



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

Appeal Number: HU/19180/2016

THE IMMIGRATION ACTS

Heard at Field House

On 14 March 2018

**Decision &
Promulgated
On 17 April 2018**

Reasons

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**MR YURIY [V]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Ms S Panagiotopoulou, instructed by Yemets Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of a Judge of the First-tier Tribunal who allowed the appeal of Mr [V] against the Secretary of State's decision of 26 July 2016 refusing his application for leave to remain in the United Kingdom under Appendix FM and paragraph 276ADE of the Immigration Rules. I heard helpful submissions from Mr Tarlow on behalf of the Secretary of State and from Ms Panagiotopoulou on behalf of Mr [V]. I will refer to Mr [V] as the appellant and the Secretary of State as the respondent as they were before the judge.

2. The judge from noted the immigration history that Mr [V] has overstayed since his visa expired in November 2001. He was working up to 2015. As regards relationships, he met his partner in 2002, their relationship began then and their daughter [M] was born in 2009. Both she and her mother have indefinite leave to remain in the United Kingdom but neither is a British citizen. The relationship with his partner ended in 2012 and there were problems with access. The judge set those out. There were financial contributions made from 2012 to 2015. The appellant managed to see [M] once a month up to June 2017 but had not seen her since then because of ongoing difficulties over access and he said he had now instructed his current solicitors to make an application to the Family Court. There was a requirement for mediation and his former partner did not cooperate and so he made a formal application to the court. That application was lost by the court and a fresh application had to be made.
3. The judge was satisfied that the appellant had a genuine and subsisting relationship with [M] despite difficulties with his partner over access. There was recent evidence of him wishing to give her a present. She sent him a Father's Day card in 2017 and the judge noted that he is attempting to obtain a formal order giving him access to [M]. It would not be reasonable the judge said to expect her to leave the United Kingdom and therefore the appellant should succeed under EX.1(a). The judge was also satisfied there would be very significant obstacles to Mr [V] returning to Ukraine in order to apply for leave to return to the United Kingdom not least because he might be called up for military service and he would also be deprived of the right to see [M] in the meantime and be unable to pursue his application to the Family Court.
4. The judge went on to say that if her had not concluded the appellant should succeed under the Immigration Rules he would have allowed the appeal under Article 8 because it would be wholly disproportionate for Mr [V] to be compelled to return to Ukraine and the public interest did not require his removal where he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom under Section 117B(6) of the 2002 Act. The appeal was therefore allowed.
5. The Secretary of State's grounds were adopted by Mr Tarlow today. The first point that is made is that it was common ground that the appellant could not satisfy the grant of GEN.1.2 of Appendix FM because he had not been cohabiting with his current partner for two years at the date of the application. Despite this point which as the respondent says acts as a complete bar to reliance on the partner route, the judge went on to consider EX.1 and apparently allowed the appeal under EX.1(b) which I think is common ground a clear error of law and there is the authority of Sabir [2014] UKIAT 00063 (IAC) to attest to that.
6. The judge was then criticised for allowing the appeal with reference to EX.1(a) noting again the point that EX.1 is not freestanding and it was not

made clear how EX.1 was reached via the parent route. Secondly, [M] is not British, was less than 7 years old at the date of application so could not meet those elements of EX.1(a) and also the grounds also argue that there was an error as to whether or not the appellant has a genuine and subsisting relationship with his daughter. The point is made that it is unclear whether he ever claimed to have lived with her but his relationship with her mother ended in 2012, contact with the daughter was limited to about once a month afterwards, none since June 2017, and there was no evidence before the Tribunal that he had made an application through the Family Court for contact with her and so, it was argued, the judge had erred with regard to the nature of the relationship and elsewhere as regards the decision outside the Rules other than referring to section 117B(6) the judge referred to the risk of Mr [V] being called up for military service in the Ukraine but the point was made in that regard that there was no evidence to support this finding and also the country guidance suggested that he was not in an age range where he would be likely to be called up and there had been a failure to take account of the public interest in assessing the claim outside the Rules.

7. As regards the decision within the Rules, I think essentially Ms Panagiotopoulou accepts that the judge may have gone wrong. She argued that he was not in error in respect of the decision outside the Rules and that he was entitled to conclude that the relationship between the appellant and his daughter was a genuine and subsisting one and that there was proper consideration given to the public interest. He was clearly aware of the fact of the overstaying and so on and she argued that as a consequence the appeal was properly allowed in that regard.
8. It is clear, I think, that the judge erred with regard to the situation under the Rules. He appears to have treated EX.1 as being freestanding where it is clear that it is not. The claim could not succeed under the Rules in that regard and I think the point should also be made, given the timing the decision, that the appeal could not be allowed under the Rules anyway because there was only a right of appeal under human rights or international protection grounds by then so that would be a further difficulty with the decision. And so for the reasons set out in the grounds, as I have sketched out above, I consider the judge clearly erred with regard to the decision under the Rules.
9. As regards the issue of a genuine and subsisting parental relationship which is an element of the consideration of the claim outside the Rules, I think the points made in the grounds are well-taken. There has been limited contact since 2012, no contact since June 2017 and no evidence of an application through the Family Court for contact. If there had been such an application made one would have thought there would have been evidence of that and it seems to me that the judge therefore erred in that regard also. There is no proper consideration of the public interest in the rather brief paragraph 38. Certainly it is right that the judge had noted earlier on the immigration history but that was not factored into the

equation in deciding the proportionality issue at paragraph 38. The judge was also, I think, wrong to factor in the risk of being called up for military service in light of recent country guidance in VB [2017] UKUT 00079 (IAC) which indicates that people of his age would not be likely to be called up for military service. There is also the linked point which is made in relation to the decision within the Rules but also outside, that [M] was not at that time anyway a qualifying child, not a British citizen and less than 7 years at the date of application. So for all of these reasons it seems to me that the points made in the grounds are properly made out and as a consequence the judge has erred in law and the Secretary of State's appeal is allowed. The matter will have to be fully reconsidered in the First-tier Tribunal at Hatton Cross with a time estimate of an hour and a half.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed

Date 12 April 2018

Upper Tribunal Judge Allen