



IAC-RH-NL-V1

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

Appeal Number: IA/27281/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 November 2015 and 7  
January 2016**

**Decision & Reasons Promulgated  
On 28 January 2016**

**Before**

**UPPER TRIBUNAL JUDGE GOLDSTEIN**

**Between**

**HANNA HORZOV  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

(For the hearing on 5 November 2015)  
For the Appellant: Ms K McCarthy of Counsel instructed by Sterling & Law  
Associates LLP  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

(For the hearing on 7 January 2016)  
For the Appellant: Ms S Praidoodo of Counsel instructed by Visa Direct  
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant, a citizen of Ukraine, born on 6 February 1947 against the decision of First-tier Tribunal Judge Shepherd who, sitting

at Taylor House on 5 March 2015 and in a determination promulgated on 15 April 2015 dismissed her appeal against the decision of the Respondent dated 12 June 2014 to refuse to vary her leave to remain in the United Kingdom and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The brief immigration history of the Appellant is that she arrived in the United Kingdom on 19 October 2013 having travelled on a visit visa valid to 28 February 2014 and made her current application on 27 February 2014. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 16 June 2015 who considered it arguable that the Judge fell into legal error by failing to consider whether the Appellant would meet the requirements of entry clearance as an adult dependent relative under Section EC-DR of Appendix FM of the Immigration Rules and, if so, whether it would be appropriate and proportionate to require her to return to her country of origin in order to make such an application (paragraph 87 of the decision). In that regard First-tier Tribunal Judge Kelly referred to Chikwamba [2008] UKHL 40 and MA (Pakistan) [2009] EWCA Civ 953. Regrettably, without more, the Judge considered that whilst the other grounds were “*less persuasive*” they were also arguable. With respect to the First-tier Tribunal Judge I consider in that latter regard that it is regrettable that no further explanation for so doing was provided.
3. In her Rule 24 response dated 28 June 2015 the Respondent had this to say:

“It is clear from paragraph 66 onwards, the Judge was not convinced that the Appellant would be alone on return to Ukraine and the evidence as between the witnesses and between the oral testimony and that stated in witness statements differed in that respect. The Judge heard evidence that the Appellant’s son used to live very near to her in Ukraine as did the aunt/sister. It led the Judge to conclude at paragraph 71 *‘this was such a fundamental discrepancy in the evidence of the two that it undermines to a large extent what is said about the Appellant having no one in Ukraine to turn to’*.

The Judge heard the evidence of all the witnesses, it was contradictory and undermined their own case that the Appellant would be alone on return. There was no mistake of fact. The account was an exaggerated one and the Judge was entitled to find that it would not be disproportionate for the Appellant to return home.

It has been argued that the Judge and the SSHD were wrong in failing to address the relevant immigration rule and then should have addressed the Chikwamba point. This ground is misconceived for two reasons. Firstly, the application made by the Appellant was an ‘outside the Rules’ application (FLR(O)), there was thus no duty on the SSHD or the Judge to address whether the refusal was in accordance with the immigration rules. Secondly, in so far as the adult dependent relative (ADR) rule was relevant, the Appellant clearly fails to meet it because on the Judge’s findings she would not be alone on

return, and she would have someone to care for her, and furthermore taking the case at the highest the UK Sponsor could employ a full-time live in carer in Ukraine, especially given the financial means at the Sponsor's disposal for the care of her mother. The Appellant did not therefore meet the substantive requirements of the ADR rule save for entry clearance, she did not meet the substantive or the procedural provision of the said rule. The Chikwamba principle has no application to this case."

4. The grounds further contended that consideration of Article 8 outside "the letter of Appendix FM" was required in that the Appellant had a "meaningful private and family life that engaged Article 8". It was said that the Appellant enjoyed a particularly close relationship due to her dependency on her daughter. The Appellant was an elderly woman and a widow. She had a health condition and was fearful of dying alone as her husband did. Neither of her children lived in Ukraine.
5. Notwithstanding the above, it was said that the Tribunal failed to consider whether (the Appellant had) a private life with her daughter, son-in-law, grandchildren and their network of friends. It was contended that the Tribunal materially erred in law by stating at paragraph 87 that it was open to the Appellant to apply for UK entry clearance from outside the UK. In that regard reference was made to R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality) 1JR [2015] UKUT 189 (IAC).
6. The grounds also argued that the Tribunal failed to adequately provide reasons as to why the Appellant could not bring herself within the provisions of 276ADE of the Immigration Rules.
7. The hearing on 5 November 2015 was presided over by myself and by Upper Tribunal Judge Wikeley. At that hearing Ms McCarthy then for the Appellant, informed me that this was an application made under the old Rules that were changed in July 2012 and were now to be found in ECDR of Appendix FM. That changed the test for entry clearance for dependent relatives. The new test at 2.4 and 2.5 were requirements that the Appellant could clearly meet. It would be as well therefore to set out those provisions below:

"E-ECDR.2.4. The applicant or, if the applicant and their partner are the Sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.

E-ECDR.2.5. The applicant, or if the applicant and their partner are the Sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in the country where they are living, because -

- (a) it is not available and there is no person in that country who can reasonably provide it; or

(b) it is not affordable.”

8. Ms McCarthy continued that unfortunately, the application was made under the old Rules and refused because they no longer applied and the new test was not looked at and the refusal letter went straight on to a consideration of Article 8 outside the Rules and the appeal had proceeded on the same basis, so that there was an acceptance of the old Rule that did not apply. The new test was not set out anywhere in the determination, indeed the First-tier Tribunal Judge had gone straight into a consideration of Article 8. Ms McCarthy contended that there should have been a Chikwamba consideration and an examination of whether, if the Appellant were required to go to the Ukraine and apply for entry clearance, she would have met the requirements of the Rules.
9. Ms McCarthy however accepted that these were Rules that the Appellant could not make in-country and therefore it was always a matter of considering Article 8 outside the Rules, but she submitted that in considering Article 8, Chikwamba was highly relevant case law given that the Appellant otherwise met the requirements of the current Immigration Rules. The Judge however failed to take this into account.
10. Mr Tufan considered that the Appellant was raising a new matter that the Respondent had not had an opportunity to consider and that in those circumstances Ms McCarthy should make an appropriate application for leave to amend her grounds. It was however apparent to us that this was not the case in that there was reference to this issue at paragraph 12 of the existing grounds.
11. In all the circumstances we agreed with the parties that it was in the interests of justice that the matter be nonetheless adjourned for further hearing.
12. When the matter was restored before me for hearing on 7 January 2016 it was overlooked that as noted on file, I was also to sit with Upper Tribunal Judge Wikeley. However I was able to obtain an appropriate transfer order, in that it was not practical for the original Tribunal to give its decision without undue further delay and that it was appropriate for such a transfer order to be made and that I should thus continue to hear this case on my own. This was a matter which both parties before me accepted and the hearing thus proceeded.
13. My first task was to determine whether the determination of the First-tier Tribunal Judge contained an error or errors on a point of law such as may have materially affected the outcome of the appeal.
14. I note that the Respondent was not satisfied with the reasons the Appellant had given for applying to remain in the UK and the Appellant's application had thus been refused under paragraph 322(1) of the Immigration Rules.

15. In that regard the Judge observed that the Respondent had concluded that the Appellant could not show that she could bring herself within the requirements of Appendix FM in that she could neither show that she had a partner settled in the UK nor that she had a genuine and subsisting parental relationship with a child under the age of 18 years and thus the provisions of Appendix FM could not apply.
16. It was noted that the Respondent proceeded to consider whether or not the circumstances of the Appellant brought her within paragraph 276ADE (private life/long residence) of the Immigration Rules, but it was clear in that regard, that the Appellant could not show that she had lived continuously in the UK for twenty years or that she had no ties with the country to which she would go if required to leave the UK and that she could not bring herself within the requirements of paragraph 276ADE(iii) and (v) of the Immigration Rules.
17. The Respondent thus considered the Appellant's application outside the Rules taking into account the medical evidence put forward as to the nature of the relationship between the Appellant and her daughter and son-in-law and concluded that the Appellant had not provided evidence that was "*sufficiently compelling or compassionate*" such as would enable the Respondent to allow the Appellant to remain in the United Kingdom.
18. It was rightly pointed out by the Respondent that the Judge analysed and took careful note of the evidence of the witnesses.
19. At paragraph 67 the First-tier Tribunal Judge, pointed out that '*a significant difficulty*' had arisen in the evidence as to whether the Appellant had any family in Ukraine and if so their geographical and emotional closeness to her. The unequivocal evidence of the Appellant in her witness statement was that she had no one in Ukraine to look after her and it was noted that her daughter in her witness statement had confirmed this to be the position.
20. At paragraph 68 the Judge explained how it was that a "*somewhat different picture emerged in oral evidence*".
21. At paragraph 69 the Judge noted that the Appellant's son-in-law's evidence not least under cross-examination, and at paragraph 70 the Judge continued that there was a "*dissonance therefore, between the evidence given by the Appellant's daughter and son-in-law*" such that led him to conclude at paragraph 71 that:

"... this was such a fundamental discrepancy in the evidence of the two that it undermines to a large extent what he said about the Appellant having no one in Ukraine to turn to. It suggests to me that there has been an element of fabrication in the factual matrix put forward to support the basic premise of this appeal, which is that the only family she can realistically turn to is the UK family. Furthermore on the additional premise that because of her heart condition she cannot be left alone, it undermines the assertion that she would inevitably be on her own if she were to return to her home in Ukraine.

The credibility of the Appellant's case put forward is damaged on both the accounts."

22. The Judge proceeded to consider the medical evidence not least that of Dr Sethi, and in paragraph 82 of the determination, stated inter alia, that at its highest, the doctor had confirmed that the Appellant had some symptoms of heart abnormality which gave cause for concern, but he did not consider those to be of an imminent or an urgent need in recommending a pacemaker to be fitted. Further the doctor's report of 13 September 2014 appeared to show a lack of urgency.
23. Ms Praisoody in her submissions, notably conceded that in order for the Appellant to meet the requirements of the relevant Rules she could only do so by making her application for entry clearance by returning to the Ukraine and applying there but she continued that in the Judge's consideration of Article 8 outside the Rules, there was a need to balance the interests of the Appellant against the public interest, taking into account all the factors that had been identified in the Appellant's circumstances. She notably however further conceded that overall and upon reflection, the appeal could not succeed.
24. Indeed it was accepted that in terms of the Appellant's health, the First-tier Tribunal Judge at paragraph 93, had taken careful account of the recent judgment in the Court of Appeal in GS (India) [2015] EWCA Civ 40 that had now settled the position of migrants who claimed entitlement to remain in a Contracting State in order to continue to benefit from medical assistance and services provided by the expelling state. The Judge continued, "*if the medical claim could not succeed under Article 3 the claim under Article 8 could not prosper without some additional or separate factual element*".
25. In my view the Judge adequately and properly reasoned as to why he had concluded that in this case, there were no additional elements of dependency that engaged Article 8 and that the Appellant's medical condition similarly, did not by itself "*get her home*". The Judge continued that if in that regard he was wrong, "*then the question to be considered would be whether the proposed interference by removal with such Article 8 rights, as are entrenched in this lady's case would be disproportionate in her circumstances to those rights*" and he reminded himself of the weight to be placed on the public interest.
26. There was found to be insufficient evidence to show that the removal of the Appellant would interfere with her right to family or private life in a way that would be disproportionate to the legitimate aim of the maintenance of effective immigration control.
27. As the Respondent has rightly submitted, the Chikwamba principle has no application in this case, a matter that Ms Praisoody clearly conceded before me.

28. Indeed, the grounds in that regard misunderstand what the Judge said at paragraph 87 of his determination and thus have placed his reasoning out of context. As rightly pointed out by the Respondent, the Judge did not say that the Appellant should now return to the Ukraine and make an entry clearance application from abroad, but that in terms of the Appellant's present appeal, it was apparent that she could not bring herself within the provisions of Appendix FM (family life) or paragraph 276ADE (private life). He continued *"The case she puts is that she is an adult dependent relative but she falls immediately outside that category under Appendix FM because she did not come here with entry clearance in that capacity but as a family visitor"*. The Judge went on to say that:
- "It would have been open to her to have applied for entry clearance in Rome or Kiev to come to the UK in the capacity of an adult dependent relative and the ECO at either post would have been afforded the opportunity to make the relevant enquiries had she done so. However she did not do this."
29. The Judge continued in fairness to state, *"the implicit explanation for this is that it was only when she arrived in the UK that her health worsened. It was only at this point that she became 'dependent'."* He continued, *"However as I have indicated I have concluded this was not the case and that matters healthwise have remained much as they had been for some considerable time"*.
30. Having considered the grounds upon which permission was granted, the submissions of the parties and having read the Judge's determination and for the above reasons I find myself in complete accord with the reasoning in support of the Respondent's Rule 24 response and for like reason find there to be no error on a point of law in the Judge's decision.
31. The grounds place reliance on R (On the application of Chen) v SSHD. Whilst I have found that the Chikwamba principles have no relevance to the present case, I have considered it prudent in light of the grounds of challenge and for the sake of completeness, to remind myself that it is apparent that the Appellant in this appeal, is only able to meet the requirements of the relevant Rules because she overstayed her visa and that she now seeks to be excluded from what is required of those who have not remained in the United Kingdom unlawfully, which is to make the application out of country. Indeed ECDR1.1 at (a) states that the applicant must be out of country, i.e. outside the UK.
32. It cannot therefore be right, for the Appellant in such circumstances, to claim that she would be deprived of the care that she needs whilst she goes back to the Ukraine to make an appropriate application.
33. It may be that there are circumstances in which the consequences of an Appellant being deprived of that care during the period necessary, to return home to make an appropriate application, would be so pronounced as to demand an outcome in her favour compliant with Article 8 of the ECHR, but it is apparent that on the facts as found by the First-tier Tribunal

Judge, such cogent evidence of detrimental effect did not exist in this particular case.

34. It is not in any event an appropriate use of Article 8 of the ECHR to seek thereby to circumvent the requirements of the Immigration Rules.
35. Contrary to the assertion in the grounds, it is apparent to me this was a detailed determination prepared with evident care in which the Judge took careful account of the evidence both oral and documentary and relevant case law guidance that he had properly applied against the backdrop of the facts as found. There is no doubt that the Judge's findings were well-reasoned, amply supported by and open to him on the evidence and are sustainable in law.
36. The grounds assert in summary that the determination discloses inadequate reasoning and that the First-tier Tribunal Judge failed to make findings of fact in every issue arising and generally expressed disagreement with the findings made but it is entirely clear from the determination read as a whole why the appeal was dismissed. The reasoning of the First-tier Tribunal Judge cannot be said to be irrational nor his conclusions perverse. The Judge was required to explain why he reached his conclusions but was not required to assemble and set out in the determination everything that was capable of supporting a contrary view
37. It will be a matter for the Entry Clearance Officer to determine any application under the Adult Dependent Relative Rules that the Appellant might make upon her return to the Ukraine, but it was argued with some force both in the grounds and over the course of the two hearings before me, that other than the fact that the Appellant was required to make such an application out of country, she met all the remaining requirements in order to successfully meet the requirements of the Immigration Rules.
38. I can only express the hope that in view of the circumstances of this applicant as indeed identified in the Judge's determination that includes her age, her health and the strength of her relationship with her daughter, son-in-law and grandchildren in the United Kingdom, that any such entry clearance application that she may seek to make from Ukraine under the Adult Dependency Rules can in the circumstances, be considered with as much expediency as possible. It was the understanding of Mr Walker that such an application could possibly be conducted within a matter of weeks but in fairness to Mr Walker, he was unable to give that assurance with any certainty.

### **Notice of Decision**

39. The making of the previous decision involved the making of no error on a point of law and I therefore order that it shall continue to stand.
40. No anonymity direction is made.



Signed

Date: 23 January 2016

Upper Tribunal Judge Goldstein