



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06931/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 January 2019

Decision sent to parties on:
On 14 January 2019

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LARYSA VOLKOVA
[NO ANONYMITY ORDER]

Respondent

Representation:

For the appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the respondent: Mr Hoa Dieu, Solicitor with N.C. Brother & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appealed with permission against the decision of the First-tier Tribunal to allow the claimant's appeal on human rights grounds based on her relationship with her French national grandson and her son, a British citizen. The claimant is a citizen of Ukraine.
2. By a decision sent to the parties on 4 December 2018, I found no material error of law and upheld the decision of the First-tier Tribunal. In my decision, I set out the unusual factual matrix in this appeal at [13]-[17]. I held that:

"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."

3. On 18 December 2018, Legal Rights Partnership solicitors made an application for the claimant's costs under rule 10 (3)(d) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). They claimed costs in the amount of £2025, including the costs of their out of time Rule 24 Reply, the Upper Tribunal hearing, and the costs application itself.
4. The application was served on the Secretary of State but no submissions in reply have been received.

Claimant's costs application

5. In grounds of application settled by Mr Alasdair Mackenzie, the claimant's Counsel at the Upper Tribunal hearing, the claimant contends that the respondent should not have appealed the First-tier Tribunal decision, and that it ought to have been obvious to the Secretary of State at all material times, and certainly after the filing of his Rule 24 Reply, that there being no challenge in the grounds of appeal to the First-tier Tribunal's findings of fact, the appeal could not succeed.
6. The core of the grounds for this application for costs is at [9]-[10]:

"9. Indeed, the decision of the Home Office Presenting Officer at the hearing before Judge Gleeson not to press the challenge with any vigour would appear to indicate that it was clear to him, notwithstanding the grant of permission to appeal, that the appeal was unarguable.

10. Of course, no criticism is made of the Home Office Presenting Officer at the hearing for apparently recognising the inevitable; however, a belated recognition on the [Secretary of State's] part that his challenge was unmeritorious is not a reason why the [claimant] and her family should have been put to the expense of being represented at the hearing. The question is why the lack of merit in the [Secretary of State's] appeal was not appreciated sooner: cf. *Cancino* [25(iii)]. To that there is no obvious answer."

7. That is the basis on which the Upper Tribunal is asked to award the claimant his costs under rule 10(3)(d).

Rule 10(3)(d) of the Upper Tribunal Rules

8. The relevant procedure rule is as follows:

“(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings [transferred or referred by, or on appeal from,] another tribunal except— [provisions in relation to national security certificate appeals and under section 4 of the Forfeiture Act 1982]...

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—

... (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; ...”

Analysis

9. The claimant relies on the decision in *Cancino* (costs - First-tier Tribunal - new powers) [2015] UKFTT 59 (IAC). That is a decision on the First-tier Tribunal costs powers and not on the Upper Tribunal power under rule 10.
10. Permission to appeal was granted on 17 September 2018. The only remaining question is whether, following the claimant’s Rule 24 Reply on 2 October 2018 it was unreasonable of the Secretary of State not to withdraw her appeal.
11. The decision of the First-tier Judge was that the application for permission to appeal was arguable. There is nothing in the Rule 24 Reply to suggest that the appellant considered that the respondent was acting unreasonably or should withdraw his appeal. Nor was any such argument made at the Upper Tribunal hearing.
12. It is not arguable that the Secretary of State acted unreasonably in continuing with the present appeal following the grant of permission. The Secretary of State was entitled to consider that he had shown an arguable case, on that basis.
13. I am not satisfied that the respondent acted unreasonably in bringing or conducting this appeal and I refuse the application for costs.

Date: 10 January 2019

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson