



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19722/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10th May 2018

Decision & Reasons Promulgated
On 24th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MRS LYUBOV DAKHNOVSKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Swain

For the Respondent: Mr L Tarlow

DECISION AND REASONS

Introduction

1. The Appellant born on 31st July 1959 is a citizen of the Ukraine. The Appellant was represented by Mr Swain. The Respondent was represented by Mr Tarlow, a Presenting Officer.

Substantive Issues Under Appeal

2. The Appellant had made application for leave to remain in the United Kingdom under Article 8 of the ECHR. The Respondent had refused that application on 29th July 2016.
3. The Appellant had appealed that decision and her appeal was heard by Judge of the First-tier Tribunal Wyman sitting at Hatton Cross on 19th December 2017. The judge had dismissed the Appellant's appeal.
4. An application for permission to appeal was made and that application was granted by Judge of the First-tier Tribunal Hollingworth on 22nd February 2018. It was said that it was arguable the judge had attached insufficient weight to the matrix of factors bearing on the question of the degree of emotional dependency.
5. Directions were issued for the Upper Tribunal to deal with the case firstly on the basis of whether or not an error of law had been made by the First-tier Tribunal. The matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellant

6. Mr Swain submitted that the Appellant's son had made an application under paragraph 276ADE(iv) at a point where he was under the age of 18 but had been in the UK for over a seven year period. That application had been granted by the Home Office and he had been given discretionary leave to remain until December 2018. I was referred to the Grounds of Appeal and it was said that a material error of law had been made in accordance with the matters raised in the grounds. In particular it was said that the judge had accepted there was a close family unit between the Appellant and her son but there was an inadequate analysis of that relationship. In particular, it was submitted that the judge had erroneously stated that the Appellant's son intended to go away from home to study at university and had based much of his decision in terms of the relationship upon that erroneous factor.

Submissions on Behalf of the Respondent

7. It was said that the Grounds of Appeal merely demonstrated a disagreement only with the decision which had been made by the judge and that the judge had been entitled to reach the conclusions that he had.
8. At the conclusion, I reserved my decision to consider the submissions and the evidence in this case. I now provide that decision with my reasons.

Decision and Reasons

9. The Appellant had initially entered the United Kingdom illegally with her son Olexandr in 2006 to join her husband who had himself entered the United Kingdom illegally some three years earlier in 2003. There had been an initial application by the family to remain in the United Kingdom under Article 8 of the ECHR in June 2013 but that application had been refused and the Appellants had become appeal rights

exhausted in September 2014. There was then a further application to remain in December 2014 which had been refused in February 2015 with no right of appeal. The Appellant's son Olexandr turned 18 in December 2015. Prior to him becoming an adult, it would appear that he had made an application to remain under paragraph 276ADE(iv) on the basis that he had been in the UK at that stage for over a seven year period. The Respondent had given him discretionary leave to remain for a limited period only until December 2018. In July 2016 this Appellant and her husband had made fresh claims on the basis of their adult son having been granted that period of limited leave. On 1st August 2016 the Appellant's husband had died.

10. The judge had noted correctly, at paragraph 18 that Section 55 of the Borders Act 2009 no longer applied in this case as the Appellant's son was over the age of 18. He had also referred himself to the decision of the previous Immigration Judge who at the hearing in 2014 noted that the Appellant appeared to have no ties or property or business to keep her in the UK. He had also noted that no-one came to speak for the family and there was no evidence produced by any other individuals to show that they had integrated into the community and participated in that community. That judge in 2014 had concluded that this Appellant together with her husband had not integrated into UK society. (Paragraph 18).
11. The judge at paragraph 23 when considering relevant case law had noted the case of **Treebhawon [2017] UKUT 00013**. From that decision he had referred to three conclusions reached in that case. He had noted "where the case of a foreign national who is not an offender does not satisfy the requirements of the Article 8 ECHR regime of the Immigration Rules, the test to be applied is that of compelling circumstances." He had also noted

"the Parliamentary intention underlying Part 5 of the NIAA 2002 is to give proper effect to Article 8 of the ECHR. Thus a private life developed or established during periods of unlawful or precarious residence might conceivably qualify to be accorded more than little weight and Sections 117B(4) and (5) are to be construed and applied accordingly. Mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are very unlikely to satisfy the test of 'very significant hurdles' in paragraph 276ADE of the Immigration Rules".

Further at paragraph 25 the judge had quoted briefly from the case of **Kugathas [2003] EWCA Civ 31**.

12. He had heard evidence from both the Appellant and her adult son.
13. In his findings and conclusions, he had at paragraph 44 referred to the case of **Devaseelan** in terms of the proper approach to be taken where a previous Adjudicator had heard an appeal by the same Appellant. He had correctly identified the principles in **Devaseelan**. He had in particular at paragraph 45 noted that so far as the Appellant was concerned there were no ties to keep her in the UK nor did she appear to have integrated into UK society or participated within it. He further stated

that since that determination there were two significant changes that had affected the Appellant which he was entitled to consider, namely the untimely death of her husband in August 2016 and secondly that her son, who is now an adult, had been granted leave to remain until December 2018. The judge clearly had in mind therefore those two, and perhaps only two significant changes since the earlier decision that had dismissed her appeal in 2014. Indeed at paragraph 49 he referred to the fact that as at the previous hearing there were letters from three friends in identical format and wording and that no-one else had attended the court to give oral evidence, nor was there any other documentary evidence. The judge in fairness however did infer that over a ten year period it is likely that the Appellant would have made connections with the local community but that other than that inference there was nothing to show that she had integrated into the UK. He also identified the factors to indicate why there was no obvious significant obstacle or difficulty that would prevent her returning to the Ukraine and re-integrating into that society. At paragraph 58 he had specifically examined the position of the Appellant and her adult son. He was aware of the fact that the son had been granted discretionary leave until December 2018. It was submitted by Mr Swain that it was the son's intention either before or at that stage to make a further application to remain in the UK. It is speculative to know whether such application will be made or more significantly whether that application would be successful. The Appellant's son is a young man and his intentions as to his own future may change and may change swiftly. Whilst therefore it might be inferred likely that he would make further application before the end of 2018, beyond that inference there is nothing that really could be said with any evidential certainty. The judge had fully accepted that he lived with the Appellant, that he was close to her, particularly since the death of his father, and he was aware of the arrangement whereby the son worked and the Appellant kept house for him. The judge had further noted at paragraph 59 as follows "whilst I accept that the Appellant and her son are a close family unit it is noted that if her son had the opportunity he would have gone away to study at university. Indeed it is very common for young adults to study at university." The core of the submissions made by Mr Swain were based on what was said to be an erroneous belief by the judge that the Appellant's son intended to travel away from the family home to attend a university whereas the evidence was that he intended or would have intended to study at a college or university close to the family home. The phrase "he would have gone away to study at university" does not necessarily imply that the Appellant's son would attend a university of such a distance away from his home that he would be unable to remain living in the home. It could be construed as merely a turn of phrase. Equally, the judge may have had in mind that the Appellant's son may have attended a university such that he would not have remained living at home. However, this specific area is in fact speculative. Whilst the Appellant's son may have desired to go to university, he was not actually attending university but in employment. In like manner, the assertion made by Mr Swain that the Appellant's son would be making a fresh application to remain and intended to study is again no more than speculation. Even if allowed to remain the Appellant's son may discover that for financial reasons he decides to continue in employment rather than attend university. In reality at paragraph 58 to 60 the judge

simply indicated that the Appellant's son's intention of going to university to study was a common feature amongst young people and that in his analysis of the relationship between the Appellant and her son, he found no more than the normal emotional ties. He also noted, which must be the case, that the son had the opportunity of returning to the Ukraine with his mother if he wished and potentially having the opportunity of studying in the Ukraine if he so wished.

14. The judge's conclusion that there was no more than the normal emotional ties that one would expect between the Appellant and her son in the circumstances of them being alone following the death of the Appellant's husband was a decision that the judge was entitled to reach based on the evidence that he had heard, which included the oral evidence of both the Appellant and her son. It cannot be said that that was a decision which no reasonable judge would have reached. In terms of proportionality under Article 8 of the ECHR together with that finding referred to above, the judge had earlier noted the unlawful status of the Appellant throughout her time in the UK and her lack of integration into the UK society. He also had the findings of the previous Immigration Judge made in 2014 who had reached the same conclusions and had noted that since that appeal hearing in terms of the factors to consider under Section 117B of the 2002 Act there had been in reality no change. The judge was therefore entitled when conducting that test of proportionality under the final stage of **Razgar** where he needed to pay heed to all aspects of Section 117B to have reached the conclusion that he did. The decision therefore does not disclose an error of law.

Decision

15. I find that there was no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed 
Deputy Upper Tribunal Judge Lever

Date 22/5/18

TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed 
Deputy Upper Tribunal Judge Lever

Date 22/5/18