



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31447/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31st January 2014

Determination Promulgated
On 14th February 2014
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Before

DEPUTY UPPER TRIBUNAL JUDGE
HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR STEPAN NIKOLAEV
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr B Hawkin, Counsel

DETERMINATION AND REASONS

The Proceedings

1. The appellant in the Upper Tribunal is the Secretary of State for the Home Department. Hereafter in this determination the parties are referred to as they were in the First-tier Tribunal so that the Secretary of State for the Home Department is the respondent and Mr Stepan Nicolaev is the appellant.
2. Mr Nicolaev was born on 14th July 1947 and is a citizen of Russia. He entered the United Kingdom as a visitor to see his daughter and her family settled in the United

Kingdom. Just before the expiry of his visitor's leave the appellant and made an application, on 27th November 2008, for further leave to remain outside the Immigration Rules in order to receive medical treatment. The application was refused on 2nd January 2009 for reasons including the expectation that he would have recovered by May 2009 from the surgery he underwent at University College Hospital after admission there in June 2008.

3. Notice was served on the appellant of his liability to removal as a person remaining beyond his leave, followed by a decision to remove him from the United Kingdom. The appellant appealed against this decision on human rights grounds at a hearing on 16th October 2013 at Hatton Cross before First-tier Tribunal Judge Raymond (the Judge). The Judge allowed the appeal on Article 8 ECHR grounds.
4. On 4th December 2013 the respondent was granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Sommerville as follows:

“The first ground seeking permission contended that the FTJ erred in law in allowing the appeal on human rights grounds without reference to the provisions of Appendix FM of the Rules as amended on 12th July 2012 insofar as they relate to the circumstances in this appeal. The grounds are arguable.”

5. The matter accordingly came before me for an initial hearing to determine whether the making of the decision in the First-tier Tribunal involved the making of an error on a point of law. The appellant and his family attended the hearing but the proceedings did not progress to a stage where it was appropriate to hear evidence from any of them.

Consideration of the Issues and Submissions

6. The respondent's grounds of appeal assert that Judge failed to give adequate reasons and made a material misdirection of law to himself. In considering the fourth and fifth Razgar questions about a legitimate aim and proportionality the Judge is submitted to have placed undue weight on the fact that, in his opinion, the appellant would be entitled to succeed in making an application from Russia as an elderly dependant. The Judge is submitted to have erred by taking into account only part of the Rules without reference to Appendix FM, in particular: E-ECDR.2.5 – the inability to obtain the required level of care in the country where the applicant is living because of its unavailability and the lack of any person in that country who could reasonably provide it, and the financial requirements of E-ECDR.3.1. and ECDR.3.2. as set out in the grounds of appeal.
7. The respondent states that the Judge did not have the ability to determine the availability to the appellant in Russia of care homes, visiting daily nurses, social services, personal carers, or other paid assistance which would be available or affordable in Russia. The Judge failed to consider the issue of recourse to public funds in the United Kingdom in circumstances where the appellant had already benefited from a large amount of NHS care and it is unclear whether the family have

the funds to pay for the continuation of his treatment privately; it is submitted to be more than likely that the family do not have the funds to meet the requirements of the Rules.

8. The respondent submits that in these circumstances there is a wrongful assessment of the weight to be afforded to immigration control, including the economic well being of the country, given the level of dependency on the NHS the appellant is likely to have for the rest of his life; the Article 8 analysis has been infected. In conclusion, the respondent asserts that the Judge's assessment of Article 8 is too greatly dependent on his assumption that the appellant would meet the requirements of the Immigration Rules if he made an out of country application. It is not in the public interest that an appellant should be entitled to sidestep the requirements of having no recourse to public funds by entering as a visitor and overstaying.
9. Mr Tarlow, for the secretary of State for the Home Department, relied on the grounds of appeal (as set out above) in his oral submissions to me at the hearing. He submitted in particular that the whole Article 8 assessment is flawed because the Judge failed to refer to all the elements of ECDR.3. Mr Tarlow placed emphasis on the lack of reference by the Judge to the requirements of E-ECDR.2.5, the lack of consideration of the facility and its affordability as well as the requirement to show access to treatment without recourse to public funds.
10. Mr Tarlow referred me to paragraph 32 of the determination and submitted that it is flawed in finding that the interference to family life would not be necessary in the interests of immigration control because an out of country application would be "almost certain to succeed". Paragraph 27 of the determination gives consideration to the private and family life provisions of the Immigration Rules and is submitted to lead to a material error of law in Article 8 proportionality balancing exercise.
11. The appellant served a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 indicating opposition to the appeal in the Upper Tribunal which was relied upon by Mr Hawkin in his submissions to me. The decision of the Judge is submitted in this response to have been detailed, thoughtful, balanced and without material error; the approach of the Judge by reference to the Immigration Rules was one which was open to him in the light of the particular circumstances of the case. It is submitted that this was clearly a compelling case from the factual background. The Judge heard evidence from not only the appellant, his daughter, son-in-law and three family friends. The Judge's conclusions under Article 8 of the ECHR, in findings set out in paragraphs 28 - 34 of his determination, are submitted to have been entirely open to him.
12. In his oral submissions to me Mr Hawkin stressed the need in considering the making of a material error of law to look at the determination as a whole. Paragraph 2 of the determination set out the important medical background to the case. The appellant had undergone surgery to remove a giant cell tumour on the right side of

his pelvis after suffering severe hip pain and being unable to walk after his arrival in the United Kingdom. The surgery was to do a massive hip reconstruction and in paragraph 3 of the determination the Judge took into account the appellant's evidence that his recovery had been a lot slower than expected by the doctors; his condition had in fact worsened after 2009. Infection to the appellant's pelvis had spread rapidly and resulted in the amputation of one of his legs and part of the pelvis leaving him wheelchair-bound, in excruciating pain, unable to remain seated for more than 15 minutes at a time and dependent upon his family members to move him around.

13. The Judge took into account the emotional trauma to the appellant and his evidence, set out in paragraph 5 of the determination, that he could not bear the thought of being separated from them; they had provided great support to him. Mr Hawkin relied on the Judge's acceptance of the appellant's evidence, also set out in paragraph 5 of the determination, that there were very close bonds with the family and careful consideration had been given to the impact upon all the family members of the appellant's removal from the United Kingdom.
14. Mr Hawkin submitted that the case goes beyond being about health care; the Judge had properly considered a range of different emotional, as well as medical, factors and in paragraph 6 of the determination the Judge took account of the appellant's current situation including his heavy dependency on others. Medical evidence showed him to be unable to manage his daily living tasks independently and to need a high level of pain management medication in circumstances where he suffers very limited mobility, constant pain and chronic phantom limb pain.
15. Mr Hawkin drew my attention to the Judge's consideration of the presence of the appellant in the United Kingdom for 7 years and his lack of ability to travel, making the case extreme. The respondent's assertion that the appellant would have a life-long dependency on NHS services was speculative and was not the evidence before the Judge. Mr Hawkin submitted that the respondent's assertion that the appellant had already received a great of NHS treatment was equally speculative; the evidence was that the appellant had received life-saving surgery. The respondent failed to take into account the lack of availability of emotional support, as opposed to medical support, for the appellant in Russia and had made assumptions in the grounds of appeal about the family finances.
16. In conclusion, Mr Hawkin invited me find that any error of law on the part of the Judge was not material and asked me to allow the decision of the Judge to stand. Taking account of all the submissions before me I found merit in these submissions for the appellant and I announced to the parties at the end of the hearing that I was satisfied that, taking the determination of the Judge as a whole, he has not made a material error of law in the making of his decision. I reached this conclusion for all the following reasons.

17. In relation to the respondent's submission that it is not in the public interest that an appellant should be entitled to sidestep the requirements of having no recourse to public funds by entering as a visitor and overstaying I take account of the Judge's acceptance of the evidence that the appellant did not enter the United Kingdom as a health tourist but as a genuine family visitor who was overcome by events after his arrival in the United Kingdom. Nor did the evidence before the Judge show that there would be recourse to public funds.
18. The Judge explicitly took account of the arguments and submissions from both representatives at paragraph 27 of his determination and he specifically considered the Immigration Rules in relation to family and private life. He concluded that the appellant could not succeed under those Rules before proceeding to consider Article 8 under the relevant jurisprudence. The appeal was not allowed under the Immigration Rules but the Judge nonetheless returned to the Rules at paragraph 32 of his determination and found that the appellant would succeed under ECDR.2.4. because in his finding the appellant did, as a result of age, illness or disability require long-term personal care to perform everyday tasks. It was not in my view incumbent upon the Judge to consider the Immigration Rules any further.
19. The criticism is that the Judge misdirected himself at this stage by finding the interference to family life not to be necessary because of the likely success of an out of country application. If the Judge did err in his approach to this issue I am satisfied that it was not a material error in the light of the strength of the evidence he accepted from and on behalf of the appellant which made this, as submitted for the appellant, an extreme and compelling case. I am satisfied that taking the determination as a whole the Judge's findings were justified on the evidence and were properly open to him. I am satisfied that his findings could not have led to a conclusion that the interference to his Article 8 rights was necessary in the interests of immigration control, aside from the likely success of an out of country application.
20. It is submitted by the respondent that the Judge erred in the proportionality assessment by failing to weigh adequately in the balance the economic factors in favour of the public interest and economic factors linked with the interests of immigration control; the Judge is submitted only partially to have considered the Immigration Rule requirements. In this regard I find merit in the submissions from Mr Hawkin that the respondent enters the realms of speculation in this ground of appeal. The evidence before the Judge was not that there would be a life-long dependency on the NHS. The evidence before the Judge was that the family members of the appellant were employed and not that there would be recourse to public funds which should or could have been weighed in the balance. Mr Hawkin submitted that the respondent's assertion that the appellant had already received a great deal of NHS treatment was equally speculative.
21. I am satisfied that the issues reflected by the evidence were properly weighed in the balance by the Judge on both sides, as opposed to what the evidence might have been. There was a considerably greater quantity of evidence to weigh in the

proportionality balance on the side of the appellant and I am satisfied that any factors not explicitly weighed in favour of the respondent would not have swayed that balance.

22. I reach this conclusion in the light of the careful consideration and analysis the Judge undertook of the evidence from the witnesses before him leading to the following findings at paragraph 28 of the determination:

“I found all the witnesses to be credible and honest in their account of this very deep bond between them, the appellant and his immediate family members in the UK, which has been tried in the fire of the serious life threatening illness that both he and his daughter Natalia have gone through and not been found wanting.”

23. In the light of these findings and the primary consideration the Judge gave to the interests of a child in the family unit I am satisfied that the Judge could not arguably have come to any decision other than allowing the appeal under Article 8 of the ECHR in favour of the appellant. The Judge considered the impact of the respondent’s decision upon Nicole, the appellant’s British, minor, grandchild with whom he accepted there was an attachment and a deep bond. He found, in effect, that the removal decision of the respondent ran counter to her best interests of her psychological and emotional welfare.

Decision

24. I find that the making of the previous decision did not involve the making of a material error on a point of law and it follows that the First-tier Tribunal Judge’s decision stands.
25. The appeal to the Upper Tribunal by the Secretary of State for the Home Department is dismissed.

Anonymity

The First-tier Tribunal made did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and there has been no application for such an order by any party to the proceedings.

Signed:

J Harries

Deputy Upper Tribunal Judge
Date: 13th February 2014

Fee Award

In the light of the dismissal of the appeal in the Upper Tribunal the fee award of the First-tier Tribunal stands.

Signed:

J Harries

Deputy Upper Tribunal Judge

Date: 13th February 2014