



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

Appeal Number: IA/01997/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19<sup>th</sup> May 2015**

**Determination Promulgated  
On 3<sup>rd</sup> June 2015**

**Before**

**THE HONOURABLE MR JUSTICE EDIS  
DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS VIKTORIIA KRAVCHENKO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell (Senior Home Office Presenting Officer)  
For the Respondent: Mr S Noor (Counsel)

**DECISION AND REASONS**

1. The respondent's appeal against decisions to refuse to vary her leave and to remove her from the United Kingdom to Ukraine was allowed by First-tier Tribunal Judge Symes ("the judge") in a decision promulgated on 17<sup>th</sup> November 2014. The respondent applied for leave to remain with her spouse, settled here. The application was refused as the eligibility requirements of the partner route under Appendix FM of the Immigration

Rules (“the rules”) were not met, the respondent being present in the United Kingdom as a visitor when she made her application.

2. The judge found that the requirements of the rules were, in fact, met as the respondent could rely upon EX.1 in the light of his finding that she and her husband were in a genuine and subsisting relationship and that there were insurmountable obstacles to family life with her husband continuing outside the United Kingdom. In the alternative, and on the basis that his analysis under the rules might be wrong, the judge made an Article 8 assessment outside the rules. Having taken into account section 117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), and having weighed the competing interests, the judge concluded that the adverse decisions amounted to a disproportionate response.
3. The Secretary of State applied for permission to appeal. She contended, first, that the judge misdirected himself in relation to paragraph EX.1 of the rules. That paragraph did not apply, as the respondent was present here as a visitor at the relevant time. The judge had failed to take into account and apply Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 00063. The Upper Tribunal held in that case that EX.1 was “parasitic” on the relevant rule within Appendix FM that otherwise grants leave to remain.
4. Secondly, the Secretary of State contended that the judge’s Article 8 assessment was flawed and that his conclusion that family life could not be continued outside the United Kingdom was not sustainable. The respondent and her husband could choose where to continue family life and, if they wished to live in the United Kingdom, an application for entry clearance should be made. Although the respondent’s husband’s parents were elderly, there was support available to them from the wider family and health care was available here to meet their needs. The judge concluded that it would not be in the best interests of the husband’s children from a previous relationship for him to leave the United Kingdom but this was, again, a matter of choice and contact arrangements with the mother of the children might be agreed. If the respondent were genuinely at risk in the Ukraine from her former husband, as the judge found, there were channels that she could pursue and, in any event, the judge did not engage with internal relocation. Armed conflict in the Ukraine was not such as to pose a general risk. Overall, there was an insufficient basis for the judge’s conclusion that the respondent’s human rights would be breached on her removal. She could continue family life with her husband abroad or apply for entry clearance to return to the United Kingdom. The public interest in removal was informed by the failure on the respondent’s part to meet the requirements of the rules. The judge did not properly weigh the public interest in removal.
5. Permission to appeal was granted on 9<sup>th</sup> January 2015. The judge granting permission found that the first ground was arguable. He described the second ground as no more than a disagreement with the judge’s findings

and the weight given to the evidence and concluded, in paragraph 4 of the grant of permission, as follows: “Nevertheless given the first ground is arguable permission is granted.”

### **Submissions on Error of Law**

6. Mr Whitwell said that the first ground succeeded. Paragraph EX.1 was not available to the respondent in the light of her status as a visitor at the time she made her application, as is clear from paragraph R-LTRP.1.1.(d)(i) to (iii) and paragraph E-LTRP.2.1.(a) of the rules. Mr Noor confirmed that this was so but said that the second ground of application was not available to the Secretary of State in the light of the grant of permission. She was unable to attack the judge’s findings on Article 8.
7. Mr Whitwell disagreed, in the light of Ferrer (limited grounds; Alvi) [2012] UKUT 00304 (IAC). Paragraph 4 of the grant did not restrict the grounds available to the Secretary of State.
8. Mr Noor said that it was accepted that the assessment made “inside the rules”, as the judge described it, must fail. Paragraph EX.1 was not available because the respondent applied for leave to remain while she was a visitor. If she had applied shortly thereafter, while present here as an overstayer, EX.1 would have been available to her. Nonetheless, the judge made clear, cogent findings regarding insurmountable obstacles, in the context of family life and the possibility of continuing it abroad. It was clear from the decision that these were based on his assessment of the credibility of the account given by the respondent. The judge was entitled to find that there was a genuine and subsisting relationship and that refusal to vary leave and the respondent’s removal would interfere disproportionately with it. The findings on insurmountable obstacles were transferred to the Article 8 assessment, outside the rules. A sensible reading of the grant of permission showed that the Secretary of State was not able to challenge the Article 8 assessment. There was a material difference between leave granted to a person within the rules, for a period of 30 months, and success under Article 8 outside the rules, where a person would merely be given discretionary leave for a period of time, subject to the Secretary of State’s discretion. The grant of permission should be read in the light of that material difference.
9. Mr Whitwell said in response that there was nothing in the decision that gave the impression that the judge granting permission to appeal had in mind any particular period of leave. Moreover, if the judge erred in relation to insurmountable obstacles, that would infect the Article 8 assessment outside the rules.

### **The Scope of the Grant of Permission**

10. We find that the grant of permission does not restrict the grounds available to the Secretary of State and that the second ground,

challenging the judge's Article 8 assessment outside the rules, is available to her. We have taken into account the guidance which appears at paragraphs 21 and 22 in Ferrer. The judge granting permission failed to make clear, if this is what he intended, that the grant was on limited grounds only. Had he done so, the Secretary of State would have realised that, in order to seek permission on the second ground, she needed to apply to the Upper Tribunal for permission to do so. The grant of permission is not, with respect to the author of it, as clear as it might have been but we conclude that the judge did not intend to limit the grant only to the first ground and we read paragraph 4 as amounting to a grant of permission to appeal on both grounds. The first ground has been made out. The judge erred in relation to EX.1. That error is not material, however, if the Article 8 assessment he made outside the rules is sustainable.

### **Submissions in Relation to the Second Ground: the Article 8 Assessment "Outside the Rules"**

11. Mr Whitwell said that it was apparent from the grounds that no challenge was made to the findings of fact. In the light of the respondent's failure to meet the requirements of the rules on what might be described as a technical ground, namely her status here, Article 8 was more at large. In paragraph 25 of the decision, the judge clearly imported the findings he made in the preceding paragraph in relation to insurmountable obstacles and he noted at paragraph 26 that the respondent had no adverse immigration history. At paragraph 28, having moved on to weighing the competing interests, the judge noted the respondent's lack of English but then limited the weight given to that factor by explaining her lack of progress and the reasons for it. The legitimate aim pursued by the Secretary of State was the maintenance of immigration control, in the interests of the economic wellbeing of the United Kingdom but paragraph 28 contained no express balancing exercise and it was here that the judge erred.
12. Mr Noor said in reply that the decision revealed no failure to consider the public interest in the Article 8 assessment. At paragraph 26, the judge took into account the respondent's immigration history. He set out section 117B in paragraph 27 and then, in the following paragraph, dealt with matters arising in the light of relevant public interest considerations. He considered the respondent's ability to speak English, noting that it was limited. On the other hand the respondent was well educated. The judge considered whether she would be an economic burden and concluded that she would not, in the light of her sponsor's income and the respondent's ability to integrate into British society. Overall, the public interest was clearly considered and taken into account and the conclusion could not be described as irrational or perverse.

13. In a brief response, Mr Whitwell said that the Secretary of State's challenge was not based on perversity. There had been a failure to engage in an adequate balancing exercise at paragraph 28 of the decision.

### **Conclusion on Error of Law**

14. As Mr Whitwell accepted, the findings of fact made by the judge, and particularly those appearing in paragraph 24 in relation to insurmountable obstacles, were not challenged. Instead, the Secretary of State contended that the overall Article 8 assessment was flawed and that, for example, the respondent's husband had no expectation that he and his wife would be able to remain in the United Kingdom to care for his elderly parents and that, in any event, support was available from the wider family here. Family life might be continued in Ukraine and, if need be, the respondent's husband might agree contact arrangements with the mother of his children.
15. It is clear that the judge's findings of fact were carried over into his Article 8 assessment outside the rules and that those findings weigh in the respondent's favour. The judge did not err in taking into account the best interests of the respondent's husband's children, as they are part of the wider family. The judge was entitled to find that the respondent has established family life here and that her removal would represent an interference with it. At paragraph 25, the judge took his findings into account expressly in relation to the proportionality assessment, following on from his finding that family life had been shown. Also material was the judge's finding that there was no deceit in the respondent's immigration history.
16. Having set out section 117B of the 2002 Act in paragraph 27, and directed himself that these factors were required to be taken into account in the assessment of proportionality, the reasoning leading to the overall conclusion appears at paragraph 28. As Mr Noor submitted, a close reading of that paragraph shows that the judge did, in fact, expressly take into account and consider material factors, including the respondent's limited ability to speak English, the extent to which she would be a burden on taxpayers and the likelihood that she would easily integrate into society here. What is not plainly visible in that particular paragraph, however, is any express mention of the public interest in the maintenance of effective immigration control and no express weighing of the public interest against the favourable factors identified by the judge.
17. On the other hand, as is clear from the Upper Tribunal decision in Dube [2015] UKUT 00090 (IAC), what is important is that a decision should reveal reasoning which shows that the factors set out in this section have been properly engaged with. In this context, taking into account the findings of fact carried over into the Article 8 assessment, we conclude

that the judge has given adequate reasons for his conclusion that removal would amount to a disproportionate response. Overall, we find that the decision shows that he had in mind the public interest in the maintenance of effective immigration controls and that his reasoning was not confined to the recitation of section 117B at paragraph 27. Taking into account the earlier findings, and in combination with what appears at paragraph 28, we find that the judge has adequately explained why the balance fell in favour of the respondent, such that the public interest in her removal was outweighed by her particular circumstances, and those of her close family members here.

18. In summary, notwithstanding the Secretary of State's success in showing that the first ground has been made out and that the rules assessment was flawed, no material error of law has been shown in the decision, which shall stand.

### **NOTICE OF DECISION**

The decision of the First-tier Tribunal, containing no material error of law, shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell