Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21949/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 10 June 2015	**On 25 September 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MRS RAISSA BEVENOVA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D McGlashan, McGlashan MacKay, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Clough dismissing the appeal under the Immigration Rules and on human rights grounds.

2) The appellant is a Russian citizen. It appears that she entered the UK illegally in 2003. In 2011 the appellant married a British citizen, Mr Mohammad Zaraf Doulati. Subsequently the appellant made a number of applications for leave to remain as a spouse. Following the refusal of the third application in September 2012 she made a human rights claim. It is the respondent's decision refusing this which has given rise to the present appeal.

3) The Judge of the First-tier Tribunal made findings on the relationship between the appellant and her husband. The appellant's husband is in

receipt of Disability Living Allowance. The appellant cooks for him and shops and cleans. She helps him with his medication and medical appointments. The appellant's husband was aware of her immigration status from 2005. The appellant has passed an English language test.

4) The judge accepted that the appellant has established a private and family life with her husband and that Article 8 was engaged. The judge proceeded to consider the issue of proportionality. She noted that the appellant had been in the UK without leave since December 2004. She and her husband married in the knowledge of her lack of status. The appellant is a Russian citizen and formerly worked as an accountant in Russia. The judge saw no reason why the appellant would not obtain employment in Russia if she returned there, where her two adult children reside.

5) The judge noted that the appellant's husband has health problems and is in receipt of Disability Living Allowance. The appellant's husband would be able to receive medical treatment in Russia. The appellant's husband had a Russian passport of his own, although he denied that he had a right of residence in Russia. He had travelled to Russia for lengthy visits in 2003, 2004 and 2006 in order to visit his elderly father and close friends. The judge, although accepting that the appellant helped to care for her husband, considered that care services would be available from social services in the UK were the appellant's husband to remain in the UK after the appellant returned to Russia. In any event the judge was satisfied that the appellant and her husband would be able to live together in Russia.

6) Permission to appeal was granted on two grounds. The first of these was that the judge had found that adequate medical treatment would be available in Russia for the appellant's husband but arguably the judge erred by not identifying the evidence upon which this finding was made. The second ground on which permission was granted was that the judge arguable erred in applying a test of whether it would be "unjustifiably harsh" for the appellant's husband to relocate to Russia.

Submissions

7) At the hearing before me Mr McGlashan submitted that there was no evidence showing that the appellant's husband would have the right to reside in Russia. The medical evidence showed the extent of his ill-health. The judge found that health care was available in Russia but this was a speculative finding with no evidence to support it. There was a letter from the GP saying that the appellant's husband needed to be reminded to take his medication and that he may black out when he has an asthma attack.

8) Mr McGlashan further submitted that the judge applied a test of whether it would be unjustifiably harsh to expect the appellant and her husband to relocate to Russia but the test should have been whether there were exceptional circumstances. A full assessment was required in relation to proportionality. The judge did not mention that the appellant's husband was a British citizen. The relevance of this arose in the case of Mirza [2015]

CSIH. In assessing proportionality the individual circumstances of the parties should have been taken into account and the judge did not do this.

9) For the respondent, Mrs O'Brien said that the starting point for consideration had been paragraph EX.1 of Appendix FM. The appellant did not meet the Rules. The Judge of the First-tier Tribunal found that paragraph EX.1 was not satisfied and there were no insurmountable obstacles to the couple carrying on their married life in Russia.

10) On the medical evidence, Mrs O'Brien continued, it was for the appellant to show that his medical circumstances were a barrier to leaving the UK. The burden of proof in relation to this was on the appellant.

11) Mrs O'Brien continued that it had not been established that the appellant's husband would not be able to gain entry to Russia. The judge made rational findings on the evidence, which was that the appellant's husband has visited Russia.

12) Although the appellant's spouse needed assistance with his care it was not only his spouse who would be able to provide this. There were other options for support if the appellant left the UK. The judge referred to the possibility of assistance from social services. The appellant's husband was in receipt of Disability Living Allowance. It was not unreasonable for the judge to rely on her own knowledge of what assistance might be available in this country. In conclusion, it was not possible to envisage what other decision could have been made and accordingly the judge had not erred.

13) In response Mr McGlashan pointed out that the appellant's husband had formerly been a citizen of Afghanistan. His father had served in the Afghan Army during the Russian occupation and had travelled to Russia for medical treatment. The appellant's husband used to visit his father in Russia and he was allowed to enter Russia for this purpose.

14) Mr McGlashan continued that although paragraph EX.1 of Appendix FM was mentioned in the refusal letter, there had been no real discussion about this at the hearing before the First-tier Tribunal. The emphasis was on proportionality outwith the Immigration Rules of the appellant's removal from the UK.

15) Mr McGlashan further submitted that there was no evidence on which the judge could have found that health care would be available if the appellant's husband was left alone in the UK. He required the assistance of the appellant. There was no evidence as to the availability or frequency of support from social services.

16) Mr McGlashan further submitted that it was relevant that the appellant's husband was in receipt of Disability Living Allowance. Essentially the respondent's position was that the appellant should leave the UK and apply for entry clearance. The respondent had not said that the appellant would not receive entry clearance. The appellant's husband has Disability Living Allowance and meets all the requirements. It was not proportionate to

require the appellant to return to Russia to apply for entry clearance, having regard to Chikwamba [2008] UKHL 40. The appellant had brought herself to the attention of the authorities and had permission to marry.

17) Mr McGlashan said that he would ask for the appeal to be remitted to the First-tier Tribunal and heard afresh. The findings made by the judge were not based on evidence before the Tribunal. Health functions in Russia were mentioned in the respondent's refusal letter but did not relate to the circumstances of the appellant's husband and the assistance he required. There was also the issue of whether he had a right to reside in Russia. When the appellant's husband came to the UK he was given first refugee status, then ILR, and then citizenship. The judge had failed to take the entire case into consideration in considering the proportionality of the refusal of leave. If the appellant was to apply for entry clearance from abroad this could only be granted.

Discussion

18) The issues in this appeal developed in the course of the hearing before me. I refer in particular to Mr McGlashan's reference to the case of Chikwamba, which although not specifically referred to in the application for permission to appeal, would seem to be relevant to the issue of proportionality, in accordance with R (on the application of Chen) v SSHD (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 00189. It is difficult to fault the Judge of the First-tier Tribunal for failing to consider the Chikwamba issue if it was not argued before her but there is an error of law in her consideration of the issue of proportionality. This arises from the judge's use of a test of whether consequences of the appellant's removal would be "unjustifiably harsh". This test may have some application to a person whose immigration status is precarious but, as pointed out in Mirza [2015] CSIH 28 at 22, there is still a "need for a specific, individual assessment of the whole facts including the degree to which it may be said that the status of the relevant party was truly precarious." Since the judge made her decision the understanding of how the test of proportionality outwith the Rules is to be applied has been further considered as, for example, in the more nuanced approach of asking whether there are "compelling circumstances", discussed in the leading authority of SS (Congo) [2015] EWCA Civ 387 at 33. The way in which the judge applied a test of whether removal would be "unjustifiably harsh" in this appeal was not compatible with the approach to proportionality in SS (Congo). In particular the judge applied this test not only to the removal of the appellant but also, at paragraph 23, to the impact on the appellant's husband of remaining here alone. Overall the judge's use of this test meant that the issue of proportionality was not given full and proper consideration and accordingly the judge erred in law. I am satisfied that owing to this error the decision of the Judge of the First-tier Tribunal should be set aside.

19) The other point on which permission to appeal was granted is less substantial. As Mr McGlashan acknowledged, in the respondent's reasons for refusal letter reference was made to medical facilities in Russia, although Mr McGlashan submitted that these did not relate to the appellant's

husband's specific conditions. Nevertheless, I consider that the material in the refusal letter was sufficient to show that the respondent had considered the availability of medical facilities in Russia and, as Mrs O'Brien rightly submitted, it would then be for the appellant to show that treatment of the sort required by her husband would not be available.

20) I gave little weight to Mr McGlashan's further point, namely that there was no evidence on the availability of care and support in the UK. As Mrs O'Brien rightly submitted, the availability of such support in this country is a matter which the judge was entitled to regard as being within judicial knowledge. If for some reason the appellant sought to show that the type or degree of care he required would not be available in the UK then the burden would be upon the appellant to adduce evidence in relation to this.

21) I have considered whether to substitute a fresh decision for the decision of the First-tier Tribunal. Mrs O'Brien submitted that no other decision could have been reached than the decision made by the Judge of the First-tier Tribunal. This comment was made, however, prior to Mr McGlashan's submission upon the relevance of Chikwamba. As I have already indicated, the Chikwamba issue does not appear to have been argued before the First-tier Tribunal and no notice of it appears to have been given to the respondent. Given that the Chikwamba issue was not considered before the First-tier Tribunal and given that there are a number of points on which either party might wish to adduce further evidence, I consider that the appropriate course is for the appeal to be remitted to the First-tier Tribunal to a judge other than Judge Clough for a fresh decision to be made on Article 8 with particular consideration of the question of whether it would be disproportionate to expect the appellant to return to Russia to make an entry clearance application to rejoin her husband in the UK.

22) I note in this regard that the suitability requirements under Appendix FM were considered by the respondent in the refusal letter and the appellant was considered to satisfy these requirements. No consideration was given to the eligibility requirement for entry clearance in E-ECP.3.3, to which Mrs O'Brien helpfully referred me at the hearing, in relation to the appellant's husband's receipt of Disability Living Allowance. Of course, at the time of the refusal letter this was not an issue under consideration. It would, however, be appropriate for the appellant to adduce evidence to show that the requirements of E-ECP.3.3 would be satisfied were an application to be made. Evidence to be adduced in relation to maintenance should include evidence as to the adequacy of accommodation. A schedule of income and outgoings for the appellant's husband should be provided.

23) The findings made by the Judge of the First-tier Tribunal in relation to the existence of private and family life between the appellant and her husband are preserved. It appears from the evidence before the First-tier Tribunal that the appellant has successfully completed an English language test and confirmation of this should be produced. Where there is further medical evidence or evidence as to the care and support requirements of the appellant's husband, then evidence may be adduced in relation to this.

Conclusions

24) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

25) I set aside the decision.

26) The appeal is remitted to the First-tier Tribunal for the decision to be remade by a judge other than Judge Clough in accordance with the observations set out above.

Anonymity

27) The First-tier Tribunal did not make an order for anonymity. No such order has been sought and I see no reason of substance for making one.

Signed Date

Judge of the Upper Tribunal