IAC-AH-LEM-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12689/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 22nd January 2016 **On 23rd March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS TETYANA MOYISEYENKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Spurling, Counsel
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Ukraine born on 3rd January 1971. The Appellant entered the UK as a visitor with a valid visa on 21st July 2007. That visa expired in January 2008. On 15th November 2011 the Appellant was issued with IS151A as an

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overstayer, arrested and detained. The Appellant was released on 13th December 2011 from detention and on 31st December 2011 married Mr Farooq Dar a British citizen.

2. On 4th July 2012 the Appellant lodged an application pursuant to Article 8 of the European Convention of Human Rights contending that it would breach her human rights to return her to the Ukraine a country listed in Section 94(4) of the Nationality, Immigration and Asylum Act 2002. The Appellant's application of 4th July 2012 whilst requesting that the Appellant's circumstances be considered under the European Convention of Human Rights also within an accompanying letter raised issues regarding asylum but on 24th March 2013 the Appellant's instructed solicitors wrote to the Home Office confirming that the Appellant would not be making an asylum claim and provided further evidence of her relationship with her partner. The Appellant's application pursuant to the European Convention of Human Rights was refused by the Secretary of State on 21st February 2014.

3. The Appellant appealed and the appeal came before Immigration Judge Braybrook sitting at Taylor House on 12th March 2015. In a determination promulgated on 20th March 2015 the Appellant's appeal was dismissed under the Immigration Rules and on human rights grounds.

4. On 7th April 2015 the Appellant sought permission to appeal to the Upper Tribunal. On 18th May 2015 First-tier Tribunal Judge Shimmin granted permission to appeal. In granting permission Judge Shimmin considered that it was arguable that the First-tier Tribunal Judge had not taken the correct approach to the "insurmountable obstacles" test in the light of *Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048*. He also considered that the judge may have erred in law in refusing to factor into the Article 8 assessment the Appellant's current inability to succeed in an application from abroad under the Immigration Rules and the reasons why she would fail.

5. It was on that basis that the appeal came before me to determine whether or not there had been a material error of law in the decision of the First-tier Tribunal. It was Counsel's submission that there were two principal errors of law in the decision of the First-tier Tribunal Judge. Firstly he contends that the judge's approach to the assessment of "insurmountable obstacles" is flawed and secondly that the judge's approach to the assessment of the facts relevant to the Article 8 assessment is also flawed and that the judge has failed to give proper consideration to the authorities of *Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048* and *Chikwamba v Secretary of State for the Home Department [2008] UKHL 40*.

6. Mr Spurling when addressing the issue of insurmountable obstacles drew to my attention the IDIs 2013 that were in place at the date of decision and submitted that the judge had failed to consider the impact of the assessment of the *Sanade* principle namely that whilst accepting that in a case where a third country national is unable to claim a right to reside it will not logically be possible when assessing the compatibility of their removal or deportation with the ECHR to argue that any

interference with Article 8 rights could be avoided by the family unit moving to a country which is outside the EU. He submitted that it is necessary to look at paragraph EX.1 of the Immigration Rules and submits that the appeal can only fail if there are no insurmountable obstacles in the Appellant returning to the Ukraine. It was his submission that there has been a failure by the First-tier Tribunal Judge to consider the assessment as set out at paragraph 3.2.7(c) of the IDIs in force in May 2013 in the assessment as to whether or not there are insurmountable obstacles. He submitted that the analysis of the judge places it within the *Sanade* principle.

7. The Home Office submitted that paragraphs 15 and 16 of the First-tier Tribunal Judge's decision addressed the issue of insurmountable obstacles and considered that the judge had addressed this along with the relevant authorities at paragraph 25.

8. Mr Spurling's response contended that the difficulty of what the judge had said at paragraph 25 was that he has refused to consider the real impact of requiring the Appellant to go back to the Ukraine and that this was not straightforward because the Sponsor would not only need, if that situation arises, to have an income of £18,600 but he would have to have had this for six months immediately prior to the application. Consequently not only did the Sponsor therefore need to find a job for an application to succeed in such circumstances but he must have been in that job for a continuous period of six months.

9. The Home Office indicated that the Secretary of State was aware of this and referred me to paragraphs 23 to 28 of the original Notice of Refusal which they claimed addresses this issue. They acknowledged the position that the Appellant and Sponsor might find themselves in but pointed out that the Immigration Rules are specific and are there to be followed.

10. Mr Spurling disagreed pointing out that paragraphs 23 to 28 of the Notice of Refusal do not address the issue of Article 8 and that the guidance given in *Sanade* was neither mentioned nor considered.

11. On that basis I found that there was a material error of law in the approach adopted by the First-tier Tribunal Judge. The judge appeared only to have considered Article 8 rather than the position under the Immigration Rules. Whilst paragraph 25 of the decision appeared to accept the *Sanade* principles the methodology of approach seemed to be wrong in that the Rules should be considered first before a free-standing Article 8 application outside the Rules is looked at and it is necessary to look at the position that would arise under *Sanade*. It is a matter for submission and argument if the Sponsor is not required to go outside the European Union i.e. to the Ukraine as to whether or not insurmountable obstacles actually arise.

12. Further the First-tier Tribunal did not appear to have given full due and proper consideration to the IDIs in place in May 2013 namely that when assessing an application under paragraph EX.1.(b) in determining whether there are "insurmountable obstacles" the decision-maker should consider the seriousness of the difficulties which the applicant and their partner would face in continuing their

family life outside the UK and whether they entail something that could not (or could not be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned.

13. In such circumstances having been satisfied that there were material errors of law I set aside the decision of the First-tier Tribunal Judge and gave directions for the rehearing of this matter. On 3rd December 2015 the matter came back before me and was adjourned with further leave to the Appellants to vary the original directions. It was recorded therein that the Appellant no longer sought to rely on the submission as to whether or not the First-tier Tribunal Judge took the correct approach to the insurmountable obstacles test in the light of *Sanade and others (British children – Sambrano – Dereci) [2012] UKUT 00048* and now relied on grounds pursuant to the Appellant's skeleton argument and the documentation attached to the Appellant's supplementary bundle filed on 25th November 2015. Thereinafter I gave further procedural directions leading to the rehearing of this matter. It is on that basis that the appeal comes back before me for rehearing. The Appellant continues to be represented by her instructed Counsel Mr Spurling who has had considerable involvement in this matter including attending court hearings and being the author of skeleton arguments. On this occasion the Secretary of State appears by her Home Office Presenting Officer Mr Duffy.

Evidence

14. The Appellant is in attendance and available for cross-examination. However Mr Spurling does not submit the Appellant for cross-examination and Mr Duffy does not require any further oral testimony to be provided. In that instance it is agreed that the matter will be dealt with at this stage and hereinafter by way of submissions.

Submissions /Discussions

15. Mr Spurling starts by reminding me of the facts in this matter. The Appellant is a Ukrainian national born on 3rd January 1971. She is 44 years old and has been living in the UK since she arrived on a visit visa on 21st July 2007. It is accepted that her visit visa expired in January 2008 and she has overstayed. She met her husband Farooq Ahmed Dar, a British citizen, in the summer of 2009. They started a relationship soon after their meeting and by late 2009 they were living together and have lived together ever since except for a period of about a month following 15th November 2011 when the Secretary of State frustrated their first attempt to get married by arresting the Appellant on their wedding day and taking her into immigration detention.

16. The Appellant was released from detention on 13th December 2011 and they successfully got married just two weeks later on 31st December. The current appeal stems from an application for leave to remain in reliance upon the Appellant's rights under Article 8 of the European Convention on Human Rights which was submitted to the Secretary of State as long ago as 4th July 2012.

17. Since then Mr Spurling points out that it has been accepted by the First-tier Tribunal Judge that the parties are living together in a genuine marriage in a relationship which has lasted at least since 2012 if not earlier and that the parties intend living permanently together. However it is accepted, that the Appellant and her husband did not meet the minimum income requirements for Appendix FM at the time of decision and still could not do so at the time of the First-tier Tribunal hearing.

18. In her determination the First-tier Tribunal Judge at paragraphs 16 to 18 gave due consideration to the question of whether or not there were "insurmountable obstacles to family life with Mr Dar continuing in the Ukraine." The judge found that the security situation and the level of racism in the Ukraine were not insurmountable objects and came to the conclusion that there were not insurmountable obstacles to family life with Mr Dar continuing outside the UK. The judge also found that if Mr Dar did not accompany his wife to the Ukraine the interference with family life was proportionate because it would be limited to the period necessary to enable the Appellant to make an entry clearance application from the Ukraine.

19. It was against that background that I found that there was a material error of law and set aside the decision of the First-tier Tribunal. As set out above the issue is now proceeding by way of submissions. Mr Spurling submits that the real issue is a factual one and that the court is required to assess whether requiring a non-EU citizen to leave the territory of the union would oblige the EU citizen to leave also. If so, it will have the effect of depriving the EU citizen of the "genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the union". Mr Spurling continues by stating that the First-tier Tribunal's error was its failure to decide on the balance of probabilities whether the Appellant's husband would be compelled to leave with her if she were required to return to the Ukraine and the reasons for and consequences of his decision whatever it may be. He submits that if the motives and consequences of a decision to leave relate to mere desirability or preference i.e. that they relate to obstacles that, although they may be unwelcome, are nonetheless reasonably surmountable by the Appellant then the *Sanade* line of cases does not identify anything relevant to the "insurmountable obstacles test". However he considers that where the reasons for a decision to leave cannot reasonably be characterised as relating to mere desirability or preference then he contends that EU constitutional rights (as identified in the *Sanade* line of cases) are relevant to the insurmountable obstacles test and that in the instant case the judge had failed to make a finding about whether or not Mr Dar would accompany his wife to the Ukraine, what the reasons were for whether he would stay or go and whether they amounted to choice or compulsion.

20. He submits that Mr Dar is dependent upon his wife, both economically and emotionally. He acknowledges that he can survive economically in her absence because he is entitled to benefits but he cannot reasonably be expected to do so without her emotional support which he contends is obviously a matter of fundamental importance to him. Consequently the practical effect he contends of the Appellant having to return to the Ukraine is whether or not Mr Dar will go there with her or stay here without her. His contention is that, in ordinary language, that

is not a matter of choice or mere fact of what is desirable but a matter of compulsion which affects Mr Dar's "genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the union" and accordingly he submits that seen through the prism of his European constitutional rights there are insurmountable obstacles in this case.

21. Mr Spurling acknowledges that the question is what does "choice" mean but submits that in this instant case bearing in mind where the Appellant would have to return to that the choice of living together is effectively a matter of compulsion and it is necessary to look at the reasons why a British citizen would want to move to the Ukraine and he submits that that must be more than just choice but an ability to carry on his life there. Ultimately he submits the question is can Mr Dar live in the Ukraine. He submits that in this instant case bearing in mind where the Appellant would return to is a matter of compulsion rather than choice.

22. He takes me to the First-tier Tribunal Judge's determination pointing out that at paragraph 16 Judge Braybrook considered the issue as to where the Appellant lived noting that it was very near the Russian border and pointing out that whilst reference is made to the Appellant's sister her sister is in fact a Russian citizen. He acknowledges that at paragraph 70 Judge Braybrook did not consider the current security situation in the east of Ukraine or the threat from Russia to be an insurmountable obstacle to Mr Dar living there but he contends that factually the judge was wrong in coming to that conclusion based on the evidence.

23. Mr Spurling turns then to the second issue namely whether or not there has been a flawed assessment of the facts relevant to the Article 8 assessment and the question remains as to what the relevant facts were. He reiterates that the First-tier Tribunal Judge had misdirected herself as to the effects of *Sabir* and *SB (Bangladesh)* and that *SB (Bangladesh)* was not authority for the proposition that it is irrelevant whether any alternative application under the Rules could or could not succeed. He contends that it is not possible to know precisely how long it would be before the Appellant can make an application with reasonable prospects of success. It is possible he contends to know that it will be at least six months and probably considerably longer because the Sponsor has not been able to find durable employment at the level of income for at least the last two years. He submits that if the Appellant and her husband are forced to move to the Ukraine together the likelihood of earning an annual income of £18,600 and thus being able to return becomes considerably more remote because the employment prospects and costs of living there are much lower than in the UK. He submits that this is of relevance as it goes to interference with the Appellant's private and family life. He points out that the Appellant has been offered a job as an interpreter which would produce for her an income in excess of the £18,600 limit. He accepts at present the Appellant does not get past the Immigration Rules test as her earnings potential cannot be taken into account but that it is relevant to the Article 8 assessment and he refers me to references within the Appellant's bundle as to the Appellant's prospects of employment and that her prospective employer has previously given evidence in this matter. He acknowledges that the test is not one of

undue harshness and that that would only apply if this were an asylum case. He asked me to allow the appeal.

24. In response Mr Duffy says that the correct approach is, he acknowledges following guiding case law, to look at the concept of insurmountable obstacles but absent those it is a matter of choice and that if the test cannot be met it does not become a matter of choice. Consequently even if the obstacles are not in the circumstances reasonably described as insurmountable that is only one material fact in the overall exercise. He points out that the test set out in *VW (Uganda) v The Secretary of State for the Home Department [2009] EWCA Civ 5* is that the test is more than one of mere hardship. Mr Duffy acknowledges that the case rises and falls on what constitutes insurmountable obstacles pointing out that "if you do not succeed under the Rules the guidance is that you are not likely to succeed outside the Rules." He acknowledges that paragraph EX.1 addresses the issue with regard to the test under *Chikwamba* as the Appellant does not meet the Rules then that cannot be the basis of an Article 8 claim. If that were the case he submits that there would be no point in having the Rules in the first place and that the test for insurmountable obstacle should be one that involves proportionality. He acknowledges that each case is fact sensitive but that there must be an element of consistency and submits that the fact that the Appellant is a British citizen or that he does not wish to work in the Ukraine does not in itself constitute an insurmountable obstacle. He does acknowledge that if the British citizen was unable to integrate to the place that he would be returned then that could constitute an insurmountable obstacle.

The Law

25. I start by first considering whether the Appellant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims and where the Appellant does not meet those requirements it is necessary for me to go on to make an assessment of Article 8 applying the criteria established by case law. The correct approach was originally set out in *Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)*. That was the approach to appeals involving both Article 8 and the new Immigration Rules. There is was found that the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount, they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh.

26. In *Haleemudeen v The Secretary of State for the Home Department [2014] EWCA Civ 558* Beatson LJ held that where the Article 8 ECHR element of the Immigration Rules is not met refusal would normally be appropriate but that leave can be granted where exceptional circumstances in the sense of unjustifiably harsh consequences for the individual would result.

27. It is no longer relevant to consider whether there are insurmountable objects to the family enjoying family life elsewhere. *VW (Uganda)* and *AV (Somalia) v SSHD [2009]*

EWCA Civ 5 established that the test is not whether there are insurmountable obstacles but whether it is reasonable to expect the United Kingdom based person to move to another country.

28. In *R (On the application of Agyarko) [2015] EWCA Civ 440* it was held that the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in EX.1(v) which needs to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However in the context of making a wider Article 8 assessment outside the Rules it is a factor to be taken into account not an absolute requirement which has to be satisfied in every single case across the whole range covered by Article 8.

29. *Regina (Agyarko)* set out that the test as to whether there were 'insurmountable obstacles' to a couple continuing their family life outside the UK was a stringent one. It was more demanding than a mere test of whether it would be reasonable to expect them to continue their family life outside the UK, although it was also to be interpreted in a sensible and practical rather than a purely literal way.

Findings

30. The Sponsor, it is accepted, cannot meet the financial requirements that are required under the Appendix FM – SE. The appellant has applied to remain under the Rules. In order to be allowed to stay on family life grounds she would have to show there would be insurmountable obstacles. Insurmountable obstacles as defined in Section Ex2 of Appendix FM means the very significant difficulties which would be faced by the appellant or her partner in continuing family life together outside the UK and which could not be overcome or would entail very serious hardship for the appellant or her partner.

31. This case is fact specific. The issue turns entirely on whether or not there are insurmountable obstacles that would prevent the Sponsor returning with the Appellant to her home in the Ukraine. The Appellant comes from the east near Donetzk. It is not disputed by the Secretary of State that that is close to or even within the war zone. The fact that the Appellant's sister has Russian citizenship is not challenged either by the Secretary of State. I have had the benefit of having both the Appellant and the Sponsor before me. Their financial circumstances and their emotional connection is not challenged. I accept the evidence that it is not possible nor practical for Mr Dar to move to the Ukraine.

32. The appeal sets out clearly the basis upon which a claim based on insurmountable obstacles is maintained. The test is one of proportionality. I have given due consideration to the factual circumstances and in particular to the issues relating to the emotional health of Mr Dar. I am satisfied that he is not someone who could return with the Appellant to the Ukraine. In such circumstances I am satisfied that he has an element of vulnerability but that this alone does not mean that he must succeed. It is just one of the factors to be considered and that I am required to carry out a balanced judgment of what can reasonably be expected in the light of all the

material facts. As the Court of Appeal have said in *Agyarko* the interpretation of insurmountable obstacles must be practical and sensible. The fact is that Mr Dar is a vulnerable person with emotional instabilities. His ability at present to earn is limited. The Appellant can obtain work as an interpreter and documentary evidence in support of that is not challenged. The Appellant has stated that she could not relocate to Kiev. Even if she could it is not, I find, reasonable to expect Mr Dar to go there anymore than it is reasonable for him to go to Donetzk albeit that clearly the closer he is to the war zone the more exposed to serious risk both he and the Appellant would be. The Secretary of State no longer challenges the validity of the marriage.

33. In all the circumstances this is one of those exceptional cases where I am satisfied that it would not be possible for the Sponsor to integrate into the Ukraine and the result of refusing this appeal would be to separate the Appellant from the Sponsor in a manner that it becomes almost impossible for them to reunite in the UK. In such circumstances for all the above reasons I am satisfied that this is an exceptional case and that there are insurmountable obstacles which cannot be overcome and the Appellant's claim pursuant to the Immigration Rules succeeds.

Notice of Decision

The Appellant's appeal is allowed under the Immigration Rules.

No application is made for an anonymity order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris