Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00149/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2018	**On 4 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MRS MAZURENKO VALENTYNA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J E Norman, of Counsel instructed by Law Firm Limited
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Woolf who, in a determination promulgated on 24 May 2017, dismissed the appellant's appeal against a decision of the Secretary of State to refuse to grant her leave to remain on human rights grounds.

2. The appellant is a citizen of the Ukraine, born on 27 March 1958 who appealed against a decision of the Secretary of State made on 21 December 2015 to refuse her application for leave to remain outside the Immigration Rules. The appeal was dealt with on the papers by Judge Woolf. Judge Woolf noted the appellant's immigration

history: the appellant had been the recipient of a number of visit visas commencing in March 2000 culminating in the grant of a visa which was valid from 23 August 2006 to 23 August 2007. A further application for a visit visa dated 24 September 2007 had been refused as the appellant had overstayed her previous leave. That decision was appealed and the appeal was allowed but the visa was not issued as the respondent discovered that the appellant had accessed NHS treatment to which she was not entitled. The appellant was refused a visa in December 2007. The appellant had also applied for a visit visa in Cyprus under the name of Valentyna Shcherbyna which was refused because when she was fingerprinted it was discovered she had previously been refused under a different name. The appellant admitted entering Britain illegally in 2008.

3. When she made the application for leave to remain on human rights grounds the appellant had submitted a report from a consultant in clinical oncology dated 1 July 2015 outlining her medical history and treatment. This indicated that she had been treated for metastatic liposarcoma which had been treated by excision and radiotherapy in 2002, for breast cancer in 2003 and a further cancer in 2009, and that a benign tumour had been excised in 2013. A consultant stated that three of the cancers which had been indicated were capable of relapsing and causing further disability. Although the appellant was not in active treatment at the time she remained under active surveillance with three monthly reviews and regular CT scanning.

4. The refusal of the Secretary of State referred to the decision in **N v UK [2008] ECtHR** asserting that in that judgment it was observed that the court had never found a proposed removal of an alien from a contracting state to give rise to a violation of Article 3 on grounds of the applicant's ill-health. The Secretary of State noted that the appellant's son was in Britain and it was considered that the appellant would be able to maintain contact with him from the Ukraine.

5. In paragraphs 9 onwards the judge sets out further evidence from the appellant which included statements from her and her son. The appellant said that she had come to Britain in 2000 to give her son the best possible education and that he had attended an independent school in Eastbourne while she studied English here. She had rented a private house and had fully supported him. They then moved to Brighton where they had been residing since. Her son had studied at the University of Sussex. It appears that the appellant owns a home in Brighton without a mortgage. There was further evidence relating to the various cancers which the appellant had suffered as well as evidence that the appellant's son had opened his own catering business in Brighton after graduating from university. The appellant stated she had no relatives or friends left in Ukraine and that all her friends were here and were willing to help her. Her son stated that he had received permanent residence in 2011 and that his mother had paid for his tuition and living costs and devoted her entire life to him. He referred to the fact that her left leg had been amputated and at that time she had been fully dependent on his support. He stated that she feared loneliness and had concerns about being abandoned and rejected by

him. They lived together and had no recourse to state benefits as he owned a successful restaurant business in Brighton.

6. The judge noted a letter dated 6 March 2008 from the appellant's representatives which referred to the refusal of the visit visa and stated that:

> "The issue with failing to disclose that the passport she submitted in 2008 with her application was stated at the counter at the British Embassy post when she was questioned". She apologised for not completing the section on the application form and had apologised at the earliest possible opportunity."

It was said that her failure to disclose her previous immigration status was not deliberate. Moreover, with regard to her surname it was stated that had used a previous surname than that which was used in other applications and that her name was changed officially in Ukraine and an original document of that change had been issued. It was stated that the application which had then been refused under paragraph 320(7A) had not resulted from deliberate act on her part.

7. The judge set out her findings of fact and conclusions in paragraphs 25 onwards of the determination. She noted that it appeared the case that a claim in the grounds of appeal before her that the appellant's Article 3 rights would be infringed was an error. The judge stated clearly that no Article 3 claim could succeed. It was conceded by the appellant's representatives that the appellant could not meet the requirements of the Immigration Rules. The judge accepted that the appellant had acquired a private life in Britain and that at some time she had entered in 2008 and remained here illegally ever since. She pointed out that between 2000 and 2008 the appellant only had leave to enter and to remain as a visitor for short periods and that she did not deny having overstayed and, moreover, the judge said that she did not accept for a moment the assertion made in the appellant's representative's letter that the appellant did not knowingly seek to deceive the respondent in the application she made for entry clearance just prior to her unlawful entry. The judge stated that she accepted that the appellant might have changed her name but it was clear that she did not disclose on her application form anything about her previous refusals. The judge said it was not remotely plausible that this was not deliberate.

8. Moreover, the judge went on to state that she noted that when the appellant had last arrived in Britain in undisclosed circumstances and remained unlawfully it was a time when her son had been resident in the UK for eight years and had yet to qualify for indefinite leave to remain. She pointed out therefore that the appellant's son had applied for indefinite leave to remain when he knew that his mother was living with him and had no lawful leave to remain.

9. In paragraph 28 of the determination the judge stated that:

> "Given the degree to which the appellant has indulged in previous deception of the immigration authorities in the UK I am not minded to accept as necessarily credible any bare assertion she makes that is not adequately supported by evidence. I appreciate that it is difficult to prove a negative, however her claim that she has no relatives or friends in Ukraine falls to be assessed in that light. Whilst the appellant claims to be entirely financially dependent on her son and

> he claims that he runs a successful restaurant business in Brighton, no evidence of his financial resources, his income or profit, savings or any other assets have been disclosed. I accept that she owns a flat in Brighton in which both she and her son live. The only other evidence of her financial resources consists of bank statements. The latest of those appear to relate to something described as a 'tracker bond eighteen month' which shows a balance of £10,127.63 as at 7 April 2015."

With regard to her son's current account the judge said that he appeared to have an overdrawn balance of £350.27 on 19 June 2015.

10. The judge accepted that the appellant enjoyed private life in the UK and that she was emotionally dependent on her son and that some physical dependency could not fail to arise in light of her disabilities. The inference was of sufficient gravity so as to potentially engage the respondent's obligations under Article 8 of the ECHR.

11. The judge went on to consider whether or not the decision was proportionate. She referred to the provisions in Sections 117A and B of the 2002 Act. She said that the appellant had not demonstrated that she was financially independent and that although she claimed financial dependency on her son neither her son's resources nor hers were satisfactorily evidenced. She was not satisfied that there was not a prospect that the appellant would be a burden on public funds were she allowed to remain in the United Kingdom. The judge went on to say:-

> "Her position in the UK has at all times been precarious; those periods of leave she enjoyed as a visitor were finite and her last entry was clearly unlawful and she has had no leave to remain since 2008. She has not demonstrated that she would not receive adequate care and monitoring of her various health problems in Ukraine. When the consequences for the appellant and her son are weighed with public interests it is my judgment that the public interest in removing illegal entrants and enforcing immigration controls outweighs those individual considerations that the appellant has prayed in aid. What has to be understood is that my consideration has to be based on the obligations owed by the respondent under international treaties.
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> Whilst the appellant's circumstances cannot fail to arouse compassion given the degree to which she has suffered from very serious health problems it is not apparent from the evidence before me that they cannot be adequately addressed were she to return to Ukraine. I accept it is emotionally difficult for both the appellant and her son to be separated from each other and that difficult choices may have to be made by the appellant's son as to his continuing to live in the UK in order to benefit from his indefinite leave to remain in the UK and to run a business here. There is an option open to the appellant in that she may apply for entry clearance as his dependent relative. The evidence before me does not however show that she meets the requirements of the Rules relating to such a category. There is no reason in my judgment why she should gain the benefit of her unlawful entry in not demonstrating that those requirements of the Immigration Rules were met. To afford her that advantage over other potential candidates for entry would undermine the proper management of immigration control."

For those reasons the judge dismissed the appeal.

12. The grounds of appeal stated that the judge had erred by finding that the appellant had had no regard at all for the immigration laws of this country and said that it was clear by making an application to regularise her stay in the United Kingdom and to wait over one year for her appeal showed that she did have regard to the immigration laws. It was stated there was clear evidence from the refusal letter that the appellant had never had recourse to public funds and that she owned her own home and had more than adequate funds to enable her to live in the United Kingdom without recourse to public funds. It was further argued that the appellant paid privately for medical treatment thus contributing to the UK economy.

13. Ms Norman argued that the judge had erred in her consideration of Section 117B and was wrong to refer to deception in paragraph 28 of the determination. There had been a lengthy covering letter referring to the visit refusal. She pointed out that no point had been taken regarding the provisions of paragraph 322 of the Rules or any general rules of refusal and therefore there was nothing to warrant the conclusions of the judge or any other higher consideration. It was not said in the refusal letter that the Secretary of State did not believe the appellant's assertions and no point had be taken against her regarding such deception. No difficulties had been raised regarding the appellant's visits between 2000 and 2007. She also argued that the judge had erred when considering the issue of Section 117B and private funds: those provisions extended to private life rather than to family life. She argued, moreover, that the judge had erred by stating that the appellant had used public funds when there was clear evidence in the bundle that she had paid privately for her cancer treatment here.

14. In reply, Mr Wilding pointed out that the appellant had produced no evidence that she had not used national health treatment prior to 2007 and argued that the judge was correct to find that the appellant's private life was precarious. He pointed out that the appellant admitted that she had entered illegally.

15. Ms Norman, in reply, argued that the judge had raised issues which had not been highlighted by the Secretary of State, particularly that relating to deception and again argued that the appellant's position should not be considered to be precarious as the appellant was basing her claim on family rather than private life. Mr Wilding at this stage referred to the decision in **AM (Section 117B) Malawi [2015] UKUT 0260** which indicated that when considering the issue of whether or not an appellant's residence here was precarious there was no distinction between private and family life.

16. I consider that there is no material error of law in the determination of the judge. The reality is that she was fully entitled to find that the appellant had exercised deception when she had last entered Britain in 2008 and to place weight on the fact that the appellant had lived in Britain without leave to remain for seven years before making the application. I consider that the judge was entitled to take into account the fact that the appellant had changed her name and used a different name when making a visa application and had not been candid about refusals of visa

applications when she had made further applications for visit visas and was therefore not someone whose assertions could be trusted. That conclusion was entirely open to the judge on the evidence before her, particularly given that the appellant had entered illegally. Moreover the judge did properly consider the financial evidence and was fully entitled to come to the view that this appellant, although she may not have used public funds to date, might well be in a position where she would do so in the future. I would add that the reality is that although it appears that the appellant has paid for medical treatment since 2007 there is nothing to indicate that she had done so when she first entered Britain and indeed that was a reason why she had been refused a visit visa. The refusal on that ground does not appear to have been challenged.

17. The judge was, in my view, not unsympathetic to the position in which the appellant has found herself but she was fully entitled to come to the conclusion that the interference with the appellant's family life was fully proportionate. She was clearly right to place weight on the appellant's deception and the length of period she had lived without leave. I also consider that the immigration status of an illegal entrant, which is what this appellant is, must be considered to be precarious irrespective of the argument that the issue of precariousness as set out in Section 117B is related only to private life. For these reasons I find there is no material error of law in the determination of the Judge and I dismiss this appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed:  Date: 28 March 2018

Deputy Upper Tribunal Judge McGeachy