Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/14043/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11 November 2014

Determination Promulgated
On 19 November 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MRS VERA ASOKINA
(No Anonymity Direction Made)

Appellant

and

ENTRY CLEARANCE OFFICER - MINSK

Respondent

Representation:

For the Appellant: the appellant's daughter who is her sponsor appeared for her

For the Respondent: Mr C Avery a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Belarus born on 27 November 1950. She has been given permission to appeal the determination of First-Tier Tribunal Judge Ruth ("the FTTJ") who dismissed her appeal against the respondent's decision of 22 July 2013 to revoke her multi-entry visitor's visa and to refuse her application

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for a visitor's visa on the basis that she had failed to pay for NHS treatment in the UK.

2. On 29 July 2013 the appellant applied for two-year entry clearance as a family visitor to enable her to visit her daughter and her family in the UK. The application was granted under Visa was issued on 15 April 2014.

3. The appellant had previously travelled to the UK and she was issued with a family visitor Visa for two years valid from 25 March 2010 until 25 March 2012. The respondent said that she had travelled to the UK on 22 September 2011 three weeks after being diagnosed with breast cancer and having had a mastectomy operation in Belarus. It was alleged that during her stay in the UK she sought further medical treatment for her cancer and she said that she had seen a doctor privately. However, the respondent had made checks and become aware that she sought NHS treatment in the UK and had not paid the cost of the treatment amounting to £5395. The respondent took the view that at the time of her application the appellant had not mentioned that she had sought NHS treatment or that she had not paid for this. Had the Entry Clearance Officer been aware of this the visitor visa would not have been issued.

4. On the information available to the respondent the appellant's visitor visa was revoked and she was refused a further visitor Visa under the provisions of paragraph 320(22) of the Immigration Rules which applied where an NHS body has notified the respondent that the person seeking entry or leave to enter had failed to pay a charge or charges with a total value of at least £1000 in accordance with the relevant NHS regulations on charges to overseas visitors.

5. The appellant appealed against these decisions. The FTTJ determined the appeal on the papers on 10 March 2014 and his determination was promulgated on 17 March 2014. The FTTJ found that the appellant clearly received medical treatment from the NHS costing more than £5000 whilst she was here as a visitor. This had not been paid and as a result the respondent was entitled to refuse the application. He dismissed the appeal both under the Immigration Rules and on Article 8 human rights grounds.

6. The appellant applied for but was refused permission to appeal to the Upper Tribunal by a judge in the First-Tier Tribunal. However the application was renewed and granted by a judge in the Upper Tribunal. There is a Rule 24 response from the respondent.

7. The appellant's daughter and sponsor, Mrs Mumford, appeared before me. Mr Avery submitted the National Health Service (Charges to Overseas Visitors) Regulations 2011 and the National Health Service (Charges to Overseas Visitors) Amendment Regulations 2012. Mrs Mumford pointed out that she had already submitted and the FTTJ had the NHS Guidance on Implementing the Overseas Visitors Hospital Charging Regulations issued by the Department Of

Health together with an extract from the website setting out the Overseas Visitors Accessing NHS Primary Medical Services – Guidance for GPs, GPC General Practitioners Committee, and BMA – February 2011.

8. When a question arose as to why the NHS invoice relied on by the respondent was only a single page when it appeared that there should be more than one, Mrs Mumford provided copies of both pages. She also submitted the letter of complaint which she had sent to Broomfield Hospital on 22 July 2014 in response to their letter of 16 July 2014.

9. With hindsight it is perhaps unfortunate that the appellant asked the First-Tier Tribunal to determine her appeal on the papers. The issues in this appeal are far from straightforward and the FTTJ would have benefited from oral evidence and explanation for Mrs Mumford. At the hearing before me Mrs Mumford presented her mother's case clearly and succinctly.

10. Mr Avery submitted that if the appellant thought that she should not have been charged then she could take the matter up with the NHS hospital. The appellant had come to this country shortly after major surgery and should have checked the position in relation to charging before accepting treatment from the NHS. Article 8 human rights grounds were not engaged. He submitted that there was no error of law and asked me to uphold the decision.

11. I find that this is too simplistic an approach. Firstly, the appellant claimed that the appropriate NHS regulations were such that she should not have been charged in the first place. Secondly, she had in any event complained and her complaint had not been properly addressed.

12. I find that the FTTJ erred in law. It was not open to him to reach the conclusion in paragraph 12 that the appellant ought to have known that she was not entitled to use the NHS without paying for the service without at least considering and assessing the documentary evidence before him. This showed that the appellant had first obtained private medical treatment in the UK and that the invoice for the NHS medical treatment had not been issued until long after the treatment was received. He should also have addressed the statement from Mrs Mumford disputing that the NHS was entitled to charge for the treatment backed up by relevant documentary evidence as to the provisions of what appeared to be the appropriate regulations. Whilst I appreciate the pressures on First-Tier Tribunal judges determining appeals on the papers, in this appeal there was a substantial respondent's bundle containing relevant documents which, although they are referred to in paragraph 10, do not appear to have been properly considered.

13. Having found that the FTTJ erred in law I set aside his decision on the basis that it could be remade immediately after hearing oral evidence from Mrs Mumford and submissions from her and Mr Avery.

14. I heard oral evidence from Mrs Mumford which is set out in my record of proceedings. She handed in a further copy of a letter dated 7 June 2012 from the GP in the UK who had treated the appellant. The appellant was visiting the UK and appeared to be in good health only three weeks before she returned to Belarus where it was discovered that she had breast cancer. As a result she had a mastectomy operation in a hospital in Belarus on 2 September 2011. Mrs Mumford could not get away from work at such short notice but arrived in Belarus a week later. The appellant was unwell and Mrs Mumford decided that she should come back to the UK so that she could look after her. Because of her job Mrs Mumford was not able to stay very long in Belarus to look after her mother. After she arrived in the UK the appellant became very unwell and Mrs Mumford took her to her GP. The GP recommended that she be taken to hospital and Mrs Mumford decided to take her for private treatment. The GP referred the appellant to Professor Davidson at a Nuffield clinic. She saw him and he referred her to the NHS hospital at Broomfield. He said that it would be better if she had NHS treatment under his care at Broomfield Hospital. The appellant saw Professor Davidson at Broomfield Hospital in October 2011. She was sent for a CT scan and ultrasound imaging.

15. Mrs Mumford accompanied the appellant on all her visits to the GP and the hospital. The appellant does not speak good English. They were never told by the GP, the hospital or anyone else that payment would be required. They were never given any estimate of the cost of treatment. The appellant had chemotherapy treatment on 18 November 2011 after which she developed septicaemia. She was admitted to Broomfield Hospital as an inpatient for one week. She then discharged herself after she became upset, largely because she did not understand most of what was said to her in English. She refused further inpatient treatment.

16. Separately and after taking legal advice the appellant applied for settlement in the UK in September 2011. This was refused in June 2012. On 22 July 2012 the appellant went back to Belarus where she has been ever since.

17. The appellant and Mrs Mumford first heard that a charge was going to be made by Broomfield Hospital when they received the invoice dated 19 June 2013. A further letter was sent to them on 22 July 2014 saying that the bill had not been paid.

18. Mrs Mumford submitted that part of the appellant's treatment was urgent and part not. The question of what charges should or should not be made was regulated by the NHS Guidance on Implementing the Overseas Visitors Hospital Charging Regulations issued by the Department of Health. For non-urgent treatment these Regulations meant that she should have been told that she was going to be charged in advance of the treatment and an estimate of the charges should have been provided (see paragraph 4.3 of the Guidance). Urgent

treatment should have been provided without charge (paragraph 3.18 of the Guidance). She relied on the Overseas Visitors Accessing NHS Primary Medical Services – Guidance for GPs, GPC General Practitioners Committee and BMA – February 2011 which, she argued, showed that there were bilateral health agreements between the UK and a long list of countries which included Belarus. This gave her GP a discretion to accept patients from a country with a bilateral health care agreement as a temporary resident without charge.

19. Mrs Mumford submitted that the NHS invoice incorrectly stated that payment was due immediately whereas under the Regulations and the Guidance there was three months to pay. She argued that it was not possible to challenge the NHS invoice until after it was received because the appellant had no reason to know or think that one was going to be submitted. Mrs Mumford took this up with the local NHS Trust Patient Advice and Liaison Department whose letter dated 16 July 2014 was unhelpful not least because it referred to the Professor by an incorrect name and the wrong Nuffield Hospital. She is pursuing the complaint. She produced a lengthy letter dated 22 July 2014 addressed to the Patient Advice and Liaison Department dealing with this. As to the appellant's Article 8 human rights grounds, the appellant was still in remission, able to fly and desperately needed her support. The appellant came to stay with her, her husband, and her two children.

20. Mr Avery reiterated his earlier submission that there was no error of law and he could not see how any Article 8 grounds were engaged. I reserved my determination.

21. I find Mrs Mumford to be a credible witness. I accept her evidence. The NHS invoice dated 16 June 2013 for a total of £5395 has not been paid. The invoice states that it covers treatment over a period. The earliest date is 9 November 2011 and the last 8 March 2012. I find that the invoice was not sent to the appellant until about 16 June 2013 more than 15 months after the final treatment. The invoice states; "Account raised at the request of Department of Health and UK Borders". This supports my finding, based on Mrs Mumford's evidence, that this NHS Trust not only failed to invoice the appellant until long after the treatments covered by the invoice but also failed to say anything to her about the possibility of charges being made or to give her an estimate of those charges.

22. The NHS Guidance on Implementing the Overseas Visitors Hospital Charging Regulations issued by the Department of Health provides in paragraph 4.3; "non-urgent treatment should not be provided unless the estimated full charge is received in advance of treatment". If any of the appellant's treatment was non-urgent then she should have been given an estimate in advance and the failure to do so means that she cannot be charged later, in particular much later. The urgent treatment she received should have been provided without charge. I find that, in relation to urgent treatment, the appellant received "relevant services" as defined in paragraph 3.18 of the Guidance. Excluding categories

which do not apply to the circumstances of this case these were treatment(s) for which the need arose during her visit. I reach this conclusion because treatment for which the need arises during a visit includes treatment needed where, in the opinion of a doctor employed by the relevant NHS body, treatment is needed quickly to prevent a pre-existing condition increasing in severity. I find that the urgent treatment which the appellant received was treatment needed quickly to prevent a pre-existing condition increasing in severity. The pre-existing condition was the cancer from which she was suffering and in particular the mastectomy operation in Belarus.

23. I find that there is a bilateral health care agreement between Belarus in the UK. On the documentary evidence before me I conclude that "bilateral health care agreements have more significance for hospital treatment than for primary medical care" and GPs have a discretion to accept patients from a country with a bilateral health care agreement as a temporary resident or include them on their lists should they choose to do so. GPs can offer to treat an overseas patient on a fee paying basis but not for emergency or immediately necessary treatment. Regrettably, I have received no assistance from the respondent in relation to bilateral health agreements or the Overseas Visitors Hospital Charging Regulations. On the balance of probabilities I find that the appellant was entitled to treatment from the GP and treatment covered by the NHS invoice free of charge for the reasons I have given.

24. I have not been asked to make an anonymity direction and I can see no good reason to do so.

25. In the light of my conclusion that the appellant succeeds under the Immigration Rules it is not necessary for me to go on to consider the position on Article 8 human rights grounds.

26. In these circumstances I find that the appellant has established, on the balance of probabilities, that the respondent was not entitled either to cancel her visa or refuse to grant her a new one. Having set aside the decision of the FTTJ I remake the decision and allow the appellant's appeal under the Immigration Rules.

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Signed Date 17 November 2014

Upper Tribunal Judge Moulden