



IAC-AH-CO-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/40006/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1st December 2015**

**Decision & Reasons Promulgated
On 15th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

**HALYNA HUDKOVA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel

For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this decision I shall refer to the parties as they were described before the First-tier Tribunal, that is Mrs Halyna Hudkova as the Appellant and the Secretary of State is the Respondent.
2. The Appellant is a Ukrainian citizen born on 27th September 1974 and so 41 years old as at the date of my consideration. The Appellant is married to a Ukrainian citizen

who settled in the United Kingdom. The couple had married in November 1995 in the Ukraine. The couple have a daughter Anastasia born on 9th May 1996.

3. In 1999 the Appellant's husband Mr Oleh Lohachov came to the United Kingdom leaving the Appellant and their daughter living in the Ukraine. The Appellant has two parents living in the Ukraine. After the couple married the Appellant's husband's grandparents lived with them and shortly after the Appellant's husband's mother was diagnosed with stage four cancer which resulted in her having her leg amputated. The Appellant looked after the three elderly dependants and her daughter. In about 2000 the Appellant's husband's mother died and shortly after his grandmother died and his grandfather was diagnosed with stage three prostate cancer. He subsequently passed away and then the Appellant "moved" to the UK to support her husband. By which is it apparent that what is meant is that the Appellant obtained a visit visa on the basis of an intention to return but did not do so. The Appellant's own parents looked after her daughter. In 2005 the Appellant's daughter similarly travelled to the United Kingdom on a visit visa which she subsequently overstayed.
4. In August 2013 the Appellant's husband was granted indefinite leave to remain. The Appellant's husband has been employed for the last seven years with a company called Sheer Products earning on average £30,000 per year.
5. The Appellant and her daughter made an application for indefinite leave to remain in February 2014 on the basis of the Appellant's daughter having resided in the United Kingdom for more than seven years. The daughter has subsequently been granted discretionary leave to remain until 11th March 2017.
6. The Respondent's decision refusing the Appellant leave to remain on the basis of her family and private life was appealed to the First-tier Tribunal.
7. Following a hearing on 17th February 2015 Judge S O'Brien allowed the appeal .
8. The judge found that the Appellant did not meet the requirements of the Immigration Rules set out at Appendix FM. The route of parent was closed as the daughter was over the age of 18. In the context of the partner route the judge noted that the Appellant's partner would be able to return with her to the Ukraine where they would be able to look to the Appellant's parents for help in the short term so that although the husband would face significant difficulties in relocating in the context of having left the Ukraine sixteen years previously and having had to sacrifice a well-established and well paid job in the United Kingdom, they would be able to turn to the Appellant's parents who remained living in their own home, for support in the short term. The judge found that the Appellant's husband's concerns that he would be called up to the army unsupported by objective evidence.
9. The judge nonetheless considered whether the Appellant could succeed on the basis of Article 8 outside of the Rules.

10. The judge noted that the removal was lawful and necessary in the context of the legitimate aim to which effective immigration control is directed. The judge reminded himself that the Appellant had made no attempt to regularise her status over a considerable period of time and that in the context of that unlawful residence the development of private and family life should carry little weight. The judge refers to the family being close-knit and the fact of the earlier period of separation "through force of circumstance" until they were reunited here in 2005. The judge states that the family are "rightly reluctant to be separated again. Indeed, it is Anastasia's desire to live with her parents while she completes her university studies." The judge concluded that the Appellant enjoyed family life with her daughter and husband, the family living as a unit with the daughter continuing in full-time education. The judge found that it would be unreasonable to expect the daughter and husband to leave the United Kingdom, because although the immigration rules could not be met as the couple could relocate to the Ukraine without facing insurmountable obstacles, the rules did not make adequate provision respecting the rights of the adult daughter who resided with them as a dependent student, and consequently removal would breach the Article 8 rights of the Appellant, her husband and their daughter.
11. The Respondent's application for permission to appeal was granted on the basis that the judge had failed to adequately articulate why family life existed between the Appellant and her daughter, who is an adult, and failed to weigh the public interest appropriately as described in Section 117B of the Nationality, Immigration and Asylum Act 2002, particularly on account of her poor immigration history, or to give appropriate weight to the inability to meet the requirements of the Immigration Rules.
12. Those grounds were maintained before me when Ms Isherwood made submissions which, whilst fleshing out the grounds, in substance did not vary from them.
13. For the Appellant Ms Nnamani relied on the Rule 24 response to the point that the finding that the Appellant, her husband and daughter lived as a family unit in the context of the daughter's continuing full-time education at university was sufficient to found a finding that family life with the daughter was engaged. In respect of the weight of the proportionality exercise the judge had had the benefit of hearing and seeing the Appellant and her family give evidence, had the benefit of detailed documentary evidence of the character and quality of the family life enjoyed in the United Kingdom, and was entitled to conclude that it was unreasonable to expect either the husband or daughter to leave the United Kingdom with the Appellant in order to maintain that family life.
14. I am satisfied that the judge's decision reveals a material error of law for failure to adequately weigh the public interest considerations at Section 117B of the NIAA 2002. Additionally even if there was evidence before the judge substantiating the claim to enjoy family life within the meaning of Article 8 with her daughter it did not relieve the judge of the duty of identifying it and explaining why he considered that it was not adequately dealt with by the consideration under the Rules.

15. I set the decision aside. I heard submissions as to how to proceed to deal with the Appellant's case if I decided, as I have, to set it aside. There is no application to adduce further evidence and the representatives were content that I should proceed without further hearing to remake the decision on the evidence as it was.
16. The argument for the Appellant is that the presence of the daughter in the UK household, as a student financially dependent on her parents and receiving their emotional support, renders the position under the rules an inadequate response to their family position.
17. Relocation in the context of Article 8 encompasses not only permanent relocation as the rules do, but also temporary relocation by the Appellant with or without her husband, in order to bring the Appellant within the rules by making an application for entry clearance from abroad.
18. S117 of the 2002 Act informs the evaluation of proportionality, containing factors that must be taken into account, and indicates that the public interest is in maintaining immigration control.
19. The First-tier Tribunal's decision under the Immigration rules was unchallenged before me, so that that part of the judgment, and the factual findings on which it relies, remain: the husband and wife could relocate permanently to the Ukraine remain.
20. Family life was formed in the Ukraine at a time when both lived there. It remained a family life in the Ukraine when the husband came here in 1999. The husband's stay here was precarious in the sense that it was limited, whilst he could return to the Ukraine his wife could not come here without restriction. The family locus, in terms of home and hearth was in the Ukraine, so that family life came to be enjoyed with the wife living in the Ukraine and the husband living with her but travelling to work abroad in the UK. Choices, such as the ones made by this couple, necessarily include choices about how they are going to enjoy their family life. I find that the family life is plainly one deserving respect, so as to engage Article 8: the relationship is longstanding; there is a child of the union, now in the UK studying with limited leave and living with the couple, dependent on them financially, and receiving emotional support as is common between adult children living at home studying with supportive parents. Whilst that situation may not be uncommon, it is sufficient to provide a degree of dependence sufficient to find that family life continues beyond the formal age of maturity ordinarily denoting independence of the family unit. I am satisfied that the family life of the Appellant includes not only her relationship with her husband but also with their dependent daughter.
21. I consider the impact of removal and the claimed interference.
22. The uncontested findings of the first tier tribunal are that should the Appellant's husband decide to return with the Appellant to the Ukraine and live there permanently, leaving their daughter in full-time education in the United Kingdom, there are simply not the sort of obstacles to reintegration that would make that

position so difficult for the partner or Appellant that they have any entitlement to remain under the Rules.

23. The evidence does not identify anything in respect of the daughter's circumstances here which means that she would be required to return with them, as Ms Isherwood pointed out this is not the first time that the Appellant has been separated from her daughter because that was the position of choice of the Appellant and her husband when the child was a minor. If the reality is that the parents cannot so afford, then they have the option of the father remaining so as to support the daughter here, including the additional option of the Appellant making an application to re-enter.
24. The daughter is not a minor now so that in respect of Section 117B the weight to be attached to the public interest is not reduced by the presence of any qualifying child.
25. The Appellant's ability to speak English, and the financial independence obtained through her husband do not give rise to any positive right to a grant of leave to remain (AM (Section 117B) Malawi [2015] UKUT 00260 (IAC)).
26. S117 B (4)(a) indicates that little weight should be given to a private life developed in the context of unlawful residence, whilst S117 (4) (b) states that a family life formed with a qualifying partner, that is established when the person is in the UK unlawfully, should be given little weight, this is not such a relationship. S 117 B (4) (a) does not direct that such a family life carries little weight; it is silent about the weight to be attached, so that the weight to be attached falls for evaluation on its facts, in the usual way.
27. There is no absolute right for the family to enjoy their family life as they currently experience it in the UK.
28. In the event that the couple chose that the Appellant should make a fresh application in the Ukraine, the question of disproportionality of temporary separation is not addressed in Appendix FM. The case of Chen [2015] UKUT 00189 (IAC) addresses the impact of temporary separation and the principles first established in the case of Chikwamba [2008] UKHL 40. This is not a Chikwamba case where there were no countervailing factors. This is a case where the Appellant's immigration status has always been understood by the parties to the marriage. The history reveals an extensive period of unlawfulness, including in the context of contact with the authorities in relation to the daughter's subsequent visit and overstay, and the father's obtaining of indefinite leave in 2013.
29. In short although the relationship was not formed in the context of known unlawful residence here, the family life established here, as it now is, has been established in the context of unlawful residence.
30. There are no compelling or compassionate circumstances, including taking account of the position of the daughter, which warrant leave outside of the immigration rules.

31. I find that removal of the Appellant will not give rise to any breach of Article 8 rights of the Appellant or her family.

Decision

32. The decision of the First tier –Tribunal in respect of Article 8 is vitiated by error and I set it aside to remake the decision dismissing the Appellant's appeal on Article 8 grounds. The decision of the First-tier Tribunal dismissing the appeal on Immigration Rules stands.
33. No anonymity direction is made.

Signed

E Davidge

Date 14 January 2016

Deputy Upper Tribunal Judge Davidge