IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39410/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th May 2015	**On 12th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HALYNA PALANYTSYA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss E Savage, Senior Home Office Presenting Officer
For the Respondent: Ms J Norman of Counsel instructed by Sterling & Law Associates

DECISION AND REASONS

Introduction and Background

1. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Majid promulgated on 16th February 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.
3. The Claimant is a Ukranian citizen born 9th March 1959 who made two applications to the Secretary of State. One was an application for leave to

remain based upon her family and private life, and the other an application for a residence card as the family member of an EEA citizen, that being her daughter-in-law.

4. The Secretary of State issued two decisions, one being a refusal to issue a residence card dated 29th August 2014, and the other being a decision to remove the Claimant from the United Kingdom dated 17th September 2014.

5. The Claimant appealed against both decisions, and her appeal was heard by Judge Majid (the judge) on 11th February 2015.

6. The judge appears to have conflated the two decisions, referring in the first paragraph of his decision to the Secretary of State's decision dated 17th September 2014, refusing the Claimant leave to remain in the United Kingdom under the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations). This decision was in fact not connected with the 2006 regulations, but was a decision to remove the Claimant following refusal of a human rights claim.

7. Having heard evidence, the judge indicated at paragraph 17 that he was minded to allow the appeal outside the rules, although at paragraph 27 he records that "I am persuaded that the Appellant comes within the relevant immigration law, as amended."

8. The judge then records that the appeal is allowed, although does not state whether this is under the Immigration Rules, the 2006 regulations, or with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the rules.

9. The Secretary of State applied for permission to appeal which was granted by Judge of the First-tier Tribunal Grant-Hutchinson in the following terms;

> 'It is arguable that the judge has misdirected himself in law by failing (a) to make any findings under the Immigration (European Economic Area) Regulations 2006 and (b) to make any findings in relation to the Appellant's private and family life under the Immigration Rules before proceeding to deal with Article 8 of ECHR outside the Immigration Rules.'

10. Following the grant of permission, the Claimant did not submit any response pursuant to Rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

11. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

The Secretary of State's Submissions

12. Miss Savage relied upon the grounds contained within the application for permission to appeal which may be summarised as follows.

13. The judge had materially erred by failing to make findings on material matters. He had failed to determine the Claimant's position in relation to the requirements of the 2006 regulations.

14. The judge did not consider Article 8 within the Immigration Rules. The decision fails to set out the proper basis for allowing the appeal. The judge did not explain why he had considered Article 8 outside the Immigration Rules, and did not specifically engage with the facts or evidence before him, and reached an unsustainable and unintelligible conclusion which was against the weight of evidence.

15. The judge failed to consider the public interest considerations when assessing proportionality under Article 8.

The Claimant's Submissions

16. Ms Norman accepted that the judge had erred in law by not making specific findings in relation to the 2006 regulations, but submitted that the error was not material. This was on the basis that the judge had considered all the evidence and made clear findings.

My Findings and Conclusions

17. The judge materially erred in law. The decision lacks clarity and there is a lack of adequate reasoning. The Upper Tribunal in Budhathoki [2014] UKUT 00341 (IAC) set out principles to be considered in giving adequate reasons for a decision and for ease of reference I set out below the headnote;

> "It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

18. I do not find that the judge complied with the principles set out above. I do not find that there has been adequate consideration of the issues raised so far as consideration of the EEA regulations is concerned. No findings are made in relation to the EEA regulations. The decision does not address material issues.

19. No adequate findings were made in relation to consideration of Article 8 under the Immigration Rules, which should be the starting point for an Article 8 consideration. The finding in paragraph 19 of the decision that the best interests of a child must be considered and given paramount weight as part of the assessment of proportionality is in my view incorrect, as the best interests of a child are a primary consideration not a paramount consideration, and those considerations can be outweighed by the cumulative effect of other considerations.

20. There is an inadequate assessment of Article 8 outside the Immigration Rules. The consideration of proportionality is flawed, as no indication is given that the judge had regard to the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. The Upper Tribunal in Dube [2015] UKUT 00090 (IAC) confirmed that judges are duty bound to have regard to the specified considerations set out in section 117B. It was also confirmed in Dube that it is not an error of law to fail to refer to considerations within sections 117A-117D of the 2002 Act if the judge has

applied the test he was supposed to apply according to its terms, as what matters is substance not form. Unfortunately in this case there is no indication that there has been any adequate consideration of the factors set out in section 117B.

21. For the above reasons the decision of the First-tier Tribunal is set aside.

22. Once I had announced that the decision was set aside, both representatives suggested that it was appropriate to remit this appeal back to the First-tier Tribunal to be considered afresh.

23. I have taken into account the Senior President's Practice Statement 7.2 which states;

> '7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in rule 2 it is appropriate to remit the case to the First-tier Tribunal.'

24. In my view the requirements of paragraph 7.2 are met. The substantive issues in this appeal need to be considered by the First-tier Tribunal and judicial fact-finding is required. It is more appropriate for this to be undertaken by the First-tier Tribunal.

25. The appeal before the First-tier Tribunal will take place at Taylor House Hearing Centre. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by a First-tier Tribunal Judge other than Judge Majid. The appeal is to be heard afresh and there are no preserved findings. It was indicated that an interpreter in Ukranian will be required and this will be arranged by the Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request to the Upper Tribunal for anonymity and no anonymity order is made.

Signed Date 1st June 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

No fee award is made by the Upper Tribunal. If this is relevant, it is to be considered by the First-tier Tribunal when the appeal is heard afresh.

Signed Date 1st June 2015

Deputy Upper Tribunal Judge M A Hall