**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/22383/2014

**THE IMMIGRATION ACTS**

| **Heard at: Field House** | **Determination Promulgated** |
|---|---|
| **On: 28th May 2015** | **On 30th June 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**MR OLEKSANDRA PADIY**
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms A Watterson, Counsel
For the Respondent: Mr S Witwell, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of the Ukraine born on 30 April 1962. However, for the sake of convenience, I shall continue to refer to the latter as the "appellant" and to the Secretary of the State as the "respondent", which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant's appeal to the First-tier Tribunal was against the decision of the respondent to refuse his application dated 2 May 2014 for leave

to remain pursuant to Article 8 of the European Convention on Human Rights.

3. A Judge of the First-tier Tribunal, KSH Miller allowed his appeal. First-tier Tribunal Judge Fisher in a decision dated 1 April 2015 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge failed to consider whether the Immigration Rules had been adequately taken into account in respect of the appellant's circumstances. In *R (Aliyu & Anor) v Secretary of State for the Home Department [2014] EWHC 3919 (Admin)* the court held that such consideration would condition the nature and extent of the consideration required in respect of the claim under Article 8 outside the Immigration Rules. At Paragraph 29 the Judge concludes that there would be an interference with the appellant's private life, but he has not identified the nature of that private life, having regard to the decision in *Nasim and Others (Article 8) [2014] UKUT 00025 (IAC)* nor does he appear to have considered that a private life was established when the appellant was in the United Kingdom unlawfully for 10 years.

4. Thus the appeal came before me.

**First-tier Tribunal's Findings**

5. The First-tier Tribunal allowed the appellant's appeal, concluding that. :

> "[25] this is an unusual case, in as much as, if the appellant had requested, in 2003, that she be added to her husband's claim as his dependent, it is difficult to see that she would not have been granted leave with him and her son. Quite why her solicitor told her to wait is not apparent, but it is not altogether surprisingly, given the poor advice that appellants often appear to receive.
>
> …
>
> [27] Section 19 of the Immigration Act 2014 outlines the public interest considerations applied in all article 8 cases. It is stated that the maintenance of effective immigration control is in the public interest and that persons who seek to remain in the United Kingdom are able to speak English because they are less likely to be burden on the taxpayer and are better able to integrate into society. In this regard I am satisfied that all that the appellant's spoke Russian during most of her evidence, which was understandable that she was extremely nervous, she can speak a degree of English and furthermore, I am satisfied that she would try to obtain employment. In any event however her husband was clearly hard-working, holding two jobs, has maintained her and her sons in the past and would continue to do so in the future.
>
> [28] finally, whereas section 117B states that "little weight to be given to the relationship formed with a qualified partner, that is established by a person at the time when the person is in the United Kingdom unlawfully" is clearly not the case here, the appellant and her British national husband have been married for 27 years.

> [29] having regard to the five stage test in Razgar, I am satisfied that the appellant's removal would be an interference with her right to family and private life in the UK, such as to engage Article 8. I am also satisfied, however, that the respondent's decision is in accordance with the law. However, having regard to what I have stated above, I do not consider that it is necessary for the maintenance of effective immigration control, since she would have obtained status had she made an application in line with that of her husband."
>
> [30] With regard to whether her removal would be proportionate, I find that, in light of all that I have stated above, it would not be so. The effect would be to break up a marriage that has endured for a very long period of time, as well as separating the appellant from her two sons who have status here. It also place a real difficulty with regard to accommodation in the Ukraine, even if her husband were to remain in the UK and sent money to her.
>
> [31] In the light of all that I have stated, therefore, I do not find that it would be unduly harsh for her to return and that the circumstances are sufficiently exceptional to justify her be granted leave to remain."

6. Therefore the appeal involves two steps, the first being to determine whether there is an error of law in the determination of the first-tier Tribunal and the second, if I find there was an error, to hear evidence or submissions to enable me to remake the decision.

**The grounds of appeal**

7. The respondent in her grounds of appeal states the following which I summarise. The Tribunal has erred in law in its approach to the Article 8 assessment in the following ways. It was made clear in *Gulshan [2013] UKUT 00640 (IAC)* that the Article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the Immigration Rules. In this case the Tribunal has failed to identify why the appellant circumstances are so compelling that they amount to exceptional circumstances outside the Immigration Rules.

8. The Tribunal's assessment of s117B of the Immigration Act 2014 is incorrect. At paragraph 28, the Tribunal has found that the appellant and her husband established their relationship prior to coming to the United Kingdom they have not established their relationship when she is here unlawfully. This is illogical, whilst the appellant and her husband may have established their relationship prior coming to the UK, they have established their relationship together in the UK when the appellant has overstayed her permitted leave. Thus her stay during their relationship in the UK was unlawful and therefore little weight should be given to it which the Tribunal has failed to do.

9. The second ground of appeal states that the Judge has failed to give reasons or adequate reasons for finding on material matters. The Tribunal has failed to provide adequate reasons for why the appellant's

circumstances are either compelling or exceptional. The appellant and her husband were fully aware throughout their relationship here that the appellant's immigration status was unlawful and that they may not be able to continue their relationship together in this country. Whilst the Tribunal found at paragraph 25 and 27 that had the appellant sought to be included as a dependent of her husband's application, she would have been granted leave. This is pure speculation on the Tribunal's behalf. The Tribunal ignored the fact that the appellant did not seek to be included as a dependent of her husband and failed to seek to regularise her stay for almost a decade after her leave expired and approximately three years after her husband had been granted leave. No reasonable explanations for these delays have been given and the appellant should not be given credit for actions which she did not take. Article 8 does not give the appellant the right to choose where she exercises that family life.

10. There are no is insurmountable obstacles to the appellant's husband returning to Ukraine where they have bought lived the majority of their lives, including their youth, formative years and education, speak the language and may have family and friends there. Whilst the Tribunal found at paragraph 26 that they would be unable to obtain employment in Ukraine due to their ages, the Tribunal has not based these findings on any independent evidence and it is therefore merely speculation. It is submitted that there is no evidence. The appellant and her husband would be in a position no different to that of any other persons their age in Ukraine.

11. They both have savings and family in Ukraine who can help them with seeking employment and accommodation. It remains the choice of the appellant's husband as to whether he relocates to Ukraine or not and it is a decision he and the appellant must make and not the Tribunal on their behalf. If the husband chooses to remain in the United Kingdom, they can maintain contact via modern methods of communication and visits. It is proportionate to remove the appellant given her blatant disregard for immigration law of this country and given there is no evidence nor consideration by the Tribunal as to whether she would even meet the requirements of entry clearance.

12. Whilst the Tribunal has found that the appellant has established a private life in the UK, the Judge has failed to direct himself to the case of *Nasim and Others (Article 8) [2014] UKUT 00025 (IAC)*, where it was found that the use of Article 8 had very limited use for private life cases which did not interfere with the person's personal, moral and physical integrity. The Supreme Court in *Patel and others v Secretary of State for the Home Department [2013] UKSC 72* serves to refocus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that article 8's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. The Tribunal made no reference to the appellant's moral and physical integrity, and it is submitted that the appellant's circumstances

in the United Kingdom and are not sufficient for her to allege that her removal would breach her moral and physical integrity. There are not very significant obstacles to the appellant's re-integration into Ukraine and there is nothing in the appellant's private life which cannot be continued in Ukraine.

13. With regard to paragraph 117B of the Immigration Act 2014, the decision to remove her is proportionate. The appellant stay in the United Kingdom has been unlawful since her leave expired in October 2003, therefore little weight should be given to a private life in those circumstances and the Tribunal has failed to do so. Secondly whilst the Tribunal has found at paragraph 27, that the appellant can speak English and can obtain employment, the evidence suggests otherwise. The appellant used a Russian interpreter at the hearing which does not suggest that her English is sufficient to either for her to integrate or prevent her becoming a burden on public resources or able to obtain employment and become financially independent.

**The hearing**

14. I heard submissions from both parties as to whether there is an error of law in the determination of the first-tier Tribunal.

**Decision on the error of law**

15. Having considered the determination as a whole, I find the judge's consideration of the appellant's appeal in respect of Article 8 is materially flawed. The appellant did not apply for further leave to remain in this country pursuant to the Immigration Rules but her application was pursuant to Article 8 of the European Convention on Human Rights in respect of her family life with her husband of 27 years.

16. The exceptional circumstances found to exist in this appeal were, as the Judge found, that had the appellant added herself to her husband's claim as his dependent in his application in 2003, it is difficult to see why she would have been granted leave to remain as his dependent. The Judge accepted the appellant's explanation that her solicitor told her to wait. The Judge went on to say that it does not surprise him given the poor advice that appellant is often do appear to receive. In making this finding the Judge did not consider that the appellant remained in this country unlawfully for 10 years and speculated that the appellant did not apply because of bad advice given to her.

17. The Judge took into account section 117B and stated that "little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully". The Judge stated that this is clearly not the case here as the appellant and her British national husband having been married for 27 years.

18. The Judge did not take into account that most of this relationship was established outside Ukraine and the family life that they have enjoyed in the United Kingdom was at the time when the appellant was in this country unlawfully and had made no attempts whatsoever to regularise her stay for over 10 years.

19. The Judge also stated that the appellant speaks English even though she gave evidence through a Russian interpreter. The Judge stated that the appellant was extremely nervous and "she can speak a degree of English". The Judge erred in his finding that given that the appellant has demonstrated that she speaks English to a degree, she should be granted leave to remain. Furthermore, on the evidence this is a perverse finding that nervousness precludes a person from speaking English.

20. The Judge found that there are insurmountable obstacles to the appellant and her husband continuing family life in the Ukraine because both of them would not be able to find jobs due to their ages. The Judge did not base this finding on any objective evidence that people over 50 cannot obtain jobs in the Ukraine. The Judge thereby fell into material error.

21. Having considered the determination as a whole I conclude that the Judge erred in law in his evaluation of the appellant's appeal pursuant to Article 8 and I therefore set aside the decision in its entirety and remake the decision.

22. I find that if the appellant's husband can support the appellant's application to join him as his spouse, she can make an application from her home country. The Judge said that the appellant's husband has been able to support her and her two sons and there is no reason to suggest that he cannot continue to do so. This should have suggested to the Judge that if the appellant's husband is able to fulfil the maintenance and other requirements of the Immigration Rules there is no reason for why she should not apply for entry clearance as a spouse from her home country.

23. I have taken into account the case of *Chikwamba [2008] UKHL 40* (where the issue for determination was framed thus):

> 'In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family life, when, if ever, is it appropriate to dismiss the appeal on the basis that the appellant should be required to leave the country and seek leave to enter from an entry clearance officer abroad?'

24. In that case the appeal was allowed and it was said that:

> "I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

25. The effect of this passage in *Chikwamba* was subsequently considered by the Court of Appeal in *TG (Central African Republic) v Secretary of State for the Home Department [2008] EWCA Civ 997*. In that case, Keene LJ said that:

> "These are fact-sensitive issues and inevitably there are factual differences between this case and Chikwamba, not all to this appellant's advantage. For example, just to take two matters, Mrs Chikwamba had married at a time when removals to Zimbabwe were suspended. This appellant, during some of the time when he has been living with his partner in this country, seems to have disappeared from the official radar screen for a period of something around two years. Such matters as the immigration history of an appellant are clearly relevant, as Lord Brown indicated himself at paragraph 42. Then Mrs Chikwamba, it was accepted, could not realistically leave her child behind in order to seek entry clearance from Zimbabwe, so in that case there would have been an impact on the child who had a right to remain in the United Kingdom."

26. Buxton LJ added that:

> "… it is quite clear that a very strong consideration in Chikwamba was the fact that it was the wife who was to be removed from the country, inevitably in the companionship of her four-year-old child. That is made absolutely plain as the determining factor in paragraph 8 of the speech of Baroness Hale of Richmond."

27. *Chikwamba* was again considered in *R (Forrester) v Secretary of State for the Home Department [2008] EWHC 2307 (Admin)* in which Sullivan J said at paragraphs 13-14:

> "… what is the purpose of requiring the claimant and her daughter to return to Jamaica? I readily accept that there is a general need to maintain a fair and firm immigration system and to deter those, who do not have entry clearance, from coming to this country without entry clearance and, as it were, jumping or bypassing the queue. However, there is no question of the claimant jumping the queue in the present case. There is no question of her coming to this country when she did not have entry clearance. She came to this country entirely lawfully. She was in this country lawfully for a number of years and the only reason why her continued presence was not lawful was the fact that a cheque [sent with her application for further leave to remain as the spouse of someone who was present and settled in the United Kingdom] was not honoured by her bank. It is one thing to say that one should have a fair and firm immigration policy, it is quite another to say that one should have an immigration policy which is utterly inflexible and rigid and pays not the slightest regard to the particular circumstances of the individual case."

28. In paragraph 41 of the speech of Lord Brown [in *Chikwamba*] he asked whether the real rationale for the policy was:

> "... perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?"

29. The case of *Chikwamba* does not exempt the appellant from satisfying the requirements to obtain an entry clearance from her home country. I do not understand *Chikwamba* to say that an appellant can circumvent the requirements of the Immigration Rules if she is already in the country and therefore should not be required to return to her home country to make an application in the appropriate category. *Chikwamba* states that only in exceptional cases and cases which normally involve children that it would not be proportionate and more appropriate for the appellant to apply for leave from abroad.

30. I find that there are no exceptional circumstances in this case for why the appellant should not apply for entry clearance from Ukraine. I find that the appellant has been in this country illegally for 10 years and therefore should return to Ukraine and apply for entry clearance.

**DECISION**

For the reasons given above, the determination of the First-tier Tribunal is set aside.

I remake the decision on appeal and dismiss the appellants appeal pursuant to Article 8 of the European Convention on Human Rights.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

The 26th day of June 2015