



**First-tier Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: HU/11275/2016**

**THE IMMIGRATION ACTS**

**Heard at Field house  
On 28<sup>th</sup> September 2018**

**Decision and Reasons  
Promulgated  
On 16th October 2018**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

**Between**

**Ms MTETYANA ONYSHCHUK  
(no anonymity direction made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: MS J Norman of Counsel

For the Respondent: Ms S Vidyadharan Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant, a citizen of Ukraine, born on 17 April 1969, appealed against the decision of the respondent dated 11 April 2016 refusing her leave to remain in the United Kingdom pursuant to paragraph 276 ADE and Appendix FM of the immigration rules and Article 8 of the European Convention on Human Rights.

2. First-tier Tribunal Judge CH O'Rourke dismissed the appellant's appeal in a decision promulgated on 8 September 2017. Permission to appeal was first refused by Tribunal Judge Mark Davies but subsequently granted by Dr HH Storey, an Upper Tribunal Judge stating that it is arguable that having accepted the sponsor would face "very significant difficulties" if he accompanied the appellant to Ukraine the Judge arguably erred in finding that there would be no insurmountable obstacle to the appellant and the sponsor continuing their relationship outside the United Kingdom.
3. Thus, the appeal came before me.
4. At the hearing it was agreed that the Judge had made an error by confusing Article 8 and EX1 of Appendix FM of the immigration rules. I was referred to the case of **TZ (Pakistan) and PG v the Secretary of State for the Home Department [2018] EWCA 1109** sets out recent decision of the Supreme Court in **R (on the application of Agyarko) and Anor the Secretary of State for the Home Department [2017] UKSC 11** where it was made clear that the scheme established by the rules and the Secretary of State's instructions are lawful and compatible with Article 8. Accordingly, the Secretary of State is entitled to apply a test of insurmountable obstacles to the relocation of the family within the rules and the test of exceptional circumstances as described outside the immigration rules.
5. In respect of insurmountable obstacles, the Judge found that "the sponsor would face very significant difficulties in Ukraine which he is unlikely to be able to overcome". The Judge listed these difficulties as that the sponsor speaks no Ukrainian and therefore he would be hindered in operating his business in that country. Even if he was minded to re-establishing his business to operate in Ukraine, starting afresh in a foreign country it would be very unlikely that he could operate the business to the same level. The sponsor is effectively a sole trader/sole director with only one employee and his business has a large element of face-to-face engagement. He could not run his business effectively from Ukraine and as a consequence his livelihood would be damaged.
6. It is established law that appellant's application should be first considered under the immigration rules and only if the applicant does not qualify, the appeal should be considered outside immigration rules under Article 8 of the European Convention on Human Rights as to whether the appellant's removal would amount to a breach of her Article 8 rights.
7. The only issue taken by the respondent in respect of the immigration rules was whether the appellant comes within the exception set out in EX 1 (b) of the immigration rules. The Judge's findings were that the appellant's British citizen sponsor faced insurmountable obstacles in relocating to Ukraine which he could not overcome but nevertheless found that he could relocate to Ukraine with the appellant. These findings are clearly contradictory, and the Judge has not applied the immigration rules correctly.
8. EX.1. This paragraph applies if:

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “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.

9. The findings of the Judge were that the appellant’s sponsor would face insurmountable obstacles or put another way, very significant difficulties to relocate to Ukraine which could not be overcome. This should have therefore entitled the appellant to succeed under the immigration rules. That was the only issue taken by the respondent.
10. The question was whether there are insurmountable obstacles to family life with her partner continuing outside the United Kingdom. EX1 only applies to the appellant, if she is in a genuine and subsisting relationship with a British citizen settled in the United Kingdom and there are insurmountable obstacles to family life with her spouse continuing outside the United Kingdom.
11. Insurmountable obstacles have been defined as very significant difficulties which would be faced by the applicant or their partner in continuing the family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner.
12. The First-tier Tribunal Judge fell into material error by his finding that the appellant did not come within the exceptions set out in EX1 even though he found that there were insurmountable obstacles for the appellant’s British citizen sponsor to relocate to Ukraine to continue family life with the appellant in that country.
13. The appellant’s sponsor cannot relocate to Ukraine for the reasons set out in the decision of the First-tier Tribunal. Therefore, the appellant comes within the exception set out in EX1 of the immigration rules.
14. I therefore set aside the decision of Tribunal Judge and remake it allowing the appellant’s appeal under the immigration rules.

**DECISION**

Appeal allowed pursuant to the Immigration Rules.

Dated this 11<sup>th</sup> day of October 2018

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Signed by

A Deputy Judge of the Upper Tribunal  
Ms S Chana