Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01557/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2019	**On 21 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

NATALIYA [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Norman, counsel, instructed by Sterling & Law Associates LLP
For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a national of the Ukraine appealed the decision of First-tier Tribunal Judge Povey, who on 11 January 2018 dismissed her appeal against the Respondent's decision to refuse leave to remain based on human rights grounds.

2. The Appellant's husband Mr [VM] had also appealed and their appeals were considered by the First-tier Tribunal Judge Povey under reference [~]. At material times Sterling & Law Associates were instructed by the husband, but whilst they remain on record they have no instructions from him, no address at which they can contact him but they do have some form of telephone contact with their client. It appears their client also has some form of occasional telephone contact with his children who are in the care of the Appellant but other than that there was no means at the moment for the Tribunal to communicate with Mr [M].

3. Accordingly it was agreed between the parties and myself that we would proceed to hear the appeal of the Appellant, whilst her husband's appeal would be adjourned. Further steps will be taken to establish if he wished to continue to pursue his appeal and if so with or without representation.

4. When this matter came before First-tier Tribunal Judge Povey (the Judge) for reasons that I gave in writing in a decision dated 29 September 2018, I concluded that the Judge had not correctly assessed the case law or applied it to the facts: In the context that one of the children of the family named [R], date of birth 22 February 2009 had not been properly considered. The position was since his birth there was a second child [I], date of birth 28 June 2013 who was just under 6 years of age.

5. As a fact [R] has applied for British nationality and that application was acknowledged on 14 March 2019 on the basis of his presence in the United Kingdom of ten years. That application may be determined by September 2019 but there was no guarantee of that date. At present in the light of the considerations that apply there was nothing at the moment which raised any particular difficulty with the child's application under the provisions of Section 1(4) of the British Nationality Act 1981.

6. For these purposes I do not proceed on the basis that he will have British nationality but I take it into account as a factor that can reasonably be considered in the light of the seemingly undisputed facts as to his presence since birth in the United Kingdom.

7. In considering this matter I have been taken to the provisions under the Rules in relation to paragraph 276ADE(1)(iv), in that it was argued that [R] was under 18 years of age, had lived continuously in the United Kingdom for seven years and it would not be reasonable to expect him to leave. Ultimately this is an appeal addressing Article 8 ECHR grounds. I conclude that there was an issue of the Appellant and her son and family having a family life in the United Kingdom and to a degree the Appellant's son has partly a private life of which no doubt his family forms the significant part. I accepted also that the Appellant has no rights to remain here and her immigration history was poor. It was clear that the Respondent's decision gave rise to an interference in the exercise of private/family life rights. No specific case in terms of national security or public safety, protection of health and morals and the freedoms of others was particularly raised. Nevertheless I concluded on the facts that the interference was an interference sufficient to engage Article 8(1) rights. I concluded that the decision of the Respondent was lawful and properly served Article 8(2) purposes.

8. I therefore in that context apply in the assessment the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009, in relation to the welfare of the children. I also apply Sections 117A and 117B of the NIAA 2002. I concluded on the evidence that I have received that the son, [R] of the Appellant has grown up in the United Kingdom without return to the Ukraine. On the evidence [R], as does his sister speak English between themselves and at school but that in the home his mother communicates with them in Ukrainian even if they respond in English. It seemed to me the likelihood on the background evidence was that the Appellant's son and daughter have an understanding of Ukrainian and if it is necessary some limited ability to communicate with relatives and others in the Ukraine on family matters. I find their preference was to be in the UK and speak English.

9. The evident benefits of the provisions made both in guidance given to caseworkers and earlier guidance as long ago as DP5/96 with the seven year Rule as it was then referred to, embraced a continuity of recognising that the analysis needed to be addressed under the 2002 Act on a discrete basis under Section 117B (6), for the Appellant was not liable to deportation and under the provisions of the Act the question is whether the public interest does require the Appellant's removal where the Appellant has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK.

10. That was clearly a fact specific matter but there was no argument that the Appellant does have such a genuine and subsisting parental relationship. As is clear from the case law demonstrated recently in JG (Section 117B(6): "reasonable to leave" UK) Turkey 219 UKUT 00072 Rev 1, that there was the need to hypothesise that the child in question would leave the UK, even if it is not likely to be the case, and ask whether it would be reasonable to expect the child to leave.

11. The Tribunal's analysis helpfully takes on the development of the case law through KO Nigeria [2018] UKSC 53 and explained the contextual relationship between a child and the immigration history of the child's parents as reflected in EV (Philippines) and Others [2014] EWCA Civ 874. What was clear and remained clear was that Parliament has intended to benefit children, who are qualifying children, and it was no issue in this case that [R] was a qualifying child and that they should have and be able to enjoy the benefits of status in the UK if it was not reasonable to require or expect the child to leave the UK.

12. On the evidence I find that the correct assessment of the facts showed that the Appellant's son, [R], was settled in school in the United Kingdom and doing well albeit earlier school reports showed plainly the difficulties associated with language and settling in. Secondly his social and community ties, friends are in the United Kingdom. Thirdly he has never been to the Ukraine and whilst he has some language understanding and ability to communicate, the fact was that he has no

experience of life, schooling and social customs in the Ukraine. It was unlikely he was numerate in Ukrainian or reads Ukrainian. He was not on any view fluent in the Ukrainian language and that is demonstrated by his lack of meaningful contact with anyone in the Ukraine.

13. Therefore the position was that [R] was a qualifying child and it did not seem to me that simply saying while he can return with his sister and his mother addressed the benefits intended by Parliament to fall upon a qualifying child, if it is not reasonable for him to be removed. I did not find it becomes reasonable for him to be removed simply because he would return to Ukraine with his mother and sibling sister.

14. On this basis, irrespective of the any weight that might be given to his application for nationality, it seemed to me that it would not be reasonable for him to leave the United Kingdom and it follows that it is not in the public interest and disproportionate for the Appellant to be required to leave the UK when she is the sole carer of [R].

15. So far as the sibling sister is concerned it seemed to me clearly in the child's best interests to remain with her brother. There was no suggestion there was anyone that could care for him in the absence of the mother and it followed logically that the family unit is an important one in the children's development.

16. Accordingly irrespective of the position under Section 117B(6) NIAA 2002 I concluded that in relation in any event to the Appellant and her daughter that their removal would be disproportionate.

17. In reaching that view I have also taken into account, although the medical evidence which was very limited, that the Appellant's father was suffering from mental health problems and left the family home in January 2019. It was uncertain what if any future role he might play in the children's lives or to what extent his removal would have any meaningful impact on them. At the present time it appeared that he may, if

minded to telephone, speak with the children, but not the Appellant, on one or two occasions a week by telephone: I know no more of that contact. There was nothing to indicate he was financially supporting the children, in part or whole, nor if he was playing any decision making role whatsoever in the daily lives of the children or if he has been doing for any particular period of time.

18. In the circumstances it did not seem to me there was sufficient evidence to take a view one way or another on any significance of this decision on the Appellant's husband, nor his failure to attend the appeal hearing.

DECISION

19. The appeal is allowed under Article 8 ECHR grounds.

ANONYMITY

Given the ages of the children and the presidential guidance it seemed to me that no anonymity order was sought nor required.

FEE AWARD

The appeal has succeeded. A fee of £140 was paid by the Appellant and in the circumstances a fee award in that sum is appropriate.

Signed Dated 10 May 2019

Deputy Upper Tribunal Judge Davey