Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/49886/2013
IA/49889/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th December 2014	**On 12th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

MRS MARIYA HERMAN (1)
MR VASYL HERMAN (2)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Seelhoff, of A Seelhoff Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

Interpretation:

Ms Vira Cresswell, in the Ukrainian language

DETERMINATION AND REASONS

Introduction

1. The appellants are citizens of Ukraine. The first appellant was born on 30th August 1969 and the second appellant on 27th June 1964. They are married. They

say that they came to the UK in 1996, and have remained in the UK unlawfully since that time without leaving the country. On 6th July 2012 they applied for indefinite leave to remain on the basis of their long residence in accordance with paragraph 276B of the Immigration Rules as in force at that time. Their applications were refused on 13th November 2013 and the appellants appealed on 2nd December 2013. Their appeals were dismissed in a determination promulgated by First-tier Tribunal Judge Lingam on 16th July 2014. Permission to appeal against this decision was granted by Judge of the First-tier Tribunal JM Holmes on 6th October 2014. I found that Judge Lingam had erred in law and set her determination aside in its entirety in a decision promulgated on 12th November 2014. The reasons for that decision are set out at annex A to this decision.

2. The matter came back before me to re-make the appeal. The issues in this appeal are whether the appellants can meet the requirements of paragraph 276B of the Immigration Rules as it stood at the time of their applications or failing that if they can show that their removal would be a breach of Article 8 ECHR. The burden of proof is on the appellants and they must demonstrate on the balance of probabilities that they can fulfil the Immigration Rules, or that their removal would constitute a real risk of a violation of their protected human rights.

The Refusal

3. In summary the Secretary of State says that the appellants cannot show they meet the requirements of paragraph 276B of the Immigration Rules or qualify to remain in accordance with Article 8 ECHR because:

- The second appellant had submitted insufficient evidence of his residence between 1996 and 2006. His residence in this period was only supported by an employer's letter covering 1996 to 2000. It is therefore only believed that he has been resident in the UK since 2006.

- The first appellant had also submitted insufficient evidence of her residence between 1996 and 2012 (there were only letters of employment between 1996 and 1999 & 2002 and 2005, 5 employee references for 2005 to 2010, and money transfers in the name of Maria German between 2005 and 2010) and so it is only believed that she has been resident in the UK since 2012.

- It would not be a breach of Article 8 ECHR to return the appellants to Ukraine because they could not show they fulfilled any of the Immigration Rules relating to Article 8; had lived the majority of their lives in Ukraine and had not severed all ties with that country.

Evidence - Remaking

4. The full account of the evidence is set out in the statements/ letters of the five witnesses and the record of proceedings. The appellants gave their evidence through the Ukrainian interpreter, whom they confirmed they understood. The other witnesses all gave their evidence in English. In summary the appellants say

that they both entered the UK illegally in 1996 to look for work as they were struggling to support their family in Ukraine. They have worked in the UK since this time, and provided employers letters, payslips, photographs of themselves in their work uniforms and for the later period HMRC documentation for the second appellant. They have not returned to Ukraine during this time. They have also made friendships with British citizens, and have provided letters confirming their residence from these friends.

5. The witness Ms Sarah Ellard states that the first appellant has cleaned for her every week since approximately 2006 when she moved to her current property. The witness Ms Louise Scagnelli states that she has seen the first and second appellants on a regular basis (between one and four times a month at the weekend, mostly on Sundays) in her café as customers and then as a friend since the spring of 2000. She is certain that this was the time she met the appellant as it was just after the death of her father in 1999. The witness Ms Sharon Davies states that she has been friends with the appellants since 1998. She is clear in her memory that it was this time as her daughter was two years old and she had to return to work, with the first appellant initially being with her in her home doing child-care for the first eight or nine years of their friendship (so until about 2008/2009), when her daughter went to secondary school. Since then the first appellant has helped her with household matters such as shopping. She is certain that the first appellant has not left the UK as she has talked about missing her sons and not having the opportunity to go back and see them.

6. In addition to the witness evidence I have taken into consideration the large bundle of documentary evidence supplied by the appellants and the respondent's bundles which contained the original application forms, immigration status questionnaires, refusal letters, immigration decision notices and notices of appeal.

Submissions

7. Mr Walker relied upon the refusal letter. He said that he found all the witnesses credible and accepted that Mrs Davies had therefore corroborated the fact that the appellants had been in the UK since 1998. He accepted that the evidence of the second appellant was that he had worked cash in hand prior to 2006.

8. Mr Seelhoff submitted that he relied upon his skeleton argument given Mr Walkers concession about the credibility of the witness evidence. In his skeleton argument Mr Seelhoff states that the only issue in dispute under paragraph 276B of the Immigration Rules is showing the appropriate length of residence. The first appellant has passed her life in the UK test and the second appellant provided suitable evidence from an educational psychologist that he is unable to learn English due to a traffic accident, and that this appears to be accepted by the respondent as exempting him from the English language requirement. Mr Seelhoff submits that there are employment letters and there is witness evidence which show the appellants have been in the UK since 1996. The witnesses are all British citizens; are not related to the appellants; and have attended the Tribunal

on three occasions to confirm their long friendships with the appellants and support their appeal. No documents have been challenged by the Secretary of State as forgeries.

9. At the end of the hearing I informed the appellants that I accepted their period of claimed residence on the basis of the witness evidence I had heard and documents in support. As a result I would be allowing their appeal, but that my full reasons would follow in writing.

Findings – Re-making

10. The appellants contend that they meet the requirements of paragraph 276B of the Immigration Rules as it stood at the time of application on the basis that they could meet requirements at 276B(i)(b) as they had been resident for 14 years or more; because there were no reasons why it was undesirable for them to be granted indefinite leave to remain in accordance with paragraph 276B(ii); because they had no unspent convictions in accordance with paragraph 276B (iii); and because the first appellant had sufficient English and knowledge about life in the UK and the second appellant had submitted suitable documentation to show that this was not possible due to his medical problems and so they could thus meet the requirements of paragraph 276B(iv).

11. The respondent has only contended that appellants are not so entitled due to concerns with the appellants' length of residence. I am satisfied, in accordance with the guidance set out in ZH (Bangladesh) v SSHD [2009] EWCA Civ 8, that the appellants can show that there are no reasons in the public interest which would make it undesirable to grant them indefinite leave to remain. There is also no evidence before me that shows the appellants have any criminal convictions, let alone any that are unspent.

12. I am also satisfied that the first appellant submitted a relevant ESOL qualification as this is indicated on her application form as having been provided to the respondent; her certificates form part of the appellants' bundle and no submissions/ allegations have been made that they are not satisfactory by the respondent. I am satisfied that the second appellant is properly to be seen as exempt from this requirement as he has provided the report of a qualified educational psychologist, Mr T Francis. I find Mr Francis to be an appropriately qualified expert who has written a careful report in which he sets out his expertise and the methodology by which he reaches his conclusions. Mr Francis concludes that due to a very severe car accident when he was 22 years old (so in 1986 whilst the appellants still lived in Ukraine) the second appellant suffered damage to the areas of the brain that deal with the acquisition of new skills, including languages, and that as a result despite being a man of high academic potential there is no meaningful possibility he would be able to pass a citizenship examination which involved with learning of new materials using memory, language and literacy skills.

13. Mr Walker has conceded for the respondent that the witness evidence before the Tribunal was credible. I am also satisfied that is the case. All the witnesses answered questions put to them directly; their evidence was consistent with their written statements, with each other, and with the other documentary materials supplied.

14. Paragraph 276B (i)(b) of the Immigration Rules requires at least 14 years of continuous residence prior to the service of a removal notice. The appellants received their removal decisions on 21st November 2013, so the fourteen year period would start on 21st November 1999.

15. I am satisfied that the appellants have been resident for a period of more than 14 years at the date of service of removal notice on the basis of the credible witness evidence from Ms Davies which starts from 1998 and from Ms Scagnelli which commences from the Spring of 2000. Both witnesses confirm the appellants' residence from those points to the current day, giving good reasons for their certainty about the start dates for their friendships. Ms Davies is able to confirm the first appellant's residence on weekdays from 1998 to approximately 2008, and then from time to time thereafter. She is a close friend of the appellants and was certain that they had not left the UK as she knew how much the first appellant missed her sons and how she had said she was unable to travel to see them. Ms Scagnelli has seen the appellants in her café as customers and then friends at weekends between once a month and once a week since the spring of 2000. This witness evidence is also supported by other documentary evidence as set out below.

16. The second appellant has a letter from the company he says employed him between September 1996 and 2000 as a building labourer for Field Starkey Building Co Ltd. There is evidence from Companies House that this was indeed a general construction and civil engineering company, which was incorporated in 1997 and went out of business in 2009. The first appellant has said that on arrival in the UK in 1996 until 1999 she worked for the Crowne Plaza Hotel, and has produced a letter confirming this. Both appellants maintain that they were only paid in cash for this work, and got the work through friends, and so there is no further documentary evidence of there presence during this period. The letter from Field Starkey states that they paid the second appellant's tax and national insurance, but in fact this was not the case, however given the second appellant's lack of ability to read the letter (which was clearly meant as an onward reference as it was issued in 2000 soon after he had finished with the company) and the potential for the company to desire to appear to have acted properly I do not find that this inconsistency invalidates the evidence of the appellant that he worked for this company.

17. Between 2000 and 2004 the second appellant says he did a variety of casual work including delivering pizzas, handing out leaflets, gardening and manual labour. Between 1999 and 2005 the first appellant was a cleaner, and has provided a letter from Mr Mark Shuttleworth confirming this was the case, as well as working for

Ms Davies doing child-care and household work. Clearly this work was all "cash in hand". Neither appellant attended a doctor or dentist during this time and they used international calling cards to keep in touch with family in Ukraine. I find it is highly plausible that they lived in this way, and given the supporting witness evidence regarding their continuous presence in the UK during this period and the first appellant's work for Mrs Davies, I find on the balance of probabilities that they did so.

18. Between 2002 and 2005 the first appellant says she worked for Hotelcare Ltd and has produced a letter from this company confirming that she was a room attendant at the Jury's Inn Hotel in Chelsea. There is evidence from Companies House which shows that Hotelcare Ltd existed as a private limited company from 1992. The second appellant says he worked for the same hotel from 2004. It is conceded by the respondent that the second appellant has been in the UK since 2006 on the basis of his work for this company who placed him on the payroll in that year. There are also photographs of both appellants clearly wearing the uniforms of this hotel with work colleagues in the same uniforms. I am satisfied that the appellants both worked for Hotelcare Ltd as they have claimed.

19. The credible witness evidence of Ms Ellard places the first appellant in the UK on the basis of the weekly cleaning of her home since 2006. There is also a letter from the Ukrainian Catholic Cathedral which says that the appellants have both been in weekly attendance at the cathedral for mass since July 2006. There are also letters from three other employers who confirm that the first appellant has been their cleaner starting variously in 2005, 2007 and 2008. The appellants' landlord from 2010 to 2014 also wrote to confirm their period of tenancy and provided a reference for them; and there is a letter from the Ukrainian community centre dated 2011 which confirms both appellants as members who actively participate in their functions. It is of course conceded by the respondent that the first appellant has been present since 2012.

20. On the balance of probabilities I am satisfied that the appellants have been continuously present in the UK since 1996 given the totality of the evidence presented to the Tribunal, and thus that they had been in the UK for a continuous period of more than 14 years at the point of service of the removal decision. As a result they qualify for indefinite leave to remain under paragraph 276B of the Immigration Rules.

21. As I have found that they qualify for leave to remain under the Immigration Rules I will deal with Article 8 ECHR briefly. The appellants have extensive private life ties in the UK as they have work, friends, church and community group connections with this country, and these would be interfered with were they to be removed. This interference would not be in accordance with the law as I have found that they are entitled to remain under the Immigration Rules.

Decision

22. The decision of the First-tier Tribunal involved the making of an error on a point of law.

23. The decision of the First-tier Tribunal is set aside.

24. The decision is re-made allowing the appeals under the Immigration Rules.

Deputy Upper Tribunal Judge Lindsley
13th December 2014

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have decided to make no fee award as I was not asked to do this by the appellant's representative and I find that the hearing of witness evidence during the appeal process was vital to the success of the appellants on appeal.

Deputy Upper Tribunal Judge Lindsley
13th December 2014

Annex A

DETERMINATION AND REASONS

Introduction

1. The appellants are citizens of Ukraine. The first appellant is born on 30th August 1969 and the second appellant on 27th June 1964. They are married. They say that they came to the UK in 1996 and have remained in the UK unlawful since that time. On 6th July 2012 they applied for indefinite leave to remain on the basis of their long residence in accordance with paragraph 276B of the Immigration Rules in force at that time. These applications were refused on 13th November 2013 and they appealed on 2nd December 2013. Their appeals against the decisions of the Secretary of State were dismissed by First-tier Tribunal Judge Lingam in a determination promulgated on the 16th July 2014. She found that the first appellant had only been in the UK since 2012 and the second appellant since 2006.

2. Permission to appeal was granted by Judge of the First-tier Tribunal JM Holmes on 6th October 2014 on the basis it was arguable the First-tier Tribunal had erred

in law as to the credibility of the second appellant's evidence as evidence regarding his cognitive and memory problems was not considered relevant to this issue. Further the approach to the different spelling of the appellants' names on documents and the appellants' attitude to documents with their names being spelt wrongly was also arguably legally flawed. Further Judge Lingam did not make negative credibility findings in relation to the three witnesses who gave evidence on behalf of the appellants but also did not attach any weight to their evidence without giving reasons: this was also an arguably unlawful approach to evidence.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

4. Mr Seelhoof relied upon the grounds of appeal.

5. These contended that it was an error of law for Judge Lingam not to have made specific credibility findings about the three British citizen witnesses who attended the Tribunal and thereafter not to have given their evidence appropriate weight. Ms Scagnelli said she had seen the appellants regularly since 1999; Ms Davies said she had met the first appellant in 1998 and given her money as a cleaner and child-carer. Ms Ellard said she had employed the first appellant since 2005. Their evidence was therefore clearly potentially material to the key issue before the Tribunal. The only challenge to Ms Davies' evidence was, that it was said her evidence differed as she said she did not "pay" the first appellant, where as evidence from the second appellant was that she did pay the first appellant. However Mrs Davies evidence was that she put money in the first appellant's hand-bag (this was Mr Seelhoof's record of the evidence, and that of the Home Office Presenting Officer and I confirmed it accorded with the Record of Proceedings at p.4). There was therefore no reason at all to find her evidence not credible, or fail to consider it in the determination of the appeal, as had been done by Judge Lingam. Ms Scagnelli's evidence had been given no assessment or consideration simply on the basis that she had said she had seen the first appellant once a month compared to the first appellant's assessment of two or three times a month on average. This was not a lawful approach to evidence either.

6. Mr Seelhoof also contends that Judge Lingam took an unlawful approach to assessing evidence of unlawful residence in discounting it because names were not spelt consistently; addresses were not consistent; money was actually paid in cash rather than via a bank as stated on documents; the issue of keeping family away from friends; and using a friend's name on a council tax bill. . It was also said that the first appellant had used discrepant names at paragraph 52 when in fact the names listed were all consistent bar one which has a different middle initial which was irrational. These matters were consistent with the history of unlawful residence the appellants gave, not a reason to find it implausible. The treatment of supporting documentary evidence was particularly unlawful given

that there was no contention by the respondent or finding by the Tribunal that it was false.

7. Mr Seelhoof also contends that Judge Lingam made a finding that the appellants had been inconsistent about what had happened to their previous passports. In fact the history in their representative's letter and before the Tribunal was the same. At all points the appellants had said the original passports were retained by the Ukrainian Embassy when they obtained their new passports.

8. Mr Seelhoof also argues that Judge Lingam had unlawfully discounted the report of Mr T Francis, educational psychologist, in consideration of the quality of the second appellant's evidence on the basis that it had been prepared to show that the second appellant could not fulfil the English language requirement - see paragraph 42 of the determination. However the report contained material about the second appellant's serious memory problems which were clearly relevant to the accuracy of the evidence he was able to give to the Tribunal.

9. Mr Tufan relied upon the Rule 24 notice. He contended that it was reasonable to discount the report of Mr Francis, as was done at paragraph 42 of the determination, as it had been prepared simply in relation to the second appellant's language skills. The evidence of the appellants was properly discounted on the basis of discrepancies between them at paragraph 43 of the determination. Inconsistencies were also identified with the evidence of the other witnesses at paragraphs 34, 35, 36, 44, 46 and 54. The determination was sound and sustainable and decided that the appellants could not make out their case to the required level of proof.

10. At the end of the hearing I informed the parties that I found that the First-tier Tribunal had erred in law for the reasons set out below and that I was setting the determination of Judge Lingam aside with no findings preserved. It was agreed that the re-making hearing should be adjourned as there was insufficient Tribunal time, and because there was no Ukrainian interpreter available.

Conclusions

11. I find that Judge Lingam had erred in law in the assessment of the credibility of the appellants. I find that overall Judge Lingam has not taken a rational approach to the assessment of credibility of the appellants, and has made factual errors in carrying out this assessment which have detrimentally impacted on the appellants.

12. It was not rational to discount the expert evidence of Mr T Francis as is done at paragraph 42 of the determination. This is a report by a qualified professional educational psychologist. Whilst the focus of the report is on the second appellant's ability to learn English his conclusion in summary is that he was someone of very high intelligence who had a severe car accident whilst still living in Ukraine and was left with great difficulties in acquiring new skills, and within the analysis of why this is the case it is said that since the time of the accident the

second appellant has had weak memory skills (he is said to have a working memory index on the 9th centile in response to standardised tests administered by Mr Francis). This was clearly relevant to consideration of evidence of inconsistencies in the second appellant's evidence but Judge Lingam gave it no consideration in this way at all.

13. As Mr Seelhoof has submitted there was no discrepancy or inconsistency in the evidence about the appellants' old passports being taken when their new ones were issued. What is said at paragraph 44 of the determination indicating this is the case is therefore inaccurate and unfairly placed in the balance by Judge Lingam as evidence that the appellants are not credible witnesses.

14. It was not rational for Judge Lingam to find that the appellant's credibility was reduced by their having documents which spelt their names in slightly different ways as is done at a number of points within the determination. It is notable that the respondent accepts that payslips and P60s with the surname "German" did in fact relate to the second appellant – see paragraph 47 of the determination – and thus seemed to have an appreciation that this was something that might well happen in the case of someone without lawful residence.

15. It is unclear what meaningful explanation the appellants could have given with respect to small variations in the spelling of Mariya (sometimes Maria) and Vasyl (sometimes Vasile, Vasil or Vasiliy) in documents issued by others - but Judge Lingam holds their failure to do this against them at paragraph 28. It does not make sense to say that the appellants were not credible because they were not careful (and insisting on corrections) about the spellings of their names as is done at paragraph 51, particularly given the expert evidence of the second appellant's total lack of linguistic ability in English and both appellants lack of status and thus standing vis a vis authority in the UK. The irrationality of this approach is all the more stark at paragraphs 52 and 53 of the determination where an inconsistent middle initial in one document is found to contribute to making documents relating to the first appellant of little weight.

16. I also find that Judge Lingam has failed to make a finding on the credibility of the evidence of the three British citizen witnesses who attended the Tribunal and gave evidence. This was something he was obliged to do so as to weigh all the evidence before him appropriately. Not only did he formally fail to do this but in relation to Mrs Davies there were absolutely no valid reasons given to discount (as he then does) her evidence at all. It was said that there was an inconsistency over whether she paid the first appellant for her child care/ cleaning assistance but ultimately this was not the case. The evidence of both appellants and Mrs Davies was that some money changed hands, even if the first appellant and Mrs Davies did not formally wish to see this as "pay". Clearly this evidence was highly pertinent to the key issue of the appellants' length of residence, as Mrs Davies informed the Tribunal that she had known the first appellant since 1998 and had seen her regularly for the past 17 years.

17. Credibility must be assessed in the round on consideration of all of the evidence before the Tribunal. I find this has not been done in a rational or factually accurate way on a number of counts as set out above, and thus that the determination discloses an error of law. I find this error to be material as if the evidence had been properly considered a different conclusion and outcome for the appeal may have been reached.

Decision

18. The decision of the First-tier Tribunal involved the making of an error on a point of law.

19. The decision of the First-tier Tribunal is set aside.

Directions

1. The appeal will be remade de novo before me on Friday 12th December 2014.

2. The estimated length of hearing is 3 hours.

3. Any fresh evidence that the parties wish to adduce should be served in accordance with paragraph 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the Tribunal and the other party at least seven days prior to the hearing.

4. A Ukrainian interpreter is required.

Deputy Upper Tribunal Judge Lindsley
12th November 2014