Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/07156/2018

& HU/07159/2018

THE IMMIGRATION ACT

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 1st April 2019	**On 09th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

GB & MB

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Mair of counsel instruct by TM Fortis Solicitors

For the Respondent: Mr McVitie, Senior Home Officer Presenting Officer

DECISION AND REASONS

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1. The appellants are mother, GB, and daughter, MB a minor, and both are citizens of the Ukraine.

2. I have considered whether or not it is appropriate to make an anonymity direction. As the proceedings concern and impact upon the rights and status of a child I consider it appropriate to make an anonymity direction.

3. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Alis promulgated on the 9th January 2019 whereby the judge dismissed the appellants' appeals against the decisions of the respondent to refuse the appellants leave to remain in the UK based on Article 8 of the ECHR.

4. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Povey. Thus the case appeared before me to determine whether or not there was a material error of law in the decision. The material part of the leave provides as follows: –

> *"2. The grounds allege that the judge erred in his assessment of insurmountable obstacles, proportionality and failed to make material findings on the 2nd appellant's best interests.*
>
> *3. It appeared that the judge in assessing both insurmountable obstacles to family life with the first appellant's British husband continuing in the Ukraine and the proportionality of the respondent's interference, made material errors of fact (regarding the First Appellant's immigration status and the couple's knowledge at the outset of their relationship), failed to have adequate regard to the appellants' circumstances or the prevailing circumstances in the Crimea (from where the appellants had been living). It was arguable that the judge's assessment of both these components of article 8 were in error. In addition, whilst acknowledging the primacy of the seconds appellant's best interest, it was far from clear what conclusions the judge reached as to what those best interests were or how they were weighed into the subsequent proportionality assessment. This too disclosed an arguable error of law."*

Factual background

5. Whilst the appellants are Ukrainian nationals, they were both born in Georgia. When MB was 7 months old, the appellants relocated from Georgia to the Crimea, then part of Ukraine. At that stage contact was lost with the father of MB and there has been no contact since that time.

6. The appellants lived in the Crimea in Ukraine until 11 March 2014, that is prior to its annexation by Russia. During the time that they were in the Ukraine, they obtained Ukrainian citizenship. The

population of Crimea, it is claimed, is predominantly Russian speaking, unlike the rest of the Ukraine, and the appellants speak Russian not Ukrainian.

7. In October 2013 the appellants came to the United Kingdom on holiday for 2 weeks. At the end of the holiday they returned to the Ukraine, specifically Crimea, without any problem.

8. On 11 March 2014 the appellants returned to the United Kingdom and claimed asylum on arrival. Their claims to asylum were however refused and were certified as clearly unfounded such that there was no right of appeal against the decision. The refusal letter was dated 27 February 2015. The appellants did not leave the UK but remained in the UK. Whilst they were in the United Kingdom, Russia annexed the Crimea and is still in physical and political control of the area.

9. On the 23rd January 2015 GB met JRB, a British citizen. According to the evidence their first meeting was only 1 month before the refusal and certification of their asylum claim. Prior to that date GB and JRB had been in contact on the Internet. The relationship between the couple developed after January 2015 and ultimately they wished to marry.

10. JRB is a British citizen. He has employment as a telecoms engineer, which he has maintained over a significant number of years. He appears to have his own property. His parents live nearby. His parents are to an extent dependent upon him for help and support. He indicated that the system used in Ukraine for telecoms is different and he would require retraining and re-education including language education, if he were required to relocate Ukraine.

11. In order to get married GB required her passport. The passport had been lodged with the respondent at the time of her making her asylum claim. GB therefore requested her passport from the Home Office, which was provided on 30 December 2016. The couple then booked a civil marriage ceremony to be conducted at Manchester Town Hall. GB and JRB married on 23 April 2017. After the marriage on the 19th May 2017 both the appellants moved to live with JRB at a property that he was occupying.

12. The second appellant had been attending school since coming to the UK in March 2014 and continued to attend at the same school. The 2nd appellant has now started studying for A-levels in the United Kingdom.

13. Both the appellants speak English fluently.

14. On 10 August 2017 the appellants applied for leave to remain in the United Kingdom on the basis of GB being married to JRB, that is family life both under the immigration rules and on the basis of article 8 of the ECHR. GB's application was made on the basis of a spouse application and MB's application as the dependent child of her mother. The second appellant could not apply as a child of the

stepfather JRB, see definition of a parent in paragraph 6 of the Immigration Rules.

15. Judge Alis noted in paragraph 10 of the decision that:-

    "10 Having considered the decision letters it is apparent that the first named appellant satisfied all the requirements of Appendix FM except for the fact that she did not meet the eligibility immigration status requirements, set out in paragraphs E-LTRP 2.1 to 2.2 of Appendix FM of the Immigration Rules, because she did not have valid leave to remain in the United Kingdom and had been on immigration bail since January 26, 2017."

16. Accordingly the only factor militating against granting the first appellant's application under the Immigration Rules was the first appellant's immigration status. All of the other requirements of the rules were met including the genuineness of the relationship, the validity of the marriage, the subsisting nature of the marriage, the availability of accommodation, satisfying the financial requirements of the rules, the fact that the partner was a British citizen and was also present and settled in the United Kingdom, the fact that the appellant could speak English and the fact that the parties intended to live together permanently.

17. At the time the application was made for leave, the appellants did not have valid leave and certainly the first appellant had been on Immigration Bail since the 26th January 2017. It was only the immigration status of the first appellant which prevented her from meeting the requirements of the rules.

18. As is evident from paragraph 11 of the decision the 2nd appellant was to be refused in line with her mother and it is suggested could not otherwise meet the requirements of paragraph 276 ADE. In a sense the 2nd appellant is a minor and the fact that she has had to remain in the United Kingdom should not be held against her.

19. As part of the proceedings before Judge Alis it was conceded that the appellants and JRB, the current spouse and sponsor of the first appellant, could not live in the Crimea because the recommendation from the Foreign & Commonwealth Office was not to travel to the Crimea since the annexation of the area by Russia. The evidence also identified that other areas of the Ukraine had been placed under martial law by the Ukrainian government, that is primarily the areas adjacent to the Crimea and the east of the country.

20. In considering the appeal Judge Alis also considered whether, if the first appellant were returned to Ukraine, any application for entry clearance would be refused and if it were to be refused whether it would be refused under paragraph 320 (11). Whilst it is clear that the first appellant had overstayed the issue was whether or not there would be other aggravating circumstances as required by the rule.

Judge Alis considers that in paragraphs 87 to 89. Judge Alis concludes that he was not persuaded that there were aggravating circumstances and in the light of that any application for entry clearance could not be refused successfully under paragraph 320 (11). It is suggested on the part of the appellant's representative that in considering paragraph 320 (11) the judge was entering into speculation as to what was likely to happen were the appellants to be returned to the Ukraine and have to make an application for entry to the United Kingdom.

21. However it is on the basis outlined that the judge considered the appeals of the appellants and dismissed them.

Consideration

22. I heard submissions from both the appellant's representative and from the representative of the Home Office.

23. At the outset I note the provisions of section 55 of the Borders, Citizenship and Immigration Act 2009. It is accepted that there is a duty to safeguard and promote the welfare of a child who is in the United Kingdom. The welfare of the child becomes a primary consideration.

24. In dealing with the issues the judge clearly from paragraph 51 onwards was concentrating upon whether there were very significant difficulties, insurmountable obstacles or exceptional circumstances impacting upon the rights of the first appellant and her partner, JRB. In assessing whether there were insurmountable obstacles or exceptional circumstances consideration was given to the impact that the decision would have upon the first appellant and her partner but no consideration as an integral part of that assessment of the impact that the decision would have upon the child and whether that in turn alters the approach to be taken to the first appellant's application. Indeed in coming to a conclusion in paragraph 59 the judge is specifically limiting himself to consideration of the position of the first appellant and the first appellant's application.

25. It is only thereafter the judge commences to consider the impact of removal upon the child but he does not seek to consider that impact in the context of the rights of the first appellant.

26. I would draw attention to the provisions of GEN.3.2 and GEN.3.3 of the rules which provides:-

> *'GEN.3.2 (1) Subject to subparagraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of*

the Rules, the decision maker must consider whether the circumstances in subparagraph (2) apply.

(2) Where subparagraph (1) above applies, the decision maker must consider on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance or leave to enter or remain a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, the partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under as appropriate paragraph … DLTRP.1.2.

…

GEN.3.3(1) In considering application for… leave to …remain where paragraph GEN.3.1 and GEN.3.2 applies, the decision maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1 and GEN3.2 and this paragraph, 'relevant child' means a person who:

> *a) is under the age of 18 years at the date of the application; and*
>
> *b) it is evident from the information provided by the applicant would be affected by decision to refuse the application'*

27. The provision clearly contemplates that there may be exceptional circumstances which would render it unjustifiably harsh to a relevant child to refuse leave to remain to a parent. The 2nd appellant certainly appears to fall within the term of relevant child. In assessing whether or not there where exceptional circumstances resulting in unjustifiably harsh consequences it is clear from paragraph 51 onwards that the judge was only considering the appellant and her partner and not whether or not there were exceptional circumstances or unjustifiably harsh consequences to the 2nd appellant which impacted on the rights of the first appellant.

28. A conclusion is reached in paragraph 59 but it is only thereafter that the judge goes on to consider interests of the child.

29. Given the provisions of the rules highlighted it was necessary to take into account the position of the child in assessing the rights of the first appellant. The failure to take such into account in assessing the rights of the first appellant is a material error of law. Accordingly the decision contains a material error of law. That in turn will impact upon

the rights of the 2nd appellant as her application is dependent upon consideration of the first appellant's application.

30. Further it is suggested on the part of the appellant's representative that in considering paragraph 320 (11) the judge was entering into speculation as to what was likely to happen were the appellants to make an application from the Ukraine to enter the United Kingdom under the Immigration Rules. It seems to me that the judge was only making a conclusion that aggravating features would not be applicable, whether an application by the appellants was refused or not. Whilst it may be speculation as to what an ECO might do or what grounds an ECO might raise, the judge was entitled on the facts as presented to point out that there were no aggravating features justifying refusing any such application under paragraph 320 (11). It may be considered that the approach posed is consistent with the case of Chikwamba 2008 UKHL 40.

31. In effect the conclusion by Judge Alis was if the appellants returned to their home country and made application to enter such applications had every reasonable prospects of success given the circumstances. The question to be posed therefore is whether or not the appellants should be required to return to the Ukraine and make an application. In argument before me reference was made to the case of Chikwamba 2008 UKHL 40. I would also draw attention to the case of Hayat (Nature of Chikwamba principle) Pakistan [2011] UKUT 444 and Agyarko & Ikuga v SSHD 2017 UKSC 11.

32. I draw specific attention to paragraph 51 in Agyarko & Ikuga v SSHD [2017] UKSC 11 where Lord Reed stated:-

> *"51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department."*

33. Despite that consideration it is worthy of note that in Agyarko's case, an individual that had been in the United Kingdom for 9 years and in a relationship with her partner for a considerable part of that time, the court still held that removal in the circumstances was justified. In refusing the appeal it was material that the appellant and sponsor were not able to meet other requirements of the rules including the financial requirements. The same position applies in respect of Ikuga.

In respect of both it was clear that they would otherwise not meet the requirements of the Immigration Rules on other grounds. The same cannot be said in the present circumstances in respect of the first appellant as noted by Judge Alis in paragraph 10 of the decision.

34. The same considerations do not apply in respect of present appellants. It has been accepted by the judge that in respect of the first appellant the only issue was her immigration status and in respect of the 2nd appellant her application would it appear succeed or fail in line with her mother.

35. In respect of Hayat the headnote makes the point:-

> *"The significance of Chikwamba v SSHD [2008] UKHL 40 is to make plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance ..."*

36. It has to be accepted that since the case of Chikwamba section 117B has be enacted, specifically subsection (4)(b) which requires that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. However the same cannot be said of Agyarko, which was clearly decided after the statutory amendment.

37. It is in that context that consideration has to be given to the circumstances that exist in the Ukraine. It was accepted that JRB would not be able to travel to Crimea. But it is suggested that there is no legal bar to him travelling to other parts of the Ukraine. In a sense the difficulty is that parts of the Ukraine are subject to martial law and the ability of an individual to travel to such areas had to be considered carefully. Equally that would impact upon the position of the first appellant, 2nd appellant and JRB in being able to settle in parts of Ukraine.

38. There was before the judge an independent social worker's report which indicated that if the 2nd appellant had to return to the Ukraine this would put her education back by some 3 years. In looking at the provisions cited above, GEN.3.2 and GEN3.3., consideration of such factors as the 2nd appellant's education as an integral aspect of the assessment was a necessary part of determining whether or not there were exceptional circumstances in assessing the first appellant's appeal. The judge clearly has not taken that into account.

39. Therefore for the reasons set out I find that the decision by the First-tier Tribunal contained a material error of law.

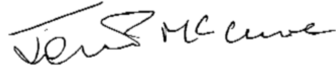
40. I invited the representatives to indicate how the matter should be determined if I did find that the was a material error of law. It seemed

to be agreed that, if there was an error of law, it would be necessary for the matter to be reheard and fresh findings of fact made.

41. For the reasons set out I find that there is a material error of law and direct that the decision of the first-tier Tribunal be set aside. I direct that the matter is to be heard afresh in the First-tier Tribunal

Notice of Decision

42. I allow the appeal to the extent that it is remitted back to the First-tier Tribunal for a hearing afresh.

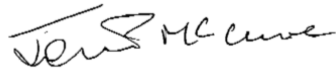


Signed Date 2nd May 2019

Deputy Upper Tribunal Judge McClure

Direction regarding anonymity- rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings



Signed Date 2nd May 2019

Deputy Upper Tribunal Judge McClure