Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39665/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9th April 2015	**On 14th April 2015**

Before

UPPER TRIBUNAL JUDGE COKER

Between

ELENA GROMOVA
(no anonymity order)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance in person or by legal representative
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Neither the appellant nor anyone instructed on her behalf appeared before me. The notice of hearing was sent to her last notified address and has not, so far as I am aware, been returned undelivered. I therefore proceeded to determine the appeal and announced at the hearing that I was going to dismiss the appeal and would give my written reasons later which I now do.

2. The respondent, for reasons set out in the decision dated 20 September 2013 refused to vary the appellant's leave to remain from Tier 4 (General) Migrant to Tier 1 (Entrepreneur) and made a decision to remove her pursuant to s47

Immigration Asylum and Nationality Act 2006. The First-tier Tribunal in a determination promulgated on 12th September 2014 dismissed her appeal against that decision. She sought and was granted permission to appeal on the grounds

(a) the judge erred in failing to consider whether the decision breached Article 8
(b) the judge erred in failing to consider "evidential flexibility"
(c) the judge erred in determining what evidence was before the respondent when she made her decision
(d) the judge erred in failing to consider whether the appellant should have been granted discretionary leave given that she fulfilled the spirit albeit not the letter of the law
(e) the judge erred in making significant errors of fact.

3. For some reason the First-tier Tribunal judge made an anonymity direction. There is no basis for such a direction; the appellant has not asserted that she fears persecution (if she did the proper course is to claim international protection) and there is no submission why such a direction should have been made other than that she has contacts with high profile people and she has a duty to protect their privacy. The appellant is involved in public proceedings; the letters in support were written either for those proceedings or to support an application. None of them have asked for anonymity. There is no basis for these proceedings to be anonymised. I lift the anonymity order.

4. The appellant does not meet the requirements of the Immigration Rules. The findings of the judge in so far as the funding asserted to be available from Lord M, the issue of the Venture Capital Business and the failure to produce evidence that funds for the proposed business were held in a regulated financial institution were not challenged. The challenge was that the judge failed to take account of the power of attorney held by her over her mother's account and that meant that she could meet the maintenance requirements. Although the judge erred in her conclusion that the Power of Attorney was not before the respondent, that error is not material. Even if the judge had found that she had access to sufficient funds to meet the maintenance requirements, she still could not meet the requirements of the Immigration Rules in so far as Attributes were concerned.

5. The appellant relies on the "evidential flexibility policy". The finding that at the date of application the applicant did not have access to the required funds is not challenged. In particular the finding in paragraph 43 of the determination that at the date of application the funds were not in the client account of the firm but were expected imminently and that the funds were nothing more than a pledge is not challenged. Although evidence produced subsequent to the respondent's decision showed that as at 9th October 2013 there were funds this evidence not only post dates the application but does not provide evidence that the funds were in place on the date of application. There is no requirement on the part of the respondent to request information, which on the face of the application does not appear to be available and does not fall into the category as set out in paragraph 245AA of the Immigration Rules. But even if she had requested further information of funds available as at the date of application, those funds were not there as confirmed by the letter from the accountants stating that the

funds were expected imminently. There is no error of law in the failure of the respondent to exercise 'evidential flexibility" and no error of law in the judge failing to take account of evidence that post-dates the application when she considered whether the applicant met the requirements of the Immigration Rules.

6. In so far as the pleaded ground that the judge failed to consider whether the respondent should have exercised her discretion to grant leave to remain given she met the spirit if not the letter of the law, there is no such discretion in the PBS Rules. Although the respondent does of course retain an inherent right to exercise her discretion if she considers it appropriate, the failure to exercise such discretion is not a matter susceptible to statutory appeal (s86(6) Nationality Immigration and Asylum Act 2002); the proper remedy for such challenge is by way of judicial review. There is no error of law by the judge failing to consider and make findings on the exercise of the respondent's discretion.

7. In so far as the alleged errors of fact are concerned, the judge's findings are not errors of fact: he correctly identified that the funds asserted to be available from Lord M were not in fact there and he correctly found that Equity Stake Limited were not providing funds. There is no error of fact such as to amount to an error of law.

8. In so far as Article 8 is concerned, the grounds seeking permission also refer to s6 Human Rights Act 1998. Although the respondent in her decision did not address Article 8 because the appellant had not previously raised this, the respondent included in the decision a s120 notice; the appellant relied upon Article 8 human rights grounds in her grounds of appeal – as she was entitled to do in accordance with s84 Nationality Immigration and Asylum Act 2002 and the judge erred in law in failing to reach a decision on that ground of appeal – she was required to reach a decision on all grounds argued. The issue is whether such error was material such that the decision of the First-tier Tribunal should be set aside to be remade.

9. The evidence before the First-tier Tribunal as regards Article 8 was as follows:

   (a) The appellant has lived in the UK since 2005.
   (b) She does not meet the requirements of the Immigration Rules.
   (c) She has established a wide circle of friends and business contacts.
   (d) To undertake a similar business enterprise in Belarus would involve her in undertaking research etc of an economic and legal base with which she is unfamiliar given her length of residence in the UK and the skills she has acquired whilst here.
   (e) Her business in the UK, when established will create jobs.
   (f) She has the potential to establish a successful business and a number of prominent people have attested to her enthusiasm and skills.
   (g) She has integrated into British Society and has initiated projects promoting home and international projects for young people.
   (h) She has become a high profile member of the artistic community.
   (i) She has a strong relationship with a person and they intend to marry; they do not live together; he cannot go to her country although he does not say why

not. He says she cannot go to his country (Latvia) but does not say why not. It is not clear what his immigration status in the UK is, how long he has been in the UK or whether he is exercising Treaty Rights as a Latvian citizen. No evidence other than assertion that he had a business was produced.

(j) She previously won an immigration appeal in 2009 to enable her to continue her studies.

10. The grounds do not identify any other evidence that was before the judge and there is none apparent from the papers.

11. Although removal of the appellant from the UK will interfere with her private life, she has not established family life, albeit there is an intention to do so in the future. There was no explanation why she could not live with her fiancé in Belarus or why she could not live with him in Latvia or why she could not apply for leave to enter as a spouse or fiancée in the future. Although she had previously been successful in an appeal that was involved with the interruption to studies, those studies have now been completed and the decision the subject of appeal before the First-tier Tribunal was against a decision to refuse to vary her leave to remain. Furthermore it was some considerable time ago and a decision is taken on the basis of relevant facts at the date of hearing. There is no other submission as to why that decision is relevant other than she has a history of success in the tribunal against a decision of the respondent. Part 5 of the Nationality Immigration and Asylum Act 2014 came into force on 28th July 2014. The judge failed to take account of this and in particular to consider s117B of the 2002 Act.

12. The appellant has been in the UK lawfully since 2005; she speaks English; she has been financially independent whilst here in the UK and the evidence, which was produced after the decision confirms that she has financial backing for her business proposition. S117B(5) states that little weight should be given to private life established in the UK when status is precarious. S117B also refers to the public interest in maintaining effective immigration control.

13. The dictionary definition of 'precarious' includes phrases such as dependant on chance, uncertain, insecure. Plainly the appellant had a student visa; her residence in the UK as a student was not thereby precarious. She had lawful valid status which was not subject to challenge and was certain. Her residence during her period of studies with a student visa was not subject to chance.

14. The appellant does not fall foul of s117B.

15. The factors set out in s117B are not exhaustive and the fact that an applicant meets those criteria does not mean that s/he succeeds in an appeal on Article 8 grounds. The Tribunal is still required to undertake a 'balancing act" and to assess the applicant's history, background, circumstances and so on in the context of the overriding public interest in maintaining effective immigration control.

16. As was made clear in Patel [2013] UKSC 72, Article 8 is not a general dispensing power; Article 8 is concerned with private or family life and not

education as such. The same approach is relevant to this case. The fact that the appellant may (although I make no finding in that regard) now be able to meet the requirements of the Rules is not an argument in support of a finding that the objectives of immigration control should carry less weight – see [45] and [56] of Patel. For this applicant, she did not meet the Rules, she may meet the Rules now as an entrepreneur, she does not meet the 'long residence' rules and she has not established family life in the UK. Throughout her time in the UK she has been on a visa that was limited in time with no expectation that she would be able to remain permanently.

17. Taking all of those matters into account it is inconceivable that a judge would have found that her private life in the UK was such as to outweigh the overriding interest and objective of immigration control. Her appeal on Article 8 grounds would not have been allowed and therefore, although the First-tier Tribunal judge erred in not reaching a decision on all the pleaded grounds, the outcome would have been the same namely her appeal would have been dismissed.

18. Mr Tufan informed me that although he had not received an explanation why the appellant had not attended the hearing, he was aware tat she had submitted an application for a residence permit as the spouse of an EEA national. This may be the explanation why she has not attended the hearing today.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside to be re-made.

I do not set aside the decision

Anonymity

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

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

Date 9th April 2015

Upper Tribunal Judge Coker