Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26356/2014**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 29 January 2015	**On: 30 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MS ALINA MOTSENKO
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: **Mr S A Canter, counsel**
For the Respondent: **Mr T Melvin, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The appellant is from Ukraine and is 27 years old. She appeals with permission against the determination of First-tier tier Tribunal Judge Stott who dismissed her appeal under the Immigration Rules and on human rights grounds.

2. The appellant had applied for leave on the basis of her relationship with Mr Paul Harris, who was her partner at the time the application was made. That application was refused on 18 June 2014. At the date of refusal, she was thus single.

3. She subsequently married her sponsor, Mr Paul Harris, at Gretna Green in Scotland on 10 October 2014.

4. She claimed at the hearing before the First-tier Tribunal that her situation had changed since the refusal as she was now married and accordingly the provisions of

paragraph EX.1 can be taken into account. She has a genuine and subsisting relationship with her partner, a UK citizen, who is settled in the UK. There are insurmountable obstacles to family life being continued outside the UK.

5. Judge Stott referred to the applicable provisions under the rules set out in Appendix FM, noting that account must also be taken of the provisions of s.117B-D of the Nationality, Immigration and Asylum Act 2002 when considering the public interest considerations applicable to a claim under Article 8 of the Human Rights Convention.

6. The appellant had stated in her application that they only commenced cohabitation in October 2013. She was therefore unable to satisfy the provisions of paragraph GEN 1.2 as they had not been living together in a relationship akin to marriage for a period of two years.

7. Even though not raised in the refusal notice, the validity of the marriage was challenged. There was significant disparity between the oral evidence of the appellant and her sponsor as to how they celebrated her last birthday. [7b]

8. The appellant came to the UK in 2006, entitled to work as an agricultural seasonal worker. She did not return at the end of the six month period but remained as an overstayer from 2006 onwards.

9. The respondent stated that even if it is accepted that the union between the appellant and her sponsor is genuine, the provisions of EX.1 are not satisfied. The appellant gave evidence that her mother lives in Ukraine, although working for several months of each year in Poland. The family home remains to be used, despite the appellant stating that it had no water or gas available.

10. The appellant is 27 years old and came here when she was 19. She has been able to maintain herself here despite residing here unlawfully. She has demonstrated resource and determination and she would be able to maintain herself in Ukraine where she spent 19 years of her life.

11. She claims to have married Mr Harris in 2014. He is a self employed plasterer, earning in excess of £22,000 per annum. She said that he was extremely busy. It was contended however that he would have the financial capability of transferring money to the appellant in Ukraine to enable her to make an application under the rules for re-entry here.

12. The appellant stated that it would be "extremely difficult" for her to use the former family home on account of its condition and due to her having been away from Ukraine for eight years [7g].

13. There was an option for the sponsor to accompany his wife to Ukraine as he is self-employed and gave every indication that there was plenty of work for him in the UK, to which he could return after a period. He could stay with her whilst she

made her application for entry. The opportunities for plasterers in Ukraine were not known. However, there was no evidence given to suggest that he could not resume his self employment by carrying on his trade on return.

14. It was contended by he respondent that her private life as well as the relationship with her partner had both been established while she was unlawfully resident in the UK. Little weight could therefore be given to either her private life or the relationship which she formed. There were thus no compelling reasons why she should not be required to return and the consequences would not be unduly harsh for her.

15. The Judge referred to the appellant's case, including her grounds of appeal, her oral evidence and the skeleton argument. The fact of her valid marriage should be accepted even though no marriage certificate had been produced. As there had been a valid marriage, she was entitled to rely upon the provisions of paragraph E-LTRP 2.2 and the requirements set out in EX.1 of the Rules.

16. The appellant had been frank in stating that her mother still lives in Ukraine; she still has to seek employment in Poland for several months of the year. If the appellant had to return to Ukraine on her own she would only have use of the former family home, which has no running water or gas.

17. As to the suggestion that her sponsor could return with her, she said that he has an established business and is working hard to build a married life. He rents a home and although he would be able to support her financially to some extent, the majority of his money is spent on his living expenses.

18. Insofar as "insurmountable obstacles" are concerned, these should be considered in the light of the amendment to paragraph EX.1 requiring ".....very significant difficulties in continuing family life which would not be overcome and would entail serious hardship for the appellant or her partner."

19. It was argued that the former phraseology should be interpreted with that amendment in mind.

20. As regards the making a fresh application, this could be done; but the length of time it would take for such an application to be assessed is unknown. Accordingly, it was not realistic or feasible to expect the sponsor to leave his job and his family to accompany her. He does not speak the language and there is no evidence of availability of employment for him in Ukraine. It would therefore be jeopardising a successful business created in the UK.

21. At the hearing, the relevant visa processing times regarding applications from Ukraine for a settlement visa were provided: About 10% are processed within ten days; 50% in just over two weeks; 70% within 30 days; 90% within 60 days and 100% within 90 days. The data provided related to all decisions made during December 2014.

22. For the purposes of EX.1(b), it is provided in EX.2 that "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. It was also contended on behalf of the appellant that she had an arguable case for an Article 8 claim to be considered if she did not satisfy the immigration rules. The provisions of s.117B-D of the 2002 Act must be taken into account. It was accepted that she had overstayed her leave for many years, but during that time she has not sought benefits and has been able to maintain herself.

24. It was submitted that account should be taken of the approach in Chikwamba [2008] UKHL 40 which decided that the refusal of the application was disproportionate if there was no sensible reason for requiring the appellant in that case to return to her country to re-apply when the outcome was clear. In the circumstances of that case, the refusal of the application was held to be disproportionate. Likewise, in the appellant's case, her sponsor is well able to meet the financial limits set out in the immigration rules and the parties have now entered into a valid marriage which has been evidenced by members of the family. To require her simply to return to Ukraine to make an application which has the prospect of success is disproportionate in all the circumstances [8].

25. Judge Stott accepted that the parties were living together [9]. He also accepted that their marriage was entered into on 10 October 2014 at Gretna Green [10]. It is accepted that she overstayed her leave from 2006 until she made her application. In view of her marriage, he found that she could rely on the provisions of paragraph EX.1.

26. The issue was whether or not there are insurmountable obstacles to her family life now being continued outside the UK, namely in Ukraine. He found that there is a family house available and that her mother is there for part of the year. Although this is a small village and the appellant has been away for several years, there was no evidence suggesting that she would not know other people in that village who would be well disposed towards her. She is able to speak the language [12].

27. Although it was contended that the current security situation in Ukraine would also pose a considerable risk to her, the Judge noted that no evidence was given as to the proximity or nature of that risk and he "discounted that particular argument." [13]

28. Judge Stott accepted that her sponsor would be loath to accompany her, bearing in mind that he does not speak the language, that he has family in the UK and an established business. However, he also noted that her sponsor knew of his wife's lack of status several weeks after they met in 2010. He therefore entered into a relationship well knowing its precarious nature [14].

29. Judge Stott found that the sponsor would be well able to provide financial help to her. Although not minimising the difficulties she would face on her own, those would be for a relatively short period during the course of which she could communicate with her husband as well as being able to receive his financial help. Consequently he did not find that the obstacles facing her are insurmountable, nor that they would entail her suffering very serious hardship even if the amended definition in EX.2 is applied [16].

30. He considered that the appellant had established a family and private life in the UK. He accepted that she entered into a valid marriage with Mr Harris. Having overstayed for a long period she would have built up friendships and contacts [17].

31. The provisions of s.117B-D are mandatory. It is in the public interest that effective immigration control is maintained. Furthermore, little weight should be given to a private life and relationship formed when the individual is in the UK unlawfully. That is the situation facing the appellant [18]. He took into account that she speaks English and has financial independence [19].

32. He had regard to decisions including Razgar and Gulshan. He accepted that she would face difficulty on her return. When assessing the appellant's claim under the Human Rights Convention, he did not consider that it would be unduly harsh for her now to have to return to Ukraine so as to make an application. Although having regard to the length of time she had been in the UK she had weakened her ties to Ukraine, he found that she is resourceful and determined and would be able to maintain herself despite not initially speaking the language.

33. With regard to Chikwamba, that decision pre-dated the amendments to the 2002 Act which directed that little weight is to be given to either the private life or relationship formed whilst the person was in the UK unlawfully.

34. Having balanced the factors both for and against the application of Article 8, he found that it would not be disproportionate for her to return to Ukraine to make a fresh application.

The appeal to the Upper Tribunal

35. On 16 December 2014, Designated First-tier Tribunal Judge Zucker granted the appellant permission to appeal. He noted that the grounds submitted in the permission application asserted that the Judge erred in failing adequately to consider whether family life could be continued outside the UK within the meaning of the exceptions within Appendix FM and wrongly held that the guiding principles in Chikwamba are not applicable to the facts of the appeal.

36. Mr Canter relied on these two grounds. He submitted that the Judge wrongly focused only on the obstacles and hardship faced by the appellant in relocating to Ukraine temporarily [16]. In fact, EX.1 (b) requires a consideration of the obstacles to family life between the appellant and the sponsor continuing in Ukraine. He

contended that there is no indication that the Judge "has done this" beyond noting (at paragraph 14) that the sponsor would be loath to accompany her. It had been argued that there would be very serious hardship in such relocation on the basis that his income would be likely to drop below the requisite threshold so that he would be unable to sponsor a successful entry clearance application.

37. Accordingly, the Judge wrongly confined the consideration of insurmountable obstacles to the appellant individually rather than to her and her husband jointly.

38. He submitted that the evidence of all the obstacles and hardship that the couple would face in Ukraine had been set out in the witness statements as well as in oral evidence. Accordingly, focusing on obstacles and hardships faced only by the appellant alone and not considering all the factors as set out in her witness statement and referred to in evidence, meant that a proper consideration had not taken place. Moreover, it had not been argued that the civil war posed a considerable threat to the appellant but rather that the civil war added to the hardship that would be faced due to the consequent economic deprivation in Ukraine.

39. He also submitted (ground 2) that the Judge erred in holding that Chikwamba would not survive the introduction of Article 8 considerations into statute. Lord Brown had stated that the principle applied notwithstanding the existence of policy considerations to the contrary. Mr Canter submitted that section 117B reflects such policy considerations but does not change the measure of Article 8. The Immigration Act 2014 which introduced the section was accompanied by the express statement that it was compatible with human rights obligations which included the interpretation of Article 8 as espoused in Chikwamba.

40. He also submitted that whilst s.117B provides that "little weight" should be given to a relationship formed whilst the appellant's presence was unlawful or her status was precarious, it did not mean that no weight must be given. Once it was established that she had family life and private life, irrespective of s.117, it fell to the respondent to justify whether or not there was some sensible reason to require her to return home to apply.

41. The Judge did not consider this even in the assessment relating to proportionality. A proper evaluation of the difficulties referred to was missing from the proportionality assessment. Whilst accepting [20] that there would be difficulties, the Judge stated that it would not be "unduly harsh" for her to return. However, the test was not one of "undue harshness" - that is a test relevant in asylum law when assessing internal relocation – but one of proportionality.

42. Accordingly, the Judge did not properly assess the question required to be considered, namely whether or not the interference with their family life could be justified. Given that it had been accepted that there were difficulties in returning, it is not clear from the reasons given why the interference contemplated was justified.

In particular, no assessment was made as to the financial difficulties that a return to Ukraine would entail.

43. Mr Melvin in his Rule 24 response noted the Judge's findings relating to their cohabiting as well as their marriage entered into on 10 October 2014 and his consideration of whether family life could be continued outside the UK.

44. Mr Melvin accepted that there was no definitive finding by the Judge that family life could be continued in Ukraine. However, he submitted that the Judge found that the sponsor had entered into the relationship knowing of its precarious nature. He also took into account that there is a family home in Ukraine and other factors of a positive nature to the appellant [12].

45. He submitted that it is clear from the conclusions at paragraphs 11-16 that the Judge has concluded that there are no insurmountable obstacles to the family life continuing outside the UK.

46. The argument about the conflict in Ukraine was in any event speculative. The assertion by Mr Canter that the entry clearance officer might, when deciding the appellant's application, 'make a mistake' was also speculative. The time frame was relatively short, being at most up to three months. However, 70% of applications were considered within 30 days.

47. Insofar as the Chikwamba ground is concerned, that decision was based on a completely different set of immigration rules and in different circumstances. Here there are no exceptional or compelling circumstances as to why the appellant should not return to Ukraine to apply for entry clearance. He referred to Hayat **[**2012] EWCA Civ 1054 at [51], where regard was had to a submission made by the secretary of state that there is strong Strasbourg and domestic authority to the effect that only in exceptional circumstances will a couple who have formed a union in the full knowledge of the precarious status of either of them be entitled to remain pursuant to Article 8 rights. That applied in this case.

48. He accordingly submitted that the First-tier Tribunal's findings under the Rules and Article 8 are sustainable.

49. Mr Canter submitted in reply that the Judge had found that the appellant could endeavour to use the provisions of paragraph EX.1. The Judge defined the issue as to whether there were insurmountable obstacles to her family life being continued outside the UK [11]. Mr Canter stated that his "chief complaint" is that no proper consideration had been given to the insurmountable obstacles applying to the appellant's partner.

Assessment

50. Under paragraph R-LTRP.1.1 (d) of Appendix FM, a person qualifies for leave to remain as a partner if they meet the eligibility and suitability requirements and if

paragraph EX.1 applies. The Judge accepted that EX.1 did apply. The Judge found that the appellant had overstayed her leave from 2006. It was accepted that she could use the provisions of paragraph EX.1 [11], having identified the issue as being whether or not there were insurmountable obstacles to her family life now being continued outside the UK in Ukraine.

51. From 28 July 2014, "insurmountable obstacles" were defined as very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship for the applicant or their partner.

52. Mr Canter submitted that it is evident from passages such as paragraph 16 of the determination that the emphasis was upon the difficulties that the appellant would alone face. During the period they could communicate and she could receive his financial help. Judge Stott did not find the obstacles "facing her" to be insurmountable, nor that they would entail "her suffering" very serious hardship even if the amended definition set out in EX.2 applied [16].

53. However, upon an analysis of the determination as a whole, I do not accept the submission that the Judge's approach has led to the claimed material error. The Judge had earlier taken into account and accepted the difficulties that the sponsor would face: He took into account that her sponsor would be loath to accompany her as he does not speak the language; that he has family in the UK; that he has established a successful plastering business in the UK. He also had regard to the fact that the sponsor had been aware of the appellant's lack of status shortly after they met in 2010 and that they nonetheless entered into a relationship being aware of its precarious nature.

54. It had also been argued that there would be very serious hardship facing the couple in such a relocation as his income would be likely to drop below the requisite £18,600 so that he would be unable to support a successful entry clearance application. There was no basis given for that pessimistic forecast however. There was no evidence given to suggest that he could not continue his trade in the UK whilst the appellant's application is pending, nor, if he accompanied her to the Ukraine, that he would be unable to resume his self employed status carrying on his trade on return after a few months.

55. The Judge took into account the evidence from the appellant that her sponsor was very busy. It was also accepted that he would have the financial capability of transferring money to her in Ukraine to enable her to make an application under the rules for re-entry here. There was no evidence adduced as to the opportunities for plasterers in Ukraine. There was no assertion that any research had been undertaken in that regard.

56. The appellant contended that it would be "extremely difficult" for her to use the former family home on account of its condition and due to her having been away

from Ukraine for eight years [7g]. However it was accepted that she would have use of the former family home, albeit that it does not have running water or gas.

57. The Judge pointed out that there was an option available to the couple: the sponsor could decide whether to accompany his wife to Ukraine as he is self employed and gave every indication that there was plenty of work for him in the UK, to which he could return after a period. He could stay with her whilst she made her application for entry. On the other hand he could remain abroad pending the outcome of an entry clearance application which is not likely to take very long and could be decided at most within a few months.

58. The Judge also took into account that there was a civil war going on in the west of the country. The civil war added to the hardship based on the consequent economic deprivation in Ukraine rather than anything specific to the life or physical integrity of the appellant or her sponsor.

59. I find that there has been a proper assessment of the obstacles to family life between the appellant and her sponsor continuing in Ukraine. The Judge did not confine the consideration of insurmountable obstacles to the appellant individually but had proper regard to obstacles applicable to her and her husband jointly.

60. I have had regard to Mr Canter's submissions relating to the Judge's statement that the Chikwamba approach did not survive the introduction of Article 8 considerations into statute. Lord Brown had stated that the principle applied, notwithstanding the existence of policy considerations to the contrary. The Judge also wrongly had regard to a test - unduly harsh - more appropriate to internal relocation in asylum cases. The test he submitted was one of proportionality. The question related to whether or not the interference contemplated in their family life was justifiable.

61. Section 117B contains such policy considerations. I was informed, without any assertion to the contrary, that when the Immigration Act 2014 was introduced, it was accompanied by the express statement that it was compatible with human rights obligations.

62. I accept that these obligations include the interpretation of Article 8 as expressed in Chikwamba. The issue then is whether there has been a material error of law in the circumstances of this case. The issue in the second ground is whether in the absence of a sensible reason to the contrary, the appellant should be required to return to Ukraine in order to seek entry clearance.

63. The Judge has set out the difficulties associated with her return for the appellant and her sponsor, which I have set out above. The sponsor has the option to remain in the UK whilst her application is being considered or he can accompany his wife to Ukraine. He is self-employed and indicated that there was plenty of work for him in the UK, to which he could return after a period. He could stay with her whilst she made her application for entry.

64. Although the opportunities for plasterers in Ukraine were not known there was no evidence given to suggest that he could not resume his self employment by carrying on his trade on return. He is in the position to be able to support the appellant for the relatively short period it would take for her application to be decided.

65. I have had regard to the Court of Appeal's decision in Hayat [2012] EWCA Civ 1054 and the House of Lords Chikwamba [2008] UKHL 40, where Lord Brown stated that he was far from suggesting that the respondent should routinely apply the policy of requiring the appellant to apply for leave from abroad in all but exceptional cases. It seemed to him 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.

66. In Hayat, the Court of Appeal stated that if it is clear that there is a good claim, it should be granted; if not, it should be dismissed. Chikwamba provides that where Article 8 is engaged, the decision makers should not, absent some good reason, fail to engage with the merits and dismiss the claim on the grounds that the application should be made from abroad.

67. The provisions of s.117B-D of the 2002 Act must be taken into account. It was accepted that the appellant had overstayed her leave for many years. On the other hand she has not sought benefits and has been able to maintain herself. Although she entered into a lawful marriage her husband had been aware since at least a few weeks after he met her in 2010 that she had no immigration status and was here unlawfully.

68. He thus entered into relationship well knowing its precarious nature. The Judge thus properly had regard to the mandatory provisions of sections 117B-D. In particular it was in the public interest that effective immigration control be maintained.

69. As submitted by Mr Melvin the respondent has not had the opportunity of considering whether the appellant does satisfy the relevant requirements under the rules, including the English language provisions.

70. The relevant documentation required to be produced under Appendix FM-SE has not been disclosed. It is thus not evident that this is a case where it is clear that there is a good claim.

71. I find no merit in Mr Canter's submission that the entry clearance application might not succeed. That is an irrelevant matter.

72. Having balanced the factors both for and against the application of Article 8, the Judge found that it would not be disproportionate for her to return to Ukraine to make a fresh application.

73. Despite the failure by the Judge to consider the approach set out in Chikwamba and Hayat, supra, I find for the reasons referred to above, that there has not been a material error of law in the circumstances.

74. I accordingly find that the making of the decision by the First-tier Tribunal did not involve the making of any material errors of law. The decision shall accordingly stand.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed Date 25/4/2015

Deputy Upper Tribunal Judge Mailer