



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

Appeal Number: VA/04450/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 September 2015**

**Decision & Reasons
Promulgated
On 18 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS OLGA STREPETILOVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Andriy Strepetilova, Sponsor
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the Decision and Reasons promulgated on 13 March 2015 by First-tier Tribunal Judge Aziz. The decision under appeal before the First-tier Tribunal was the refusal by the respondent of an application to enter the UK as a family visitor.

2. The respondent's reasons for refusing the application were set out in the refusal of entry clearance dated 21st of July 2014. The respondent was not satisfied that the appellant's social, economic and financial circumstances were such that she was likely to leave the UK at the end of her visit. The respondent was not satisfied that the appellant was genuinely seeking entry as a visitor for a limited period and that she intended to leave the UK thereafter. It followed that the respondent was not satisfied that the appellant met the requirements of paragraph 41(i) and (ii) of the immigration rules.
3. The decision to refuse the application was reviewed by an Entry Clearance Manager who acknowledged that the sponsor was able and willing to support the appellant, but again noted that the appellant had failed to provide any supporting documents with regards to her own personal and/or economic ties to Ukraine.
4. The First-tier Tribunal Judge was required by s86(2) of the Nationality, Immigration and Asylum Act 2002 to determine any matter raised as a ground of appeal. The Grounds of Appeal advanced by the Appellant expressly referred to the ECHR and the appellant claimed that there was no other way that the appellant would be able to see her son, to whom she is close, other than by her travelling to the UK for a short visit.
5. First-tier Tribunal Judge Aziz dismissed the appeal brought by the appellant under Article 8 ECHR for the reasons set out in his decision promulgated on 2nd March 2015. He noted that there is only a limited right of appeal on human rights grounds.
6. The appellant was granted permission to appeal by First-tier Tribunal Judge Nicholson who made reference to the decision of the Upper Tribunal in **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)**. In that case, the Upper Tribunal held that the claimant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

7. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The hearing before me

8. Mr Andriy Strepetilova, the appellant's son and Sponsor appeared before me. He relied upon written submissions set out in a 'Speech of the appellant' dated 25th September 2015, a copy of which he handed to both Mr Walker and me.
9. Before me, Mr Strepetilova submitted that he has a very close relationship with both of his parents who remain in the Ukraine. He had lived with his parents before he came to the UK and he has remained in regular contact with his parents, frequently visiting them in the Ukraine. He submitted that both of his parents had been invited by him to come to the United Kingdom for a visit, and they had each made a separate application. Both applications had been refused and the family had decided that they would appeal against the decision made in respect of the appellant, but in light of the concerns raised by the respondent, his father would remain in the Ukraine and perhaps visit at some other point in the future. Mr Andriy Strepetilova stated that his mother has previously been granted entry clearance in 2005. She had visited the UK for 11 days or so, and she returned to the Ukraine within the terms of the visit visa granted to her. To the best of his recollection, she arrived in United Kingdom on 22 October 2005 and returned to the Ukraine on 5 November 2005. He stated that this appeal is of particular importance to him because of his mother's age. He submitted that any future application that she makes, is probably doomed to failure because the appellant is a pensioner and it would be very difficult for her to provide evidence of her social and economic situation in the Ukraine.
10. Mr Andriy Strepetilova, stated that he arrived in the UK in 2004 under the highly skilled migrant programme and since his arrival he has travelled back to the Ukraine about three times each year. He did that every year until 2014, when the situation in the Ukraine deteriorated and it was unsafe for him to travel there. He stated that he keeps in

touch with his parents regularly by telephone but that telephone calls are expensive and they are no substitute for the face to face contact that he has previously enjoyed with his parents. The appellant is a pensioner and is not familiar with modern means of communication, and meeting in a third country would prove impossible because of language barriers and the fact that the appellant would have to seek entry clearance to meet her son in a third country. If she cannot secure entry clearance to the UK where her son lives, and has accommodation readily available, the appellant is unlikely to be able to secure entry clearance to another third country. Mr Strepetilova submitted that the effect of the decision is to prevent him having a relationship with his mother, with whom he remains very close. He confirmed that the appellant has no intention of staying in the UK and, just as she had in 2005, she will return to the Ukraine after a short visit. The appellant's husband will remain in the Ukraine and she has a daughter, Elena Shumak (aged 50) who is married and lives in Ukraine. Her daughter has two children and the appellant assists in looking after her grandchildren. He submits that the appellant has every reason to return to Ukraine.

11. In reply, Mr Walker submitted that at paragraph [13] of the decision, the judge notes that there was a lack of evidence as to the appellant's ties to the Ukraine. He accepted that at paragraph [21] of the decision, the judge accepted that this is a genuine visit and that the appellant would leave the UK at the end of the visit. He submitted that the submissions made by Mr Strepetilova about his relationship with his parents, his frequent visits to the Ukraine previously, and the appellant's previous visit to the UK in 2005, had not been before the ECO and was not considered by the Judge in assessing whether there was a disproportionate interference with the right to family life.

Error of Law

12. The grounds of appeal advanced by the appellant to the First-tier Tribunal following the refusal of Entry Clearance stated:

"According to European Convention on Human Rights everyone has the right to respect for his family life, I have applied for family visitor visa to visit my son who is a British citizen to be able to see my son

during these 2 weeks. Current situation in Ukraine is dangerous as it is in the state of war with east areas where separatists are. My son can not travel to Ukraine to see me because of work reasons and current dangerous situation in the country which is in state of war with separatists. I do not want my son to travel to see me because my country Ukraine is too dangerous. Instead I decided to apply for visa and travel to see him. My son is willing to sponsor my trip and all expenses associated and he provided payslips, letter from work, bank statements and saving statements to support this in addition to the invitation letter. He also provided necessary documentation to support him able to accommodate me during my trip. There was no indication in guidance documents that sponsor declaration with his supporting documents is not sufficient to support issuing the visa. Entry clearance officer decided that without my own financial documents visa can be denied. Regardless that my son's salary is sufficient to support my trip and return to Ukraine. Having refused a visitor visa , entry clearance officer installed the barrier between me and my son which I believe violates basic human right to be able to physically see your close family. My son's birthday is 27 of October and I was hoping that will be pleasant surprise for him that I can travel (with valid visa) and see him on his birthday. We have no other ways of seeing each other than me traveling to UK. Refusal to issue the visa caused significant amount of pain to me and my son and visa is refused second time to me in the row. My son and me believes that refusal to issue the visa is violation of human right to see family members by short visits. I have no plans to stay in UK, I like my country Ukraine and will stay there but I did not think that I can not simply visit my son. I was issued visitor visa ones and visited UK ones in the past (2005) to see my son and my visit did not cause anyone any problems because I followed all rules. I do not understand why as a person I was treated not by my previous actions (previous visit to UK) but rather by guess of what can happen in future not taking into account my previous visit. My son's and my rights for family visit were violated by refusal issue the visa."

13. At paragraphs [20] and [23] of the decision, the Judge correctly notes that there is only a limited right of appeal on human rights grounds. At paragraph [25], the Judge states:

"In conclusion, the appellant's application cannot succeed under the Rules. In Gulshan (Article 8 - new Rules - correct approach) [20131 UKUT 640 OAC) the Upper Tribunal set out the correct approach to appeals involving both Article 8 and the new Immigration Rules. It stated that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

14. At paragraph [26] the Judge stated:

"I am afraid that even taking her case as its highest, there are no good grounds for granting leave outside of the Immigration Rules and therefore it is not necessary for this Tribunal to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules."

15. The approach adopted by the judge discloses a material error of law. The Judge states at paragraph [25] that the appellant's application cannot succeed under the rules and that "...only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.". It was not open to the Judge to determine whether the decision of the ECO made under the immigration rules was a decision made in accordance with the law. That much appears to have been recognised by the Judge at paragraph [22] in which the Judge notes "... this Tribunal is not entitled to assess the veracity of the entry clearance officer and entry clearance manager's decision in respect of the objections that have been raised in consideration of the application under the Immigration Rules.".

16. The task of the judge was to determine whether the decision of the respondent was unlawful under s6 of the Human Rights Act 1998. That is, whether the decision was incompatible with the appellant's Article 8 Convention rights. As set out in the decision of the Upper Tribunal in **Adeji (visit visas - Article 8) [2015] UKUT 261 (IAC)**, the first question to be addressed in an appeal against a refusal to grant entry clearance as a visitor where only human rights grounds are available, is whether Article 8 of the ECHR is engaged at all. If it is not, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If Article 8 is engaged, the Tribunal may need to look at the extent to which the appellant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow.
17. In considering the appeal on Article 8 grounds, the Judge failed to deal with the appeal on the basis of the five tests identified by Lord Bingham of Cornhill in **R -v- SSHD ex parte Razgar [2004] UKHL 27**. In failing to do so, the Judge erred in law and the decision of the First-tier Tribunal is set aside.

Re-making the decision

18. In entry clearance cases, the Tribunal is concerned with whether there has been an unjustified lack of respect for private and family life. Decisions of this sort are entirely fact specific and the Judge accepted that in the particular circumstances of this case, there was a family life between the applicant and her son. At the hearing before me, it was not in issue that the decision to refuse the appellant entry clearance interferes with her and her son's family life and that the interference is of sufficient gravity as potentially to engage the operation of Article 8. The issue before me is whether the refusal of entry clearance for the specific and limited purpose sought, interferes disproportionately with the private and family lives of the appellant and her son.
19. I remind myself that section 85A of the 2002 Act applies, and although the Tribunal can consider evidence that was not in existence, or not produced, at the date of decision, it can only consider additional evidence of "circumstances appertaining at the time of the decision".

20. In refusing the application for entry clearance the Entry Clearance Officer was not satisfied that the appellant's social, economic and financial circumstances are such that the appellant will leave the UK at the end of the visit. On review, the Entry Clearance Manager maintained that the appellant had failed to provide any supporting documents with regards to her own personal and or economic ties to Ukraine.

21. To that end, having noted that the right of appeal is limited to human rights grounds only, the Judge was satisfied that the substantive requirements of the immigration rules appear to be met. Importantly, insofar as any assessment of proportionality is concerned, the Judge found:

"20. Having had sight of the documentation, I am prepared to accept that this is a genuine trip. I also note that the entry clearance manager accepted that the sponsor was able to maintain and accommodate the appellant during any visit.

23. ...I note that the current situation in Ukraine may make it difficult for the appellant's son to visit her...

22. Mr Andriy Strepetilova stated that his mother has previously been granted entry clearance in 2005 and that she had visited the UK for 11 days or so. To the best of his recollection, she arrived in United Kingdom on 22 October 2005 and returned to the Ukraine on 5 November 2005. Mr Walker did not dispute that. I find that the appellant has previously travelled to the UK in 2005 and that she has not acted in any way that undermines the system of immigration control.

23. Whilst not the question before the Tribunal, the underlying merits of the application and the ability of the appellant to satisfy the substantive requirements of the immigration rules, is capable of being a weighty factor in an appeal on human rights grounds. I accept that it is not determinative, but the fact that the appellant appears, on the findings made by the Judge, to satisfy the requirements of the immigration rules, combined with the finding that the current situation in Ukraine may make it difficult for the appellant's son to visit her, as her has regularly

done in the past, in my judgment tips the balance in favour of the appellant in the particular facts and circumstances of this case. The appellant's son has travelled back to the Ukraine about three times each year to see his parents and did so every year until 2014.

24. In my judgment the decision to refuse entry clearance in the particular circumstances of this case, is disproportionate to the legitimate public end sought to be achieved.

NOTICE OF DECISION

25. I allow the appellant's appeal to the extent that the decision of the First-tier Tribunal discloses a material error of law and the decision is set aside.
26. I remake the decision, and allow the appellants appeal against the decision of the Entry Clearance Officer under Article 8 ECHR.

FEE AWARD

27. I make no fee award.

Signed

Date

Deputy Upper Tribunal Judge Mandalia