**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/19839/2014**

**THE IMMIGRATION ACTS**

**Heard at: Field House**
**On: 15th April and 7th May 2015**

**Decision and Reasons Promulgated**
**On: 12th May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**EH**
**(anonymity direction made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

Representation:
For the Appellant: Mr Jones, Counsel instructed by London Visas Services Ltd
For the Respondent: Ms Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Israel date of birth 14th April 1963. He appeals with permission[1] the decision of the First-tier Tribunal (Judge Geraint Jones QC) to dismiss his appeal against a decision to refuse to vary his leave to

[1] Permission was refused by First-tier Tribunal Brunnen on the 11th October 2014 but granted upon renewed application by Upper Tribunal Judge Goldstein on the 11th February 2015

remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

**Background**

2. On the 18th December 2013 the Appellant made an application for indefinite leave to remain as the dependent family member of a Points Based Migrant. The application was refused on the 7th April 2014. The Appellant duly lodged his appeal, on the grounds that the decision was not in accordance with the immigration rules, that it was contrary to his human rights and that the decision was not in accordance with the law.

3. The matter was listed for the 4th December 2014. On the 29th April 2014 the Appellant's then representatives requested an early listing for a CMR. The Appellant's father, who lives in Israel, had suffered a stroke and the Appellant wished to visit him. He therefore wished the appeal to be listed as soon as possible or alternatively for a ruling that a short absence from the UK would not, in these circumstances, result in his appeal being treated as abandoned. The First-tier Tribunal expedited listing and the matter was set down for the 26th August 2014. It was subsequently agreed that the Appellant's representatives would serve bundles by the 19th August 2014.

4. On that date the Appellant's representatives wrote to the Tribunal requesting that the matter be adjourned:

> "It will be apparent from our previous correspondence that this firm was instructed in good time and that we were actively representing our client's interests and carrying out instructions. However, from mid-June we heard nothing further from him until today. We were awaiting his further instructions and to be put in funds; both these occurred just this morning.
>
> We asked our client for an explanation for the delay, and he explained that the last two months were extremely difficult because he had been refused permission to visit his parents in Israel, and he was worried for their safety. In addition, his wife (a very important witness in this appeal) had to start treatment for cancer abroad, and left the country. She will not be returning until the beginning of September 2014"

The letter goes on to point out that it was the Appellant who had sought to have the matter expedited and that in no way wished to delay matters unnecessarily. Having regard to the "complex nature" of the case, the need to take witness statements and in particular the Appellant's wish to call his wife, the representatives requested that the matter be adjourned. The letter further opined that the matter was too complex to be dealt with in the two hours that Hatton Cross had set aside for the hearing and that the preferred Counsel, Mr Laurie Fransman QC, was not available as he would be in Vienna.

5. The application to adjourn was refused by Designated Judge Manuell in the following terms: "1. It is up to the Appellant to instruct his solicitors properly if he wishes to retain them. 2. Other Counsel can be briefed".

6. On the 26th August 2014 the matter came before Judge Geraint Jones QC sitting at Richmond Magistrates Court. The Appellant was represented by Mr Sayeed of Counsel. Mr Sayeed reiterated the matters set out in the letter of the 19th August 2014. He relied on a skeleton argument dated the 25th August 2014 and set out further arguments as follows:

    a) The Appellant is separated from his wife but continues to play an active and important role in the life of their children, the youngest of whom was 12 years old at the date of the appeal;

    b) He continues to support his family financially and because of his role in caring for their children his wife supports his appeal notwithstanding their separation;

    c) His wife is now seriously ill with cancer and this brings into sharp focus the significance of the care the Appellant provides for his children, both of whom are settled in the UK;

    d) There is a "complex history" in this matter because the Appellant has been the subject of extradition requests by the Russian government. An Interpol Red Notice has been issued in his name. He has defeated two such attempts, one in the UK and one in Spain, on the grounds that the charges are politically motivated. The Red Notice means that travel abroad (for instance to go and apply for entry clearance to return to the UK) would likely be problematic. The Appellant is, in effect, "confined" to the UK;

    Having set out those factors Mr Sayeed submitted that the case was not a straightforward PBS dependency case. It was actually an Article 8 appeal which would take longer than two hours because the Appellant wished to call evidence *inter alia* from his wife (about the family life and her health), Spanish lawyers (about the extradition proceedings) and Israeli lawyers (about the potential danger of arrest, detention and extradition from Israel to Russia). The revised time estimate was one day.

7. Judge Geraint Jones QC refused the adjournment request, and following instructions, Mr Sayeed withdrew. The appeal was considered on the scant evidence before the Tribunal and dismissed. The reasons given for refusing the adjournment were:

    i) anyone could "force an adjournment" by not turning up;

    ii) the appeal could be justly determined on the basis of the evidence that the parties had seen fit to adduce;

iii) "no reason whatsoever" was advanced as to why the Appellant had not attended court;

iv) the fact that the Appellant's wife was out of the country did not prevent her from providing a witness statement. Judge Geraint Jones QC could see no reason to assume that she was out of the country for medical reasons;

v) it would be grossly unjust to allow an appellant to manipulate the procedure of the Tribunal by failing, with no explanation, to provide instructions to his solicitors;

vi) other appellants are waiting for their appeals to be listed and heard.

8. In respect of the substantive appeal Judge Geraint Jones QC was not satisfied that there was sufficient evidence before him to discharge the burden of proof and dismissed the appeal on all grounds.

**Error of Law**

9. I am satisfied that the First-tier Tribunal erred in law in the decision not to adjourn.

10. The First-tier Tribunal was quite correct to express indignation at the way that this Appellant, and indeed his then solicitors, approached this matter. The determination makes the very good point that many (thousands of) other appellants are waiting for their appeals to be listed and that adjournment requests such as these take up valuable time and resources. It was not however the entirely accurate to find that "no reasons" had been advanced for the fact that the Appellant was not ready to proceed with his case on the appointed day. The reason given was that his wife, a key witness, was suffering from cancer and had to travel abroad for treatment: I am unsure why the First-tier Tribunal felt that the reason given for her absence was unclear, since it was plainly spelled out in the solicitor's letter of the 19th August 2014, and was reiterated by Counsel. The Appellant had further been said to have been distracted, if I can put it like that, by the Gaza conflict and his father's illness. The Tribunal might have considered neither of these matters to be *good* reasons why and adjournment was justified, indeed close analysis might have shown that to be the case, but they were reasons that merited consideration and this was not done. Nor did the determination give any weight to the fact that the Appellant had previously sought to have his hearing brought forward: hardly the actions of a vexatious litigant or someone seeking to delay proceedings.

11. Futhermore Mr Sayeed's submissions on the day made it clear that the Appellant was then intending to advance "complex" argument and evidence about the peculiar circumstances in which the Appellant finds himself, being

the subject of the Interpol Red Notice. This issue was significant, since it went to the heart of the Appellant's Article 8 family life with his young daughter. His case was that if he is removed, his lawful return to the UK would face serious obstacles in that he may well be detained in Israel pending resolution of Russia's extradition request. That separation of father and daughter would come at a time of great stress and uncertainty for her, because of her mother's illness. Unpalatable as an adjournment in these circumstances might be, this was a matter that deserved careful consideration, in light of the Tribunal's obligations under s55 of the Borders, Citizenship and Immigration Act 2009.

12. For those reasons I find that the decision to refuse to adjourn, and to determine the appeal in the absence of evidence, was flawed. The decision is set aside.

**The Re-Making**

13. At the close of the 'error of law' hearing there was some discussion between the parties as to the most appropriate disposal. Mr Jones indicated that although ordinarily he would have requested remittal to the First-tier Tribunal in these circumstances, in this case there were particular reasons why it would be preferable to go ahead and remake the decision in the appeal without the need to further adjourn. He pointed out that notwithstanding the submissions made by and on behalf of the previous representatives about the complexity of this case, as matters stood today the issue was in fact narrow.

14. The application had been for indefinite leave to remain as the dependent spouse of a Points Based System Migrant. The reasons for refusal raised two issues under the Rules: the Appellant had failed to establish that he had passed his "life in the UK' test and the Respondent could not be satisfied that the Appellant's relationship with his wife was subsisting. The first matter could be easily resolved with reference to the documentary evidence: the Appellant had passed his Life in the UK test, and evidence of the same had been sent with his application. As to the Appellant's relationship with his wife Mr Jones proposed to call both of them as witnesses. He asked that their evidence be taken immediately following the error of law hearing. The Appellant's wife Ms S had very recently – in the preceding 48 hours - been informed that the cancer that she thought had been successfully treated had in fact returned, and that she would imminently have to leave the UK in order to go to the USA for further therapy. It could not be said with certainty when she would be able to return to appear in any further hearing. This was at 3pm. Ms Holmes for the Respondent had not had any opportunity to read the bundle that she had received that morning but in view of the pressing nature of the request she very fairly agreed to prepare the case. She was given 30 minutes to read the witness statements. I am sure that the Appellant and his family are very grateful to her for agreeing to take on a full remaking so late in the day; for my part I am very grateful to both representatives for their clear, concise and helpful presentation.

15. On the afternoon of the 15th April 2015 I heard live evidence from the Appellant and his wife, S. That evidence is summarised below. The matter was then adjourned part-heard for lack of time, resuming on the 7th May in order to hear oral submissions.

*The Matters in Issue*

16. The Respondent's reasons for refusal are set out in a letter dated 15th April 2014. It is noted that the Appellant arrived in the UK with leave to enter as a visitor on the 30th March 2008. He thereafter successfully applied to vary his leave, being granted Leave to Remain as the Dependent of a Points Based Migrant until the 14th November 2011, leave that was further extended until the 17th November 2013. On the 16th November 2013 he made an application for further leave to remain in the same capacity, thereafter varied to an application for Indefinite Leave to Remain as the partner of a Points Based Migrant.

17. The relevant paragraph of the Rules is paragraph 319E:

> To qualify for indefinite leave to remain as the Partner of a Relevant Points Based System Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
>
> (b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who:
>
> (i) has indefinite leave to remain as a Relevant Points Based System Migrant; or
>
> (ii) is, at the same time being granted indefinite leave to remain as a Relevant Points Based System Migrant, or
>
> (iii) has become a British Citizen where prior to that they held indefinite leave to remain as a Relevant Points Based System Migrant.
>
> (c) The applicant must have, or have last been granted, leave as the partner of the Relevant Points Based System Migrant who:
>
> (i) has indefinite leave to remain as a Relevant Points Based System Migrant; or
>
> (ii) is, at the same time being granted indefinite leave to remain as a Relevant Points Based System Migrant, or
>
> (iii) has become a British Citizen where prior to that they held indefinite leave to remain as a Relevant Points Based System Migrant.

(d) The applicant and the Relevant Points Based System Migrant must have been living together in the UK in a marriage or civil partnership, or in a relationship similar to marriage or civil partnership, for at least the period specified in (i) or (ii):

(i) If the applicant was granted leave as:

(a) the Partner of that Relevant Points Based System Migrant, or

(b) the spouse or civil partner, unmarried or same-sex partner of that person at a time when that person had leave under another category of these Rules
under the Rules in place before 9 July 2012, and since then has had continuous leave as the Partner of that Relevant Points based System Migrant, the specified period is 2 years

(ii) If (i) does not apply, the specified period is a continuous period of 5 years, during which the applicant must:

(a) have been in a relationship with the same Relevant Points Based System Migrant for this entire period,

(b) have spent the most recent part of the 5 year period with leave as the Partner of that Relevant Points Based System Migrant, and during that part of the period have met all of the requirements of paragraph 319C(a) to (e), and

(c) have spent the remainder of the 5 year period, where applicable, with leave as the spouse or civil partner, unmarried or same-sex partner of that person at a time when that person had leave under another category of these Rules.

(e) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.

(f) The applicant and the Relevant Points Based System Migrant must intend to live permanently with the other as their spouse or civil partner, unmarried or same-sex partner.

(g) The applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(h) DELETED

(i) The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days will be disregarded.

18. Paragraph 4 of the letter contains the central ground of refusal. It appears to omit two key words which I have added in parenthesis to make sense of it:

> "Although it is accepted that at the time of your previous grant of leave you were married to a Tier 1 Migrant, no evidence has been provided to show that you are still married, especially since it is noted that you have spent a significant period out of the UK without your spouse. Therefore it is considered that you have [not] established that you are the [partner] of a

> person who has indefinite leave to remain as a Relevant Points Based System Migrant, or has become a British Citizen where prior to that they held indefinite leave to remain as a Relevant Points Based System Migrant. Consequently you do not meet the requirements of paragraph 319E(b)."

19. Paragraph 7 further states that the Appellant has failed to provide any evidence that he has passed his 'Life in the UK test'.

*The Evidence*

20. The Appellant adopted his witness statement dated 14th April 2015. He was born in the former Soviet Union to Jewish parents, who have since emigrated to Israel. He is now a citizen of Israel. Whilst living in post-Soviet Russia the Appellant "managed to grow a significant level of wealth". He traded in commodities such as wheat, oil, steel and meat. Later on he went into banking.

21. The Appellant and S met in the early 1990s. They have been married for 22 years. He describes her as the love of his life. When they married each already had a son from a previous relationship. After their marriage they lived together with her son in Moscow. The Appellant has always treated his stepson as his own child, and continues to support him now he is an adult. They have two children from their marriage, a son born in 1995 and a daughter born in 2002. They all lived together in a large house in the suburbs of Moscow. They were very happy together.

22. In 2006 things started to go wrong. The Appellant had invested in a large real estate development and this had brought him and his co-investors into conflict with the government, which seized the land and launched prosecutions against the Appellant and others. By 2007 it became clear that the Appellant had to leave Russia. He was living in hiding to avoid arrest or worse. In 2008 the family relocated to London. S was granted leave to enter as an Investor, having invested £1,000,000 in UK government bonds. The children were treated as her dependents. The Appellant initially entered as a visitor but was subsequently granted leave to remain as a dependent to S.

23. When they arrived in London they lived in an apartment in Knightsbridge. The Appellant was also using it as his office and as a result it was quite hectic. There were frequently business associates coming and going, and the Appellant was "always on the phone" or on his computer. The Appellant said that they had never employed a nanny to look after their children. He was very proud that he and his wife had chosen to try and be a "normal" family notwithstanding their wealth. They had an "aunty" who would help out, particularly when his wife was very ill, and sometimes used a driver, but generally they had always tried to do everything for their children themselves. They lived there with their daughter and their son who were enrolled in private schools. The family did their best to re-establish themselves in the UK.

24. In 2010 S was diagnosed with cancer. She received private treatment in London and in Germany. At this time, when she was undergoing chemotherapy, she really wanted somewhere peaceful to try and focus on her recovery. She looked for and found another apartment, in Chelsea. This was a place that she and their children could live without being disturbed by the business activity going on in Knightsbridge. The Appellant would stay at the flat in Chelsea with them, and if he was to be working late, stay over in Knightsbridge. Sometimes she needed to be alone and he would bring the children – and pets – back to Knightsbridge with him.

25. Then in 2010 the family received a further blow when the Russian authorities attempted to extradite the Appellant from London. The Appellant had to face these proceedings, which he won in Westminster Magistrates' Court, at the same time as S was battling cancer. It was a stressful time for the family but they held together.

26. In 2012 S was given the "all clear". The Appellant booked her into a private spa in Spain to aid her recovery. That year was her 45th birthday and he decided to fly to Spain in order to organise a surprise birthday party for her in Ibiza. He was arrested as he landed, the Spanish police informing him that he was to be extradited to Moscow. He was held in detention for some weeks, with S shuttling between Spain where she could visit him, and London where she was trying to organise legal representation. In November 2012 he was granted bail but was not permitted to leave Spain.

27. The Appellant set up home in Marbella. S and the children remained in London. They were all under a lot of stress, having been advised that statistically he was likely to lose his battle against extradition in the Spanish court. He feared for his life if returned to Russia. In January 2013 the Appellant and S quarrelled over "something minor" and she did not visit him for a few months. The Appellant did something that he had never done before; he was unfaithful to S. He expresses deep regret for having an affair during this period. He said that unlike other wealthy Russians he knew he had never had an extra-marital relationship. The woman fell pregnant and subsequently gave birth to a little girl.

28. By May 2013 the Appellant and S had made-up and she attended the lavish 50th birthday party that he threw for himself in Marbella. He describes her coming to this party as one of the "best moments" in his life. Sadly, in June 2013 S was told that her cancer had returned. These were the worst moments. S was upset about the affair, and distressed about her illness. The Appellant had lost his case in the lower courts in Spain. They were facing the greatest challenge of their long marriage. It was during this time that S instructed Mischon de Reya solicitors to make settlement applications for her and the children.

29. In November 2013 the Spanish Supreme Court held that the Appellant should not be extradited. This was a first in Spain's legal history and it was a great victory. He was released from bail and was able to travel back to the UK. The night he arrived he was greeted by his wife and children and they went out together for a celebratory meal. He immediately began studying for his 'Life in the UK' test to support his application and passed it. The application that is the subject of this appeal was made on his behalf. The Appellant avers that his relationship with his wife is subsisting, as it was at the date of the application. He loves her very much. He believes that she has forgiven him for his affair. She and the children know about the little girl. He and S have always treated all their children as part of their family and she will be no different. He is fully providing for this child and S is aware of and supports that decision.

30. The remainder of the Appellant's witness statement is taken up with his complaints against his former representatives. I need not address these matters herein save to note that the Appellant vigorously contests the assertions made in the letter of the 19th August 2014: he had put his solicitors in considerable funds well before the appeal and had maintained contact with them throughout the entire period. He was not made aware that either he or his wife should attend court. She had been on "stand-by" to come back to the UK if needed but was not asked to. The submission made by counsel on the day, that the marriage had broken down, was made without instructions.

31. S adopted her witness statement dated 14th April 2015. She confirmed that she and the Appellant have been married almost 23 years. Asked to describe her husband she said:

> "He's a strong man – a man of good character who is a good friend. He spends a lot of time caring about his partners, and his friends. He is the ideal of courage. The bible says that I should not create an idol – but he is my ideal".

She said that when they lived together in Russia their marriage was seen amongst their peers as being exemplary – they were like a "brand". People looked to them as an inspiration because their marriage was good and so were their lives. They were well off, secure and happy.

32. When they were forced, in 2008, to leave Russia their lives were "annihilated". They had to leave suddenly, taking only a few possessions and their passports. They had to leave everything behind and rebuild their lives in London. They could not speak English well and the experience "shattered" them: "we were not prepared for such a turn of events…but the main thing for us was that we were together".

33. They set up home in Knightsbridge. They tried to maintain a normal life. S describes her husband as a loving and active father. He has worked hard to provide material things for his children but the main thing that he brings them

is love and care. They faced the "terror" of the attempted extradition and her illness together, and the most important thing was that they had each other.

34. When she became ill she found it difficult to relax in the flat in Knightsbridge. The area was full of Russians and she felt as if she "were in Red Square". She wanted peace and quiet and asked the Appellant to find somewhere more tranquil for she and the children to live. This was how they came to have the flat in Chelsea: "we chose this model to save our family". They would all stay there together for three to four nights a week, and sometime she or the children would stay over at the "work' flat.

35. For S, things became immeasurably more difficult when her husband decided to throw her a surprise party in Spain. What she got was a lot of surprises, but not the kind he had in mind. She was in the clinic in Madrid when she received the news that he had been arrested in Ibiza. It was the middle of the night and she went straight to Valencia where he had been transferred. He was kept there for a few days before being sent to prison in Madrid. She was visiting him each day. She said that the terror she experienced in these few weeks was "unbelievable". She was trying to sort out lawyers in London as well as looking after their daughter and seeing their son, who was at that time in Portugal. She was in constant fear that her husband would be sent to Russia.

36. As it was, he defeated the extradition request in Spain. In the time that he was stuck there however, one of the "many" women who "circle men like him" was successful. S said that Russian men with money are a constant target for "women who want support" and even some boys. She has come to accept it as part of her life but never thought that one would actually succeed. In her oral evidence S made clear her distaste for the woman involved, but confirmed that the little girl who was born of the affair will be treated like all the rest of her husband's children, by her as well as him. She was very upset when she had found out about it but when he returned to the UK in November 2013 he promised her that he loved her and no-one else; she now accepts this and has forgiven him, although she describes this period as being a "tremendous test" for their marriage, and for her. She believes that it was the stress of 2013 that resulted in the cancer returning.

37. S states the she is committed to her husband, and he to her. On the 13th April 2015 she was told that they have found another lump. Her consultant is recommending that she goes to America for pioneering treatment. She will be away for the next few months and her daughter and husband will remain in London. This will be yet another test of their endurance, but it is one she is confident about tackling.

*My Findings*

38. As Mr Jones frankly pointed out, this was not a case that required a full day's hearing, nor junior and lead Counsel. There are two grounds for refusal under

paragraph 319E, and if the Appellant can show, on a balance of probabilities, that they are both wrong, he succeeds.

39. The first matter can be dealt with very briefly. Ms Holmes used her best endeavours to find out whether the Respondent had indeed ever received a copy of the Appellant's 'Life in the UK test'. She managed to get it on the day of the resumed hearing, and she accepts that he had passed that test at the relevant time.

40. The second matter was whether this is a genuine and subsisting marriage. Having heard the live evidence, and having conducted her own sensitive but efficient cross examination, Ms Holmes conceded at submission stage that the evidence was wholly credible, and she could advance no reason why I should reject it. I entirely agree.

41. This is a marriage that has lasted for well over two decades. The past nine years have been extremely testing. This couple has faced investigation and potential prosecution by the Russian authorities, accepted by both Westminster Magistrates' Court and the Supreme Court of Spain to be politically motivated[2]. They have lost all that they had in Russia – their home, friendships, security and influence. Having re-established themselves in the "little Moscow" of Knightsbridge they were then faced with the cumulative blows of the extradition request to the UK government, the Interpol Red Notice and the diagnosis of cancer. Just when they thought that they had dealt with these challenges, they had to go through the entire thing again, this time in Spain. The Respondent's reasons for refusal letter dryly notes that the Appellant has spent long periods absent from the UK without his spouse. Presumably that is a reference to the time he spent in a Spanish jail and thereafter on bail awaiting resolution of his extradition proceedings. It is clear from the evidence that there were periods during this stressful period that they were not living under the same roof. I accept that S was extremely upset when her husband told her he had had an affair but I am equally satisfied that she is telling the truth when she says that this is now behind them. All long marriages go through difficult periods: that is part of married life. She told me that they are looking to buy a house in the UK. They are committed to each other. Her evidence was compelling and wholly credible. I am accordingly satisfied that they were together as a couple at the date of the application, and that they remain a couple today.

42. I find on the balance of probabilities that the Appellant meets all of the relevant requirements of paragraph 319E.

**Decisions and Directions**

43. The determination of the appeal by First-tier Tribunal involved the making of an error of law and it is set aside.

[2] See paragraph 16 of the decision of Senior District Judge Workman dated 15th June 2010

44. I re-make the decision by allowing the appeal under the Immigration Rules.

45. This case involves a minor, and information about the health of a witness which should remain private. For those reasons I make the following direction for anonymity:

    "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings".

Deputy Upper Tribunal Judge Bruce
7th May 2015