



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00550/2019
HU/11632/2019

THE IMMIGRATION ACTS

Heard at Field House via Teams
On 22 June 2021

Decision & Reasons Promulgated
On 21 July 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

KOSTYANTYN PEREGUDA
ALINA PEREGUDA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Collins, instructed by LS Legal Solicitors
For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against decisions made on 20 December 2018 to refuse them leave to remain and to reject their human rights claims. Their appeals against those decisions were allowed by the First-tier Tribunal for reasons set out in a decision promulgated on 9 November 2019. For the reasons set out in my decision of 6 April 2021 (a copy of which is attached) that decision was set aside.

2. The first appellant is the father of the second appellant. Both are citizens of Argentina. The first appellant was originally a citizen of the Ukraine and emigrated to Argentina with his then wife, and, once there, the second appellant was born. The relationship between the first appellant and his wife broke down and she went to live in Spain. That was in 2008. It was later that the first appellant met his now wife, Caroline Neads. They were married in the United Kingdom on 16 June 2012 and he was granted entry clearance to the United Kingdom as the spouse of a person present and settled here in 2012. In the usual way that was for a period of 30 months and was later extended by a further 30 months.
3. The second appellant had remained in Spain with her mother and visited the first appellant and his new wife during the summer holidays, moving to join them permanently on 17 July 2014. By that point her mother had lost her job and was unable to support them.
4. Since her arrival in the United Kingdom the second appellant has been educated here and has developed a close relationship with Ms Neads, whom she now sees as her mother. Ms Neads sees the second appellant as her daughter. The second appellant finished her A levels here and hopes to attend university.
5. The first appellant is self-employed in construction; Ms Neads is in receipt of state pension and also a pension from her former employer. In addition, she also wishes to return to working but has devoted much of her time since 2012 to getting probate of her late mother's estate. Ms Neads has osteoporosis and arthritis and her health continues to deteriorate.
6. The appellants' leave to remain expired on 19 May 2018. They did not, however, apply for further leave to remain until 31 July 2018. This is because owing to confusion over what was required and how they could complete the necessary forms, applications were delayed, Mrs Neads being unable to get the necessary documentation from Lambeth Council, who pay her pension, evidence of her state pension and evidence of the first appellant's earnings from self-employment.
7. The Secretary of State refused the applications on the basis that the applications were made more than 28 days outside the permitted time and so they did not meet the requirements of E-LTRP.2.2 in that they had overstayed for a period greater than that permitted by paragraph 39E of the Immigration Rules. It was considered also that they did not meet the financial eligibility requirements nor was EX.1 or EX.2 met in respect of the first appellant.
8. The Secretary of State was not satisfied that the first appellant met the requirements of EX.1 as although it was accepted that he had a genuine and subsisting relationship with his partner but she was not satisfied that there were insurmountable obstacles such that he or his partner would be unable to continue their family life together outside the United Kingdom in Argentina which they could not overcome or would entail very serious hardship for him or his partner.

9. The respondent did not consider that either of the appellants met the requirements of paragraph 276ADE(1)(vi) nor that there were exceptional circumstances having had regard to paragraph GEN.3.2 such that it would be disproportionate to require them to leave the United Kingdom.
10. The First-tier Tribunal heard evidence from the appellants and Ms Neads. It also heard submissions. The judge found that the witnesses were truthful in the circumstances which led to the application not been submitted on time. He said:-

“The first appellant and his partner made strong attempts to lodge the application on time but they failed to do so because they claimed that they did not have all the documents that were required. The respondent does have a discretion in circumstances where there are exceptional circumstances. I have considered the contents of the instruction of the Directorate and I do not find that the reasons for the delay comes within the terms of the instruction because the reason for the delay in this instance was that they were awaiting documents from Pensions and HMRC and this in my opinion could have been sorted in time and it was not unforeseen.

13. I consider that the appellant and his partner would not face insurmountable obstacles under EX.1 even though that I accept that they would face very difficult circumstances it would be difficult for the appellant’s partner to reside in Argentina and this would perhaps be a strain on the relationship. The appellant’s partner gave evidence that she would find it difficult to visit the appellants in Argentina. I find that EX.1 does not apply to the appellants for the reasons cited above.”
11. The judge also found that the first appellant could not satisfy paragraph 276ADE(1)(vi) as he would not face very significant obstacles but he did find that the appellant was integrated into the culture of the United Kingdom. He also found that they had made bona fide attempts to contact the respondents prior to the submission of the application and that its late submission was unintentional. He found Mrs Neads to be “a very credible witness and she is taking twenty tablets a day”.
12. The judge also found that the second appellant was residing with her father and is dependent on him, indeed very dependent on him and that she could not reside with her mother in Spain.

The Law

13. There is no need to set out the relevant provisions of the Immigration Rules or section 117A and B of the 2002 Act. It is sufficiently clear that the relevant provisions are set out in EX.1, EX.2 and 276ADE(1)(vi), and I have applied them and section 117 in reaching my decision.
14. As did the First-tier Tribunal, I found the appellants to be credible witnesses. In reaching that conclusion I note Miss Isherwood’s submission that there were differences as to whether the family had discussed going back to Argentina but I find

that these are not in fact discrepancies. The point is that different discussions were had on a different basis.

15. I accept that the appellants have told me the truth about their circumstances in the United Kingdom and now it was that they have ended up in the United Kingdom. I accept also that Ms Neads has also been truthful.
16. I accept that as there is a genuine and subsisting relationship between the appellant and Ms Neads that there exists a family life between them. I accept also that a family life continues to exist between Ms Neads and the second appellant and between the second appellant and her father. In reaching that conclusion I bear in mind that she came to the United Kingdom to join her father and her stepmother when she was still a minor. I accept her evidence that this is the first time that she has had a stable house and home in which to live and to develop, given that there were difficulties when they lived in Argentina and again with her mother in Spain as she always had to move houses due to the precarious situation. I accept also the evidence set out in the witness statements that Mrs Neads has not had any children before and sees the second appellant as her daughter, albeit one to which she is not related by blood. I accept also that the second appellant relies on and has emotional ties to her stepmother.
17. I bear in mind that she is still an adult but equally she still lives in the family home, is dependent financially on her father and stepmother and maintains a close emotional relationship. I am satisfied that in the particular circumstances of this case the family life that normally exists between a child and a parent has not ceased to exist just because the appellant in this case had turned 18.
18. It therefore follows that the existence of this family unit is a starting point for assessing the remainder of the application.
19. Miss Isherwood's submission that this is an "outside the Rules" appeal is misplaced. It is manifestly the case that the first appellant seeks to rely on EX.1 and EX.2 and that the second appellant seeks to rely on 276ADE(1)(vi). I accept, however, that if these are not met, then it would be necessary to consider the applications through the prism of GEN.3.2.
20. I turn first to the consideration of EX.1 and EX.2. While I note Miss Isherwood's submission that the primary concern in this case appears to be financial and in particular the financing of the second appellant's education, that is because of the the questions she put in cross-examination.
21. I accept on the basis of the medical evidence that Ms Neads suffers from osteoporosis and this has caused difficulties. It is not, I consider, of much relevance that the medical evidence is based on two phone calls. It is difficult to see how, in current circumstances, any other form of consultation could have taken place and it must be seen in the context of a view of a medical professional who is aware of Ms Neads's underlying illness and the fact that she is 75. I accept that she now needs assistance around the house because of the difficulties arising from osteoporosis.

22. I accept the evidence that it was difficult for the first appellant to obtain employment in Argentina when he first arrived, now over twenty years ago. He is 60 and I bear in mind that Argentina was a country to which he emigrated. It is not a country in which he has ties beyond living there for a relatively short period there over ten years ago. He does not have family there, does not have a home there and whilst he has established a successful business in the United Kingdom it does not necessarily follow that he would be able to do so once again in Argentina although I do accept the submission that if his fluency Spanish is a little bit lacking at present, having learnt it in the past he could become more fluent relatively easily. I accept that it would be difficult for his wife to relocate to Argentina, given her age and the fact that she has never lived there. It is likely that the financial position would be precarious although I do bear in mind that there is no indication that she would not if she relocated there be unable to rely on the pension income she derives already.
23. Whilst it is submitted that she could continue her work there via Zoom as she does at present, that is not something that was put to her properly by Miss Isherwood. Whilst I accept that meetings may be continued by Zoom and similar electronic means, it does not necessarily follow that the work would be given to somebody who has located outside the United Kingdom and who might not, for example, be able to undertake, as an architect would be expected to do, site visits or meetings in person.
24. I accept also that Ms Neads retains a close attachment to her brother, who she feels she needs to support and that relocating to Argentina would be a significant disruption.
25. Given the relatively short period that the first appellant lived in Argentina, his separation from that for over a decade, it is difficult to see how he would be able to assist his wife in adapting to life there. Accordingly, I consider that whilst no-one of these factors taken in itself will be insurmountable, I consider that viewed together it would be very difficult, not necessarily impossible, for them to continue a family life there in uncertain and precarious circumstances in a country with which the first appellant is no longer familiar.
26. Accordingly, for these reasons I am satisfied that EX.1 and EX.2 are met and that the first appellant's appeal falls to be allowed on that basis alone.
27. I accept, however, that it would be very difficult for the second appellant if returned to Argentina. It is a country she had left at the age of 8 and I accept that there is no indication that she would now be able to join her mother again in Spain, given that she is now an adult and her mother is not a Spanish citizen. I accept that she would have difficulties in returning into the education system, given that she has not been in it since the age of 8 and I accept also that she may have financial difficulties. That said, she speaks Spanish, she has lived in that country and I do not consider that either singly or cumulatively any of the factors identified are sufficient such that she meets the requirements of paragraph 276ADE(1)(vi).

28. In assessing further the circumstances in this case, I bear in mind that it is now argued that the appellants did at the date of application and decision meet the financial requirements of Appendix FM-SE. I am satisfied that that is so from the P60s supplied to me in respect of Ms Neads' pension from Lambeth and also from the figures regarding her entitlement to the state retirement pension. I find that, taken together, these show that at all material times she had sufficient income to meet the financial requirements of Appendix FM in respect of a family unit consisting of her, and the first and second appellants.
29. I bear in mind that this is not a situation like that in **Younas** in that there has been no indication of dishonesty in this case at all. On the contrary, the appellants have been open and candid with the respondent about their position and it is owing to the misunderstandings of the working of the Rules which resulted in an application not being made within time or within 28 days of leave expiry.
30. In Younas at [90] The Upper Tribunal held:

90. *Chikwamba* pre-dates Part 5A of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"), which was inserted by the Immigration Act 2014. Section 117A(2) of the 2002 Act provides that a court or tribunal, when considering "the public interest question," must have regard to the considerations listed in section 117B (and 117C in cases concerning the deportation of foreign criminals, which is not relevant to this appeal). The "public interest question" is defined as "the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2)". There is no exception in Part 5A of the 2002 Act (or elsewhere) for cases in which an appellant, following removal, will succeed in an application for entry clearance. Accordingly, an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on *Chikwamba* does not obviate the need to do this.

92. The first question to be addressed is whether her temporary removal from the UK is a sufficient interference with her (and her family's) family life to even engage article 8(1). If article 8(1) is not engaged then the proportionality of removal under article 8(2) - and therefore the *Chikwamba* principle - does not arise.

...

94. The second question is whether an application for entry clearance from abroad will be granted. If the appellant will not be granted entry clearance the *Chikwamba* principle is not relevant. A tribunal must determine this for itself based on the evidence before it, the burden being on the appellant: see *Chen* at 39.

95. The third question is whether there is a public interest in the appellant being required to leave the UK in order to undertake the step of applying for entry clearance; and if so, how much weight should be attached to that public interest.

96. In some cases, the fact that a person will be able to re-enter the UK means that there will be no public interest at all in his or her removal. By way of example, in Parveen v The Secretary of State for the Home Department [2018] EWCA Civ 932 the appellant had entered the country lawfully and genuinely on a spouse visa and had remained married to her husband and resident in the UK ever since but had not, thirteen years earlier, made an application for leave. Underhill LJ observed at para. 28:

"It is hard to see how it could be right to insist on the empty but disruptive formality of leaving the country in order to correct a venial administrative error made thirteen years previously".

97. If there is no public interest in a person's removal then it will be disproportionate for him or her to be removed and no further analysis under Article 8 is required. On the other hand, if there is at least some degree of public interest in a person being temporarily removed then it will be necessary to evaluate how much weight is to be given to that public interest so that this can be factored into the proportionality assessment under article 8(2).

...

99. The fourth question is whether the interference with the appellant's (and her family's) right to respect for their private and family life arising from her being required to leave the UK for a temporary period is justified under article 8(2). This requires a proportionality evaluation (i.e. a balance of public interest factors) where consideration is given to all material considerations including (in particular) those enumerated in section 117B of the 2002 Act.

31. The starting point for assessing the public interests in this case is Section 117B. The fact that the appellants speak English and are financially independent are neutral but it is relevant to consider whether they would meet the requirements of the Rules or not. Two alternatives fall to be considered: whether if the first appellant meets the requirements of the Rules and whether, in the alternative, he does not.
32. On any view, if the first appellant did not meet the requirements of the Rules, it is only by a narrow margin; and there is little doubt that he would, in ordinary circumstances, be able to return to Argentina and apply for Entry Clearance.
33. It has to be considered also that the public interest is not necessarily fixed. I accept that the decision in Chikwamba predates KO (Nigeria) but nonetheless, the fact that the first appellant would be able relatively easily to re-enter the United Kingdom is a factor to be taken into account. This is not a case where there is any hint of the appellant not being granted entry clearance, given his good immigration history apart from a relatively short period of overstaying.
34. The second appellant of course could not meet the requirements of the Immigration Rules. But the family life that exists between her, the first appellant and his wife could only reasonably be expected to take place in the United Kingdom. There will be a significant interference in the family life which exists. The interference would be

serious and would, in effect, sever the ties as they currently exist between the second appellant and her father and stepmother.

35. The effect of not permitting the second appellant to remain in the United Kingdom would be to sever any meaningful way of the family life that exists between her and her parents. She would be required to go to live in a country where she has not lived since the age of 8, no family and no connections on which to depend. She would in effect, although she speaks the language, be isolated and whilst that might not amount to very significant obstacles, I consider that the difficulties she would encounter as well as the effective severing of any meaningful family ties are such as to amount to very compelling circumstances such that GEN.3.2 is engaged.
36. For these reasons, I am satisfied applying the principles set out in TZ (Pakistan), that the appeals ought to be allowed on human rights grounds.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) I remake the appeals by allowing the appeals on human rights grounds.

No anonymity direction is made.

Signed

Date 12 July 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION



IAC-AH-KRL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/00550/2019
HU/11632/2019

THE IMMIGRATION ACTS

Heard at Field House
On 18 March 2021
Extempore

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR KOSTYANTYN PEREGUDA (FIRST APPELLANT)
MISS ALINA PEREGUDA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondents: Mr T Aitken, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Abebrese promulgated on 19 November 2019. The judge allowed the

appeal of Mr Pereguda and his daughter Alina Pereguda against the decision of the Secretary of State to refuse their human rights claims.

2. I refer to Mr and Miss Pereguda as the appellants as they were for the First-tier Tribunal for ease, rather than for any other reason. The first appellant entered the United Kingdom in 2012 with a spouse visa valid until 2015. He applied for further leave as a spouse on 7 July 2015, which was granted until 19 May 2018. The second appellant was granted leave to enter as his dependant daughter in 2015 as she had previously been living in Spain with her mother who it is said is no longer able to support her. She has had limited time spent in Argentina, the country of her nationality.
3. The appellants applied for further leave to remain but the applications were refused by the Secretary of State firstly, because the application was made 28 days out of time and thus they were overstayers and second, on the basis that they could not satisfy the financial eligibility grounds on the information supplied as regards self-employment. The Secretary of State also concluded that the provisions of EX1 did not apply as insufficient evidence had been provided to show that there were insurmountable obstacles or that they would face very significant difficulties which could not be overcome. The Secretary of State suggested also that the appellant and his partner could therefore return to Argentina.
4. The judge heard evidence from the first appellant and the first appellant's partner. He heard submissions from both parties and he allowed the appeal. Importantly it has to be borne in mind that the judge found at paragraph 13 that the appellant and his partner would not face insurmountable obstacles under EX1. even though he accepted they would face very difficult circumstances. He also considered the first appellant could not satisfy the provisions of paragraph 276ADE again on the basis that the appellant would not face very significant obstacles because he had resided most of his life in Argentina and would be able to integrate on his return.
5. The judge then at paragraphs 15 to 16 found on the basis of the evidence before him that there were exceptional circumstances outside of the Rules such that removal would be disproportionate. He also found that the decision would be disproportionate in respect of the second appellant as she had been living in this country with her father, and was dependent on him even though she is now an adult. He concluded at [18] that the first and second appellant's removal would cause unjustifiably harsh consequences to the appellants and to the partner of the first appellant. He also noted they would not have found themselves in the situation if they had not missed the deadline in submitting the application.
6. The Secretary of State sought permission to appeal on two principle grounds. First that the judge had failed having concluded that paragraph EX1 had not been made out, that on the same facts there were nonetheless exceptional circumstances making removal disproportionate and that the judge failed to make adequate findings while the circumstances are not insurmountable would be exceptional. The second ground is that the judge failed properly to consider paragraphs 40 to 60 of R (on the

application of Agyarko) v Secretary of State [2017] UKSC 11, thus misdirecting himself in law.

7. Permission to appeal was granted by First-tier Tribunal Judge O’Keeffe on 11 May 2020, the judge stating that it was arguable that Judge Abebrese had given insufficient reasons for finding that removal would result in unjustifiably harsh circumstances, adding that the second appellant is an Argentinian national who was an adult at the date of hearing, stating that the judge has not considered whether she could return to Argentina, as submitted by the respondent it is arguable the finding that the decision would result in unjustifiably harsh consequences is again inadequately reasoned.
8. Subsequent to that the appellants have produced a response pursuant to Rule 24 which in summary argues that the reasoning by the judge is sound on the basis of the findings of fact and the material before him and submitting also that Judge O’Keeffe erred in going beyond in granting permission on a ground which had not been raised by the parties plus relying on **Durueke [2019] UKUT 197**. I add at this point as an aside that I have no power to alter the terms of the grant of permission. They must stand and I have no power to set aside either the whole or the part of the grant of Judge O’Keeffe.
9. In considering the submissions made to me by both parties I consider that the starting point must be the findings of Judge Abebrese set out in his decision beginning at 13. As the grounds submit it is difficult to see what would have been considered by the immigration in reaching a conclusion that neither EX.1 nor 276ADE were reached yet would fall to be considered within the wider ambit of Article 8, not as the judge said outside the Rules entirely but I would have thought pursuant to paragraph GEN3.2 in Appendix FM.
10. Mr Aitken has very helpfully taken me to these matters which were taken into account which are that the appellant has integrated into the United Kingdom and has a settled life here with his partner who is British. But I note also that the judge said he gave little weight to any private life being established in this country. The judge also took into account that there would be difficulties in the appellant’s wife relocating to Argentina and that she would not visit him because of conditions there. Looking at this in terms of the evidence as a whole, I conclude that the judge has not explained adequately or properly why he concluded that factors he took into account as not meeting the test applicable in EX.1 or 276 ADE (1) (vi) were such that it would be disproportionate to remove the appellants, nor has he identified any factors that would not have been taken into account in assessing those tests which nonetheless tipped the balance in the appellants’ favour, still less why that is so when significant weight has to be attached to the public interest in removal when the requirements of the Immigration Rules are not met.
11. Having had regard to the decision of the Supreme Court in **Agyarko** at paragraphs 40 to 60 I consider that in this case the judge has not explained properly or identified what factors properly underpinned the conclusion there were unjustifiably harsh

consequences bearing in mind that the requirements of the Immigration Rules had not been met and for that reason I am satisfied that the decision involved the making of an error of law.

12. In doing so I bear in mind that it should not be the position of the Upper Tribunal to set aside decisions simply because they might have reached findings different from those reached by the First-tier Tribunal. But in this case I consider that the reasoning is so inadequate that the judge has failed properly to explain why by reference to the factors he did and did not take into account the public interest was outweighed in this case despite the fact that the Immigration Rules were not met. The only factors being identified being the fact that the first appellant was present and settled here and consequently that the second appellant who was dependent on him ought to be able to remain here.
13. The decision is defective for these reasons. I find therefore that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
14. The question then is whether this should be retained in the Upper Tribunal or remitted to the First-tier Tribunal for a fresh decision. I conclude that as any further fact-finding will be limited, that it is appropriate for the decision to be remade in the Upper Tribunal. That remaking will involve the consideration of whether, on the facts as found, EX.1 and/or paragraph 276 (1)ADE of the Immigration Rules is met, and if not, whether the removal of the appellants would still be disproportionate.

Notice of Decision & Directions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I direct that the decision be remade in the Upper Tribunal on a date to be fixed.
3. No anonymity direction is made.
4. Any party wishing to rely on any further material must serve it on the other party and on the Upper Tribunal at least 10 working days before the next hearing.
5. If the appellants wish to give further oral evidence, then they must prepare and serve additional witness statements in line with direction (4) above.

Signed

Date 6 April 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul