Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14008/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham

On 14th October 2014

Determination Promulgated
On 20th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EKATERINA GORLACHEVA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Miss V Sharkey of Medivisas

DETERMINATION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal Camp promulgated on 10th February 2014.

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

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3. The claimant is a Russian citizen born 24th September 1983 who on 17th February 2012 applied for leave to remain in the United Kingdom outside the Immigration Rules, relying upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

4. The application was refused on 15th April 2013, the Respondent having considered Article 8 under Appendix FM, and paragraph 276ADE of the Immigration Rules.

5. The Respondent did not accept that the family life that the claimant claimed to have with her mother, brother and stepfather in the United Kingdom constituted family life under Appendix FM of the Immigration Rules, and therefore considered the application only with reference to private life, under paragraph 276ADE of the Immigration Rules. The application was refused with reference to paragraph 276ADE(iii) because the Appellant had not lived continuously in the United Kingdom for at least twenty years.

6. The Secretary of State did not accept that the claimant satisfied any of the other requirements within paragraph 276ADE, not accepting in relation to sub-paragraph (vi) that the claimant did not have any ties to Russia.

7. The claimant's appeal was heard by Judge Camp on 28th January 2014 who allowed the appeal with reference to paragraph 276ADE(vi) finding that the Appellant did not have any ties to Russia.

8. The Secretary of State was granted permission to appeal to the Upper Tribunal, contending in brief summary that the judge had failed to provide adequate reasons for his finding that the claimant had no ties to Russia and that he had misinterpreted the test to be applied on this issue, and misdirected himself in law, and that he had erred in his approach to consideration of Article 8 outside the rules.

9. Permission to appeal was granted and following a hearing before me on 20th May 2014 I set aside the decision of the First-tier Tribunal concluding that Judge Camp had not followed the principles and guidance set out in Ogundimu Nigeria [2013] UKUT 00060 (IAC).

10. The hearing was adjourned for further evidence to be given. Full details of the application for permission to appeal, the grant of permission, and my reasons for finding an error of law are set out in my written decision dated 30th May 2014, which was promulgated on 5th June 2014.

11. The next hearing was on 20th July 2014, the purpose of the hearing being to remake the decision. However Miss Sharkey raised a new issue, in relation to Edgehill [2014] EWCA Civ 402, and wished to argue that Judge Camp had in fact erred in considering paragraph 276ADE, as the application for leave to remain had been made prior to the introduction of paragraph 276ADE into the Immigration Rules on 9th July 2012. Miss Sharkey had given no prior notice that this point was to be raised, but

explained that it had been raised because Edgehill had been decided after the decision of the First-tier Tribunal had been promulgated.

12. Mr Smart on behalf of the Secretary of State did not object to the point being raised, but requested an adjournment to prepare a response, as the Secretary of State's position was that the First-tier Tribunal had been correct to consider paragraph 276ADE.

13. In the interests of fairness I adjourned the hearing and directed that both parties file skeleton arguments as to the application of paragraph 276ADE in the light of Edgehill.

The Upper Tribunal Hearing – 14th October 2014

Preliminary Issues

14. I ascertained that I had all documentation from which the parties intended to rely. I had the Respondent's bundle of documents containing Annexes A-C, two bundles served on behalf of the claimant, one comprising 40 pages, and the other 17 pages. I had received skeleton arguments from both parties. Mr Smart produced Rafiq [2014] EWHC 1654 (Admin).

15. I proposed that I hear evidence, and at the conclusion of oral evidence I would hear oral submissions which would include submissions as to whether the appeal should be decided under Article 8, or whether paragraph 276ADE should be considered notwithstanding that the application for leave to remain was made in February 2012.

16. I was told that the claimant would be giving evidence together with her mother, stepfather, and brother. No interpreter was required. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

17. The claimant adopted her witness statement dated 26th June 2014, her mother Alla Lawlor, her brother Vladim Gorlachev, and her stepfather Steve Lawlor all gave evidence and adopted their witness statements of 26th June 2014.

18. The claimant and the witnesses were questioned by both representatives, and I have recorded all questions and answers in my Record of Proceedings. It is not necessary to repeat the evidence here.

The Respondent's Submissions

19. At the commencement of his submissions Mr Smart submitted Nnyanzi v The UK – 21878/06 [2008] ECHR 282. The hearing was briefly adjourned to allow Miss Sharkey time to consider this authority and the hearing resumed when she indicated that she was in a position to proceed.

20. Mr Smart submitted that both the Secretary of State and the First-tier Tribunal were correct to consider paragraph 276ADE of the Immigration Rules despite the application for leave to remain having been made in February 2012, and relied upon his skeleton argument on this point. Mr Smart also relied upon paragraph 12 of Rafiq.

21. I was asked to dismiss the appeal. Mr Smart submitted that the Appellant's evidence that she had no family or friends in Russia should not be accepted as this was unlikely. I was asked to note that her brother, who had attended the same school in Russia, had stated in evidence that he had returned to Russia in the summer of 2014 for a school reunion.

22. I was asked to accept that the claimant speaks Russian, that she is educated to degree level in Russia, and that she has qualifications obtained from her studies in the United Kingdom, and she would therefore be able to find employment in Russia. Any interference with the Appellant's private life in the United Kingdom would be proportionate, and Mr Smart relied upon Nnyanzi on this issue.

The Claimant's Submissions

23. Miss Sharkey relied upon her skeleton argument and submitted that Edgehill indicated that the appeal should be determined in reliance upon Article 8 only, without reference to paragraph 276ADE. I was specifically referred to paragraphs 32 and 33 of Edgehill.

24. I was asked to find the claimant and her witnesses credible and to accept that the claimant had no family or friends in Russia. I was asked to accept her evidence that she had encountered difficulties by being bullied both at school and university. The claimant had three close friends when she was in Russia, but those friends had now moved away and were living in different countries, and her friend living in Germany had attended a previous hearing, and had submitted a statement in support of the claimant.

25. Miss Sharkey submitted that the claimant had explained that although she had a degree in Russia, that was obtained ten years ago, and she had no employment experience in Russia, and that Russia did not adopt international accounting standards and therefore the claimant would not be able to find employment in that field.

26. I was asked to accept that the claimant had established a family life in the United Kingdom as well as a private life and that her removal would be disproportionate. Miss Sharkey pointed out that the claimant has always been in the United Kingdom lawfully, and has studied and worked when she had permission to do so.

27. If paragraph 276ADE was to be considered, I was asked to accept that the Appellant satisfied paragraph 276ADE(vi) as she had no ties to Russia, and

there would be very significant obstacles to her reintegration into that country.

Findings of Fact

28. The claimant's mother and brother came to the United Kingdom in 2003 following the mother's marriage to a British national, Mr Lawlor. The claimant remained in Russia, living with her paternal grandmother, in order to finish her studies at university.

29. Following the settlement of her mother and brother in the United Kingdom, the Appellant was granted visas enabling her to visit the United Kingdom between July 2003 and July 2005.

30. The Appellant was granted a student visa on 28th July 2005, and arrived in this country on 15th August 2005. She was 21 years of age. She had completed her studies in Russia and commenced studies in the United Kingdom, initially for an ACCA qualification.

31. Since arriving in the United Kingdom the claimant has lived with her mother, brother and stepfather. Her mother and brother are now British citizens. The claimant was financially supported by her family whilst she studied here, and has been financially supported by them since ceasing employment in 2012.

32. The claimant has returned to Russia twice since 2005, the first time being for approximately a week when her grandmother was taken ill, and the second time for approximately nine days following her grandmother's death.

33. The claimant's paternal grandmother owned her own home, and neither the claimant nor her family know what happened to that home. The claimant's paternal grandmother had a son, the claimant's father, and a daughter who had a son. The claimant and her mother and brother have had no contact with relatives in Russia and have no relatives other than those just mentioned. The claimant's mother is originally from Ukraine, and her family members reside there.

34. The claimant has now achieved her ACCA qualification, and an MBA in financial services. Following her studies in this country the claimant was granted leave to remain as a Tier 1 post-study worker, and worked with Coventry Building Society from August 2010, until 2012.

35. The claimant has always had leave to remain in the United Kingdom. She has not breached either immigration law or criminal law.

36. This is not an appeal where there are any relevant medical issues, and the claimant is not in a relationship and does not have children.

37. I am satisfied that the claimant does not have contact with any family member or friends in Russia.

My Conclusions and Reasons

38. In my view Edgehill is authority for finding that this appeal should be determined with regard to Article 8, outside the Immigration Rules, and not with reference to paragraph 276ADE, for the following reasons.

39. The implementation of the changes to the Immigration Rules is referred to in paragraph 7 of Edgehill which refers to the following paragraph contained in the Statement of Changes in Immigration Rules (HC 395) under the heading of "implementation";

> "However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9th July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8th July 2012."

40. The question to be decided in Edgehill was;

> "Is it lawful to reject an Article 8 application made before 9th July 2012 in reliance upon the applicant's failure to achieve 20 years' residence, as specified in the new rules?"

41. I set out below paragraphs 32 and 33 of Edgehill;

> "32. The Immigration Rules need to be understood not only be specialist immigration counsel, but also by ordinary people who read the rules and try to abide by them. I do not think that Mr Bourne's interpretation of the transitional provisions accords with the interpretation which any ordinary reader would place upon them. To adopt the language of Lord Brown in Mahad, 'the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State's administrative policy,' is that the Secretary of State will not place reliance on the new rules when dealing with applications made before 9th July 2012.
>
> 33. Accordingly, my answer to the question posed in this part of the judgment is no. That answer is subject to one important qualification. A mere passing reference to the 20 years requirement in the new rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE(iii) as a consideration materially affecting the decision."

42. My view is that the decision maker in this case, did rely upon paragraph 276ADE(iii) in the reasons for refusal letter dated 15th April 2013, as a consideration materially affecting the decision, and this was not a mere passing reference. Although Rafiq is a decision made after Edgehill, it is not a decision that overrules Edgehill, which was a decision made by the Court of Appeal and which is binding upon the Tribunal.

43. I have considered paragraph A277C which was introduced into the Immigration Rules after 9th July 2012 which states that where the Secretary of State deems it appropriate, any application to which the provisions of Appendix FM and paragraph 276ADE do not already apply

will be applied in line with those provisions. This however is subject to paragraphs A277 to A280 and A280(c)(i) appears to indicate that the new rules will not apply to persons who have made an application before 9th July 2012 under Part 8 of the Immigration Rules, which application was not decided as at 9th July 2012.

44. In considering Article 8 I have adopted the step by step approach advocated by the House of Lords in Razgar [2004] UKHL 27 which involves answering the following questions;

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

45. If I find that the claimant has established family life which engages Article 8, I must consider the family life of all of her family, not only the claimant, following the decision in Beoku-Betts [2008] UKHL 39.

46. In my view it is clear that the claimant has established a private life since her arrival in the United Kingdom. She has now lived in this country for just over nine years.

47. I have to consider whether she has established a family life. She is not in a relationship, nor does she have children, but she lives with her stepfather, mother and brother. I have to decide whether that amounts to family life that would engage Article 8.

48. My starting point is to consider Kugathas [2003] EWCA Civ 31 in which at paragraph 25 it was stated;

> "25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties."

49. I next consider Ghising Nepal [2012] UKUT 00160 (IAC) in which it was accepted that the judgment in Kugathas had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts (paragraph 56).

50. The Upper Tribunal in Ghising reviewed jurisprudence on this issue and noted the Secretary of State for the Home Department v HK (Turkey) [2010] EWCA Civ 583 in which the Court of Appeal considered Kugathas and found that an individual who had reached his majority in September 2005 but continued to live at home or with his family, undoubtedly had family life while he was growing up, and that this would not be suddenly cut off when he reached his majority.

51. The Upper Tribunal in Ghising also considered RP (Zimbabwe) [2008] EWCA Civ 825 in which it was found that two individuals aged 23, and 25 enjoyed family life with their parents as they still lived with them, and referred to a number of European authorities in which it had been accepted that the relationship between young adults who had not founded a family of their own, and their parents or other close family members constituted family life that would engage Article 8.

52. The principal in Ghising, is that there should be no blanket rule when considering family life between adult siblings living together, and each case should be analysed on its own facts, and whilst some generalisations are possible, each case is fact sensitive.

53. In this case I conclude that the claimant is extremely close to her brother and mother. It is true that her mother and brother left the claimant in Russia in 2003 and the claimant lived apart from them until August 2005. However since that date she has lived continuously with her family. She does not have children of her own or a partner. I am satisfied there are more than emotional ties. It is clear that the family are very much emotionally dependent upon each other, the claimant is also dependent upon her family at the present time for accommodation and financial support.

54. The claimant was dependent upon family for financial support throughout her studies in the United Kingdom although the financial support ceased whilst she had employment, but that has now resumed and this has been the case since 2012, and the claimant has always been dependent upon her family for accommodation.

55. As the claimant has not founded a family of her own, and has been living with her mother and brother all of her life, with the exception of approximately two years between 2003 and 2005, I conclude that on the facts of this case, she has established a family life which engages Article 8.

56. Dealing with the five stage approach advocated in Razgar, I find that the claimant’s proposed removal would be an interference with her right to respect for her private and her family life, with consequences of such gravity as potentially to engage the operation of Article 8.

57. I find that the proposed interference would be in accordance with the law because the claimant cannot satisfy the Immigration Rules in relation to her application for leave to remain.

58. I then have to consider whether the interference is necessary for one of the reasons set out in Article 8(2) and proportionate.

59. I take into account section 117B of the Nationality, Immigration and Asylum Act 2002 which provides that the maintenance of immigration control is in the public interest. It is also in the public interest that an individual who seeks leave to remain can speak English, and is financially independent.

60. Little weight should be given to a private life established when an individual is in the United Kingdom unlawfully or when their immigration status is precarious.

61. The claimant can speak fluent English. She is not financially independent at present because she is unable to work owing to her immigration status, but I am satisfied that she would be financially independent if given leave to remain and permission to work.

62. I do take into account that the public interests means that there must be effective immigration control. I also take into account that the claimant is highly qualified. She has not claimed benefits and if allowed to work in the United Kingdom, there would be no detriment to the economic well-being of this country.

63. The claimant has an excellent immigration history. She has never overstayed or breached any immigration law. There is no evidence that she has ever committed any criminal offence.

64. I have taken into account the numerous letters of support produced on behalf of the claimant, and I accept that she is fully integrated into British society.

65. I accept that she has no family or friends in Russia and if returned would have no accommodation and no employment. I find that although well qualified, she may find it difficult to find employment in Russia because of her lack of work experience.

66. It is clear that the claimant and her family very much wish for her to remain in the United Kingdom so that they can continue their family life and the Appellant can return to employment here.

67. When conducting the balancing exercise I take into account that the claimant has only ever had limited leave to remain, initially as a visitor, then as a student, and thereafter as a Tier 1 post-study migrant. She has no legitimate expectation that she would be allowed to settle in this country.

68. It is however clear that she has made the United Kingdom her home and fully integrated here. I have to decide whether her removal would be disproportionate. In my view the appropriate test is still that set out in paragraph 31 of VW (Uganda) [2009] EWCA Civ 5 when the Court of Appeal approved the following;

> "But recognition should be given, as Richard Drabble QC for both Appellants readily accepted, to the conclusion at which the AIT arrived (para 44) that, if a removal is to be held disproportionate, 'what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.' I would respectfully endorse this. The question in any one case will be whether the hardship consequent on removal will go far enough beyond this baseline to make removal a disproportionate use of lawful immigration controls."

69. The claimant has waited a considerable period of time for her application made in February 2012 to be finally determined. There was a delay in deciding her application, which was not initially decided by the Secretary of State until 15th April 2013. There has then been a further delay because of the Tribunal proceedings. It is clear that the uncertainty has very much affected the claimant and her mother. The period of time has however strengthened her ties to her family and the United Kingdom.

70. If this appeal was based only upon the claimant's private life, I would find the decision to remove her proportionate. However I find that a combination of her family life and her private life, means that the decision to remove would be disproportionate, on the facts of this particular case and would therefore breach Article 8.

71. If I am wrong in concluding that the Immigration Rules introduced on 9th July 2012 should not be considered, my finding would be that the Appellant could not succeed under paragraph 276ADE(vi) which was in force at the date of refusal which provided that the Appellant would have to prove she had no ties to Russia. I would have found that the appeal could not succeed on that basis, as the Appellant had lived in Russia for the greater part of her life, and was 21 years of age when she left and was educated to degree level in Russia, and speaks Russian.

72. If I had considered paragraph 276ADE(vi) as at the date of hearing, which provides that she would be entitled to succeed if there would be very significant obstacles to her integration into Russia I would have found in her favour. This is because I believe that there would be very significant obstacles if the Appellant had to return to Russia. She has no friends and no family. She has no employment and no accommodation. She has no work experience in Russia. On that basis I would have allowed her appeal.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal of the Secretary of State is dismissed. I allow the claimant's appeal on human rights grounds in relation to Article 8 of the 1950 Convention.

Anonymity

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

Signed Date 15th October 2014

Deputy Upper Tribunal Judge M A Hall
TO THE RESPONDENT
FEE AWARD

The appeal has been allowed mainly due to evidence produced to the Tribunal that was not before the Secretary of State. There is no fee award.

Signed Date 15th October 2014

Deputy Upper Tribunal Judge M A Hall