



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

Appeal Number: UI-2022-004396
First Tier: HU/04589/2021

THE IMMIGRATION ACTS

**Heard at: Manchester Civil Justice Centre
Issued:
On: 2nd August 2023
August 2023**

Decision & Reasons

On: 15th

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Valentina Smith
(no anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

**For the Appellant: no legal representative
For the Respondent : Mr McVeety, Senior Home Office Presenting
Officer**

DECISION AND REASONS

1. The Appellant is a national of Russia born on the 15th January 1988. She appeals with permission against the decision of the First-tier Tribunal dated 29th March 2022 to dismiss her appeal against the Respondent's decision to

refuse to grant her leave to remain so that she can live in the United Kingdom with her British husband.

2. From the Respondent's point of view, the case was one which clearly merited refusal under Appendix FM. Although the Sponsor Mr Smith had a job which met the minimum income requirement, and there was no dispute about the validity or nature of this marriage, it fell to be refused for one simple reason: Mrs Smith had entered the UK as a 'visitor', and Appendix FM specifically prohibits visitors from 'switching' into the category of 'partner'. Judge Austin agreed, and the appeal was dismissed.
3. Mrs Smith has now been granted permission to argue that Judge Austin's decision was irrational and/or it overlooked key information about the couple's circumstances, namely:
 - i) That Mrs Smith only made the application 'in-country' when she did, in November 2020, because she was unable to travel back to Russia because of the worldwide lockdown in response to the spread of Covid-19;
 - ii) That whilst Mr Smith has previously lived and worked in Russia, he would today face serious difficulties in doing so because he is suffering from long-Covid, a condition that has left him struggling to breath conducting daily activities;
 - iii) Mr Smith is a British national. The Foreign and Commonwealth Office currently advise against all travel to Russia for British nationals.
4. Mrs Smith submits that ground (i) should be a matter attracting significant weight given that she and her husband are a couple who can otherwise comply with the rules. Further she submits that the combined effect of issues (ii) and (iii) is such that there would be "insurmountable obstacles" to their family life continuing in Russia. His illness, and the invasion of Ukraine, have given rise to materially different circumstances to those faced by the couple in 2019 and the Judge was wrong to overlook that.

Error of Law

5. I am satisfied that ground (iii) is made out. The Russian invasion of Ukraine had occurred prior to the hearing before the First-tier Tribunal, and the FCO had immediately changed their advice to British nationals considering travel to Russia to advise against all travel. The Judge was referred to that advice at the hearing, but dismissed the concerns it expressed as follows:

"At the time of the Appeal the appellant and her partner were concerned about heightened political tensions in the Russian Federation. There is however no barrier to the Appellant returning to Russia, either with or without her partner".

6. I am not satisfied that this represents consideration of the point being made. The effect of the FCO advice was that British nationals in Russia would not be

able to call on consular assistance should it be required; British nationals already in the country were being advised to “leave immediately”. It is not clear to me that the First-tier Tribunal took this important evidence into account when it concluded that there was “no barrier” to the family life continuing in Russia.

7. I am satisfied that ground (ii) is also made out. Although the judge recognised that there was medical evidence before it concerning Mr Smith’s health issues, I am unable to see where it gave consideration to those matters, particularly his ability to travel, when concluding that there was “no barrier” to relocation.
8. It follows that I need address the remaining ground only briefly. Ground (i) is dismissed. It is apparent from paragraphs 25-26 of the decision that the First-tier Tribunal gave specific consideration to the timing of the application, but it concluded that notwithstanding the travel restrictions in place it would have been possible for Mr and Mrs Smith to return to Russia where they still had accommodation available to them in November 2020. This was a finding open to the Tribunal on the evidence before it: indeed Mrs Smith had travelled back to Russia in the summer of 2020 and could have made her application then.

The Decision Re-Made

9. I must make my decision on the evidence as it stands today.
10. The Appellant cannot meet the requirements of the immigration rules. That is because built in to Appendix FM is a requirement that to meet the requirements of the rules therein relevant evidence must be supplied *with the application*. It is common ground that the specified evidence relating to Mr Smith’s income and savings was not supplied with the application in November 2020. That it has been supplied now cannot change that. Furthermore the Appellant was a visitor at the date of the application, and Appendix FM specifically prohibits switching from that category.
11. I must now consider whether the decision to refuse leave on human rights grounds is unlawful: s6(1) Human Rights Act 1998.
12. I find as fact that there is a family life. Mr and Mrs Smith have been together as a couple since 2018, have lived together since 2019, and have been lawfully married since the 9th May 2019.
13. I find that the decision to refuse leave would amount to an interference with that family life.
14. It is a decision that the Respondent is lawfully empowered to take.
15. The question for this Tribunal is whether it is so disproportionate as to render the decision unlawful.

16. I first consider the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002.
17. Section 117B (i) provides that the maintenance of effective immigration controls is in the public interest. That is a matter that attracts significant weight in this balancing exercise, particularly given the finding that Mrs Smith could have applied from Russia instead of entering the UK as a visitor and then applying here, contrary to the intention of the rules.
18. Section 117B(2) provides that 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 are less of a burden on taxpayers, and are better able to integrate into society. Mrs Smith gave evidence before Judge Austin, and before me, in fluent English. I am satisfied that she is in a good position to integrate and this is therefore a neutral factor in the balancing exercise.
19. Section 117B(3) states that 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 are not a burden on taxpayers, and are better able to integrate into society. The uncontested evidence before me is that Mr Smith is employed full time as an accountant earning approximately £22,500 per annum. He further has a substantial amount of money in the bank – over £60,000 – some of which was legitimately gifted to him by a family member. I am satisfied, having had regard to this evidence, that the prospect of Mrs Smith becoming a burden on the taxpayer is remote. She is financially independent and this is therefore a neutral matter in the balancing exercise.
20. Section 117B(4) has no application in this case. That provides that little weight should be given to a private life, or relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. It is common ground that Mrs Smith's presence in the UK has at all times been lawful.
21. Section 117B (5) and (6) are not here relevant, since she places no reliance on either a private life nor children.
22. I now turn to assess those matters on the Appellant's side of the scales. Before me Mr McVeety agreed that it is appropriate that I be guided by the formulation found at paragraphs EX.1 and EX.2 of Appendix FM, the relevant parts of which read:

EX.1. This paragraph applies if

..

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with protection status, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), **and there are insurmountable obstacles to family life with that partner continuing outside the UK.**

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

23. To establish that this high test is met, the Appellant relies on the interplay between two very different matters.

24. The first is the FCDO travel advice. This currently reads as follows:

FCDO continues to advise British nationals against all travel to Russia. Russia’s ongoing invasion of Ukraine means the situation in Russia is unpredictable. This includes:

- security incidents, such as drone attacks, happening in some parts of the country
- lack of available flights to return to the UK
- a limited ability for HMG to provide consular assistance

Your travel insurance could be invalidated if you travel against FCDO advice. Consular support is also severely limited where FCDO advises against travel.

Situation in Russia

The Russian invasion of Ukraine is ongoing. International and domestic response to this action is affecting conditions within Russia and for those traveling to Russia. There have been numerous reports of drone attacks, explosions and fires in areas in Western and Southern Russia, particularly near the Russian border with Ukraine, Moscow and St Petersburg. The situation remains unpredictable, and could escalate further without warning.

Political rallies and demonstrations can occur in Moscow, St Petersburg and other places across Russia. Check the local media for the latest information, be vigilant, and avoid any political demonstrations or gatherings.

Consider leaving Russia

If your presence in Russia is not essential, we strongly advise that you consider leaving by remaining commercial routes.

British nationals should exercise extreme caution at all times. Consider the risks if you decide to leave Russia. Travel within or out of Russia is at your own risk.

International sanctions against Russia

The UK government has imposed sanctions against a number of Russian companies and individuals as well as other finance, trade and transport sanctions. These sanctions may have an effect on transactions in or, with Russia. [More information about Russia sanctions is available on GOV.UK](#) including on the application of sanctions prohibitions and requirements to British nationals.

MasterCard and Visa have suspended operations in Russia. This means that MasterCard and Visa cards issued outside of Russia will not work at Russian merchants or ATMs. Cards issued inside Russia continue to work in Russia but they will not work outside of Russia. Be aware that it may not be possible for you to access your funds through Russian banks or to make payments to Russian businesses with non-Russian credit/debit cards.

In May 2022, the UK government designated Aeroflot, Rossiya Airlines, Ural Airlines and Russian Railways for the purposes of UK sanctions. This means that British nationals and others who are bound by UK sanctions are prohibited from entering into transactions which result in making funds directly or indirectly available to these companies, such as purchasing tickets from them. However, the Office for Financial Sanctions Implementation has issued a [general licence](#) which means that for journeys originating in, or within, Russia, British nationals may purchase tickets from these companies without breaching UK sanctions.

25. I take from that the following. That the political and security situation in Russia remains unstable, such that Mr Smith would be required to exercise “extreme caution at all times”. If he required any consular assistance he would be unlikely to get it. He would be unable to use any of his British bank accounts. It also means that if he booked a flight to Russia on any of the remaining airlines operating that route, he would be breaking British law. I have not considered it necessary at this stage to follow the hyperlink embedded in this advice to investigate what possible sanctions Mr Smith might face from the Russian government.
26. The second factor of relevance is Mr Smith’s very significant health concerns. He contracted Covid whilst living in Russia in March 2020. He did not get better. His symptoms continued and developed until by the date of the First-tier Tribunal hearing in March 2022 he had been diagnosed with the condition known as ‘Long Covid’. In his case Long Covid primarily manifests as extreme fatigue, difficulty breathing and palpitations. Even the smallest

exertions like putting on a pair of socks can leave him breathless and exhausted. That is why he now works exclusively from home, and has qualified for 'PIP' payments to supplement his earned income. Since the hearing before the First-tier Tribunal Mr Smith has however received further news about his ongoing health issues. In November 2022 he was diagnosed with a brain tumour, for which he is now receiving ongoing investigation and treatment at the Wirral University Teaching Hospital. Mrs Smith explained to me that they have been told that medical opinion is still unclear about the extent to which this tumour has played a part in the Long Covid symptoms suffered by her husband.

27. Having had the opportunity to review the medical evidence supplied, in particular the new material about the brain tumour, Mr McVeety indicated that he had no submissions to make. This was typically pragmatic and fair, but in truth I do not know what, realistically, he could have said. Ordinarily in a case where a British Sponsor has health issues, I would be asked to look to the medical facilities in the 'other' country, and assess whether that individual could receive treatment there. In this case however it is clear from the FCDO advice, in particular the section on the sanctions regime currently in place, that there would be very significant obstacles to Mr Smith achieving this in Russia today. He would have to get on a plane to get to Russia, something currently considered prohibited by UK sanctions. Given his recurrent breathlessness and fatigue, it is a journey that would be extremely challenging physically. Setting to one side the difficulties he will likely face from the reciprocal Russian sanctions imposed on British nationals, he would still have to go about getting a job, finding somewhere to live and setting up a Russian bank account, all whilst suffering from a severely debilitating condition which in the UK has left him unable to work outside the home and qualifying for disability payments. The test in EX.1 imposes a high threshold, but it is not so high that "insurmountable" should be read literally. I am satisfied that asking Mr Smith to relocate would entail very serious hardship. I therefore allow the appeal.

Decision

28. The decision of the First-tier Tribunal is set aside for error of law.
29. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.
30. There is no order for anonymity.

Upper Tribunal Judge Bruce
3rd

August 2023