Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Birmingham Civil Justice Centre
On 5 November 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE QUEEN (ON THE APPLICATION OF RK)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Ms E Rutherford instructed by Cartwright King Solicitors
For the Respondent: Mr V Mandalia, instructed by the Government Legal Department

1. *It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.*

2. *Whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances*

and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent.

3. *Applying that approach, apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual, but not impossible, for more than 2 individuals to have a "parental relationship" with a child. However, the relationships between a child and professional or voluntary carers or family friends are not "parental relationships".*

JUDGMENT

Judge Grubb:

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the applicant's grandchildren. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the applicant or those children. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

Introduction

2. The applicant is a citizen of India who was born on 26 June 1957. In these proceedings she challenges three decisions of the respondent dated 14 March 2014, 12 May 2015 and 7 October 2015 by which the respondent refused to grant the applicant leave to remain outside the Rules under Art 8 of the European Convention on Human Rights. Permission was granted following an oral hearing by His Honour Judge Purle QC on 18 March 2015.

3. As will become clear shortly, the basis of the applicant's challenge is that her removal from the UK would breach Art 8 because she is, in effect, in a "parental relationship" with her three grandchildren who live in the UK with her son and daughter-in-law.

Background

4. The applicant's son ("SA1") and daughter-in-law ("SA2") live in the UK. They have four daughters: "L" who was born on 21 November 1998, "R" who was born on 12 May 2002, "E" who was born on 22 August 2007 and "J" who was born on 10 November 2011.

5. In 2002/2003, the applicant's daughter-in-law was diagnosed as suffering from multiple sclerosis and also Lupus. These conditions are serious and progressive in nature and, on the applicant's case, have resulted in SA2 being unable to look after her children.

6. On 8 August 2002, the applicant was granted entry clearance as a visitor valid until 8 February 2003. She arrived in the UK as a visitor on 15 August 2002.

7. On 27 January 2003, the applicant applied for leave outside the Rules as a carer. It was whilst the applicant was in the UK that SA2 was first diagnosed with multiple sclerosis. On 6 June 2003, the applicant was granted leave to remain as a carer outside the Rules until 6 September 2003.

8. On 29 January 2004, the applicant again applied for leave outside the Rules as a carer but this was refused on 24 March 2004. Subsequently, on 2 April 2004 following a reconsideration that refusal was maintained. A subsequent appeal by the applicant was rejected, it would appear, because the applicant had no right of appeal.

9. On 11 August 2004, the applicant again applied for leave to remain outside the Rules as a carer. On 7 November 2005, she was granted discretionary leave to remain until 7 November 2006.

10. On 31 October 2006, the applicant again applied for further leave to remain as a carer outside the Rules but that application was refused on 25 January 2007. Thereafter, the applicant became an overstayer.

11. On 7 July 2012, the applicant applied for leave to remain under Art 8. Further representations were made on 29 May 2013. The basis of the application was, again, SA2's health and the need for the applicant to remain to look after her grandchildren of which there were now four.

12. On 10 June 2013, the respondent refused the applicant's application for leave under Art 8. That decision was served upon the applicant on 13 August 2013. Thereafter, on 7 November 2013 the applicant brought judicial review proceedings challenging that decision. That application was compromised by a consent order approved by the Upper Tribunal on 23 December 2013 on the respondent agreeing to reconsider the applicant's application for leave.

13. On 14 March 2014, the respondent, having reconsidered the application, again refused the applicant leave to remain. That is the first decision challenged in these proceedings. Thereafter, following a pre-action protocol letter on 7 April 2014 the present proceedings were issued on 2 July 2014.

14. Permission to bring the claim was initially refused on the papers by the Vice President of the Upper Tribunal on 13 November 2014. The applicant renewed her application and, following an oral hearing, on 18 March 2015, HHJ Purle QC granted the applicant permission to bring these proceedings on the single ground that the respondent had failed properly to consider the grandchildren's best interests in accordance with her duty under s.55 of the Borders, Citizenship and Immigration Act 2009 ("BCI Act 2009").

15. On 12 May 2015, the respondent issued a supplementary decision seeking to deal more fully with the grandchildren's best interests.

16. The substantive hearing of the claim was initially listed on 21 August 2015 before the Vice President. That hearing was adjourned because he had been the judge who had refused permission on the papers. However, at

that hearing the applicant sought to raise an additional ground namely that the respondent had failed to apply s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002") because the applicant had a "genuine and subsisting parental relationship" with her grandchildren. The Vice President gave permission to the applicant to amend her ground to incorporate that challenge and made consequential directions.

17. On 26 August 2015, the applicant served a re-amended statement of facts and grounds to include that challenge.

18. On 7 October 2015, the respondent issued a second supplementary decision specifically addressing the new grounds of challenge.

19. On 7 October 2015, the respondent served amended detailed grounds of defence.

The Issues

20. The applicant has been granted permission on two grounds.

21. First, and most recently, that the Secretary of State, in assessing the applicant's Art 8 claim outside the Rules, failed to apply s.117B(6) of the NIA Act 2002 which applied because the nature of the applicant's relationship with her grandchildren amounted to a "genuine and subsisting parental relationship".

22. Secondly, that the respondent's decision failed properly to take into account the "best interests" of the grandchildren in breach of her duty under s.55 of the BCI Act 2009.

23. In the re-amended statement of facts and grounds for review, the applicant also places reliance upon a ground set out in the initial claim, but upon which permission was not granted, namely that the respondent unlawfully failed to make an appealable immigration decision in accordance with her "request for removal decisions" policy. As I have said, the applicant was refused permission on that ground by HHJ Purle QC. Before me, Ms Rutherford did not expressly renew the applicant's application for permission on this ground. She accepted that if the applicant could not succeed on her principal ground, namely that she had a genuine and subsisting parental relationship with her grandchildren, she could not succeed on this ground either.

The Respondent's Decisions

24. The first decision of the respondent was taken on 14 March 2014 in response to the applicant seeking leave outside the Rules under Art 8.

25. Having initially considered, but rejected, the applicant's claim based upon her private life under para 276ADE of the Immigration Rules (HC 395 as amended), the respondent went on to consider under the heading "Leave Outside the Rules and section 55 Consideration" whether there were any "exceptional" circumstances which resulted in unjustifiably harsh

consequences such that leave should be granted outside the Rules. At pages 3–4 of the decision letter (tab C at pages 13–14), the decision letter is in the following terms:

> "However, it is not accepted that there are exceptional circumstances which would mean removal is inappropriate in your case.
>
> You first entered the United Kingdom on 15 August 2002 as a visitor. You were subsequently given leave to remain as a carer exceptionally outside the Immigration Rules on 06 June 2003 for 3 months. As is required you were given a warning to make other arrangements for the future care of your daughter-in-law [SA2]. However you chose to remain in the United Kingdom and make several other applications for leave to remain in the United Kingdom. Given the exceptional circumstances at that time you were granted 12 months' discretionary leave. However your application for indefinite leave to remain as a carer exceptionally outside the Immigration Rules was refused. From the evidence presented, your daughter-in-law's medical condition appears not to have significantly deteriorated since then, and the carer category is only regarded as a short-term measure to enable future care arrangements to be made, and you have already been in the United Kingdom for this reason since 15 August 2002. You have also chosen to ignore the Immigration regulations particularly when an Immigration Judge ruled that your appeal against refusal of leave to remain could not be heard and they refused to accept the notice of appeal.
>
> You have previously presented evidence from a Sheila Whitehead of Derby City Council Social Services. She stated '[SA2] would be eligible for support from Social Services'. It was also mentioned that support was available from G.P Dr Lacey and Alison Smith, Neurological Rehabilitation Nurse Specialist.
>
> Other evidence presented, has stated that [SA2's] husband is now self employed and because of this employment the family have moved to Leicester to enable him to be near his main employer. This move enabled [SA1] to be able to help look after his wife for a longer period and also gave him a degree of flexibility for his caring role within the family. This evidence would indicate that alternative care is available for [SA2]. As was required in your first extension of leave to remain.
>
> It has been stated that you have been living with your son, daughter-in-law and grandchildren for over ten years and both you and your family have established a private and family life with each other. You have stated that should you be removed from the United Kingdom your family life will be disrupted.
>
> All your representations have been reconsidered however there are no insurmountable obstacles to your family life being continued overseas.
>
> Furthermore, relationships between adult children and their parents will not normally constitute family life. In reconsidering the decision to maintain the refusal of your application the Secretary of State has given careful consideration to your rights under Art 8 of the European Convention on Human Rights. When you leave the United Kingdom there would be no insurmountable obstacles that would prevent you from continuing the same level of contact and family life that you had

prior to arriving in the United Kingdom. In view of this, the Secretary of State is satisfied that there will not be a breach of Article 8.

Throughout this reconsideration we have also taken into account the need to safeguard and promote the welfare of children in the United Kingdom in accordance with our duties under section 55 of the Borders, Citizenship and Immigration Act 2009.

In support of your application you have raised the fact that your grand children have been cared for by yourself for a considerable time. However it has been noted that the children that have been cared for by you, have both their father and mother residing with them in the United Kingdom. As previously stated your son's family do qualify for extra help in the care of your daughter in law. This care would enable the children's father to devote time for the care of the children. You would be able to visit the United Kingdom in the future and they would be able to visit to you in India as they have previously accompanied you and their family on visits to your homeland. This means that you will not lose (*sic*) contact with your grand children. Indeed with modern communication aids you will be able to keep in contact with your family in the United Kingdom on a regular basis. You will therefore be able to remain in the children's lives in the future.

You would return to India knowing the family unit would continue to enjoy their family life together. Whilst this may involve a degree of disruption to your private life, this is considered to be proportionate to the legitimate aim of maintaining effective immigration control and is in accordance with our section 55 duties. It has been decided that a grant of leave outside the rules is not appropriate."

26. As can be seen, the Secretary of State sought to take into account SA2's medical condition and the role played by the applicant in caring for her grandchildren including the context in which previous leave had been granted to the applicant as a carer.

27. That letter did not, however, deal specifically with a letter from the school of one of the grandchildren, R. As a result, on 12 May 2015, the Secretary of State issued a supplementary decision letter seeking more fully to take into account the evidence concerning the children and their best interests including that letter. At pages 1–3 of that letter (tab B at pages 32–34), under the headings of "Exceptional Circumstances" and "section 55 Consideration", the Secretary of State offered the following reason for refusing to grant leave outside the Rules:

"**Exceptional Circumstances**

….

In reaching a decision the Secretary of State has had regard to all of the material that was submitted in support of your client's application for leave to remain in the UK and the subsequent representations made on her behalf. In particular, the Secretary of State has had regard to the matters set out in the witness statement of your client's son, [SA1] and her daughter-in-law, [SA2]. The evidence provided in respect of the health of [SA2] has been considered, as has the letter from the headteacher of [… School].

It has been taken into consideration that your client has been living with her son and daughter-in-law [SA1 and SA2] in the United Kingdom whilst caring for their children due to [SA2]'s illnesses. Your client's daughter in law suffers from multiple sclerosis, connective tissue disorder and lupus arthritis which affects her daily life. Your client has previously been granted leave to remain as a carer exceptionally outside the Immigration Rules so therefore your client's application has been considered with reference to the Carers concession under Chapter 17, Section 2 of the Immigration Directorate Instructions.

In deciding your case, the following points have been considered:-

- the type of care required;
- what care is available;
- what alternative care arrangements are available.

Your client has previously provided evidence from Derby City Council Social Services stating [SA2] would be eligible for support from Social Services. Your client's son and daughter-in-law can gain access to as much care and support they need in your client's absence. It is also noted that your client's son [SA1] has now become self employed enabling him to look after his wife and children for a longer period of time during the day. There is nothing to prevent [SA1 and SA2] from gaining the required support from social services. It is also noted that they have been receiving help from [SA2] and the children's other grandmother. She has been assisting with the collection of the children from school. It is therefore seen that [SA1 and SA2] have alternate support here in the UK and if they feel this is not sufficient they are eligible for more support as stated above.

Therefore the Secretary of State is not satisfied that your client can meet the requirements of the concession relating to Carers and accordingly your application has been refused.

Section 55 consideration

Consideration has also been given to Section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). The duty to have regard to the need to safeguard and promote the welfare of children requires us to consider the effect on any children of a decision to exclude, or deport, against the need to maintain the integrity of immigration control. Our aim is always to carry out enforcement of the Immigration Rules with the minimum possible interference with a family's private life, and in particular to enable a family to maintain continuity of care and development of the children in ways that are compatible with the immigration laws.

It is noted that your client claims to have played a role in the care for her grandchildren, however all four children [L] born 21st November 1998, [R] born 12th May 2002, [J] born 22nd August 2007 and [E] born 10th November 2011 all live with both of their parents as a family unit and are not dependant on your client. The parental responsibilities when having children are to care and provide for your children. As these are not your client's children she cannot been granted leave outside to rules to help care for them. We have taken into

consideration that your client's daughter-in-law struggles with daily activities due to her illnesses. As previously stated your client's son's family do qualify for extra help from Social Services in the care of your client's daughter in law. We have also taken into consideration that due to your client's daughter-in-law's illness, your client will have played a more active role in her grandchildren's upbringing. However as already established, with [SA1] now being self employed and the care available to [SA2] through the appropriate authorities your client's grandchildren will be able to spend more time with their parents and build a stronger family unit together. Therefore your client can return to India knowing that her grandchildren who have both their father and mother residing with them in the United Kingdom can continue their family life together and continue to maintain regular contact through modern means of communication.

The Secretary of State has carefully considered the content of the letter written by the headteacher of the [… School]. It is noted that your client's granddaughter, [R] has had periods of anxiety and low self-esteem which had an impact on her health and progress, including threats to hurt herself. The headteacher considers the loss of her grandmother would undoubtably have a detrimental effect on her, both emotionally and academically. The headteacher is concerned that [R] has already started talking about hurting herself. These comments made by the headteacher have been carefully considered however, no medical evidence has been provided to support this claim, and as a British Citizen your client's granddaughter is entitled to support from the NHS and social services if required. If your client's granddaughter has had thoughts of self harm recently, or if she is self harming now there are telephone help lines with specially trained volunteers who will listen to your client's granddaughter, understand what she is going through, and help her through the immediate crisis.

The best interest of the children has been considered as a primary consideration by the Secretary of State. The children's best interests are served in the first instance by remaining with their parents. The removal of your client from the UK will not alter this position. In determining whether the need for immigration control outweighs children's best interests in the particular facts and circumstances of this case, the Secretary of State has also taken account of any factors pointing the other way. Although your client may have a very close relationship with her grandchildren and be involved in the arrangements made for their day to day care, your client's immigration history is relevant. The discretionary leave to remain in the UK previously enjoyed by your client expired on 7th November 2006 Your client has throughout been given warnings to make other arrangements for the future care of her daughter-in-law [SA2], but your client has chosen to remain in the UK unlawfully. The Secretary of State considers that strong weight has to be given to the need to maintain immigration control, and to the fact that your client has had no entitlement to remain in the UK since 7th November 2006.

Whilst the removal of your client from the UK will involve a degree of disruption to your client's private life and cause initial upset to her grandchildren, this is considered to be proportionate to the legitimate aim of maintaining effective immigration control and is in accordance with our Section 55 duties. It has been decided that a grant of leave outside the rules is not appropriate."

28. Following the adjourned substantive hearing on 21 August 2015, pursuant to the Vice President's permission to the applicant to amend her grounds, the Secretary of State issued a second supplementary decision on 7 October 2015 specifically dealing with the new issue which had arisen at that hearing, namely whether the applicant could establish that she had a "genuine and subsisting parental relationship" within s.117B(6) of the 2002 Act.

29. In the course of that decision, the respondent referred to the definition of a "parent" in para 6 of the Immigration Rules and the UKVI Immigration and Directorate Instructions regarding partners and parents: "*Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*" at section 11.2 dealing with what amounts to a "genuine and subsisting parental relationship". For the present, I set out the Secretary of State's reasoning and will return to these provisions below. At page 2 of the decision letter (tab A page LXXXII):

> "In considering whether the facts and circumstances of this case are sufficient to establish that your client has a genuine subsisting parental relationship with any one or more of her grandchildren, the Secretary of State has carefully considered the background to this case, and the medical evidence relied upon concerning the health of your client's daughter-in-law [SA2]. The Secretary of State has also carefully considered the matters set out in the Community Care Assessment completed by Leicester City Council and the assistance provided by your client in household tasks and in the arrangements for looking after her grandchildren.
>
> ....
>
> There are very limited circumstances in which the Secretary of State would consider that more than two people could be in a parental relationship with a child. The Secretary of State would generally expect that only two people could be in a parental relationship with a child. The circumstances set out in the guidance ensure that those such as step-parents are capable, in appropriate circumstances, of being recognised as having a parental relationship with a child. Even then, recognition of a parental relationship would only arise where the other biological parent played no part in the child's life, or there was extremely limited contact between the child and other biological parent. The guidance makes it plain that 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.
>
> Your client's four grandchildren live with both of their biological parents who both maintain a good and close relationship with the children and who both maintain parental responsibility for the children. All the important decisions relating to the childrens' future, including decisions about their welfare, care and education will be made by their biological parents. Your client does not therefore have a parental relationship with her grandchildren. Whilst your client plays a role in the day to day care of the children, she does so as a grandparent, and not as a parent.

Your client lives in the family home with her son, daughter-in-law and her grandchildren. The children live with their biological parents, who both maintain parental responsibility for the children and see the children every day. There is no evidence that your client has responsibility for the day to day decisions relating to the upbringing of the children akin to parental responsibility whether by operation of law or otherwise. It is unsurprising you're your client's grandchildren have a close relationship with your client, and would wish her to remain in the UK, in light of the current living arrangements. However, whilst your client plays a role in the day to day care of the children, she does so as a grandparent, and not as a parent.

As your client is not the parent of her grandchildren, and the household contains both biological parents of those grandchildren, your client does not meet the relationship requirements for leave to remain as a parent under Appendix FM.

It must also be noted that the biological parents of your client's grandchildren continue to reside in the same household and it cannot therefore be accepted that they absolved themselves of their parental duties, regardless of whether one of the parents is deemed medically unfit. The Secretary of State has carefully considered the medical evidence that has been made available concerning the health of your client's daughter-in-law. The evidence that has been provided, including the medical evidence and the report prepared by Leicester City Council is not such that your client's daughter-in-law is prevented from exercising her rights and duties as a parent of her children. The evidence establishes that your client provides assistance to her daughter-in-law and assists in the care of her grandchildren. However, whilst your client plays a role in the day to day care of the children, she does so as a grandparent, and not as a parent.

The household situation is no different to that of any UK household where one parent is unable to look after the children's daily needs, but another parent is able to do so. Arrangements for the care of such children remain a matter solely for the parent or parents of such children (or the local authority should the children's welfare be deemed so precarious that extra-parental intervention is appropriate).

Whilst the guidance that your client relies upon and which is set out above, infers that a 'third' parent could demonstrate that they have a genuine and subsisting parental relationship with a child, this is termed in the context of a step-parent, adoptive parent or legal guardian, none of which your client is. Whilst reference is made to a 'de facto' parent, we do not accept that your client falls within that definition as the fact remains that both parents remain in the household and that they are the 'real' parents of your client's grandchildren. A de facto parent is one who has assumed, on day-to-day basis, the role of the parent, fulfilling the role of making parental decisions on behalf of the child, and both the child's physical and emotional needs for care and affection, in circumstances where the biological parent(s) are unable to do so. Your client's grand children remain in the care of their biological parents and whilst it is acknowledged that your client provides support in meeting some of her grandchildren's physical and emotional needs, there are others to who the children can turn, including their natural father and maternal grandmother.

....

> Considering your client's case on an exceptional basis outside of the immigration rules, we do not accept that her circumstances, or that of the household, attain the level of such exceptionality as to warrant granting her leave to remain in the UK. As stated above, the parents of your client's grandchildren face no difficulties beyond those experienced by other UK households in the same situation. Whilst your client may be assisting the household by helping with the grandchildren's daily routines, this is not a sufficiently compelling factor to allow someone to remain in the UK.
>
> If the children's parents are unable to cope with the situation they are in, then they must take positive steps to engage assistance from someone who does not require daily leave to remain here (whether that is altering their work-life balance to furnish support for their children, seeking private care assistance, or availing themselves of social services – something that any other UK parent would be required to do so)
>
> For the above reasons, we do not consider granting your client leave to remain is appropriate in the circumstances."

30. There, as will be clear, the respondent concluded that the nature of the relationship between the applicant and her grandchildren did not amount to a "parental relationship" within s.117B(6) of the NIA Act 2002.

Discussion

1. Section 117B(6)

31. The applicant's first ground relies upon s.117B(6) of the NIA Act 2002. That provision is found within the new Part 5A of the NIA Act 2002 inserted by the Immigration Act 2014 with effect from 28 July 2014. Part 5A applies where "a court or tribunal" is required to determine whether a decision made under the Immigration Acts breaches Art 8 of the ECHR (see s.117A(1)). Of course, in these proceedings the challenge is to a decision of the Secretary of State and so, strictly speaking, Part 5A has no application. However, both parties recognise that the Secretary of State would in practice apply Part 5A to any relevant decision as a matter of "good administration" (see Dube (SS.117A-117D) [2015] UKUT 90 (IAC)). Mr Mandalia, on behalf of the respondent, accepted that was the position.

32. Part 5A sets out a number of considerations relevant in determining the "public interest question" namely whether any interference with a person's right to respect for his or her private and family life is justified under Art 8.2 (see ss.117A(2) and (3)). In considering the "public interest question," a court or tribunal (or by virtue of good administration the Secretary of State) is required to "have regard" to the considerations listed in s.117B in all cases and to those in s.117C in a case concerning the deportation of a foreign criminal. The latter is, of course, not relevant in these proceedings. Further, it is accepted that the sole issue in these proceedings is the application of sub-section (6) of s.117B.

33. Section 117B(6) is in the following terms:

"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."

34. There is no doubt that each of the applicant's grandchildren is a "qualifying child" as a British citizen under the age of 18 (see s.117D(1)). Part 5A, however, sets out no definition of what constitutes a "genuine and subsisting parental relationship."

35. In her decision letter, the Secretary of State set out the relevant guidance in her 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." No reliance is placed upon those Rules in this case, 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."

36. Both Ms Rutherford on behalf of the applicant and Mr Mandalia on behalf of the respondent place reliance upon this guidance.

37. Ms Rutherford submitted that the guidance recognised that more than two people could be in a parental relationship with a child. Applying the factors set out in the guidance, Ms Rutherford submitted that the applicant had day-to-day responsibility for the children and their care. Even though, as she accepted, the applicant did not have parental responsibility, that was not fatal to there being a "parental relationship" between the applicant and her grandchildren. Whether a person had parental responsibility for a child was, she submitted, only one factor that had to be taken into account. Ms Rutherford drew my attention to the evidence concerning the closeness of the relationship between the applicant and her grandchildren, in particular, R. She referred me to letters from L and R at pages 52 and 53 of tab B. Further, she referred me to a letter from the applicant herself at pages 64-65 of tab D which spoke to the closeness and dependency between the children and the applicant. In addition, she referred me to the supporting medical and other professional evidence including from R's school concerning SA2's inability to look after her own children and the applicant's involvement with them. Ms Rutherford submitted that when all this information was pulled together, there were effectively three parents bringing up the children.

38. Mr Mandalia also relied upon this guidance and pointed out that it stated that only in "very exceptional circumstances" would more than two people be considered to be in a parental relationship with a child. He submitted that a "parental relationship" existed where somebody was effectively "standing in the shoes of the parent." Here, he submitted that the applicant was not in that position. She played a full role but as a grandmother. The children lived with their parents who took responsibility for making decisions in their lives. They played a significant role and the applicant was not a *de facto* primary carer. He pointed out that SA1, in his statement, (at page 40) noted that the maternal grandmother was also available and helped the children. He submitted that there was no evidence that the applicant was involved in the decisions in the grandchildren's lives. He submitted that it was too wide an interpretation of "parental relationship" to include those who provided physical and emotional care when the parents were present and involved. He submitted that the Secretary of State was entitled to find on the evidence that the grandmother played a role, assisted the family and children and, perhaps, assisted in their day-to-day care but that her role was as a grandparent rather than as a parent. He submitted that the Secretary of State's decision letter of 7 October 2015 lawfully concluded that the applicant was not in a "parental relationship" such that s.117B(6) applied.

39. I was referred to para 6 of the Immigration Rules. That does not provide an exclusive definition of "parent" but rather states that under the Rules a parent "includes" and then sets out five situations. Those are as follows:

> "A parent includes
>
> (a) the stepfather of a child whose father is dead and the reference to stepfather includes a relationship arising through civil partnership;

(b) the stepmother of a child whose mother is dead and the reference to stepmother includes a relationship arising through civil partnership and;

(c) the father as well as the mother of an illegitimate child where he is proved to be the father;

(d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or where a child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of these Rules (except that an adopted child or a child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paragraphs 297-303);

(e) in the case of a child born in the United Kingdom who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s)' inability to care for the child."

40. It was common ground that the definition of "parent" in para 6 of the Immigration Rules was not determinative of whether the applicant had a "parental relationship" with her grandchildren. That, in my judgment, is correct. 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." Thirdly, it is a non-exhaustive list and it is clear to me, for reasons I shall give shortly, that a "parental relationship" may in certain circumstances exist between someone who could not, in any legal sense, be seen as a "parent." However, one point worth noting from the non-exclusive list in para 6 of the Rules is that, apart from para 6(c) dealing with an illegitimate child, the remaining situations where a non-biological parent is considered to be a "parent" all arise where one or both biological parents are no longer involved with the child either because they have died, the child has been adopted or there has been a genuine transfer of parental responsibility to the "new" parent because the original parent or parents are unable to care for the child.

41. I was also referred to the relevant guidance for Appendix FM in the respondent's IDI. That is 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.

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 <u>as the child's parents</u> 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.

45. It is not necessary to consider more fully the position of a step-parent or partner of the primary carer of a child when a family has split after separation or divorce of the parents. That is not this case. That situation may, depending upon the circumstances, present a persuasive factual matrix for there to be a "third parent". The respondent's guidance differentiates between situations where the non-residential biological parent plays no (or no meaningful) continuing role in the child's life and where he or she does. In the latter situation, it is said that the step-parent or new partner would be unlikely to have a "parental relationship". Whilst each case will be fact sensitive, I do not inevitably see the virtue of the argument (other than as a numerical limitation of parents to no more than two) which excludes a step-parent or partner in this latter situation from being in a "parental relationship" <u>if that is the substance of the relationship</u> even where the non-residential biological parent continues to play some role. The issue will be fact sensitive and is best worked out in a case where it properly arises for decision.

46. In the instant case, there is no doubt that the medical evidence shows that SA2 cannot in practice perform the full gamut of functions usually associated with the role of a parent. There is also no doubt that the applicant has undertaken a number of the day-to-day practical functions that SA2 is unable to perform. There is, undoubtedly, evidence of dependency flowing from this between the appellant and her grandchildren. However, the children's mother remains in the family home and living with the children. Likewise, the children's father, SA1 remains present and, the evidence before the Secretary of State, was that he has switched from employment to self-employment in order to be more available. There is also evidence of others, namely the maternal grandmother's involvement with the children. There was no evidence before the Secretary of State, and it was not suggested otherwise before me, that the parents had relinquished legal or even *de facto* responsibility for their children. There was no evidence that the applicant made important decisions in the grandchildren's lives. Her involvement was to support her son and daughter-in-law and provide day-to-day care and practical help to look after the grandchildren because of SA2's health difficulties.

47. Despite the force of Ms Rutherford's submissions, I am unable to conclude that the respondent irrationally or otherwise unlawfully came to the conclusion in her decision letter of 7 October 2015 that there was not a "parental relationship" between the applicant and her grandchildren despite the very close familial relationship between them and the supportive role that she played. In that decision letter, the respondent fully considered all the circumstances but she was entitled to conclude that the applicant was playing no more than the role of a grandmother albeit one who was more involved in the care of her grandchildren than many.

48. Consequently, I reject the ground of challenge relying on s.117B(6) of the NIA Act 2002.

2. Section 55

49. I turn now to consider the second ground, namely that in her three decision letters the Secretary of State failed properly to have regard to the children's interests, in particular that of R and to properly apply her duty under s.55 of the BCI Act 2009.

50. Ms Rutherford submitted that the respondent had only considered the practicalities of the care of the grandchildren particularly taking into account possible support from social services if the applicant were not in the UK. Ms Rutherford submitted that that failed to take into account the close emotional ties between the grandchildren and the applicant and in particular that she had known the three youngest children all their lives and the eldest since she was 4. In relation to R, Ms Rutherford submitted that the Secretary of State had, in particular, failed to consider her best interests and the evidence concerning her past self-harming and the impact that the applicant's removal would have upon R.

51. The respondent's three decision letters have to be read in combination. Those letters contain a very detailed consideration of the circumstances of the four grandchildren and, indeed, the impact upon them if the applicant were not in the UK. The respondent had well in mind the applicant's claim based upon the caring role which she had provided for her grandchildren since she arrived in the UK in 2002. That, no doubt, was part of the basis upon which the applicant had previously been granted two periods of leave. The respondent's decision letter of 12 May 2015 (which I have set out above) in particular deals at length with the position of the children including that of R and her history of mental health issues including self-harm. The respondent specifically took into account the evidence from R's headmaster in that regard. In my judgement, the Secretary of State was entitled to take into account that if there were any reoccurrence in relation to R and there was no up-to-date medical or other evidence about that, then support was available in the UK both from the NHS, social services and, indeed, support organisations.

52. I do not accept Ms Rutherford's submissions. In my judgement, the respondent has given very careful consideration to the evidence relating to the grandchildren's best interests and her reasons, particularly in her decision letters of 12 May 2015 and 7 October 2015 where she very fully and thoroughly deals with those matters. It is clear that the Secretary of State took into account the grandchildren's best interests in reaching her conclusion that there were no "exceptional" circumstances so as justify the grant of leave outside the Rules under Art 8. There can be no challenge to the respondent's overall assessment of proportionality under Art 8 as leave was not granted on that ground. That was, in my view, for the entirely plain and obvious reason that it is wholly unarguable that the respondent's approach to Art 8 was unlawful. Having properly and fully assessed the grandchildren's best interests and fulfilled her duty under s.55 of the BCI Act 2009, the respondent's conclusion that there was no breach of Art 8 was rational and not otherwise unlawful.

53. For these reasons, therefore, I reject the ground of challenge based upon s.55 of the BCI Act 2009.

3. Removal Decision

54. As I indicated earlier, Ms Rutherford did not renew the applicant's application for permission to rely on ground 3 set out in the initial claim, namely that the respondent failed to apply her policy by not making an appealable removal decision. Ms Rutherford accepted that if her other grounds could not succeed, she could not succeed on this ground either. That, in my judgment, is plainly correct. There is no basis upon which the applicant could claim that she fell within the "Requests for Removal" policy either because she "has a dependant child under the age of 18 who is a British citizen" or because "there are other exceptional and compelling reasons to make a removal decision at this time." The ground is without merit. I too would refuse permission on this ground.

Decision

55. For the above reasons, the claim for judicial review is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal