Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08901/2017
HU/08903/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast
On 3 October 2019

Decision & Reasons Promulgated
On 15 October 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

ALLA [D] (FIRST APPELLANT)
ALINA [D] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S McTaggart, instructed by Andrew Russell & Co Solicitors
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The appellants who are sisters and citizens of Ukraine and who were aged 24 and 22 at the time of the hearing of their appeals before First-tier Tribunal Judge Fox in August 2018 arrived in the UK from Ireland on a date in 2009 with their mother and her British citizen husband whom she had married in Ukraine.

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2. Their appeals had been against the Secretary of State's decision dated 4 August 2017 refusing their applications for leave to remain in the UK. The judge observed in his decision that they were issued with (visit) visas in 2008. On 10 July 2009 they claimed to have entered the United Kingdom via Dublin on visas which were valid for three months. They made the human rights applications on 7 June 2017 that led to the refusal and these appeals.

3. Although this was clearly not the case the judge understood the applications were considered by an Entry Clearance Officer without interview. But it is not disputed that there was no interview prior to the refusal of the applications. In respect of the first appellant it was not accepted that she was in a relationship with a Mr [C] and it was thus refused under the Partner Rules. Both applications were refused on the private life basis; it was contended there were no exceptional circumstances notwithstanding the first appellant's indication that she suffers from epilepsy.

4. At [12] the judge noted the family connections in the United Kingdom as follows:

> "12. The Respondent does not take issue with the Appellants' dates of birth and nationality. No dispute arises, as to the relationship between the Appellants, their mother and their half-brother [O]. There is no dispute with the Appellant's immigration history. There is no dispute that the Appellant's mother, Iana, married Geoffrey [B] and that they had a child together [O] who was born on 5 May 2011 at Letterkenny Hospital. He is now aged seven (7) years old. The family lived together at 3 Highgate Manor, Newtownabbey until domestic disharmony broke out and Iana [B] and Geoffrey [B] separated. Various court proceedings ensued. The Appellants continue to live at this address with their mother and young [O]. I am not aware if there are any divorce proceedings issued or concluded."

And in respect of potential adoption of the appellants, he observed at [13]:

> "13. Although there was detailed and pressing cross examination of all three witnesses, I am satisfied that it is also common case, that Geoffrey [B] promised to adopt the Appellants but failed to deliver on that promise. There is a document in the papers before me today which attracted some criticism and negative observation by the Respondent. This document was signed by the Appellant's natural father. Although there may be some doubt whether it had to be registered in the judicial system in Ukraine or not, it is an indication of the biological father's intention not to object to any adoption proceedings. Mr Geoffrey [B] reneged on a promise so to do. The Appellants clearly, are now adults and it is not possible for them to be adopted. The first Appellant no longer makes the case that she is in a relationship with Jordan [C]. The partner route under family life is no longer an issue."

5. After surveying the evidence in respect of both appellants as to their background, ties with Ukraine and the first appellant's medical condition, the judge concluded that the matters referred to did not amount to insurmountable obstacles or exceptional circumstances.

6. Turning to Article 8 the judge considered that on the evidence there was not an arguable case for its consideration. He took account of the best interests of the child O who was aged 7 and after a further survey of evidence, including the possibility of visits by the child and his mother to the appellants in Ukraine, concluded that neither had adduced evidence of any exceptional circumstances or insurmountable obstacles. The judge reached a similarly negative conclusion in relation to the appellants' private life and dismissed the appeals.

7. Permission to appeal was sought on two grounds. The first was a failure by the judge to make factual findings on one of the main points of the appellants' case, being that they and their mother had been misled that they would be sorted out by their stepfather in terms of their immigration status. As part of this ground it is also argued that there was also a failure to make a finding whether the appellants' removal would be in the child's best interests. The second ground of challenge regards a failure by the judge to have regard to the mandatory provisions of sections 117A to D of Part 5A of the Nationality, Immigration and Asylum Act 2002.

8. Certain matters were clarified at the beginning of the hearing. It was thought (although Mr McTaggart could not confirm) that the appellants and their mother had obtained a visa for Ireland and then made their way to Northern Ireland. The birth of the child O in Letterkenny in Ireland was, according to the mother's evidence, considered an advantage by her husband. The grant of leave to the mother had been in the light of the presence here of a British Citizen child. Neither the appellants nor their mother have ever had any form of prior leave or permission to remain in the UK. It was also clarified that her marriage had broken down in 2013 and the appellants had been 15 and 13 respectively when they arrived in 2009. Both of the appellants were adults at the time of the applications to the Secretary of State.

9. As to the first ground, Mr McTaggart argued that the judge had failed in the Article 8 analysis to take account of the deception by Mr [B] in respect of his assurances that the appellants' immigration status would be regularised. The judge had observed at [13] that he was satisfied "… that it is also common case, that Geoffrey [B] promised to adopt the appellants but failed to deliver on that promise … Mr Geoffrey [B] reneged on a promise so to do". Mr McTaggart argued that this aspect was important because it tied in with the appellants' circumstances which were not of their own making. He also argued that a further factor in the Article 8 analysis was the strength of family life because of the immigration history.

10. In response to my observation that the judge's finding on family life was not in the grounds of challenge Mr McTaggart referred to the observation by Judge Swaney who observed that no finding had been made whether or not there is family life between the appellants and their mother in the light of the fact that although they were adults they still lived with her and their brother and they had not established independent family units of their own. As part of this ground he also argued there had been a failure by the judge to identify the best interests of O with particular reference to the appellants. As to family life he considered the judge had arguably reached a conclusion on this aspect in [30]:

> "30. [O] is currently seven (7) years old and is attending primary school. He is a British citizen and up until his mother and father separated, he enjoyed family life with his mother, father and two half-sisters. Legal proceedings have ensued and up until 2015 the child's father was no longer able to have contact with him, so far as I am aware of. That situation may have changed more recently. In any event, there is no suggestion that the child should be forced, encouraged or required to leave the United Kingdom. I make a similar observation in regard to his mother Iana. I note however that her leave to remain is currently limited and will expire in the next few years."

11. As to the second ground of challenge relating to a failure by the judge to have regard to Part 5A of the Nationality, Immigration and Asylum Act 2002, although accepting that the appellants were relying on a private life established here when unlawfully, it was still necessary to examine the extent to which they had integrated evidence in the material before the judge.

12. By way of response Mr McVeety argued the judge had made a clear finding regarding Mr [B]'s promise but it was difficult to assess the relevance of this from 2013 after separation; no application had been made by the appellants or their mother for permission to stay. He contended that the judge had looked at all other factors and there was nothing in the case that he had not considered.

13. In respect to family life being a sub-ground of the first ground Mr McVeety referred me to [33] of the judge's decision in which he recorded the evidence regarding the relationship between the appellants and O:

> "33. Both Appellants confirmed that there is little in common with [O] given the age gap between the three. They do not watch the same television programmes. They do not engage in the same activities. No doubt [O] has his own friends with whom he engages, at school and afterwards. The relationship between the Appellants and ask [sic] is a standard relationship between two adult siblings and their younger half-brother. I am satisfied that there are no particularly strong ties that demonstrate a relationship beyond the norm between such siblings."

14. He contended the best interests were dealt with in [34] as follows:

> "34. I have no doubt that when the Appellants have the family home (be it for marriage, cohabitation, employment or returned [sic] to Ukraine, or any other reason) that young [O] would initially miss his half-sisters. As a seven-year-old that's likely to be a short-lived event, given the lack of intense involvement in his life, from his half-sisters."

15. In respect of the second ground, Mr McVeety argued that although the judge had not specifically considered the case pursuant to section 117A to D, this was not material.

16. Mr McTaggart had nothing to add by way of reply.

17. I reached the following conclusions. Although Mr McVeety contended that there was nothing the judge had not taken account of, the materials in the case raised points which he does not appear to have considered. A copy of the appellants'

mother's passport indicates that it was issued in August 2008, with expiry in 2018. A stamp by an Immigration Officer at Dublin Airport dated 14 November 2008 has the following legible text in manuscript: "Join Irish spouse". A visa on the same page issued on 10 October 2008 refers to the appellant by her married name. A further visa issued by the Irish immigration authorities on 21 April 2009 also relates to the appellants' mother and appears to confirm a grant of leave for six months, together with another visa dated 15 October 2009 that runs until 7 October 2010, from which it is clear the appellants' mother was granted a form of leave to remain in Ireland as the spouse of an Irish citizen. A stamp evidently by immigration control at Dublin Airport confirms further permission to remain for the appellants' mother until 11 October 2012. I have not recorded all the entries which had been copied from the passport but it is difficult to reconcile this regime of leave with the evidence before the judge that the family crossed into Northern Ireland in 2009. It is clear that Mr [B] is a British citizen evidenced by the copy of his passport which was issued on 11 August 2008. In the light of the Irish authorities recognising him as an Irish citizen, it is evident that he has dual nationality. It is not indicated by the evidence how Mr [B] supported himself and his family during the years prior to separation. The position is unclear and does not appear to have been explored at the hearing or considered by the judge.

18. The judge began his Article 8 analysis within the Rules by considering paragraph 276ADE and there is no challenge to the findings that he reached under this provision. Instead, the grounds focused on the adequacy and correctness of the judge's approach on Article 8 grounds. It is correct that the judge did not make a clear finding on whether the appellants continue to share a family life with their mother and although this is not specifically raised in the grounds, I consider the reference to the judge's "acceptance" of family life that this point is engaged, and the grounds do not require amendment. Paragraph [30] refers to the existence of family life in the past and in my judgment the judge was required to consider whether that family life had continued into the appellants' adulthood. Although the older appellant's relationship outside the marriage point to this no longer being the case it is an aspect on which the judge was nevertheless required to make a finding.

19. As to O's best interests, I consider that these were partially addressed by the judge but only with reference to the impact on him of the appellants' return to Ukraine.

20. The focus of the judge's attention in large part was on the private lives of the appellants and whilst it is not disputed that these have been developed whilst neither has had lawful presence, section 117B(5) has been interpreted as not meaning no weight. In this regard I consider a clearer picture of the appellants' immigration history is relevant in relation to the expectation of the appellants in coming as minors with their mother to Ireland and Northern Ireland. They have spent their teenage and thus formative years here in a family and the judge did not explain in the Article 8 balancing exercise how he factored in the earlier histories of the appellants when minors. The task before him was to assess outside the Rules whether a fair balance was struck between the competing public and private interests. In my judgment the judge erred by failing to explain what weight he gave to the lives the appellants had

established but instead appears to have approached the case on the basis that there was no compelling reason why the appellants should not leave for Ukraine instead of carrying out a balancing exercise of all the circumstances to see whether the case was exceptional which does not impose a requirement that there should be "some highly unusual" or "unique" fact or feature: *Agyarko v SSHD* [2017] UKSC 11 as explained in the recent Court of Appeal decision in *GM (Sri Lanka) v SSHD* [2019] EWCA Civ 1630.

21. In my judgment the judge failed to carry out the appropriate proportionality exercise and I therefore set aside his decision. Given the extent of fact-finding required, the case is remitted for its further consideration by a differently constituted Tribunal.

Signed　　　　　　　　　　　　　　　　　　Date 11 October 2019

UTJ Dawson
Upper Tribunal Judge Dawson