



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

Appeal Number: IA/45159/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 2nd July 2014
Prepared 8th July 2014**

**Determination
Promulgated
On 31st July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MISS EVGENIYA EVSEEVA
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Nathan of counsel

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Russia born on 3rd November 1989. She appealed against a decision of the Respondent dated 16th October 2013 to refuse to vary her leave to remain in the United Kingdom and to remove her by way of directions under Section 47 of the Immigration, Asylum and

Nationality Act 2006. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Blake sitting at Taylor House on 5th March 2014. The Respondent appeals with leave against that decision and the matter therefore comes before me as an appeal by the Respondent. Nevertheless for the sake of convenience I shall continue to refer to the parties as they were referred to at first instance.

2. The Appellant last entered the United Kingdom with entry clearance as a Tier 4 (General) Student valid from 16th September 2009 to 30th October 2012. She first entered the United Kingdom in September 2007 as a student in order to study for her A levels at age 17. Prior to that time she had lived with her mother and step-father (a British citizen) in Russia. The Appellant's step-father had only ever resided in Russia on the basis of his employment and the Appellant was sent to the United Kingdom in advance of her mother and step-father's return in order to start her preparation for university and integration into United Kingdom society.
3. The Appellant's mother obtained a spouse settlement visa in May 2010 and was subsequently granted indefinite leave to remain issued to her on 22nd May 2012. Since that time she has acquired naturalisation as a British citizen. The Appellant herself went on to study at the University of Warwick where she obtained a BSc honours degree in economics with a 2:1 classification. On completion of her studies she returned to her family home in the UK living with her mother and step-father in East Sussex.

The Refusal

4. On 11th October 2012 solicitors acting for the Appellant applied on her behalf for leave to remain in the United Kingdom. The Respondent refused that application stating that it had been considered whether the particular circumstances set out in the application constituted exceptional circumstances that might require the Respondent to grant leave to remain outside the Immigration Rules. The Respondent summarised the Appellant's claim thus:

“... you have a close relationship with your mother who is settled in the UK and you have lost most ties to Russia.”

The Respondent decided that a grant of leave outside the Rules was not appropriate in the Appellant's case because she was aged 23 and was an independent adult not dependent on her mother. She had lived independently from her parents for several years in the United Kingdom which itself was a new country to her and therefore it was expected that she would be able to re-establish an independent life in Russia where she had spent most of her life. She could maintain contact with her mother through modern means of communication.

5. The reasons for refusal did not refer to whether or not the Appellant could satisfy either Appendix FM or paragraph 276ADE of the Immigration Rules.

It indicated that the application was being considered outside the Rules but there was no indication in the refusal letter of what weight if any the Respondent placed on the fact that the Appellant could not satisfy the aforementioned provisions of the Rules.

The Hearing at First Instance

6. The Appellant appealed and the matter came before Judge Blake when both parties were represented by Counsel. The Judge had before him a psychologist's report by Lisa Davies dated 16th September 2012. This report had been submitted to the Respondent but was not referred to in the refusal notice. The psychologist had undertaken an assessment of the Appellant and observed the relationship that existed between the Appellant and her mother. The Judge summarised the contents of this report at paragraphs 27 to 30 of his determination. The report noted that the Appellant had enjoyed a close and supportive relationship with her mother and step-father which appeared to extend beyond the dependency experienced by a young woman of the Appellant's peer group. The Appellant lacked a clear sense of autonomy and had found emotional separation from her mother very difficult. She would experience significant difficulties adjusting to life in Russia without the close presence of her mother and step-father. She had presented as a shy introvert and had experienced difficulties building new relationships. She would experience a profound sense of isolation and loneliness if removed to Russia. Modern means of communication would not address the Appellant's emotional needs. The Judge also heard oral testimony from the Appellant's mother and step-father and received in evidence a number of letters in support.
7. In closing submissions to the Judge the Respondent put her case on the basis that the Appellant's family life with her mother and step-father did not engage Article 8(1) and as she could not succeed under the Rules the appeal should be dismissed. Again no reference was made to the weight or otherwise to be placed on the fact that the Appellant's application was seemingly outside the Rules.
8. In his determination the Judge accepted the credibility of the evidence given to him and took the psychology report and the Appellant's personal background and difficulties into account. The Appellant had a strong bond and emotional dependency on her parents above that which would have been normal in people of the Appellant's age. The Judge considered that his task was to assess the proportionality of interference with the Appellant's family life in accordance with the authority of **Razgar [2004] UKHL 27**. The Appellant had at all times remained lawfully in the United Kingdom and her removal to Russia would cause a serious rupture to both her and her family life. The Judge concluded that the Appellant's dependence on her parents was over and above that of a normal person of her age. The Appellant's removal to Russia would bring about the Appellant's isolation which would result in depression. The interference in

the family life was not proportionate to the public aim sought to be achieved. In allowing the appeal under Article 8 the Judge noted at paragraph 130:

“I found that the Secretary of State had failed to give any or any proper weight to the psychological profile of the Appellant and the likely effect on both her and her immediate family”.

The Onward Appeal

9. The Respondent appealed against that decision arguing it was not clear from the determination on what basis the Appellant’s application was made whether pursuant to the Immigration Rules or for consideration outside of the Rules. For the first time the grounds of appeal raised the issue that the determination had made no reference to a consideration of the relevant Immigration Rules namely Appendix FM and paragraph 276ADE. It was also argued the Judge had not considered the guidance in the case of **Gulshan [2013] UKUT 640**. If there were arguably good grounds for granting leave to remain outside the United Kingdom it was necessary for Article 8 purposes for the Judge to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules. Simply undertaking a freestanding Article 8 assessment was a material error in law.
10. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 7th May 2014 who stated that it was an arguable error for the Judge to take no note of the guidance in the case of **Gulshan**. In consequence the matter came before me on 2nd July 2014 to determine in the first instance whether there was an error of law in the Judge’s decision such that it fell to be set aside. If there was then I would proceed to rehear the matter. If there was not then the decision at first instance would stand.
11. The Respondent’s submissions on the point of law were relatively short. It was acknowledged that the Respondent had not referred to Appendix FM and paragraph 276ADE in the refusal letter. The caseworker had minuted the file that the Appellant could not satisfy those requirements but that had not reached the decision notice itself. There were no exceptional or compelling circumstances such that this appeal should be allowed outside the Rules.
12. In somewhat longer submissions Counsel for the Appellant argued that there was no error of law in the Judge’s determination. Given that the appeal system was adversarial in its nature it was not for the Judge to fill in the holes in the Respondent’s case if the Respondent did not refer to the provisions of the Rules or the weight to be attached where those Rules could not be met. If the Respondent had not referred to those Rules then the Judge was required to consider the appeal on the basis of the Article 8 jurisprudence and the **Razgar** test. The important difference between the refusal letter and the determination was that the Judge in assessing

proportionality had considered the expert evidence whereas the Respondent had not. To the extent that there was an error in the Judge's determination (which was not admitted) it was a failure of form and the Tribunal was limited to the challenge by the Respondent. The Upper Tribunal was limited to consider the submissions of the Respondent at first instance. Just as the Judge could not embark on a freestanding assessment of Article 8 so the Tribunal could not embark on a freestanding assessment of the error of law. It should be confined to the issues at first instance.

13. In conclusion for the Respondent it was argued that the "concession" by the Respondent at first instance (that is that there was no mention of Appendix FM and paragraph 276ADE in closing submissions) would only be valid if it was a concession relating to facts, a concession relating to law was invalid. The Respondent could not waive the requirements of the Immigration Rules even if she did not refer to them. Even if the Respondent got the law wrong the Judge was duty bound to apply the law correctly and that should have been his starting point. **Gulshan** should have been applied. The Appellant was not a child of settled parents, she was an adult. It could not be argued the Appellant had no ties to Russia and thus could not satisfy paragraph 276ADE in respect of private life.

The error of Law Stage

14. The Judge was not assisted at first instance by the failure of either party to mention the Immigration Rules or the impact that they would have on an Article 8 assessment. Counsel for the Appellant was recorded by the Judge as indicating that the claim concerned family life and not private life. Nevertheless it was necessary for the Judge to consider whether the Appellant could meet the Immigration Rules because if she could not the Judge was required to consider the weight thereby that was to be attached to the public interest in removing the Appellant. Although I consider it is significant (for the purposes of the proportionality exercise) that the Respondent did not refer to the weight to be attached to a failure to meet the Rules in either the refusal letter or submissions to the Judge, for the purposes of considering whether there was an error of law I do not consider it significant at this stage.
15. A considerable amount of case law has developed regarding the assessment of Article 8 claims where the Immigration Rules are not met. In **Nagre [2013] EWHC 720** it was considered that in many cases the main points for consideration in relation to Article 8 will be addressed by a decision maker applying the new Rules. It was only if after doing that that there remains an arguable case that there may be good grounds for granting leave outside the Rules under Article 8 that it would be necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules to require the grant of such leave. In **Shahzad [2014] UKUT 85** the Upper Tribunal reminded first decision Tribunals that the Immigration Rules reflect an

assessment made by the government with the sanction of Parliament of what requirements are necessary in order to ensure sufficient control on a number of persons entering into or being able to stay in the United Kingdom and for how long and under what conditions.

16. The fact therefore that the Respondent did not pray in aid a failure to meet the Rules either in the decision letter or at first instance does not of itself mean that the Tribunal could disregard those provisions. There must still be an analysis of why the Appellant can succeed outside the Immigration Rules where the Rules are not met. The Rules cannot be simply ignored. It matters not that this is an adversarial system, the requirement to show compelling circumstances is a matter of law. The Appellant's argument before me is that that is a matter of form not substance since the end result is the same. I disagree with that. Unless the Tribunal has considered the weight which jurisprudence has explained should be given to a failure to meet the Immigration Rules it cannot be said that the Tribunal has assessed the claim under Article 8 correctly. I therefore find that there was an error in the Judge's assessment of Article 8 in that he failed to give any or any proper weight to the legitimate aim pursued. Importantly he did not consider the Article 8 application in terms of whether there were compelling circumstances not sufficiently recognised under the new Rules to require the grant of leave since he did not consider the impact of the Rules at all. I therefore set aside the determination as disclosing a material error of law and proceed to remake the decision in this determination preserving the findings of fact made by the Judge at first instance which were not challenged.

The Rehearing

17. I would agree that this is an appeal to be considered in relation to Article 8 family life rather than private life. The Appellant cannot satisfy the Immigration Rules but the evidence of the psychologist particularly demonstrates an arguable case that there may be good grounds for granting leave outside the Rules. The Respondent did not consider the psychologist's report or if she did she certainly made no reference to it in her refusal letter. The Respondent's case in the refusal letter appears to accept that there is a family life that will be interfered with but that the interference will not be significant and will thus not be disproportionate. The Respondent's case at first instance appears to have changed to arguing that in fact Article 8(1) was not engaged at all as there was no family life beyond normal emotional ties. It was open to the Judge to find against the Respondent on that point in the light of the contents of the psychologist's report which indicated that there was a dependency by the Appellant on her mother and step-father over and above normal family ties.
18. That having been said I must go on to consider whether there are compelling circumstances not sufficiently recognised under the New Rules to require the grant of leave to the Appellant. Inevitably such an

assessment is fact sensitive. It is not relevant to consider whether another Judge might have come to different findings on the same evidence. It is nevertheless as the jurisprudence makes clear a proportionality exercise. The weight to be placed on the Appellant's non compliance with the Rules is significant but the Respondent herself did not argue the point in either the refusal letter or the hearing at first instance. I cannot disregard the fact that the Appellant fails to meet the Rules what I can say is that the Respondent herself does not place great weight on the failure to meet the Rules because she did not argue it below. The weight which goes into the balance on that side of the argument is thereby diminished

19. On the other side of the balance the position is that the impact on the Appellant of her removal to Russia would mean the Appellant would experience a profound sense of isolation and loneliness, depression would result and it would also have an emotional effect on her mother and step-father. The disruption to the family life enjoyed by all three persons in the United Kingdom would I find be disproportionately interfered with. In terms of the **Razgar** questions, I find that family life is engaged, I find it would be interfered with by the removal of the Appellant, I find that that removal is proportionate to the legitimate aim of immigration control particularly in the light of **Shahzad** but I find nevertheless that in the particular facts of this case it would be disproportionate such that there are compelling circumstances that the Appellant should be granted leave outside the Rules.
20. Given the difficulties which the Appellant would experience if returned to Russia there would be a significant disruption to her family life. The Appellant's mother would be compelled to go with the Appellant so as to avoid the effects of separation. I would not place the same weight as the Judge did on the correspondence from the Appellant's friends as it does not significantly advance the case beyond confirming what was the likely effect upon the Appellant of the Respondent's decision. Their only significance was that it supported the expert evidence of the psychologist. Nor would I place weight as the Judge did that the Appellant would make a capable and worthwhile contribution to UK society. That may or not be the case but it would be speculation on my part to indicate that as a reason. The important point is what the Judge summarised at paragraph 127 of his determination that there would be a serious rupture to the family life enjoyed by all members of the family. For those reasons therefore I find that the Respondent's decision to remove the Appellant would breach this country's obligations under Article 8 of the European Convention on Human Rights. It would be a disproportionate interference for the reasons given with the family life of all three members of the family. There are compelling circumstances in this case such that the appeal should exceptionally be allowed outside the Rules. I therefore allow the Appellant's appeal against the Respondent's decision. I make no anonymity order as there is no public policy interest in so doing. The fee award at first instance will stand.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by allowing the Appellant's appeal against the Respondent's decision to refuse to vary leave and to remove her.

Appellant's appeal allowed.

Signed this 29th day of July 2014

Deputy Upper Tribunal Judge Woodcraft