Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10045/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 July 2013	**On 19 August 2013**
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Before

UPPER TRIBUNAL JUDGE ESHUN

Between

VIKTORIYA ONEIL

Appellant

and

ENTRY CLEARANCE OFFICER - KYIV

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel, instructed by Gulbenkian Associates
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Ukraine born on 30 April 1994. On 10 February 2012 she applied for leave to enter the UK with a view to settlement as the child of a person present and settled here, namely her mother, Iryna O'neil. On 7 May 2011 her application was refused by the respondent. In a determination promulgated on 18

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February 2013 the appellant's appeal was dismissed by First-tier Tribunal Judge Rowlands under the Immigration Rules and Article 8 of the ECHR.

2. The appellant's mother, Iryna Oneil, was born on 15 August 1974 in Kamenets–Podilsky, in the Ukraine. She was previously married to the appellant's father. Their marriage was dissolved on 8 June 2001.

3. On 29 October 2004 the appellant's mother entered the UK and began to work as a cleaner. She left her daughter, the appellant, in the care of her parents in the Ukraine. In 2007 she met Mr Alan Oniel and they got married on 9 January 2010. They have a daughter called Veronica Sarah Oneil born on 6 September 2010.

4. On 24 January 2010 the appellant's mother applied for leave to remain as the spouse of a person present and settled in the UK. That application was refused without a right of appeal. She applied to the Administrative Court to judicially review the decision. It was agreed that the Secretary of State would reconsider her decision. However the Secretary of State refused the appellant's application for leave to remain in the UK. Following a successful appealed against the respondent's decision, the appellant's mother was granted limited leave to remain in the UK in June 2011 until 2014.

5. The only issue before the judge therefore was whether refusing the appellant entry clearance would amount to a breach of her rights under Article 8 of the ECHR.

6. The judge heard evidence from the appellant's mother, Iryna O'Neil, her stepfather Alan Oneil and her grandmother Liudmyla Borovska who was visiting the United Kingdom at the time. All the witnesses adopted their witness statements.

7. The judge applied the principles set out in **Razgar** and found as follows:

> "19. It seems clear that the main reason for wanting the appellant to come to the United Kingdom is to improve her chances of a music career or even find her any work at all. She has visited the United Kingdom on a number of occasions and, on most if not all of them, has taken some kind of music course. She wants to further her music career and feels that she cannot do that in Ukraine. That may be true that but that is no reason in itself for her to be allowed to enter the United Kingdom on a permanent basis.
>
> 20. I accept that she is close to her mother and as close as she could be to her stepfather and half sister. However she has been able to visit them regularly and according to the Respondent's representative, there is no reason why she cannot continue to do.
>
> 21. She is over 18 and has been living apart from her mother for some time. It has been suggested on her behalf that the relationship between her and her daughter shows a dependency over and above that normally between

mother and daughter. I do not agree. There is nothing at all in their relationship that shows that. Although they communicate on a regular basis that is no different to mothers and grown up children generally. Her mother left her in the Ukraine when she was 10 years old leaving her safely with her grandparents. I accept that this was to try and improve her situation but nevertheless they were separated for such a long time that to a great extent the appellant has grown up rather independent.

22. For the purposes of the application the appellant's mother had stressed that she made all the major decisions in relation to her but clearly that cannot have been the whole story. For some of the time the mother has been in the United Kingdom essentially in secret and working illegally. She certainly wasn't able to go back and visit her daughter or her daughter visit her.

23. The appellant has her own life to live and is at an age when expectation would be for her to leave home and go to college anyway. She has successfully lived alone whilst at college already. I accept that her younger sister will want to see her regularly but there is no reason why they cannot do that by her continuing to visit regularly and vice versa. I do not believe that preventing her from living in the United Kingdom is disproportionate. I do not accept that it amounts to an unlawful interference with either her human rights or that of her mother, stepfather or sister.

24. We can see no reason to make a direction for anonymity in this case. There is a public interest in the deportation of foreign criminals and the public has a right to know how this Tribunal reaches its decisions in that regard."

8. The grant of permission stated that the lack of detail by the judge at paragraphs 4 and 14 that the appellant must fail under the Rules because the sponsoring mother only has leave amounts to an arguable error of law. Mr. Bazini however did accept in light of the fact that the appellant's mother has limited leave to remain in the UK that the appellant's appeal could not succeed under the Immigration Rules. The judge therefore did not err in law on this issue.

9. I also accept as alluded to in the grant of permission that paragraph 24 was a cut and paste exercise from a deportation case in which the judge was sitting as a panel.

10. Mr Bazini relied on the remaining grounds of appeal. He argued that the judge's approach to whether the appellant was a minor or not was in error. When the appellant made the application, she was 17 years and 9 month old; three months short of her eighteenth birthday. By the date of decision she was 18 years old and ten days. This was analogous to paragraph 27 of the Immigration Rules. Even though the appellant was 18 years old at the date of decision she should be treated for the purposes of the appeal as if she were a minor.

11. Mr Saunders said he was not making a great deal of this point. He accepted that the appellant was a minor at the date of application and there the clock stops in respect of the Immigration Rules. He added that the judge's observation at paragraph 21 was made in the context of the strength of connections the appellant has with her mother.

12. Mr Bazini submitted that if the Home Office's position is that the appellant's age is frozen for the purposes of the Immigration Rules, the question is whether the judge had applied the right test. Being a minor there was no requirement to show dependency over and above what one would normally expect of an adult. In any event, the judge's reasons for concluding at paragraph 19 that the main reason for the appellant wanting to come to the UK was to improve her chances of her music career or find work was unsustainable. The judge failed to consider the appellant's witness statement in which the appellant gave reasons for wanting to join her mother, stepfather and half sister in the UK. The judge's failure to make any findings on the evidence set out in the appellant's witness statement amounts to a material error of law. In any event, at no point in the appellant's witness statement did she say her desire was to come and work and study music. These would be activities she would undertake once she got here but those were not her reasons for making the application for settlement.

13. Mr Bazini said in respect of paragraph 20 that they accept in principle that the appellant can continue to visit her mother, stepfather and half sister in the UK, but argued that was not the whole picture. The appellant made numerous visits to the UK when her mother was here unlawfully. Her mother made all the major decisions in her life, funded/maintained her and was responsible for her education. That was powerful evidence of sole responsibility and the strength of ties between mother and daughter. Friends of the mother acted as sponsor for the appellant's visits. During those visits she stayed with her mother. She complied with the visa requirements and returned to the Ukraine after each visit. When her mother eventually got a residence permit in June 2011 she went to the Ukraine for thee months to visit and again in December 2012. The appellant's British stepfather flew out to Ukraine n 2009 on his own after the appellant's mother accepted his proposal of marriage in order to meet the appellant and get her approval to their marriage. In light of this evidence Mr Bazini submitted that the judge's finding at paragraph 22 was simply wrong.

14. With regard to paragraph 21, Mr Bazini submitted that it is true that the appellant's mother left her in Ukraine when she was 10 years old but in the context of the other evidence, such as the visits, regular communication between them, there is a powerful relationship between them. The judge was only looking at the appellant as an adult and not the years up to when she turned 18. Those years have not been considered.

15. With regard to paragraph 23, Mr Bazini said it has been the expectation of this young adult that she would always go and live with her mother in the UK and her half

sister. There was no consideration by the judge of how the appellant's absence will affect her half sister. The judge did not consider the best interests element of Article 8. The younger sister can visit the appellant but it is not the same as having family life together and the appellant growing up with her half sister. He concluded by saying that the judge's approach to the evidence was flawed.

16. In response Mr Saunders first addressed the applicability of Section 55 to the appellant. He relied on the Upper Tribunal's decision in **T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC)**. In that case the Upper Tribunal held that Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom. By virtue of the Home Office policy (Every Child Matters, Change for Children) issued by the UKBA in November 2009, Section 55 considerations can apply to a child overseas but there is a trigger **[18]** and that is "when there is reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention." Mr Saunders submitted that there are no such concerns here although he was not saying that the factors identified in **T** are exhaustive or definitive.

17. As regards the minor half sister of the appellant who is now 18 months old, Mr Saunders said that he had not seen any evidence as to her particular needs but of course he accepted that siblings might benefit from living together. If that were the assumption then every case bearing on this argument would succeed. He submitted however that section 55 does not bear on this case.

18. As to the judge's approach to the evidence, Mr Saunders submitted that the judge prefaced his Article 8 assessment by reference to the **Razgar** questions. He found that there was family life between the appellant and her mother. The criticisms of the judge's finding at paragraph 21 where he talks of dependency over and above that normally between mother and daughter is neither here or there because the judge finds that the appellant has got family life. The judge has to go on and look at the extent of the family life. His findings are to the effect that mother and daughter have lived apart for a considerable time since the mother chose to come to the UK and leave her with her own parents. The child has obtained some independence since she is living in a flat close to where she studies. The judge found that the appellant has been able to make visits to the UK. The judge's finding that the appellant's mother has been in the UK essentially in secret and working illegally was referring to the earlier part of her mother's stay in the UK.

19. Mr Saunders submitted that as to the conclusions regarding the real purpose of the appellant's application, the judge does not have to reach the conclusions on the basis of what the appellant said. He can reach his own conclusions. His conclusions at paragraph 19 were open to him because of the probable economic prospects in Ukraine. The judge's findings were not perverse or irrational. They were open to him.

20 I accept that the judge prefaced his Article 8 assessment by reference to the **Razgar** questions. The judge had accepted that there was family life between the appellant

and her mother. The challenge to his decision was his approach to the evidence in his assessment of proportionality.

21. I agree with Mr Saunders' submission that Section 55 has no bearing on this case in light of the triggers identified by the Upper Tribunal in the case of **T (Jamaica)**. Whilst the concerns identified in **T** are not exhaustive or definitive, in this case no particular welfare concerns have been identified either by the appellant or her mother. Indeed her grandmother said in evidence that she had been providing the appellant with the necessary care since her mother left for the UK in 2004. Uppermost in her mind has always been that the appellant should not miss out on parental care. The appellant herself said in her witness statement that her grandmother is a gentle, loving and caring woman. She has been cooking, keeping her safe and ensuring that she did not fall sick. Her grandmother has been kind enough to provide her with shelter. In light of this evidence I reject Mr. Bazini's submission that Section 55 applies simply because it has been found that there is family life between the appellant and her mother, stepfather and half sister.

22. I find that the judge erred in law at paragraph 19 when he found that the main reason for wanting the appellant to come to the UK was to improve her chances of a music career or even find her any work at all. In reaching this finding the judge failed to consider the appellant's own reasons for wanting to come to the UK which were set out in her witness statement.

23. I accept that the judge's finding in paragraph 22 was with reference to the appellant's mother's earlier life in the UK. However, the judge seemed to have based his other findings at paragraph 22 on his finding that because she was here secretly and working illegally, the mother could not have made all the major decisions in relation to the appellant; neither was she able to go back and visit her daughter nor her daughter visit her. These findings were made without regard to the evidence of visits the appellant had made to her mother in the UK and the remittances her mother had sent to Ukraine for her maintenance.

24. For these reasons I find that the judge's approach to the evidence was flawed. I did not however consider it appropriate to remit the case for rehearing by a First-tier Tribunal because the facts were not in dispute. Having considered all the evidence I found that the judge's decision to dismiss the appellant's appeal was not materially flawed. I give my reasons below.

25. When the appellant made her application for settlement on 10 February 2012, she was 17 years and 10 months old and therefore a minor. She was just over 18 years old when her application was refused on 10 May 2012. Mr Saunders accepted that the clock stopped at the date of application. Her mother had left her in the Ukraine in October 2004 with her grandparents at a time when the appellant was 10 years old.

26. The judge found that there was a family life between the appellant and her mother. That finding has not been challenged and therefore stands. In finding the

relationship between her and her mother does not show a dependency over and above that normally between mother and daughter, I do not find that the judge was considering the nature of the family life in terms of the **Kugathas** test. The judge, in my opinion, was entitled to consider the extent of the family life at the date of decision. On the evidence I agree with the judge that the appellant and her mother have lived apart for many years from when she was 10 years old when her mother left her in the care of her grandparents. When her mother left her in the Ukraine the appellant was a child but now she was almost an adult leading an independent life. She was living in a flat close to where she studied. The judge accepted that they communicated on a regular basis but found that that was no different to mothers and grown up children generally. These findings were open to the judge.

27. The evidence suggests that from 2006 to 2011, when her mother was here illegally, the appellant was able to visit her mother on five occasions using various sponsors organised by her mother. The appellant met Alan, hr stepfather, three times in the Ukraine. The first time was in September 2009; second occasion was in January 2010 just before her mother and Alan got married, and the third time was when Alan went to the Ukraine to be the godfather to her sister's younger son. Her mother has also been to the Ukraine twice since she was granted limited leave to remain in the UK.

28. There is also evidence that her mother on her own and subsequently with Alan has sent regular remittances to the appellant for her upkeep and her education in the Ukraine.

29. I accept that the evidence of regular visits, communication and remittances shows that there is strong family bond between the appellant and her mother. However, I find that this evidence does not overcome the judge's finding that to a great extent the appellant has grown up rather independent as a result of the long separation.

30. Mr. Bazini argued that this case raises an issue as to the potential impact of satisfying the sole responsibility rule and its effect on proportionality. Sole responsibility is an issue that is considered under the Immigration Rule in relation to an application by a child to join a parent for settlement in the UK. Mr Bazini accepted that the appellant's appeal could not succeed under the Immigration Rules because the appellant's mother does not have settled status in the UK. In the circumstances I find that the Tribunal is not duty bound to consider sole responsibility as an issue but in my opinion it is a factor that can be taken into account in the proportionality exercise. In **TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049,** the Tribunal found that where one parent is not involved in the child's upbringing (as in this), the issue may arise between the remaining parent and others who have day-to0day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. I accept that while her mother made the major decisions, the evidence suggests that the day to day care of the appellant when she was younger was shared between her and grandparents. Since September 2009 when she started College, the appellant has lived in a different town away from her

grandparents. At 17 years 10 months at the date of decision I find it is not reasonably likely that her mother was still making major decisions for her and had continuing control and direction over the appellant.

31. The appellant's reasons for wanting to join her mother, stepfather and half sister in the UK are set out at paragraphs 19 and 20 of her witness statement. She said she felt she had been treated unfairly by the ECO having provided sufficient documents in support of the application. She has been punished enough being separated from her mother and coming from a broken home, it means more than ever to join her in the UK. It has been very hard for all of them having a relationship at "arms length". She really longs to be with her mother, stepfather and baby sister in the UK. She wants to feel loved and cared for by her mother. It is perfectly understandable in the circumstances that the appellant would want to join her mother and family in the UK. Indeed I accept that the appellant did not mention her studies and employment in the UK as reasons for wanting to come her. I find that it is not the ECO's decision that has kept her apart from her mother, and has led to a relationship at "arms length". Their separation was as a result of a decision made by her mother to come to the UK in 2004 and leave her in the care of her grandparents. Until her mother sought to regularise her stay in the UK the appellant could not make an application to join her for settlement. I do not find that she has in any way been treated unfairly by the ECO.

32. I do not doubt as argued by Mr. Bazini that it has always been the expectation that the appellant would go and live with her mother and half sister in the UK. He argued that the best interests of the half sister should be taken into account and the effect it would have on her were the appellant not granted entry clearance. I accept that the half sister might benefit from living with the appellant. She was born on 6 September 2010 and at the date of decision was only 8 months old. Up until the date of decision, the appellant's only contact with her half sister had been the visits she had made to the UK. There is no reason why these visits cannot continue.

33. I find on the evidence before me that the ECO's decision does not disproportionately interfere with the appellant's rights under Article 8 of the ECHR.

34. The judge's decision dismissing the appellant's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun