



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14605/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Skype for Business  
On 25 February 2021

Decision & Reasons Promulgated  
On 17 March 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

OLHA NOSATA

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Plowright instructed by Sterling & Law Associates LLP

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Ukraine who was born on 3 February 1968.
2. On 1 July 2015, the appellant applied for entry clearance as a visitor which was refused on 17 July 2015.

3. On 2 September 2015, the appellant entered the UK unlawfully. She did so in order to join her daughter (“D”) who had come to the UK shortly before in order to study and was living with her father (the appellant’s ex-husband) and her brother (the appellant’s son) in the UK. D was born on 21 January 2003 and so, at the time of the appellant’s entry to the UK, was 12 years old.
4. On 3 December 2018, the appellant was arrested and granted bail.
5. On 5 February 2019, the appellant made an application for leave to remain based upon her private and family life under Art 8 of the ECHR. The appellant relied principally upon her relationship with her daughter, D, who was in full-time education and who had leave valid until 27 May 2021.
6. On 12 August 2019, the Secretary of State refused the appellant’s application for leave both under the Rules (the requirements of which it is not now suggested she could meet) and under Art 8 outside the Rules.

### **The Appeal**

7. The appellant appealed to the First-tier Tribunal. In a decision sent on 21 January 2020, Judge Stedman dismissed the appellant’s appeal. The judge found that the appellant’s removal, having regard to D’s best interests, would be proportionate and that her private and family life was outweighed by the public interest in effective immigration control.
8. The appellant sought permission to appeal to the Upper Tribunal. Permission to appeal was granted by the First-tier Tribunal (Judge Keane) on 18 May 2020.
9. Following directions issued by the UT on 23 June 2020, the appellant filed submissions in response as did the respondent.
10. The appeal was listed for an oral hearing at the Cardiff Civil Justice Centre to be heard remotely on 25 February 2021. The court sat working remotely and Mr Plowright, who represented the appellant, and Mr Howells, who represented the Secretary of State, joined the hearing remotely by Skype for Business.

### **The Appellant’s Challenge**

11. The appellant’s grounds and written submissions rely upon three grounds which Mr Plowright developed in his oral submissions.
12. First, it is contended that the judge erred in law, when assessing D’s best interests, when at paras 42 and 43 of his determination he stated that given that D is now 17 years old, she would naturally be “far less reliant on her mother emotionally than might have been the case two or three years ago”. Mr Plowright submitted that this finding was irrational and not based upon any evidence. The judge, he submitted, gave undue weight to D being 17 years old rather than a younger age.

13. Secondly, the judge erred in law in finding, in para 48 in stating that D's best interests were not "significantly reduced or compromised" by her mother returning to Ukraine. Mr Plowright submitted that that was improper reasoning and a perverse conclusion given that the appellant's mother had entered the UK a month after D had done so to study in the UK. The judge had been wrong to take into account that, if being in the UK with her mother was not in D's best interests, she would not have come to the UK to live with her father knowing that her mother might possibly not be able to enter the UK.
14. Thirdly, it is contended that the judge erred in law by failing to give primary consideration to D's best interests which were undoubtedly served by her mother remaining in the UK. Reliance is placed upon a passage in Lord Kerr's judgment in ZH (Tanzania) v SSHD [2011] UKSC 4 at [46] that where a child's best interests clearly favour a certain course, that would ordinarily dictate the outcome of a case unless there were countervailing reasons of considerable force to displace them.

### Discussion

15. The background to this appeal is no longer in dispute. The appellant and her husband divorced in 2011. He moved to the UK at some point. D, the appellant's daughter, lived with the appellant in Ukraine. In 2015 the appellant's daughter, D, came to the UK to study. She travelled here with her father. She was 12 years of age. She lived with her father and older brother, in the UK. The appellant attempted to come to the UK to live in accommodation provided by her ex-husband with D (and her brother) in order to support D while she was in education in the UK. The appellant sought to do this initially by seeking entry clearance as a visitor. In that regard, the judge found, and it is not now contested, she provided false information in her application, namely that she did not have family in the UK (whereas her son was already here) and she provided false documents as regards her employment in Ukraine. All this transpired prior to D coming to the UK in the summer of 2015. Having been refused entry clearance, on 2 September 2015, the appellant entered the UK unlawfully. She remained here, without the knowledge of the immigration authorities, until she was arrested on 3 December 2018. She made no attempt to regularise her status in the UK until some two months later when she made the application for leave to remain under Art 8, the refusal of which is the subject of this appeal.
16. The judge concluded that the appellant could not succeed under the Immigration Rules, in particular para 276ADE(1)(vi). That finding, that there were not "very significant obstacles" to the appellant's integration on return to Ukraine, is not now challenged.
17. The bulk of the judgment concerns Art 8 outside the Rules and, in particular, the circumstances of D and her best interests.
18. At paras 20-26, the judge set out the legal framework to be applied in considering Art 8 outside the Rules. In particular, at para 24, the judge cited ZH (Tanzania) and Zoumbas v SSHD [2013] UKSC 74 noting that D's best interests were a "primary

consideration” but not necessarily a “trump card”. A child’s best interests could be outweighed by the cumulative effect of other considerations but no other consideration could be treated as inherently more significant. That is undoubtedly a correct self-direction in accordance with the well-known legal principles applicable in this area and summarised by Lord Hodge in Zoumbas at [10] as follows:

“10. In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely *ZH (Tanzania)* (above), *H v Lord Advocate* 2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

- (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
- (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
- (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
- (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
- (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
- (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
- (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.”

19. At [13], Lord Hodge offered further comments on the seven principles:

“... First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in *H(H)* (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of *H(H)* shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children. In that case an Italian prosecutor issued a European arrest warrant seeking the surrender of a person who had earlier broken his bail conditions by leaving Italy and ultimately seeking safe haven in the United Kingdom and had been convicted of very serious crimes. This court held that the treaty obligations of the United Kingdom to extradite him prevailed over his children's best interests. The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in

our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in *H(H)* (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents."

20. In relation to a submission (which mirrors Ground 3 in this case) relying on Lord Kerr's comment in [46] of *ZH(Tanzania)*, Lord Hodge (at [12]) rejected that submission and explained that what Lord Kerr said was in the context of British citizen children:

"[Counsel for Mr Zoumbas] also founded on a statement in the judgment of Lord Kerr of Tonaghmore in *ZH (Tanzania)* at para 46 in support of the proposition that what is determined to be in a child's best interests should customarily dictate the outcome of cases and that it will require considerations of substantial moment to permit a different result. In our view, it is important to note that Lord Kerr's formulation spoke of dictating the outcome of cases "such as the present" and that in *ZH (Tanzania)* the court was dealing with children who were British citizens. In that case the children by virtue of their nationality had significant benefits, including a right of abode and rights to future education and healthcare in this country, which the children in this case, as citizens of the Republic of Congo, do not. The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Moreover in *H(H)* Lord Kerr explained (at para 145) that what he was seeking to say was that no factor should be given greater weight than the interests of a child. See the third principle above."

21. Turning again to the present appeal, the judge heard oral evidence from both the appellant and D. Her father did not give evidence as he was away in Ukraine. It is difficult to do justice, by way of a summary, to the judge's very full reasoning.
22. The judge accepted that D enjoyed family life with both the appellant and her father (see para 33). The judge noted that D had come to the UK knowing that her mother (the appellant) had not been granted entry clearance to come to the UK and that she lived with her father who had, at that time, been responsible for her "well-being and care" and also "financially responsible". It is D's father who has "always maintained and accommodated his daughter".
23. At several points, the judge accepted that the appellant and D enjoy a "close relationship" (see paras 34, 38, 43 and 53). Also, she has a close relationship with her older brother, although the judge did not accept that this amounted to family life for the purposes of Art 8 (see paras 34 and 39). In addition, the judge recognised that D's relationship with her father was "one which is strained, and in some ways difficult" (see para 34). Nevertheless, the judge noted that D's father provided D with a home and, indeed, a home for the appellant since she came to the UK. He pays a substantial amount of rent per month and is solely financially responsible for D (see para 35). The judge recognised that, despite the appellant's divorce, her ex-husband (D's father) was committed to his family especially his daughter (see para 36). The judge did not accept the appellant's evidence that there was an "inferior or deficient relationship" between D and her father even if, as he had already accepted, the judge concluded that the relationship was "strained and was not as close in emotional terms as it might have been". It was, nevertheless, a relationship which has resulted in D's father supporting both D and the appellant for a number of years (see para 37).

24. At para 39, the judge noted that whilst accepting that the appellant and D enjoyed a close and loving relationship, it was “simply a statement of fact that, like many parents, the appellant was willing to sacrifice being away from her daughter for a higher purpose”. That is a reference to the fact that the appellant did not obtain entry clearance to come to the UK to accompany D but that, nevertheless, D came to the UK to study.
25. I will set out in full paras 40–49 where the judge considered the relationship between the appellant and D and the latter’s best interests. Both Grounds 1 and 2 challenge some of the judge’s reasoning in this section of his judgment: at paras 42–43 (Ground 1) and para 48 (Ground 2). At paras 40–49, the judge said this:
- “40. I next turn to the heart of the appeal, which is the relationship between the appellant and her daughter and the inevitable impact that would have on them if the appellant were removed, as well as the rights of [D] to enjoy a relationship with her mother in terms of her best interests, and as a free-standing right under the Charter. I can deal with each aspect holistically and, as in all such cases, much depends on a fact specific analysis (which [is] why I have set out hopefully with some clarity the facts which I have accepted).
41. I find that [D] who will be 17 years of age at the date of the promulgation of this decision, has a relationship with her mother and father in terms of normal family life. The relationship may well be of a different nature and one which is closer with her mother, but I must have regard to the fact that she has been living with her father for four and a half years without any major difficulties.
42. I also find it significant that [D] was at a young age of just 12 able to travel to the UK to live with her father and be away from her mother for the purposes of her education, and at an age where she would have needed far more care and supervision [than] she currently requires. While [D] is closer to her mother and I am sure enjoys a loving relationship with her, I have to have regard to her age now at 17 where she will naturally be far less reliant on her mother emotionally than might have been the case even two or three years ago.
43. I accept that [D] is still a child and needs to maintain a close relationship with her mother but they will not be comparable to a child of say 12 or 13 as she was when she arrived here. The appellant has been here for her over the years and I do not agree that there were any specific issues with [D] – for example from a physical or mental health perspective – that made her more in need of emotional or physical support, or in any way made her vulnerable or more dependent or reliant on her mother, compared to another child of a similar age.
44. Neither was there sufficient evidence to suggest that [D] was going through a particularly difficult time. I appreciate that she went to her GP on 18 December 2018 feeling very stressed because of the possibility of her mother leaving the UK, but I have only a summary of the consultation and from that I can see she has not been referred for counselling or told that she had anxiety or depression or prescribed any medication. I noted that her concern as she related to the GP was about the potential impact that her mother leaving the UK would have on her ability to take exams. I did not find the GP entry as indicative of any serious concerns as to her well-being. It was natural that she should feel stressed. Stress and family problems are unfortunately part and parcel of everyday life for many people. There was nothing that highlighted any particular or more acute concerns; no red-flags.
45. I found [D] to be a credible witness. She was able to express her views and was clearly independent in her thoughts. She was adamant for example and I found

this very important to the decision I finally reach, that she was not prepared to return to Ukraine and wished to complete her studies in the UK. I took from that that she was able to contemplate her mother returning and, as much as she would prefer to have her present and close in her life (i.e. living in the same house) that she was not prepared to compromise her (*sic*) to continue with her studies to which she was clearly committed.

46. [D] did not express in her evidence any cogent reasons why she would not be able to continue living with her father and brother who were financially supporting her. I found it important in my assessment to know that she was close to her brother and that he would provide her with some emotional support and even financial support as she required. Essentially, what [D] told me was that her best interests were satisfied by her staying in the UK for the duration of her leave, and to continue with her studies, and that was not something that she was willing to jeopardise by leaving the UK, even if it meant being apart from her mother.
47. Ultimately, a choice had to be made by [D's] parents a number of years ago that she would come to the UK and continue with her studies. That decision was confirmed by [D] whose best interests I accept are to continue with her studies. It will always be preferable to do that with both parents here, but I must look at the specific facts and the person that [D] is, and her ability to remain with her father. I also acknowledge that she would be able to visit Ukraine and has done so since being here. There is a property which the appellant can go to and [D] can visit her there. The relationship therefore can continue in person to some degree and of course over the internet with video and phone calls.
48. I cannot say that [D's] best interests are significantly reduced or compromised by her mother being in Ukraine. Had that been the case she would not have come to stay with her father knowing that her mother would possibly have difficulties or delays in coming here. [D] can continue to enjoy her family life with her father and with her brother in the UK. She has enjoyed a personal relationship with both parents for a number of years and she is now just one year away from adulthood.
- ....
49. Looking at the evidence as a whole, I simply cannot conclude that the rights of [D] will be breached by reference to the Charter as a discrete right, or that in terms of section 55 her best interests which are a primary consideration outweighs in this case the public interest to which I must give significant weight looking at the specific facts of the case as they pertain to her relationship with her mother. I therefore dismiss this aspect of the appeal".

26. Mr Plowright first contends that the judge's reasoning in paras 42 and 43 was perverse or irrational in taking into account that D's emotional reliance upon her mother would be less at the age of 17 than it would have been two or three years ago, i.e. when she first came to the UK. That submission is, in my judgment, without merit. The judge was not required to leave his own common sense at the door of the courtroom. As a matter of common sense, the reliance of a 12 year old daughter upon her mother is likely to be much greater than that of a 17 year old. The judge does not say that D is not emotionally reliant upon the appellant. Indeed, he recognised on numerous occasions in his determination that there is a "close and loving" relationship between D and the appellant. What would have been wrong for the judge to do would be to have applied that view without regard to D's specific circumstances. But, as is plainly clear from the detailed reasons he gave in his judgment, he did not fall into that error. He considered D's situation as a whole.

There were no specific issues as regards D's physical or mental health (see para 43). D also had the support (both emotional and financial) of her father with whom she had also lived since coming to the UK as a 12 year old. There was, in addition, D's brother whom the judge found had, himself, a close relationship with D and could provide emotional support, and if necessary, also financial support. Although, the latter was, on the evidence before the judge, provided by D's father. The judge recognised that it was in D's best interests to continue her studies in the UK and that it would be "preferable" to do so with both parents here. Reading the determination as a whole, it is plain that the judge took fully into account the circumstances of D including her relationship with her mother, her father and brother and what impact her mother leaving the UK would have upon D. I do not accept that the judge erred in law by giving improper weight to D's circumstances now based upon an impermissible comparison with her needs (and reliance upon her mother) as a 12 year old child. I, therefore, reject Ground 1.

27. Ground 2 contends that the judge improperly reasoned and/or reached a perverse conclusion when in para 48 he said that he could not say that D's best interests were "significantly reduced or compromised by her mother being in Ukraine".
28. That statement has to be seen in context, namely the judge's assessment of the support which would be provided by D's father and her brother in the UK. It also had to be seen in the context of D's own evidence, which the judge summarised and made findings upon in paras 45-46 and which are now not challenged, that D herself wished to remain in the UK, and would do so, to continue her studies if the appellant was required to leave and go back to Ukraine. D did not give any cogent reasons why she could not continue to live with her father and brother with their support. At para 48, the judge does not say, or find, that D's best interests would not be affected by her mother going to the Ukraine. What he decides is that they would not be "significantly reduced or compromised" if that happened. That was a finding entirely founded in the evidence and not one which can be properly characterised as irrational or perverse. It was a finding open to the judge on the totality of the evidence before him. I, therefore, also reject Ground 2.
29. That then leaves Ground 3, which contends that the judge failed to give D's best interests their true weight, namely as a "primary consideration". First, it is clear that the judge, as I have already pointed out, correctly directed himself that D's best interests were a "primary consideration" (see para 24 and also para 49). Mr Plowright acknowledged in his oral submissions, quite properly, that D's best interests were not a "trump card". It is clear from the case law, such as ZH (Tanzania) and Zoumbas, that a child's best interests can be outweighed by sufficiently weighty other considerations. Ground 3's reliance upon Lord Kerr's judgment at [46] in ZH (Tanzania) where he stated that usually, unless countervailing reasons of considerable force exist, the outcome of a case should be determined by a child's best interests, has to be seen in the light of the Supreme Court's response to such a submission in Zoumbas, particularly at [12] which I set out above. There, Lord Hodge pointed out that Lord Kerr had made that statement in the context of a case where the children were British citizens and, indeed, Lord



Kerr had himself explained that he was not intending to elevate a child's "best interests" above that of being a primary consideration in H(H) at [145].

30. In this case, there were significant public interest matters and the judge was entitled to give the public interest in effective immigration control significant weight. The appellant had been refused entry clearance, had nevertheless entered the UK illegally and had practised deception in her attempt to obtain a visit visa to come to the UK with D. Despite Mr Plowright's clear and succinct submissions, I am wholly unpersuaded that the judge failed properly to carry out the balancing exercise having regard to D's best interests and the appellant's immigration history. The argument does not come anywhere near demonstrating that the judge failed to take into account all relevant matters and reached a perverse or irrational finding that the best interests of D were outweighed by the public interest in effective immigration control.
31. For these reasons, I reject Grounds 1, 2 and 3 and Mr Plowright's submissions in support of those grounds.

### **Decision**

32. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 of the ECHR did not involve the making of an error of law. That decision, therefore, stands.
33. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
10 March 2021

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

Judge Stedman, having dismissed the appeal, made no fee award. That decision also stands.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
10 March 2021