The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: OA/01935/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On September 7, 2015	**On September 10, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MS NATALYA NIKOLAYEVNA NIKITINA
(NO ANONYMITY DIRECTION)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
Appellant Mr Turner, Counsel
Respondent Ms Isherwood (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a national of Russia and on November 8, 2013 she submitted an application to join the sponsor, Ms Tatyana Taylor, as an adult dependant. The respondent refused her application on January 17, 2014 on the grounds she did not satisfy Section E-ECDR 2.4 or 2.5 of Appendix FM of the Immigration Rules.

2. The appellant appealed this refusal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on January 31, 2014.

3. The Entry Clearance Manager reviewed the matter July 8, 2014 but upheld the original decision.

4. The matter was listed before Judge of the First-tier Tribunal Malins on February 23, 2015 and in a decision promulgated on March 16, 2015 the Tribunal refused her appeal finding she did not satisfy the Immigration Rules. No finding was made under Article 8 ECHR.

5. The appellant applied for permission to appeal on April 7, 2015 and permission to appeal was granted by Judge of the First-tier Tribunal Landes on May 21, 2015.

6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SUBMISSIONS

7. Mr Turner was scathing both in his grounds of appeal and oral submissions of the Tribunal's decision. He submitted that there were fundamental errors and flaws in the decision including material errors of fact and a failure to give proper reasons -

   a. The Tribunal had materially erred in identifying the appellant as a widow when in fact the appellant had been divorced and there was evidence within the court bundle of that divorce. It was therefore wholly inappropriate for the Tribunal to suggest, as it did in paragraph 9(h)(ii), that the appellant could find a "fellow widow" to move in to the house with her.

   b. The Tribunal had material erred by referring to the appellant as having a son whereas in fact she only had one child, the sponsor, and she did not live in Russia.

   These material errors of fact undermined the whole decision.

8. Mr Turner further submitted the Tribunal had failed to take account of the conclusion contained in the medical report dated October 15, 2013 when the doctor made it clear that the appellant was in need of continuous care and had failed to have regard to the fact that there was a family dispute regarding the property that potentially would make her destitute. There was evidence to support her medical condition and the unavailability of assistance in Russia. It was clear that the appellant would be best placed with her daughter in the United Kingdom as she had demonstrated an ability to look after her mother and to ensure her medical problems did not lead to a worsening of her condition.

9. The Tribunal had failed to give it any adequate reason for rejecting the court document setting out the family dispute and it was insufficient for the Tribunal to make no finding on the issue.

10. The Tribunal failed to give any reasons to disbelieve the sponsor's evidence and whilst the case was not an "open or shut" case he submitted there was a material error.

11. As regards Article 8 ECHR Mr Turner submitted there had been no consideration and whilst the appellant would face an uphill struggle on this this was a further example of the Tribunal not undertaking its job correctly.

12. Ms Isherwood opposed the application and submitted that:

    a. The factual errors were not material as they did not go to the issue of whether the appellant satisfied the immigration rules.

    b. In order to satisfy Section E-ECDR 2.4 of Appendix FM of the Immigration Rules the appellant had to demonstrate that she required long-term personal care to perform everyday tasks. The Tribunal had considered a report provided by Christopher Bluth and had given numerous reasons for rejecting the content of that report concluding that the appellant had failed to provide an independent report as required by paragraph 35 of Appendix FM-SE of the Immigration Rules. Despite Mr Turner's lengthy submissions no challenge had been made today to those criticisms.

    c. As regards Section E-ECDR 2.5 of Appendix FM of the Immigration Rules the Tribunal had considered the medical evidence and the help available and had rejected the appellant's claim that she would be unable to obtain the required level of care and concluded that firstly there was state care available; secondly, there was financial support available from the sponsor and thirdly, the appellant had claimed when she submitted her application that she still had savings despite her subsequent claim that those savings were used on her application. The mere fact the appellant prefers not to employ someone to help care for her is not a reason to allow the appeal.

    d. None of the reports provided stated no care was available and consequently the appellant had not discharged the burden of proof. The Tribunal was aware of the appellant's claim there was no one available to look after her but it rejected the claim that there was no help available.

    e. Whilst the Tribunal's decision was not perfect there was no material error.

    f. With regard to Article 8 she accepted the Tribunal had not addressed Article 8 but in light of the decisions of Kugathas v SSHD (2003) INLR 170 and SS (Congo) and Others [2015] EWCA Civ 387 there was no material error as the appellant could not succeed.

13. At the conclusion of the evidence I reserved my decision.

FINDINGS AND REASONS ON ERROR IN LAW

14. The appellant had made an application to enter the United Kingdom as a dependent relative. According to the papers before me the appellant had been living in Russia, away from the sponsor since 1995. She had visited her daughter on a number of occasions during that period and had visited on the basis of a multi-visit Visa. Two medical reports were submitted setting out her current medical ailments and a further report setting out country conditions was also provided to the Tribunal. Evidence was given by the sponsor but the Tribunal found the Immigration Rules were not met. Mr Turner has raised a number of challenges to that decision.

15. At the outset, Mr Turner submitted that the two material errors relating to the appellant's family undermined the whole decision and the decision should be set aside. At the hearing I raised with Ms Isherwood whether there was any evidence that the appellant was widowed as against divorced. She indicated to me that she had seen a reference in the sponsor's statement but I have checked the sponsor's statement and I am satisfied there is no reference to this fact.

16. However, as I indicated to Mr Turner when he addressed me I failed to see how that fact alone would amount to a material error because the appellant's case remains that her ex-husband was not able/required/willing to provide any assistance and in light of their divorce there would clearly be no expectation for that. I therefore find the error relating to the appellant's husband is not material.

17. The Tribunal also made a factual error in paragraph 9(c). The Tribunal stated-

> "There is no evidence at all from the appellant's brother who would normally be expected to feel and possibly be responsible for his mother - especially as the only child living in the same country when the sponsor had emigrated."

18. Mr Turner submits that this error was material but I am satisfied that the error referred to is a regrettable mistake but it is clear from that paragraph and paragraph 9(h)(ii) that the Tribunal was aware it was dealing with the appellant's brother as against her son. The reference in paragraph 9(c) to mother and child should have been a reference to sister and sibling.

19. Whilst I accept both errors are regrettable and unsatisfactory they are not material without more.

20. The appellant brought her claim under two provisions of Section E-ECDR of Appendix FM of the Immigration Rules-Sections 2.4 or 2.5. The grounds of appeal provided by Mr Turner helpfully set out those sections.

21. The applications under Sections E-ECDR 2.4 and 2.5 of Appendix FM are clearly interlinked as both involve a consideration of the appellant's medical condition and then in the case of Section E-ECDR 2.4 of Appendix FM an assessment of whether she requires "long-term personal care to

perform everyday tasks" and in the case of Section E-ECDR 2.5 of Appendix FM an assessment of whether the appellant could with the sponsor's practical and financial help obtain the appropriate level of care.

22. In order to succeed under Section E-ECDR 2.4 of Appendix FM the appellant must show "as a result of age, illness or disability" that she requires long-term personal care to perform every day tasks.

23. Leaving aside the issue of age, illness or disability the Tribunal was required to consider whether this appellant required long-term personal care to perform everyday tasks.

24. The appellant submitted an "expert report" from Christopher Bluth. The Tribunal was wholly unimpressed with that report and gave detailed reasons in paragraph 9(f)(iii)-(v). All of the criticisms made are valid and Mr Turner's submission contained at paragraph 21 of his grounds of appeal does not address the core issue namely that this expert is not an expert on Russian society and in particular is not an expert on Russian health and social care provisions.

25. Paragraph [35] of Appendix FM-SE requires an independent expert report for appeals under Section E-ECDR 2.4 and I am satisfied that this report does not fall within the definition of an independent expert report especially in circumstances where he failed to address a critical question posed to him in his instructions namely, "is it possible for the appellant to obtain a live in carer/nurse".

26. Although Mr Turner criticises the Tribunal for its comments in paragraph 9(h)(ii) it is clear that the "expert" failed to give this issue proper consideration and Mr Turner's suggestion to me that the Tribunal was perhaps suggesting that the appellant's should "shack up" with another widow is a misinterpretation of what the Tribunal was suggesting. The Tribunal was referring to the availability of others to assist the appellant bearing in mind she had been assisted until recently by a third party.

27. Medical evidence was produced in this case and Mr Turner's criticism is the Tribunal failed to have regard to the evidence.

28. The Tribunal did consider the medical evidence contained in both Christopher Bluth's report and Dr Zulya Taukenova's report dated February 11, 2014. This latter report was considered by the Tribunal at paragraph 9(h) and the Tribunal also referred to the conclusions of an earlier medical report dated October 15, 2013 provided by Dr Olga Mazalskaya at paragraph 4(a) of its decision.

29. The Tribunal had in mind both medical reports and also had regard to the other evidence provided by the sponsor. The Tribunal was unimpressed with the evidence about the brother that was raised at the hearing. Mr Turner challenged effectively the weight to be attached to her current

living circumstances and the availability of help from the appellant's brother.

30. I therefore turn to the materiality of any complaints raised about the Tribunal's decision.

31. The Tribunal noted at paragraph 9(e) of its decision that the appellant did not require treatment for any condition whilst in the United Kingdom and Mr Turner submits that this was because she was receiving better care in the United Kingdom as she was with her daughter. However, Mr Turner's submission overlooks the fact that the sponsor is in full-time employment and clearly cannot and would be unable to provide the "continuous care to perform every day tasks" that it is argued she is in need of.

32. The mere fact a medical report makes reference to such a necessity merely raises the issue for the Tribunal to consider. The Tribunal considered the issue and effectively concluded that the appellant was not in need of "continuous care to perform every day tasks". The medical reports dated October 15, 2013 and February 11, 2014 are nothing more than a record of the appellant's ailments. The report dated October 15, 2013 concluded stating, "Due to difficulties in self-service and daily life the patient needs continuous home care". No explanation of why or what this appellant could do for herself is provided by the report. It describes certain problems but does not provide an explanation why the appellant was in need of "continuous care to perform every day tasks". The updated report from Dr Zulya Taukenova similarly does not provide any insight into those problems although recommends that she is in need of continuous care by her relatives. No explanation was provided why it had to be her relatives and the doctor was clearly unable to comment on what state help was available. The Tribunal was not satisfied that the appellant demonstrated she was in need of continuous care to perform every day tasks.

33. The Tribunal was therefore entitled to conclude that the appellant had failed to satisfy Section E-ECDR 2.4 of Appendix FM.

34. The case was also brought under Section E-ECDR 2.5 of Appendix FM and this required the appellant to demonstrate that she must be unable, even with the practical and financial help of the sponsor to obtain the required level of care in Russia because either it is not available and there is no person in that country can reasonably provide it or secondly it was not affordable. The sponsor has been supporting her and the evidence before the Tribunal was she continued to have a place to stay because any dispute over the house had not been resolved by the courts. The court order appears to post-date the date of the decision in any event. The Tribunal also noted the appellant received a pension and support from the sponsor and rejected her claim to have spent her savings bearing in kind she referred to them when she submitted her application.

35. The Tribunal was provided with limited evidence to make a positive finding in the appellant's favour and the conclusion reached was clearly open to it.

36. For these reasons I reject Mr Turner's submissions that there was an error under the Immigration Rules.

37. Both parties agreed that the Tribunal had failed to consider the matter under Article 8 ECHR but any assessment under Article 8 would have been undertaken having regard to the fact that the appellant had failed to satisfy the Rules. She was not refused for financial reasons but she was refused for substantive reasons.

38. I am satisfied the Tribunal applying Kugathas v SSHD (2003) INLR 170 and SS (Congo) and Others [2015] EWCA Civ 387 would not have allowed this appeal under Article 8 ECHR.

39. In Kugathas the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. The Court of Appeal made clear in SS (Congo) that appeals on family life would be difficult and made it clear that Article 8 does not confer an automatic right to join a family member because the state is entitled to control immigration and the Tribunal should look to whether there are any exceptional circumstances.

40. Based on the way this case was presented I am satisfied that there are no matters that would have warranted consideration outside of the Rules. Put simply, if the appellant met the Rules she would have been granted entry and may do so in the future if the appropriate evidence to satisfy the Rules is adduced.

41. Whilst I accept that Article 8 should have been considered I am satisfied, as Mr Turner conceded, that any such application would have been an uphill task and there is nothing in these papers that suggests the appellant would have succeeded on Article 8 grounds having failed under the Immigration Rules.

42. I dismiss the appellant's appeal.

DECISION

43. There was no material error. I uphold the original decision.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Dated:

Deputy Upper Tribunal Judge Alis