



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13094/2016  
HU/18576/2016  
HU/18581/2016  
HU/18585/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5<sup>th</sup> June 2018

Decision & Reasons Promulgated  
21<sup>st</sup> June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AS (FIRST RESPONDENT)  
II (SECOND RESPONDENT)  
EI (THIRD RESPONDENT)  
EVS (FOURTH RESPONDENT)  
(ANONYMITY DIRECTION MADE)

Respondents

**Representation:**

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer  
For the Respondent: Mr S Khan instructed by Malik & Malik Solicitors

**DECISION AND REASONS**

1. Although the Secretary of State is the Appellant before this Tribunal I refer to the parties as they were before the First-tier Tribunal.
2. The Appellants, nationals of the Ukraine, appealed to the First-tier Tribunal against a decision of the Secretary of State of 13<sup>th</sup> May 2016 refusing their applications for leave to remain on the basis of their private and family life in the UK. First-tier Tribunal Judge Hussain allowed the appeals in a decision dated 20<sup>th</sup> November 2017. The Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Davies on 24<sup>th</sup> April 2018.
3. The background to this appeal is that the First Appellant claims to have entered the UK on 13<sup>th</sup> April 2006 and the Second Appellant, his wife, on 26<sup>th</sup> April 2006. Their children, the third and fourth Appellants, were born in the UK on 18<sup>th</sup> June 2008 and 27<sup>th</sup> July 2012 respectively. On 25<sup>th</sup> July 2015 the Appellants made application for leave to remain to the Home Office on the basis of private and family life. The Secretary of State refused those applications considering the Immigration Rules. The Secretary of State had decided that the First Appellant, although he met the suitability requirements, did not meet the requirements under the ten year rule because his partner was in the UK unlawfully and the First Appellant himself was in the UK illegally. It was accepted by the Secretary of State that there was a genuine and subsisting relationship between the First and Second Appellants, however the Secretary of State considered that paragraph EX.1. and EX.2. did not apply. The Secretary of State also considered the applications under paragraph 276ADE. The Secretary of State considered each member of the family in relation to the Immigration Rules and decided that they did not meet the requirements. The Secretary of State considered whether there were any exceptional circumstances to justify the grant of leave to the Appellants outside the Immigration Rules and concluded that there were not.
4. The First-tier Tribunal Judge heard oral evidence from the First and Second Appellants. In considering the appeal the judge firstly considered the position of the Third Appellant. The judge noted that the Secretary of State does not dispute that the Third Appellant had by the time of the hearing lived in the UK for nine years but the judge noted that, as the Third Appellant had not been in the UK for seven years at the date of the application, she did not meet the requirements of the Immigration Rules. The judge went on to consider the Third Appellant's appeal outside of the Immigration Rules looking at the circumstances at the date of hearing. The judge considered the relevant factors at paragraphs 27 to 31 concluding that it would not be reasonable to expect the Third Appellant to leave the United Kingdom. On that basis the judge went on to find that it would be disproportionate to remove the other Appellants in light of the family life they enjoy with the Third Appellant. The appeals were allowed.
5. The Secretary of State put forward one ground of appeal. It is contended that the judge erred in failing to give adequate reasons for findings on a material matter. It is contended in the Grounds of Appeal that the judge failed to have regard to a number of points in considering whether the removal of the Third Appellant would be

reasonable. The Secretary of State points out that as the Third Appellant was found to be an above average student [27] she should have little difficulty in learning Ukrainian and adapting to life there where she would be supported by her parents and siblings. The Secretary of State contends in the Grounds of Appeal that the Third Appellant does not meet the requirements of EX.1 and that it would not be unreasonable to expect the Appellants to continue their family life together outside of the UK.

6. The Secretary of State notes that the evidence was that the Third Appellant speaks French and has therefore an aptitude for learning languages and that the evidence that she does not speak Ukrainian reflects a choice on the part of the Appellants. At the hearing Mr Khan pointed out that the note at paragraph 16 that the Third Appellant prefers to speak in French was a mistake as that was not part of the evidence before the First-tier Tribunal Judge. This was not disputed by Mr Lindsay.
7. The Secretary of State relied on the case of **VW & MO (Uganda) v SSHD [2008] UKAIT 00021** where at paragraph 34 Hodge J said:-

“Again and again the Court has emphasised that an applicant cannot normally succeed if all he can show is that he or she would *prefer* to conduct his family life in the host Member State. More must be shown than that relocation abroad would cause difficulty or hardship”.
8. It is contended by the Secretary of State that the Immigration Rules provide a clear basis for considering immigration cases in compliance with Article 8 and reliance is placed on the decision of the Court of Appeal in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** where the Court of Appeal said that the new Rules are a complete code. Reliance is also placed on the case of **Ahmed v SSHD [2014] EWHC 300 (Admin)** which states that the conventional Article 8 proportionality appraisal is one conducted within the framework of the Rules and guidance. It is contended that the factors raised in the decision may be the ones which require some adjustment but they were not unreasonable in nature. It is argued that the children do not suffer from any conditions which prevent them from being able to learn the language in Ukraine and that their out of school activities are activities which could be continued in the Ukraine. It is further pointed out that the Appellants’ appeal rights were restricted to human rights grounds and the judge should have undertaken a proportionality assessment and that, had he done so and had he not erred in finding that it would not be reasonable to expect the Third Appellant to leave the UK, it is contended that he would have concluded that the decision was proportionate to the public interest of maintaining an effective immigration control.
9. In granting permission First-tier Tribunal Judge Davies considered it arguable that the judge did not have proper regard to public interest consideration set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 in concluding that it would not be reasonable for the Third Appellant to return to the Ukraine.

## Submissions

10. At the hearing before me Mr Lindsay submitted that the First-tier Tribunal Judge failed to conduct a proper proportionality assessment. In his submission the judge had failed to undertake a balancing exercise in considering the appeal at paragraphs 21 to 33. He contended that within those paragraphs there are no references to factors against the Third Appellant's claimed right to remain in the UK. He submitted that the judge should also have considered factors militating against the reasonableness of remaining in the UK rather than considering only matters on one side of the argument. He submitted that factors to be weighed on the public interest side included those in section 117B(4) and (5) of the 2002 Act which can direct that in considering the public interest little weight should be given to private and family life which is precarious. In his submission, were it not for that error the judge might well have reached a different conclusion.
11. In his submissions Mr Khan contended that the judge had undertaken a proper proportionality assessment. He pointed out that at paragraph 33 the judge referred to the public interest considerations in Section 117B of the 2002 Act. He accepted that those had not been specified but submitted that it was clear that the judge had those in mind when considering the appeal. He pointed to paragraph 18 where the judge talked about issues raised under Section 117B, although he accepted that this was a rehearsal of the oral evidence, he submitted that it is clear that these factors were still in his mind when the judge dealt with the issues in the appeal. He further contended that Section 117B(6) is relevant in that where it applies and where it is found that it is not reasonable for a child to leave the UK the other public interest factors in Section 117B are of less weight. In his submission the judge appears to have applied Section 117B (6) at paragraph 33. Accordingly, in his submission, the judge's assessment of reasonableness was open to him on the evidence. He submitted that at paragraph 28 the judge was looking not just at the language issues, but at the impact of those upon the Third Appellant whose education would suffer because she does not speak Ukrainian. At paragraph 29 the judge highlighted political issues in Ukraine. In his submission the judge took into account the appropriate factors, including the immigration history of the parents which is referred to at paragraph 18. He contended that once the judge found that it was not reasonable for the Third Appellant to leave the UK he applied the correct test in relation to the other Appellants.

## Error of law

12. The Secretary of State has not criticised the judge's approach in determining the appeal of the Third Appellant first. In considering issues relevant to the Third Appellant the judge took into account the length of time she had been in the UK and acknowledged that she could not meet the Immigration Rules because she had not been in the UK for seven years at the date of application. However, the judge went on to consider the appeal outside of the Immigration Rules. In considering the situation outside of the Rules the judge took into account the length of time the Third Appellant had been in the UK (nine years at the date of the hearing) [27], the child's education and the fact

that she is an above average student who enjoys going to school [27], the fact that there was likely to be an adverse impact on the child's education by returning to the Ukraine, the adverse impact of her going to live in an unfamiliar environment, the adverse emotional impact she is likely to suffer in leaving her friends and other associates in the UK [28], the fact that the Ukraine is going through a period of instability which may influence where the Appellants would live there, the fact that the family would need time and financial resources to be able to stand on their own two feet there and possibly in an area which is unfamiliar to them, the system of household registration in the Ukraine which means that it is not likely that the Appellants could register in an area to which they would have to relocate [29].

13. The judge also took into account the decision of the Court of Appeal in **MA (Pakistan) & Ors [2016] EWCA Civ 705** where at paragraph 46 the court noted:-

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave”.

14. Having concluded that the Third Appellant could not meet the requirements of the Immigration Rules the judge considered the factors set out above and was, in my view, entitled to reach the view on the basis of this evidence that it was not reasonable to expect the Third Appellant to leave the UK. Having reached that conclusion it is clear that the judge found that the Third Appellant met the substance of the Immigration Rules despite not having been in the UK for 7 years at the date of the application. This was a weighty factor for the judge to consider in looking at proportionality. It is clear from the finding at paragraph 32 that the judge considered that the factors relevant to the assessment of reasonableness were the same factors to be considered in relation to proportionality.
15. The only matter raised by Mr Lindsay at the hearing which could have been made against the finding made by the judge are those in Section 117B(4) and (5). Section 117B(4) provides that little weight should be given to a private life or a relationship formed with a qualifying partner established when a person is in the UK unlawfully, and 117B(5) provides that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. However, further to those two provisions, Section 117B(6) gives a stronger indication of the public interest in circumstances where it would not be reasonable to expect a child to leave the UK.
16. In my view, had the judge expressly considered 117B(4) and (5) it could not have made any material difference to the outcome. I accept that the judge could have expressly considered Section 117B(4) and (5), however he referred to the oral evidence as to the

precarious nature of the immigration status of the parents at paragraph 18 and referred to the public interest considerations in Section 117B at paragraph 33.

17. I bear in mind the guidance in **MD (Turkey) v Secretary of State for the Home Department [2017] EWCA Civ 1958** where Lord Justice Singh said at paragraph 26 that the duty to give reasons requires that reasons must be “proper, intelligible and adequate” and that adequacy in this context:-

“... is precisely that, no more and no less. It is not a counsel of perfection. Still less should provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons is, in part, to enable the losing part to know why she has lost. It is also to enable an appellate court or Tribunal to see what the reasons for the decision are so that they can be examined in case some error of protest is being committed”.

18. In my view the judge’s consideration of this matter is adequate. The factors taken into account, the weight attached to these factors and the reasons for allowing the appeal are clear from reading the decision. In these circumstances there is no material error of law in the judge’s approach to this appeal.

#### **Notice of Decision**

19. The decision of the First-tier Tribunal Judge does not contain a material error of law.
20. The decision of the First-tier Tribunal shall stand.

#### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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

Signed

Date: 18<sup>th</sup> June 2018

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 18<sup>th</sup> June 2018

Deputy Upper Tribunal Judge Grimes