



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29105/2014
IA/29107/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17 March 2015

Decision and Reasons Promulgated
On 13 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

V G (FIRST APPELLANT)
D G C (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss Dulau, Counsel for Mondair Solicitors, Peterborough
For the Respondent: Miss Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of Moldova, born on 14 March 1981 and 5 October 2010 respectively. The First Appellant is the mother of the Second Appellant and I shall refer to the First Appellant as the Appellant throughout. They appealed against the decisions of the Respondent dated 26 June 2014 refusing their applications as (1) the partner of and (2) the child of IC, who has indefinite leave to remain in the United

Kingdom. The decisions were appealed and the appeals were dismissed by Judge of the First-tier Tribunal R R Hopkins, in a determination promulgated on 17 November 2014.

2. Applications for permission to appeal were lodged and permission was granted by Judge of the First-tier Tribunal Shimmin on 12 January 2015. The permission states that it is arguable that the judge did not consider all the relevant factors and exceptional circumstances of the case and that had he done so the decision would not inevitably have been the same. The grounds refer to the First-tier Tribunal Judge failing to exercise discretion and failing to adequately consider the exceptional circumstances in this case.
3. There is a Rule 24 response from the Respondent dated 19 January 2015. This states that the First-tier Tribunal Judge directed himself appropriately and the Respondent and the judge were not obliged to consider exercising discretion outside the Rules. It is for the Appellant's husband to decide whether to return to Moldova and any separation will be as a result of his decision, if he decides to stay in the United Kingdom. The Appellant's husband's status as a holder of ILR does not require him to stay in the United Kingdom. The Rule 24 response goes on to state that the judge was not required to speculate as to the possible outcome of an application for entry clearance and if, as the grounds maintain, the separation of the Second Appellant from his father will cause him harm, the resolution of this matter is entirely in the hands of the sponsor who, if he chooses to, can return to Moldova. The response states that the interruption to the family life of the parties is as a result of their own action in respect of breaches of immigration control. They state that the findings of the judge were open to him on the evidence before him and there are no compelling circumstances demonstrated. They state that the case is a mundane example of family life created and maintained when the circumstances of the parties were precarious.

The Hearing

4. Counsel for the appellant referred to the grounds of appeal, submitting that the judge did not consider all of the facts in this case.
5. She submitted that the judge should have adopted the 2 stage approach but did not do so. I was referred to paragraphs 8-14 of the grounds which list the factors which the judge did not take into account, such as the Appellant's character, conduct, associations, compliance with the conditions of leave to remain and the length of time the Appellant has spent in the United Kingdom. She submitted that the Appellant's husband, IC has been granted indefinite leave to remain in the United Kingdom. She submitted that the second Appellant's claim has not been dealt with properly by the judge. There is no mention of Section 55 in the determination.
6. Counsel submitted that there are exceptional circumstances, in that the second Appellant's father has been in the United Kingdom for 12½ years and now has indefinite leave to remain. He is in stable and secure employment in the United Kingdom and he does not want to go to Moldova. I asked her why he does not want

to go to Moldova. She submitted that he has now put roots down in the United Kingdom and the United Kingdom is his home. He has been here since 2002; he arrived when he was in his early twenties; he has spent a large proportion of his life here.

7. She submitted that the judge did not deal properly with the separation of father and son and the best interests of the son, the Second Appellant, have not been looked at properly. She submitted that the Second Appellant was born 5 days before his father was granted indefinite leave to remain and if the Appellants have to return to Moldova there could be difficulties in the family being reunited. I put to her that the judge found that the Appellants can return to Moldova and apply to join the sponsor in the United Kingdom. Counsel submitted that there are exceptional circumstances in this case as there is a risk of refusal because of the Appellant's illegal entry to the United Kingdom. She submitted that the Appellants could be apart from the Appellant's husband and the second Appellant's father, for a long time and the applications might not be successful. I put to Counsel that it is not in the judge's remit to decide whether the Appellants' applications from abroad will be successful. I referred her to Paragraph 38 of the determination in which the judge deals with the best interests of the child and refers to a short period of separation. I pointed out that the judge found that a normal application from Moldova would take around 15 days but might take 60 days maximum. She submitted that the judge did not properly take into account all the features in this claim and the exceptional circumstances. She submitted that there is no reason for the Appellants to return to Moldova to apply. They are living in a stable relationship in the United Kingdom. She submitted that if the judge had looked properly at everything, his decision would have been different. She submitted that Article 8 outside the Rules should have been considered and had that been done, it is likely that the appeal would have been allowed.
8. The Presenting Officer made her submissions, submitting that there is no material error of law in the determination. She referred me to the case of Oludoyi [2014] UKUT 539IAC. She submitted that the judge's determination is well reasoned and sustainable.
9. The Presenting Officer submitted that the Appellants' sponsor is a failed asylum seeker. He overstayed and then was granted ILR under the Legacy Scheme. She submitted that this happened 5 days after the Second Appellant was born.
10. She submitted that the challenge to the Respondent's Refusal Letter and to the judge's decision is based purely on exceptional circumstances. The applications cannot succeed under the Immigration Rules including the Article 8 aspect of these Rules. She submitted that nothing has been put forward to show that there are exceptional circumstances in this case.
11. The Presenting Officer submitted that the Appellant came to the United Kingdom illegally and did not claim asylum. She remained here illegally. She is now stating that she escaped being trafficked but at no time did she apply for asylum. She submitted that the Appellant stayed in the United Kingdom intentionally and

illegally and started a relationship with the sponsor, who at that time had no status in the United Kingdom. She submitted that the parties now expect to stay in the United Kingdom and build their family life here. She submitted that they cannot choose where they want to live. She submitted that effective immigration control is necessary in the United Kingdom and because of this the judge found that the appeal should be dismissed.

12. I was referred to the Refusal Letter. The Presenting Officer submitted that the Refusal Letter acknowledges the relationship, acknowledges the birth of the Second Appellant and acknowledges that the sponsor had ILR in the United Kingdom at the date of the decision but the refusal letter still finds that there are no exceptional circumstances. She submitted that Counsel today has not specified any exceptional circumstances. She submitted that exceptional circumstances are required if the terms of the Immigration Rules are to be outweighed.
13. I was referred to the grounds of application. In Paragraph 8 the grounds state that the Appellant's character, conduct, associations, compliance with the conditions of her leave to remain are good and should have been considered by the judge, however, at Paragraph 10 the grounds state that the exclusion of the appellant from the United Kingdom may be found to be conducive to the public good because of her conduct, making it undesirable to grant entry clearance. She submitted that this is contradictory. The Appellant's is either of good character or not. She submitted that there is no indication that the judge did not consider all the relevant factors.
14. She submitted that what the Appellants are doing is trying to get the judge to make a decision by ignoring how the Appellant conducted herself when she came to the United Kingdom.
15. The Presenting Officer submitted that at paragraph 6 of the grounds, the case of Ganesabalan [2014] EWHC 2712 Admin 16 July 2014, is referred to, relating to discretion being exercised outside the Rules. In this paragraph it is stated that the judge failed to sufficiently consider the exceptional circumstances. I was referred to the said case of Oludoyi, which deals with this issue and draws the distinction between exceptional circumstances per se and exceptional circumstances which lead to a grant of leave outside the Immigration Rules. It refers to the policy on exceptional and compelling circumstances and the Decision Maker being left to decide what amounts to exceptional and compelling circumstances. She submitted that the First-tier Tribunal Judge decided that in this case there were no exceptional and compelling circumstances. She submitted that he was entitled to do so based on what was before him. She submitted that the judge considered all the facts in this case. At paragraph 20 of Oludoyi it is stated that there is no need to look at the evidence to see if there is anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. If there is some feature which has not been adequately considered under the Immigration Rules but which cannot in any way lead to the Article 8 claim succeeding, there is no need to go any further. She submitted that that is the case here. She submitted that everything has been considered

cumulatively and this claim cannot succeed under the Rules. She submitted therefore that there is no good reason to consider the claim outside the Rules.

16. The Presenting Officer submitted that the First-tier Judge's decision should be maintained.
17. She submitted that in the determination at paragraph 5 it was found that the sponsor would not be at risk on return to Moldova. At Paragraph 7 his failed asylum claim is considered. At Paragraph 8 the Appellant's entry into the United Kingdom in 2005 is considered. She did not apply for asylum or try to get status here. At Paragraph 13 the judge states that indefinite leave to remain was granted to IC on 11 October 2010 and at paragraph 19 the judge finds that there are no insurmountable obstacles to the family all going back to Moldova together. At Paragraph 30 the Appellant's evidence is considered and the fact that she has had a low mood because she misses Moldova. She has not seen her parents for 9 years and at Paragraph 33 the judge considers the fact that the sponsor has said that he will not go back to Moldova. The Presenting Officer submitted that that is his choice. At paragraph 6 of the determination the judge considers family life and private life stating that the sponsor has not been prevented from returning to Moldova while accepting that he has said that he will not return.
18. The Presenting Officer submitted that the sponsor can remain in the United Kingdom and support the Appellant's application for entry clearance from Moldova. At paragraph 38 the judge accepts that the second Appellant would be better staying with both his parents but finds that a short period away from his father will not be a problem. She submitted that the judge was entitled to make that finding based on what was before him. She referred to the case of Azimi-Moayed and Others [2013] UKUT 197 (IAC), which is relevant to this issue. The Second Appellant is only 4 and this case states that 7 years from age 4 is likely to be more significant to a child than the first 7 years of life. Young children are focused on their parents rather than their peers and are adaptable. She submitted that this Second Appellant is not at a crucial period in his development.
19. At paragraph 39 the judge states that entry clearance may not be granted to the Appellants but there is nothing to indicate that it is likely to be refused. Again it is stressed that there is nothing to stop the sponsor from going to Moldova with the Appellants. At Paragraph 40 the judge notes that the Appellant has said she came to the United Kingdom to escape from a boyfriend who was a human trafficker but she has never sought any protection from the United Kingdom authorities and she has told her doctor that she would like to go back to Moldova to see her parents and siblings. At Paragraph 41 the judge deals with the Immigration Act 2014 and section 117B of the Nationality, Immigration and Asylum Act 2002, finding that the relationship between the sponsor and the Appellant was formed while they were both in the United Kingdom unlawfully and the Second Appellant was born when both of them were here unlawfully. The judge then considers public interest and notes that the second Appellant is not a qualifying child as he has not lived in the United Kingdom for 7 years. The judge then goes on to deal with the cases of

Chikwamba [2008] UKHL 40 and Hayat [2012] EWCA Civ 1054 and at Paragraph 43 having referred to these cases he finds that the appeals cannot succeed. He finds that the terms of the Immigration Rules cannot be met and there is no need to consider the case outside the Rules.

20. The Presenting Officer submitted that all relevant matters have been properly considered by the judge including an interruption of family life. The judge found that because of public interest the appeal should be dismissed.
21. The Presenting Officer submitted that there is no material error of law in the determination and the First-tier Tribunal Judge's decision should stand.
22. Counsel then submitted that paragraphs 8 and 10 of the grounds of application are not contradictory, they are dealing with different considerations relating to the Appellant's conduct and whether she should be removed from the United Kingdom or be allowed to remain. She has no criminal convictions but does have a poor immigration history.
23. Counsel submitted that the judge has failed to consider certain exceptional circumstances. I asked her what these exceptional circumstances are. She submitted that the judge has found it would be reasonable for the sponsor to return to Moldova but although he was not granted asylum, he still fears return and it would be unreasonable for him to go back when he has his status in the United Kingdom and his job and his private life here. She submitted that there is always the possibility that an application from Moldova by the Appellants might not succeed and I put to her that the sponsor's earnings are sufficient and the judge has looked into how long an application from Moldova would take to come to fruition. Counsel submitted that if the application failed there could be a long separation. She submitted that if the sponsor went with them to Moldova he could lose his job, in which case they would not be able to return to the United Kingdom as he would not have sufficient earnings.
24. She submitted that the Second Appellant has been in the United Kingdom for all of his life with both of his parents and there would be a bad impact on him if he has to go back to Moldova with his mother. I was again referred to the grounds of application and the best interests of the child. Counsel submitted that the judge has accepted that there is family life and there is a young child involved and the separation from his father would be an unreasonable interference to his life. She submitted that the judge did not take all the circumstances into account and had he done so he would have reached a different decision.
25. I was asked to set aside the determination and allow the appeal.

The Determination

26. The grounds of application state that the judge has not considered all the relevant factors in this case and had he done so his decision would have been different. The terms of the permission do not further clarify this. The Presenting Officer has gone

through the determination and the judge has considered the relevant issues in this appeal and come to a well thought out decision. I asked Counsel what the exceptional factors are that the judge has not considered and she submitted that the best interests of the child have not been considered and she submitted that the separation of the child from his father even for a short period would be bad for him. The judge has, however, considered the best interests of the child at paragraph 38 of the determination. He has also considered the period of separation, which should be short. He has properly considered the Appellant's ability to apply from Moldova to join the sponsor in the United Kingdom and he has assessed the immigration history of both the Appellant and the sponsor. After doing that he considered Section 117B of Part 5A of the Nationality, Immigration and Asylum Act 2002 and "the public interest question." He noted that the relationship was entered into while neither party had status in the United Kingdom and that the Second Appellant was born while neither party had status in the United Kingdom. He noted that after the sponsor's asylum claim failed he remained in the United Kingdom until he eventually was granted ILR under the Legacy Scheme. Because of this he found that the sponsor can go back to Moldova as he is not a refugee. He noted that the appellant remained in the United Kingdom with no status until she made this application.

27. I find that the judge considered all the issues in this appeal and was entitled to come to the decision he did, based on the facts before him. He finds there to be no compelling, exceptional circumstances and he has explained why he found that there was no need to consider the appeal under Article 8 outside the Rules. Failing to do this is not an error of law.

The Decision

28. There is no material error of law in the First-tier Tribunal's determination promulgated on 17 November 2014.
29. The First-tier Tribunal's decision will stand and the appeal is dismissed.
30. Anonymity has been directed.

Signed

Date **17 March 2015**

Deputy Upper Tribunal Judge Murray
Judge of the Upper Tribunal