



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

Appeal Number: HU/06931/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 31 October 2018**

**Decision and Reasons Promulgated
On 04 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**LARYSA [V]
(NO ANONYMITY ORDER)**

Respondent

Representation:

For the Appellant: Mr S Walker, a Senior Home Office Presenting Officer

For the Respondent: Mr A Mackenzie, Counsel instructed by Legal Rights Partnership

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal on human rights grounds for the reasons set out in particular at [30]-[35] in the First-tier Tribunal decision.

Background

2. The claimant is an Ukrainian citizen who entered the United Kingdom on a visit visa in December 2010. When it expired on 15 June 2011, she did not

embark. She is now 65 years old and seeks to remain in the United Kingdom to help care for her grandson, who lives with his father (the claimant's son) and who is 15 years old. The claimant was served with notice as an overstayer on 19 June 2013.

The 2011 First-tier Tribunal decision

3. An application for leave to remain as a dependent parent, made in 2011 was refused and the claimant appealed. She was appeal rights exhausted in relation to that application on 20 August 2013.
4. That decision is the *Devaseelan* starting point for any further consideration of the claimant's family and private life in the United Kingdom.
5. The First-tier Judge found that when her son's wife left him in 2008, he struggled to cope with his 5 year old son. The divorce was made absolute in 2009. In 2011, in the light of her son's difficulty in coping with his parental responsibilities, the claimant decided to come and look after her grandson and her son. Her son was working long hours and studying for his Masters' degree and using out of hours school clubs and the parents of friends to help him, in the absence of his wife.
6. The First-tier Judge in October 2011 found that the claimant had always intended to try to settle here and that her use of a visit visa to enter the United Kingdom was 'clearly deceitful'. The Judge found that she never intended to return to her country of origin at the end of her visit.
7. The Judge found that the claimant before coming to the United Kingdom had a teaching post, savings, and a house in the Ukraine. She gave up the job, transferred €8000 to her son to buy a house of his own (in their joint names), and transferred ownership of her property in the Ukraine to her son before coming here. The effect was that the claimant had divested herself of all assets in the Ukraine. At the date of hearing in 2011, the claimant was partially deaf but had not needed any medical treatment in the United Kingdom nor did she take any regular prescription drugs. She was a healthy 65-year old woman.
8. The appeal was dismissed and the claimant became appeal rights exhausted on 20 August 2013.

The 2013 application

9. On 25 November 2013, the claimant made a further family and private life application for leave to remain which was unsuccessful. The application was refused with no right of appeal on 6 January 2014. The claimant was served with a form RED00003 in 2015 not removed.
10. Following a judicial review challenge, the respondent agreed to remake the decision and did so, on 30 May 2017, with an in-country right of appeal. That is the decision under appeal.

11. The Secretary of State refused leave to remain on the basis that the claimant did not meet the family life criteria in the Immigration Rules HC 395 (as amended); that she had not been in the United Kingdom for 20 years; that she had lived in Ukraine until she was 57 and would still have ties to that country; that there were no significant obstacles to her reintegration into the Ukraine; and that although it was in the child's best interests to remain in the United Kingdom, his relationship with his father had improved and at 15 (rather than 8 years old when the claimant first arrived) he did not need parental support on a daily basis and there were no exceptional circumstances for the grant of leave to remain outside the Rules.

First-tier Tribunal decision

12. The First-tier Tribunal took as its starting point the decision of First-tier Judge Naphine in October 2011 on the claimant's application for leave to remain as a dependant parent, set out above.
13. The family home is jointly owned by the claimant and her son. The claimant's son has now remarried, to a woman who is not a British citizen. The claimant's son is a British citizen but her grandson is a French citizen. His father had struggled to cope with him and with the end of his first marriage and the family regarded the claimant as the foundation stone of the home now, and the only absolute constant in her grandson's life.
14. An independent social worker's report stated that the new wife had not taken on a maternal role in relation to the claimant's grandson, for whom she continued to be the primary carer. The son and his wife lived upstairs, with the claimant and her grandson downstairs. Indeed, for a period of nine months, the claimant's son had taken work in Eire and left the claimant to care for his son, her grandson, in his absence.
15. The grandmother and grandson were described as emotionally intertwined with the grandson significantly damaged by maternal abandonment. His natural mother had drug problems and was not much involved with him, highly unreliable as to contact, and often went to Ibiza for months on end instead of engaging with her son. Her current address was not known.
16. The claimant had been her grandson's maternal influence for 10 years, and during that time, his behaviour had improved but he remained immature, functioning at a level appropriate for a child of 10 or 11 years old. The grandson was now taking his GCSE examinations and beginning to plan for university.
17. The Judge set out his reasons for departing from the earlier decision and allowed the appeal under Article 8 ECHR outside the Rules.
18. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

19. Permission to appeal was granted on the basis of the Secretary of State's grounds of appeal, as follows:
- (1) The claimant could not meet the relevant Immigration Rules and this was not mentioned in the First-tier Judge's proportionality assessment;
 - (2) The claimant had a poor immigration history to which adequate weight had not been given, and the Judge should have given greater weight to the claimant's son's increased prosperity and ability to look after his son;
 - (3) The finding that the claimant's former daughter-in-law had abdicated her maternal responsibilities towards her son, the claimant's grandson, was not supported by evidence from the child's mother;
 - (4) It was not open to the First-tier Judge to find that the circumstances set out amounted to exceptional circumstances and if the claimant wanted to spend more time in the United Kingdom she should leave and make an entry clearance application.

Rule 24 Reply

20. The claimant responded, noting that the Secretary of State did not challenge the Judge's findings as to the credibility of the witnesses before the First-tier Tribunal or the devastating impact which the claimant's removal would have on her grandson. Her finding that removal would be disproportionate was open to her, having regard to all the facts and the best interests of the child in question.
21. The Secretary of State had not explained what different approach the Judge ought to have taken, in an appeal where Appendix FM was not met but the Judge found, without factual challenge, that the Secretary of State's decision to remove the claimant would have a 'devastating' effect on her grandson. The Judge had weighed properly the evidence and the interests of the individuals concerned, reaching a conclusion which was open to her, and the Secretary of State's grounds were no more than a disagreement with some of the Judge's findings of fact.
22. In particular, on the accepted evidence, the grandson's French mother left his father in 2008, her current address was unknown and he had little contact with her. The claimant's son had been honest about his failings as a parent, and the Judge had accepted that evidence, as well as the evidence of the strong ties between grandmother and grandson. The

Home Office Presenting Officer at the First-tier Tribunal hearing had not suggested that the claimant should leave the United Kingdom and seek entry clearance and in the light of the grandson's emotional needs, no sensible reason had been provided for that suggestion in the grounds of appeal. The First-tier Judge had been entitled to find that it was as a result of the claimant's presence in the family that all of them were now more emotionally and financially settled than when she arrived 10 years earlier.

23. That was the basis on which the appeal came before the Upper Tribunal.

Upper Tribunal hearing

24. For the Secretary of State, Mr Walker accepted at the Upper Tribunal hearing that failure to deal with Appendix FM was not a material error of law as it was not the claimant's case that she could bring herself within the Rules.

25. He further accepted that there was clear evidence that the grandson's mother has returned to France and takes no further part in his upbringing and that therefore the absence of any evidence from her was both unsurprising and immaterial.

Analysis

26. These grounds of appeal are really no more than a vigorously expressed disagreement with the First-tier Tribunal's findings of fact (but not credibility) in relation to whether there are exceptional circumstances for which leave to remain should be granted outside the Rules.

27. The Secretary of State's challenge does not approach the standard set for interference with factual findings by Lord Justice Brooke at [90] in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982: the First-tier Tribunal's findings are neither irrational, *Wednesbury* unreasonable, nor perverse, on the unchallenged evidence before him. Nor do I have any difficulty in understanding the Judge's reasoning.

28. The findings made by this judge were unarguably open to him on the evidence and accordingly the Secretary of State's appeal cannot succeed. The decision of the First-tier Tribunal stands.

DECISION

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 28 November 2018
Gleeson
Tribunal Judge Gleeson

Signed **Judith AJC**
Upper