Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19047/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th July 2014	**On 4th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IRYNA LABUZAVA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer
For the Respondent: Mr C Yeo of Counsel instructed by Irving & Co Solicitors

DETERMINATION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Lawrence promulgated on 24th April 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female Belarusian citizen born 15th May 1975 who on 1st September 2010 was granted a multiple entry visit visa valid until 1st September 2015.

4. She entered the United Kingdom on 6th May 2012, and was granted leave to remain until 6th November 2012.

5. On 8th August 2012 the Claimant applied for leave to remain in the United Kingdom on the basis of her relationship with her partner Alan Frederick William Bowes-Hindle, the Baron of Kendal, to whom I shall refer as the Sponsor.

6. The Claimant and Sponsor married in the United Kingdom on 7th June 2013.

7. The application for leave to remain was refused on 10th May 2013. The reason given for refusing the application under the Immigration Rules was that the Claimant did not satisfy paragraph E-LTRP.2.1 of Appendix FM which states that an applicant for leave to remain in the United Kingdom must not be in the United Kingdom as a visitor.

8. The Respondent considered paragraph EX.1 of Appendix FM although it would appear that the Claimant was not entitled to benefit under this provision, as she was in the United Kingdom as a visitor. In any event the Respondent accepted that the Claimant was married to a British citizen but decided that there were no insurmountable obstacles to family life continuing outside the United Kingdom.

9. The Respondent also considered paragraph 276ADE of the Immigration Rules which sets out the requirements for leave to remain based on private life, and found that the Claimant did not satisfy the criteria set out in this paragraph.

10. The Claimant appealed to the First-tier Tribunal and Judge Lawrence (the judge) heard the appeal on 11th April 2014. After hearing evidence from the Claimant and Sponsor, the judge found that the requirements of the Immigration Rules could not be satisfied, but allowed the appeal with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules.

11. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in considering Article 8. He had not had regard to the Immigration Rules, which meant that his subsequent proportionality assessment was unsustainable.

12. Reliance was placed upon MF (Nigeria) [2013] EWCA Civ 1192, Nagre [2013] EWHC 720 (Admin), and Gulshan [2013] UKUT 00640 (IAC). It was

contended that Article 8 should only be considered outside the Immigration Rules if there are compelling circumstances not recognised by the rules, and an appeal should only be allowed if there are exceptional circumstances, which are circumstances where refusal would lead to an unjustifiably harsh outcome.

13. It was submitted that the judge had failed to provide adequate reasons why he found the Claimant's circumstances to be compelling or exceptional.

14. Permission to appeal was granted by Judge of the First-tier Tribunal McDade who found the grounds arguable.

15. Following the grant of permission a response was lodged on behalf of the Claimant pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the terms on which the appeal was allowed would permit the case to succeed under Appendix FM of the Immigration Rules, and it was highly relevant to proportionality that the case would now succeed under the new rules.

16. It was contended that the judge had given detailed reasons why the couple could not relocate to Belarus and why they could not be temporarily separated.

17. it was contended that adequate reasons aspect of the challenge does not amount to an error of law challenge, and is merely a disagreement with factual findings. The judge had given sufficient reasons.

18. It was denied that Gulshan was authority for the proposition that there must be compelling circumstances before human rights were considered, as a judge could not consider whether there are circumstances such that an appeal might succeed on human rights grounds before considering human rights issues.

19. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Secretary of State's Submissions

20. Mr Parkinson relied upon the grounds contained within the application for permission to appeal. He submitted that although the judge had referred to case law, he had relied on case law that predated the changes to the Immigration Rules on 9th July 2012, and the judge had not given adequate reasons why there were compelling circumstances which meant that the Claimant was entitled to make an application for leave to remain from the United Kingdom, rather than returning to Belarus to make the application. Mr Parkinson pointed out that the Claimant had a multi-visit visa, therefore if she returned to Belarus the separation from the Sponsor would be brief. Mr Parkinson also pointed out that the Sponsor had very substantial

financial assets, and he would be able to pay for care during the Claimant's absence.

The Claimant's Submissions

21. Mr Yeo relied upon his rule 24 response, contending that the grounds amounted to a disagreement with the findings made by the judge and did not disclose an error of law. I was asked to note that there was no contention that the findings made by the judge were perverse. The judge had given reasons for finding insurmountable obstacles existed to family life being carried on abroad, and the judge had taken all relevant circumstances into account.

22. Mr Yeo submitted that cases such as Chickwamba, Hayat, and Zhang, to which the judge had referred, were still good law and there was no reason to think that the force of these judgments had diminished because of the introduction of new Immigration Rules on 9th July 2012.

23. Mr Yeo submitted that paragraph 3 of the grounds contained within the application for permission to appeal was incorrect, as the judge had identified compelling circumstances and had taken into account the unusual facts of this case, and the Sponsor's medical history.

The Secretary of State's Response

24. Mr Parkinson argued that the judge had given no reasons why the Sponsor could not hire care during the Claimant's absence when she applied for entry clearance from abroad.

25. Mr Parkinson submitted that if Chikwamba, Hayat and Zhang were still to be followed, the Court of Appeal in MF (Nigeria) would not have stated that compelling or exceptional circumstances were required to consider Article 8 outside the rules.

26. Mr Yeo interjected to point out that the issue of the Sponsor hiring care had never been raised in the refusal letter and was not raised at the hearing before the judge therefore it would not be reasonable to find an error of law on something that had not been argued before the judge.

27. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

28. Having read the determination as a whole I conclude that the judge did consider the Immigration Rules, before moving on to consider Article 8 outside those rules.

29. The judge set out in paragraph 4 of his determination, the rules that had been considered in refusing the application. In paragraph 20 the judge recorded that there was no dispute that the Claimant did not meet the requirements of the Immigration Rules, and therefore he needed to

consider whether he should consider Article 8 outside the rules. In my view the judge does not err on this point. There was only one reason given by the Secretary of State for the Claimant not succeeding under the Immigration Rules, and that was because she was in the United Kingdom as a visitor. It was not contended that she could not satisfy the English language requirements or financial requirements.

30. The judge considered the case law referred to by the Secretary of State in the grounds contained within the application for permission to appeal and recognised and set out what was stated in paragraph 24(b) of Gulshan which is set out below;

> "(b) after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre;"

31. At paragraph 22 the judge refers to 'insurmountable obstacles', which is referred to in EX.1 of Appendix FM, and was referred to in the Respondent's refusal letter. The judge makes a finding that there are 'insurmountable obstacles' in the Claimant either going alone or with the Sponsor to Belarus, to make an application for entry clearance to enable the Claimant to return to the United Kingdom as the Sponsor's wife.

32. The judge gave reasons for this finding, which in effect is a finding that there are compelling circumstances not recognised under the rules, in paragraphs 24-26 of the determination. These reasons should be considered in conjunction with the Sponsor's medical history which is set out in paragraphs 13-18 of the determination.

33. It is clear that the judge found the Sponsor's medical condition to amount to compelling or exceptional circumstances, taken together with the fact that there was no dispute the Claimant could satisfy the English language requirement and financial requirements of the Immigration Rules. The only aspect of the rules not satisfied by the Claimant, was the fact that she was in the United Kingdom as a visitor when she made her application for leave to remain. The judge has therefore given reasons for his findings and in my view has complied with the duty to give reasons set out in Shizad (sufficiency of reasons – set aside) [2013] UKUT 85 (IAC) and I set out below the first paragraph of the head note to that decision;

> "(1) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."

34. The judge has given reasons for his findings. It may be the case that other judges would not have reached the same conclusion, but that is not the issue. I find that the judge considered the Immigration Rules before considering Article 8 outside the rules, and made findings that compelling

or exceptional circumstances existed which were not sufficiently recognised under the Rules, and gave adequate reasons for those findings. The grounds submitted by the Secretary of State amount to a disagreement with the findings made by the judge, but they do not disclose an error of law.

Decision

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

I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed Date 23rd July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The fee award made by the First-tier Tribunal stands.

Signed Date 23rd July 2014

Deputy Upper Tribunal Judge M A Hall