



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

Appeal Number: IA/25599/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons

On 9th June 2015

Promulgated

On 16th June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS OG
PG (DEPENDANT)
(ANONYMITY ORDER CONTINUED)**

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer

For the Respondent: Mr E Cole, Counsel instructed by Wimbledon Solicitors

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a citizen of Russia, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 23 May 2014 to refuse her application for leave to remain in the UK on the basis of her private and family life. Her son is her dependant in this appeal. First-tier Tribunal Judge Chowdhury allowed the appeal. The Secretary of State appeals with permission to this Tribunal.

3. The background to this appeal is that the appellant entered the UK as a visitor in July 2004. She was granted a visa on three further occasions as a dependant, a visitor and a student during 2005 and 2006. She was last granted a visa as the dependant of her then husband for the period between 26 September 2009 and 10 September 2012. She submitted two further applications on the basis of private and family life; she did not appeal against the decision to refuse the first application but appealed against the instant decision. The appellant and her now ex-husband have three children. One is in Russia and the other two are in the UK. The appellant's son who is her dependant in this appeal is the youngest; he was born on 26 June 2005. Her ex-husband returned to Russia in 2013 and the appellant said that he has a new relationship and three new children there. The end of the relationship was acrimonious and the appellant has obtained a Prohibited Steps Order from the Family Court to prevent her ex-husband from removing their child from the jurisdiction. The appellant has been in a relationship with a British citizen since January 2013.
4. The respondent refused the application because the appellant did not qualify for leave to remain as a partner because, whilst it was accepted that she and her partner are in a genuine and subsisting relationship, they had not been together for the required two year period, and therefore did not meet the requirements of Appendix FM for leave to remain as a partner. The respondent did not consider that the appellant met the requirements of Appendix FM for leave to remain as a parent because it was not accepted that the child had lived in the UK continuously for five years. The respondent also decided that, even if the child had lived in the UK continuously for five years, although it was accepted that the appellant had a genuine and subsisting relationship with the child, it would be reasonable for the child to leave the UK with his mother. The respondent did not accept that the appellant met the requirements of paragraph 276ADE in relation to her private life. The respondent also considered the private life of the child and concluded that he could return to Russia.
5. The First-tier Tribunal Judge found that the child had resided in the UK continuously for five years. She allowed the appeal of the child under paragraph 276ADE (iv) of the Immigration Rules and the appeal of the appellant under Article 8 of the European Convention on Human Rights.
6. In her grounds of appeal to the Upper Tribunal the Secretary of State contends that the First-tier Tribunal Judge made five errors of law. It is firstly contended that the Judge erred in considering the son's appeal under 276ADE because the appellant's son has no appeal. Secondly the Secretary of State contends that the First-tier Tribunal Judge erred in failing to consider the appellant's appeal under the Immigration Rules. It is thirdly contended that the Judge erred in considering the son's case without reference to the wider circumstances; this is related to the fourth ground which is that the Judge erred in considering the son's private life in isolation from that of his family life. It is finally contended that the Judge failed to properly consider the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002.

7. Having heard submissions from both representatives I have concluded that the First-tier Tribunal Judge did err in her treatment of the appeal in relation to the Immigration Rules. Whilst it was appropriate for the Judge to consider the child's situation with reference to the Immigration Rules, there was no appeal by the child before the Judge as there had been no removal decision made in relation to the child and therefore there was no jurisdiction to purport to allow the child's appeal. In considering the appeal of the appellant, the child's mother, the Judge said that her appeal 'does not fall for consideration under the Immigration Rules' for the reasons determination out in the Reasons for Refusal letter [50]. However the Judge failed to carry out her own analysis as to whether the appellant meets the requirements of the Immigration Rules.
8. I consider that these two errors are interlinked. However, I am satisfied that they are not material because the question to be considered in relation to the child is the same as that which she should have considered in relation to the appellant. To qualify for leave to remain under paragraph 276ADE 1 (iv) it must be shown that it is not reasonable to expect a child under 18 who has resided continuously in the UK for at least seven years to leave the UK. This is the same as the requirements in Appendix FM for the person is the parent of a child has lived in the UK for at least seven years and Ex 1 (a)(i)(cc) applies. Ex 1 applies where a child has lived in the UK for at least seven years and it would not be reasonable to expect the child to leave the UK. Mr Nath accepted that no other aspects of Appendix FM are in issue.
9. The Judge's finding that the child has been in the UK for seven years is not challenged. The Judge accepted oral evidence of the Appellant and her partner and considered all of the documentary evidence before her. This is set out in paragraph 49. The Judge considered the issue as to whether it is reasonable to expect the child to leave the UK in paragraphs 52, 53 and 58. At paragraph 52 of the determination the Judge said:

“[the child] I find, has never spent any significant length of time in Russia. I have been presented with copies of [the child]’s school letters and reports. I find that this Appellant is fully integrated into the UK. I have given weight and have considered at great length the legitimate aim of maintaining a firm immigration control. However I find that it would be unreasonable to remove this child to Russia. I have noted the difficulties [the child] had at school in the UK during the break-up of his parents’ marriage (from the headteacher’s letter) and his success now that he has some stability in his life. I find that having regard to his substantial private life in the UK that any removal would constitute a disproportionate interference with his private life as encoded in the Immigration Rules.”
10. In the third ground of appeal the Secretary of State contended that the Judge erred in considering the child without reference to the wider circumstances but I accept Mr Cole's submission that the findings were based on the assumption that it was in the best interests of the child to be

with his mother. I accept Mr Cole's submission that paragraph 22 of the reasons for refusal letter considers the circumstances of the child where it says that it is in the best interests of the child to be with his mother. There is also significant evidence recorded at paragraphs 16 to 38 as summarised in paragraph 52 of the determination, and I am satisfied that the Judge took all of this evidence into account.

11. In the fourth ground the Secretary of State contends that the Judge should have considered whether it was reasonable to expect the child to leave the UK in the context of him leaving the UK as a family unit with his mother. Mr Nath submitted that the Judge should have considered the Appellant and his mother as a family unit and that the Judge considered private life separate from family life. However, I am satisfied on reading paragraphs 52 and 53 as well as paragraph 60 that the Judge did consider the child as a family unit with his mother as well as considering whether it would be reasonable to expect the child to be separated from his mother in paragraph 60.
12. The fifth ground of appeal contends that the Judge erred in her treatment of Section 117B. However, the Judge set out Section 117B at paragraph 55 and took into account that the Appellant is an English speaker and is financially independent. I accept that the Judge did not expressly take into account Section 117B (4) which states that little weight should be given to a private life or a relationship with a qualifying partner established at a time when the person is in the UK unlawfully. However, I note that the Judge did not take into account as a positive factor the fact that the Appellant met the provisions of Appendix FM of the Immigration Rules. Had the Judge correctly considered Appendix FM she would not have had to go on to consider Article 8. Therefore the factors set out in Section 117B would not have had to be taken into account. In these circumstances I accept that the failure to take into account Section 117B(4) is not material.
13. In the context of all of the evidence set out in the decision and the reasoning put forward I am satisfied that the reasoning is adequate and the decision that it is not reasonable to expect the child to leave the UK was open to the Judge. Accordingly the errors in relation to the determination of the child's purported appeal and the interlinked failure to consider Appendix FM are not material.

Conclusion

14. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

Notice of Decision

The decision of the First-tier Tribunal shall stand.

Anonymity

The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT
FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Grimes