



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/25155/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
On 11 March 2015**

**Determination Promulgated
On 12 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SVITLANA CHYBIZOVA

Respondent

Representation:

For the appellant: Mr D Clarke, Home Office Presenting Officer

For the respondent: In person

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
2. The appellant, a national of Ukraine, appealed to the First-tier Tribunal against a decision made by the Secretary of State to refuse her application for leave to remain in the UK as the spouse of Christopher Dance. The respondent refused the application on the basis that the appellant could not meet the requirements of Appendix FM or paragraph 276ADE of the

Rules. In particular the respondent said that the appellant had not demonstrated that she met the requirements of paragraph E-LTRP 2.1 as she had entered the UK as a visitor and did not meet Ex 1 as there were no insurmountable obstacles to family life with her partner continuing outside the UK. The appellant's appeal against this decision was allowed by First-tier Tribunal Ferguson under Article 8 of the European Convention on Human Rights. The Judge considered the decision in SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054 and concluded that, in the absence of the Secretary of State showing a sensible reason for returning the appellant to Ukraine to make an application for entry clearance, the decision to remove her would be a disproportionate interference with her family life. The Secretary of State now appeals with permission to this Tribunal.

Error of law

3. The grounds of appeal contend that the First-tier Tribunal Judge erred in making a material misdirection of law by failing to have regard to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 in considering the public interest in the proportionality assessment under Article 8. Sections 117A -117D of the 2002 Act were introduced by the Immigration Act 2014 and came into effect on 28 July 2014. These provisions require courts and tribunals to take into account the considerations listed in section 117B in all cases where they are considering the public interest question, that is the question of whether an interference with a person's right to respect for private and family life is justified under Article 8.
4. The Judge did not refer to these considerations. However that in itself is not an error of law. The Tribunal in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) pointed out at paragraph 26 that "*...it will not necessarily be an error of law for a judge to omit to refer expressly to ss.117A-117D considerations, albeit it may well be if he or she fails to address them in substance.*" It is therefore the substance rather than the expression of these considerations in the proportionality assessment which matters here.
5. Section 117B sets out a non-exhaustive list of considerations to be considered in all cases;

117B *Article 8: public interest considerations applicable in all cases*

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to—

- (a) a private life, or
- (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

6. The appellant did not use an interpreter at the hearing in the First-tier Tribunal and spoke English at the hearing before me, although there were some issues of understanding. However the First-tier Tribunal Judge did not have regard to the appellant's ability to speak English. The appellant's husband is in receipt of a state pension, Attendance Allowance and pension credits. There is no evidence that the appellant works or has her own income or savings. It appears that the appellant is not financially independent, being dependant on her husband who is in receipt of a state pension and some benefits. The Judge did not assess the implications of this and made no comment as to how much weight should be attached to any findings on this issue. The appellant entered the UK as a student visitor and married and then applied for leave to remain on the basis of that marriage during the currency of that leave. The appellant already knew her husband, they had been in contact over the internet in 2012 and he visited Ukraine in 2013. The Judge did refer to the appellant's immigration status at paragraph 21 but it is not clear whether he attached any weight to it either way.
7. I further note Mr Clarke's submission that the appellant did not possess the required English language certificate and that the Judge further erred in failing to recognise that the refusal could not therefore have been for the sole reason that she did not have the required entry clearance. This appears to be the case, although it is not mentioned in the reasons for refusal letter, and should be a relevant factor in the proportionality exercise.
8. In all the circumstances it cannot be said that, had the Judge had regard to the considerations set out in section 117B, he would necessarily have reached the same conclusion. Accordingly I must find that the failure to have regard to the statutory considerations is a material error of law and I set aside the decision of the First-tier Tribunal.

9. The appellant and her husband were unrepresented before me. The appellant's husband has hearing difficulties and was therefore unable to follow the proceedings. The appellant does speak English but had some difficulties understanding the proceedings. I had concerns about their ability to understand and properly participate in the remaking of the decision before me. They expressed their reluctance to return to London for a resumed hearing given the distance from their home. I took into account the anticipated costs and resources of the appellant and her husband and the need to ensure that they could participate fully in the proceedings. I had regard to age of the sponsor and the fact that the appellant and her husband said that the Birmingham hearing centre is more accessible for them. In light of my concerns as to the ability of the appellant and her husband to follow and understand the proceedings I had particular regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008. I considered these factors in interpreting Practice Statement 7.2 and the need to ensure a fair hearing and I decided that the most appropriate course of action for the fair and just disposal of the appeal is to remit the appeal to the First-tier Tribunal. In these circumstances the findings of fact of the First-tier Tribunal are set aside also and the appeal is remitted for a de novo hearing.

Decision

The Judge made an error on a point of law and the determination of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade.

Signed

Date: 11 March 2015

A Grimes

Deputy Upper Tribunal Judge