Upper Tribunal
(Immigration and Asylum Chamber) **Appeals: HU/07222/2017**
HU/07225/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On: 21 December 2018

Decision & Reasons Promulgated
On: 16 January 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KOSTIAN OSTROVSKI & MARIA OSTROVSKA

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: Mr J Bryce, Advocate, instructed by McClure Collins, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants appeal against a decision by FtT Judge David C Clapham SSC, promulgated on 4 July 2018, dismissing their appeals on human rights grounds against refusal of entry clearance.

2. The grounds of appeal allege error as follows:

1 (a), no reference to or consideration of proportionality, other than in recording submissions at [28];

(b), test for overseas appellants in *Ribeli* [2018] EWCA Civ 611 not applied; no express finding on whether family life existed; there should have been a finding of family life, and of interference, leading to further findings (i) that this was not a case of choice of residence, it not being practical for the extended family to move to Ukraine, the child being at a specialist school in Scotland, and (ii) on proportionality;

(c) evidence having been accepted at [32] of a bond between the child and his grandfather, error in giving any weight to the unsupported assertion that the child might visit Ukraine;

(d) error in respect of section 55 of the 2009 Act, by referring to the "best interests" of the child rather than to "the need to safeguard and promote the welfare of children who are in the UK"; having accepted evidence that the child is autistic and mute, the judge erred (i) by misinterpreting the statute and (ii) failing to reason why the welfare of the child should not be given greater weight;

alternatively -

(e) if the correct test was applied to proportionality, inadequacy of reasoning to justify the outcome.

2. The UT should allow the appeal and entry clearance should be granted.

3. The further points which I noted from the submissions by Mr Bryce were these:

(i) Relationships between grandparents and grandchildren are relevant to article 8.

(ii) The positive obligation on the state in an entry case is not materially different from the obligation in an expulsion case.

(iii) The s.55 duty is relevant to that positive obligation.

(iv) The judge went wrong by considering it not open to him to allow the appeal, absent compliance with the immigration rules.

(v) In light of those positive obligations, the judge should have seen that relocation to the Ukraine was not a choice, due to the child's needs.

(vi) The case had moved away from the appellants being adult dependent relatives, but that aspect, and their increasing frailty, did not cease to be relevant.

(vii) Grandparent – grandchild relationships could and should have been found to constitute family life: European Court of Human Rights, Guide on article 8, [281] – [285]; *Dasgupta*, [2016] UKUT 00028.

(viii) The appellants' case was better for being made from outside the UK, not after entering in another capacity, or overstaying; their immigration history is good, with no element of illegality or precariousness.

(ix) The judge at [33] in effect took the rules as determinative, and failed to set out the factors which weighed on the other side from the public interest.

(x) The judge's view that there was nothing to prevent the child visiting Ukraine went against the weight of the evidence.

(xi) The decision did not clearly explain how the "ultimate question", in terms of *Agyarko* [2017] WLR 823 at [59] – [60], had been answered. It should be set aside and there should be a further hearing.

4. In responding to the submission for the respondent, Mr Bryce made the further point that the question whether there were greater than the normal emotional ties went to relationships among adult family members, rather than to relationships between grandparents and grandchildren (who remained minors).

5. Having considered also the submissions for the respondent, I find that the appellants have not shown that the decision of the FtT involved the making of any error on a point of law, such that it ought to be set aside.

6. As Mr Govan pointed out, the case had moved a long way from the original applications, which were for leave to enter as adult dependent relatives, and for which the evidence presented to the ECO, and to the FtT, fell far short of the requirements of the rules. The grounds of appeal to the FtT say that the child will "be unable to enjoy meaningful family life with his grandparents", but do not say how the decisions have that impact. The grounds then found upon the need of the appellants for "round the clock care" from the sponsor, which was not shown.

7. The grounds of appeal to the UT overstate the position about difficulties in maintaining the link between the appellants and their grandchild, other than by finding that they have a right to reside in the UK. The family, including the child, has visited the appellants in the Ukraine, and there is no reason why they should not continue to do so. The appellants have visited their family here.

8. Mr Bryce was correct in pointing out that the criterion of "more than usual emotional ties" generally applies to finding whether family life, in the more restricted sense required for article 8 protection, continues among adult relatives. As between grandparent and grandchild, the question is usually whether the grandparent has assumed the role of a parent. The judge recognised a special and close bond in this case, but it was not of that nature. The child has the active care of both parents.

9. The judge at [32] and [33] was clearly aware that a case might succeed outside the rules, and treated the child's interests as a primary but not as

the sole consideration. He found the circumstances "difficult and unfortunate", but not "compelling". No error of law has been shown in his approach.

10. It is readily understandable, as the judge observed, that the family members strongly prefer to live together in the UK, but there was no evidence that family life for article 8 purposes extended beyond parents and child; that the decisions of the ECO interfered to a serious extent with family relationships; or that the child's welfare would be promoted by his grandparents moving here permanently, to such an extent that they have a right to do so, other than in compliance with the immigration rules.

11. Even if some error of legal approach had been detected, there was nothing by which the appeal might realistically have been allowed.

12. The decision of the First-tier Tribunal shall stand.

13. No anonymity direction has been requested or made.

7 January 2019
Upper Tribunal Judge Macleman