Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23395/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2019	**On 31 October 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

TETYANA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Collins, instructed by RVS Solicitors
For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Ukrainian national who was born on 11 May 1948. She appeals against a decision which was issued by First-tier Tribunal Judge Freer on 1 July 2019, dismissing her appeal against the refusal of leave to remain on human rights grounds.

2. The appellant sought leave to remain with her son, Dr [LS], who is a British citizen who was born on 15 April 1974. Dr [S] came to the UK as a post-doctoral researcher in 2001 and subsequently obtained citizenship.

He now works in a senior and well-remunerated position at an investment company in the City. The appellant was a doctor in the Ukraine. She worked in respiratory medicine for 44 years, providing specialist care to people suffering from tuberculosis, meningitis and encephalitis during her career. The appellant was consequently involved in providing care for those affected by the Chernobyl disaster. Her own health suffered as a result and she has suffered particularly with heart problems since around 1999. The appellant has visited her son in the UK on a number of occasions since 2005. During one such visit, following a serious deterioration in her health, the appellant underwent surgery at Kings Hospital in May 2017. She has received significant medical intervention in the UK since that date, all of which has been paid for privately by the sponsor at a cost of approximately £100,000. Her case before Judge Freer was, in summary, that it would be a breach of Article 8 ECHR to remove her to Ukraine, since she is dependent upon her son and would receive inadequate care in her own country.

3. In a lengthy reserved decision, Judge Freer dismissed the appellant's appeal. In many respects, it is a thoughtful assessment. Having considered the grounds upon which permission to appeal was granted by Upper Tribunal Judge Kekic, however, it was to Ms Isherwood that I turned at the outset of the hearing. As I explained to her, I had a number of concerns about Judge Freer's decision. Having heard Ms Isherwood's determined submissions, I regret to say that those concerns remain and that I have concluded that Judge Freer's decision is vitiated by errors of law which render it unsustainable. These are my reasons for so concluding.

4. Firstly, the right of appeal against the Secretary of State's decision was on human rights grounds. The structure of the assessment which was required should therefore have been clear. Unless Article 8 ECHR was engaged, whether in its family or its private life aspect, the appeal could not succeed: Charles [2018] Imm AR 911. In a case such as the present, therefore, much of the judge's focus should be directed towards the question which arises out of the line of authority which includes (but is by no means limited to) Britcits [2017] EWCA Civ 368; [2017] 1 WLR 3345 and the authorities considered by the Master of the Rolls at [61]. The judge was required to consider, therefore, whether there are more than normal emotional ties between the appellant and the sponsor. It is a matter of concern, therefore, that the single point in the decision where the judge turned to that question is [71], which reads as follows:

> "[71] The one ray of light is her high earning and devoted son. I cannot find her relationship with him goes 'beyond normal ties' because he goes to work full time without her. He only deals with her needs at evenings, weekends and on the phone. He has help from Bluebird."

5. I expressed concern to Ms Isherwood that this finding appeared to be inadequately reasoned or based on a misdirection in law, in that it seemed to reduce the requisite assessment to merely physical elements, when what was required was a holistic assessment of the role the sponsor plays in the life of the appellant, in order to decide whether Article 8 ECHR was engaged in its family life aspect. Ms Isherwood's response was that nothing more was required, since there was scant evidence of any type of dependency beyond the physical help provided by the appellant to the sponsor in the evenings and at the weekends.

6. I cannot accept that submission. There was extensive evidence before the judge which bore on the Kugathas [2003] INLR 170 question, not least of which were the statements prepared by the appellant and the sponsor and a short report dated 20 May 2019 from a counsellor and psychotherapist named Julia Lofts. That report detailed the fact that the appellant is suffering from severe clinical depression and that she had been required to learn how to speak and walk again following the events of 2017. The report stated that the appellant found her position particularly difficult because she had always been independent but she now found herself needing physical and emotional support from her son and others. In the face of evidence such as this, I consider that it was an error of law for the judge to reduce the Article 8(1) assessment to the four sentences I have reproduced above. This was not a distillation; it was an over-simplification, and a conclusion which was reached without reference to relevant material.

7. Secondly, there is a section of the judge's decision which appears under the sub-heading 'Discussion of public interest questions', at [72]-[76]. At [73], the judge expressed his 'considered opinion' that the sponsor

> "… needed to produce a letter from his employer stating in terms that when he was hired it was well advertised but there were no other job applicants and he cannot now be replaced, no matter how much they will advertise."

8. At [74], the judge noted that the sponsor had secured a pay rise of £30,000 but he stated that this was 'not proof of the matter I need proved'. I raised my concern about this section of the decision with Ms Isherwood. With her usual frankness, she stated that she could not understand why the judge thought that these questions were in any way relevant. She agreed with me that it appeared to be the case that the judge was asking whether the sponsor was in a shortage occupation but it was wholly unclear why he had considered any such question. Ms Isherwood's submission was, however, that any error in this respect was immaterial given the rest of the findings made by the judge.

9. I cannot accept that submission. Paragraphs [72]-[85] of Judge Freer's decision represents his assessment of proportionality under Article 8(2).

The parts of the decision which I have reproduced immediately above represent findings adverse to the appellant which were factored into that balancing exercise. The judge concluded, as I have shown, that the sponsor had failed to prove a matter which was required to be proved. If, as Ms Isherwood realistically conceded, this was an irrelevant line of enquiry for the judge, it must follow that the assessment of proportionality was skewed by the introduction of an irrelevant matter. I do not accept that an improper entry on the balance sheet of proportionality which was expressed in these strong terms can simply be dismissed as immaterial. The judge clearly concluded that the sponsor had failed to prove something and this was a factor which was wrongly held against the appellant.

10. Thirdly, also in that section of the judge's decision which concerns the proportionality of the respondent's decision, we find the following sentence:

> "It would therefore appear that the only or major problem is that the respondent did not grant a long enough period of leave in the first instance and can now remedy that by extending it, which would be a proportionate outcome on this occasion."

11. As Mr Collins submitted in his grounds of appeal, it is very difficult to understand why the judge thought that it would be *proportionate* to grant the appellant an extension of leave but went on to dismiss her appeal. The manner in which he expressed the finding is critical. He did not conclude that it would be 'kinder' or 'less harsh', for example; the language he used was of proportionality. In common with Mr Collins, I cannot understand the process of reasoning by which the judge concluded that giving the appellant what she wanted (she had never asked for settlement) would be proportionate but then, two pages later, that it would nevertheless be proportionate to remove her from the United Kingdom. As with the concern I have identified above, Ms Isherwood was unable to support the judge's reasoning process in this regard, instead submitting that the error was immaterial to the overall assessment. Again, I cannot accept that submission. Having erred in his assessment of Article 8(1), the judge fell into serious error in assessing Article 8(2), in that he expressed two findings which are accepted on both sides to be contradictory.

12. Fourthly, and this was another point to which Judge Kekic made specific reference in her decision on permission, there is no assessment of whether or not there would be very significant obstacles to the appellant's re-integration to Ukraine. Ms Isherwood valiantly strove to submit that the judge would have resolved this question adversely to the appellant if he had turned his mind to it, given the findings he had made about the availability of care in Ukraine. I cannot accept that submission. The questions the judge was required to consider under paragraph 276ADE(1)(vi) have been examined by the Court of Appeal in Kamara

[2016] EWCA Civ 813; [2016] 4 WLR 152 and Parveen [2018] EWCA Civ 932.

13. It did not suffice, in my judgment, for the judge to conclude that the appellant could receive physical care in the Ukraine. He was also required to consider, as Sales LJ put it at [14] of his judgment in the former case, whether the appellant would be 'able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life'. The appellant obviously lived and worked in the Ukraine for many years. She speaks the language. She has some relatives there, albeit that they live hours away from her former home area. But she will not be returning to the status quo ante; her mental and physical health has deteriorated significantly and it was for that reason that Mr Collins submitted to the judge that paragraph 276ADE(1)(vi) applied. The judge failed to grapple with that question at all. Had he found in her favour upon it, that finding would have been determinative of the appeal: TZ (Pakistan) [2018] EWCA Civ 1109; [2018] Imm AR 1301. The answer to that question was not a foregone conclusion as a result of the other findings reached by the judge.

14. I have not found it necessary to consider the remainder of Mr Collins' criticism of the judge's decision. It is not necessary, in particular, for me to dwell on a number of aspects of the judge's decision which are justifiably described in the grounds as being either 'bizarre' or difficult to understand. I have already alluded to one such area of concern. There is at least one more, which is to be found at [68], in which the judge stated that the appellant would find it 'very difficult to succeed without painting an extreme picture or marrying a British citizen'. In addition to the criticism levelled by Mr Collins in the grounds, he submitted before me that this comment in the decision had caused very real distress to the appellant and the sponsor, insofar as it suggested that there was an element of deceit on their part. I can well imagine how that might be so, and do not consider these to have been appropriate remarks. A self-direction with reference to Agyarko [2017] UKSC 11; [2017] 1 WLR 823 would have sufficed, and the judge had no need (even impliedly) to suggest that this vulnerable woman might have to marry a British citizen in order to succeed outside the Immigration Rules.

15. Be that as it may, the errors I have identified above suffice, in my judgment, for me firmly to conclude that the decision cannot stand. It is a decision which is shot through with fundamental error throughout the Article 8 ECHR assessment and it would be erroneous, in my judgment, to attempt to preserve any part of it. The correct course, as agreed by the advocates before me, is for the judge's decision to be set aside as a whole and for the appeal to be remitted to the First-tier Tribunal for redetermination de novo.

16. Mr Collins asked me to direct that the remitted hearing is preceded by a CMR and that any future hearings should be listed in accordance with his availability. I declined to make either direction since these are matters for Taylor House. Had the decision been for me, however, I would have been likely to accede to the second request. The sponsor attended the hearing before me and is plainly very anxious about his mother's situation. He is not entitled to a date which guarantees his choice of counsel but it might well alleviate his anxiety somewhat if there is continuity of representation.

Notice of Decision

The decision of the First-tier Tribunal is vitiated by legal error and cannot stand. I set that decision aside and remit the appeal to the FtT to be heard de novo by a judge other than Judge Freer.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

30 October 2019