond established between the two of them, a bond that has arisen out of difficult familial circumstances. The circumstances are detailed in [41] and I have summarised them in paragraph 2, above.

5. It having been accepted by her representative that the Claimant could not meet any of the provisions of the Rules, the judge goes on to consider Article 8 in its wider context. The judge concludes that there was family life between the Claimant and V. The Secretary of State's decision was said to constitute a sufficiently serious interference in the Claimant's family life in order to engage Article 8. A number of factors arising under section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") are considered.

6. At [47] the judge poses the question, "is there is 'parental relationship'?" (this being with reference to section 117B(6) of the 2002 Act). She was of the view that the term was undefined but sufficiently wide enough to cover the care of a child by, amongst others, a grandparent. On the facts of the case before her, the judge concluded that the Claimant had effectively acted as a "third parent" to V, that she had exerted a "stabilising influence" on her granddaughter, and had provided a "haven" for her in difficult times. As a result, the judge concluded that the Claimant had a "genuine and subsisting parental relationship" for the purposes of section 117B(6)(a) of the 2002 Act. At [48] the judge concludes that in light of V's circumstances it would not be reasonable for her to leave the United Kingdom. On this basis, the Claimant's appeal was allowed.

The grounds of appeal and grant of permission

7. The Secretary of State asserts that the judge misdirected herself in respect of section 117B(6) of the 2002 Act. It is said that she failed to take into account relevant case law including Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC) and R (on the application of RK) (section 117B(6): "parental relationship" IJR [2016] UKUT 00031 (IAC), and that it was not sustainable to have concluded that the Claimant had a "parental relationship" with V.

8. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 19 February 2019. He observed that the judge had arguably erred in reaching the core conclusion that she did and that there was arguably nothing exceptional about this case.

The hearing before me

9. For the Secretary of State, Mr Whitwell provided a skeleton argument upon which he relied, together with the grounds of appeal.

10. Ms Panagiotopoulou submitted that there were no material errors in the judge's decision and that the grounds amounted to nothing more than a disagreement. She emphasised the judge's findings of fact at [40]-[41] and submitted that a holistic view of the evidence had been taken. The Claimant had had a deep involvement in V's life since birth and that that life had involved a good degree of "turmoil". The judge was entitled to have concluded that the Claimant acted as a "third parent". In

consequence, she had been entitled to conclude that there was a "parental relationship" within the meaning of section 117B(6)(a) of the 2002 Act. The cases of Ortega and RK were distinguishable on their facts.

11. In reply, Mr Whitwell submitted that section 117B(6) simply did not contemplate the ability of a grandparent to have a parental relationship. In any event, even if such a relationship were possible in principle, it could not be the case on the facts of the present appeal. He submitted that the judge had not allowed the Claimant's appeal on the basis of exceptional or compelling compassionate circumstances but solely on the basis of section 117B(6), and this was something that she was not entitled to have done.

Decision on error of law

12. I conclude that the judge has materially erred in law.

13. The findings of fact in respect of the relationship between the Claimant and V are clear and in any event have not been challenged by the Secretary of State. It was certainly open to the judge to conclude that there was family life between the Claimant and her granddaughter, as it was for her to conclude that the refusal of the human rights claim constituted a sufficiently serious interference with that family life.

14. The central issue is the application of section 117B(6) of the 2002 Act to the Claimant's case. That provision states:

> "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."

15. Although it is right that the term "parental relationship" in section 117B(6)(a) is not defined within the statute, it has been considered by the Upper Tribunal on two occasions; in Ortega and RK. In [43]-[44] of RK, Upper Tribunal Judge Grubb provided the following guidance:

> "43. I agree with Mr Mandalia's formulation that, in effect, an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental relationship" with the child. It is perhaps obvious to state that "carers" are not *per se* "parents." A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit).

> Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a "parental relationship."
>
> 44. If a non-biological parent ("third party") 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 biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent.

This view was essentially approved in the context of a statutory appeal at [55] of Ortega.

16. Both RK and Ortega had been published at the time of the hearing before the judge. Unfortunately, she was either not referred to them or, if she was, failed to address the guidance provided therein. That omission is significant in this case because a key element of that guidance is that in situations where both biological parents in fact take an active role in a child's upbringing, as was clearly the case here, it will, in the great majority of cases, be very difficult for a third party, such as the Claimant, to be able to show that they have "stepped into the shoes" of a parent.

17. On the facts as found by the judge, whilst there clearly was a strong bond between the Claimant and V, the former had never had parental responsibility in a formal sense, had never been a primary carer for her granddaughter, and indeed had not been living with V for even a significant minority of the time.

18. It is true that in [47] the judge found that the Claimant had acted as a "third parent" to V. However, this was done in the absence of any reference to the guidance provided by the Upper Tribunal and in light of a factual matrix that would, at least on its face, have made it difficult to reach a sustainable conclusion in the Claimant's favour.

19. That is not to say that it is impossible to conceive of scenarios in which a grandparent might acquire a "parental responsibility": as RK makes clear, cases are highly fact-sensitive. However, it would need to be shown that the relevant legal approach was carefully followed (including a consideration of the guidance provided by case-law), with a sufficiently strong underlying factual basis, for this to be so.

20. In summary, the judge erred by failing to direct herself to or, as a matter of substance, applying, the relevant guidance on the meaning of "parental relationship" within section 117B(6)(a) of the 2002 Act.

21. I have gone on to consider whether it can be said that the judge would have allowed the appeal on an alternative basis, having due regard to her findings of fact. I

acknowledge that on a reading of [39] and the first sentence in [40], it could potentially be said that she was concluding that there were exceptional or particularly compelling circumstances in the case. Having said that, what follows thereafter is an assessment of the factual situation, a consequent finding that family life existed, and then a progression through to the proportionality exercise. At this crucial step, the judge is squarely resting her decision on the basis of section 117B(6), not on a wider Article 8 balancing exercise.

22. Therefore, it cannot be said with sufficient confidence that she was intending to make either a primary or an alternative conclusion founded on a wider Article 8 assessment. Nor is it the case that, on the facts found, it was inevitable, or close to being inevitable, that the Claimant's appeal would have been allowed in any event.

23. In light of the above I conclude that the error in respect of section 117B(6)(a) is material and I set the judge's decision aside.

Disposal

24. In the usual course of events I would be remaking the decision in this appeal based upon the evidence before me. However, Ms Panagiotopoulou informed me that the Claimant was seeking to adduce the psychologist's report referred to earlier in my decision and dealt with by the judge as a preliminary issue. I was told that the Claimant's relationship with V's mother, which had already been strained, had now broken down altogether. I was asked to adjourn the appeal, make an order for disclosure of the psychologist's report and then hold a resumed hearing in due course.

25. Mr Whitwell did not object to this course of action.

26. I informed the representatives that I would consider the issue of an order for disclosure, subject to my view on the error of law issue and whether such an order would in all the circumstances be appropriate with reference to rules 2, 5(3)(d), 15, and 16 of the Upper Tribunal Procedure Rules 2008.

27. I have decided to adjourn this appeal and have it set down for a resumed hearing in due course. A Directions Notice (including any order I make in relation to the psychologist's report) will be sent out separately.

28. The two core issues to be addressed at the resumed hearing are:

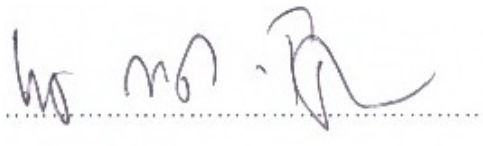
    i. Does the Claimant have a "genuine and subsisting parental relationship" with V within the meaning of section 117B(6)(a) of the 2002 Act and, if she does, would it be unreasonable to expect V to leave the United Kingdom;

    ii. If section 117B(6) does not apply, can the Claimant succeed on a wider basis Article 8 basis.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I adjourn this appeal for a resumed hearing in due course.



Signed Date: 3 April 2019

Deputy Upper Tribunal Judge Norton-Taylor