



**Upper Tribunal  
(Immigration and Asylum Chamber)**

IA/00269/2016

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House  
On 20<sup>th</sup> December 2017

Decision & Reasons Promulgated  
On 31<sup>st</sup> January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

MIKHAIL NEKRASOV  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Norman (counsel, instructed by Sterling & Law Associates LLP)

For the Respondent: Ms N Willocks (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant, a Russian national, had sought variation of his leave to remain in the UK but that was refused by the Secretary of State for the reasons given in the Refusal Letter of the 9<sup>th</sup> of December 2015. The appeal was heard by First-tier Tribunal Judge Talbot at Hendon on the 23<sup>rd</sup> of January 2017 and dismissed for the reasons given in the decision promulgated on the 9<sup>th</sup> of February 2017. The Appellant sought permission to appeal in grounds of the 23<sup>rd</sup> of February 2017, permission was granted on the 5<sup>th</sup> of October 2017 by Upper Tribunal Judge Plimmer.

2. In the decision the Judge found, as was conceded by the Appellant's representative, that the Appellant could not meet the provisions of paragraph 276ADE or Appendix FM of the Immigration Rules. Accordingly the Judge went on to consider whether there were any compelling circumstances that would justify a grant of leave under article 8 outside the rules. Whilst impressive the Appellant's circumstances did not qualify in this regard, paragraph 18. The situation he would face in Russia was discussed in the following paragraphs but although sympathetic the Judge found that the circumstances were not such that the Appellant had shown they were compelling.
3. The renewed grounds to the Upper Tribunal argue the Judge did not engage with the prohibition on the Appellant switching from Tier 4 to Tier 5, this was arbitrary and could be ignored and was relevant to the proportionality assessment. Also that as the Appellant was accepted to meet the criteria for Tier 5 and relied on the Chikwamba [2008] UKHL 40 principle to the effect that given an out of country application was bound to succeed in the context of the situation in Russia and the possible delays in his being able to re-apply. The failure to meet an administrative requirement could constitute a near miss. It is also argued that the Judge artificially separated the Appellant's private and family life aspects from the consequences of his return to Russia, that was not how the case was put and the circumstances had to be considered overall.
4. Upper Tribunal Judge Plimmer granted permission on the basis that it was arguable that the Judge erred in requiring compelling circumstances to address article 8, irrationally finding that the circumstances discussed in paragraphs 18 to 21 did not constitute compelling circumstances and failing to adequately reason that there would be no disproportionate interference with the Appellant's article 8 rights.
5. The submissions are set out in the Record of Proceedings and referred to where relevant below. For the Appellant reliance was placed on Chikwamba and Hayat (nature of Chikwamba principle) [2011] UKUT 444 (IAC) and that there was no sensible reason for requiring the Appellant to re-apply from abroad and there was no finding on that point. Secondly the Judge should have considered the effect on the Appellant's private and family life holistically.
6. For the Home Office it was submitted that the question was whether the Appellant had shown that a temporary separation from his family was disproportionate. In addition to Hayat the case of Chen [2015] UKUT 189 (IAC) was also relevant. Paragraph 18 was referred to and in paragraph 22 the Judge found that taken together the circumstances were not sufficient.
7. The fact that the Appellant meets the terms of Tier 2 which would only see leave granted for a 2 year period. As drafted the rules do not permit someone in the Appellant's position to change, that is a matter for the Secretary of State and not a ground which can be impugned in the First-tier Tribunal. The suggestion that the circumstances could amount to near miss is misconceived and does not assist the Appellant, the fact is that the rules do not permit a change of status under the rules relating to Tier 5 and the Judge had to proceed on that basis.
8. That the Appellant was not keen on returning to Russia where he would have to fulfil his civil obligations was a matter considered by the Judge along with the alternatives that could be open to him. It was inevitable that the Appellant's circumstances in the UK would have to be set out separately from those he would face in Russia in the decision as that is the nature of decision writing. The complaint that the Judge did not consider the case holistically is unfair

on the Judge given the nature of the need to set out the issues in order and then to balance them which is what was done in paragraph 22 of the decision.

9. It was not an error for the Judge to consider that compelling reasons would be required to justify a grant of leave outside the Immigration Rules under article 8. For the reasons given, and reluctantly as he stated, he found that the circumstances which he had set out fairly and fully, did to amount to such circumstances. Those findings were open to him and the decision cannot be said to be erroneous legally.
10. The Judge did not name either Chen or Hayat but that is not an error, the question is whether the Judge had regard to relevant factors and the decision shows that he did and summed the overall findings in the concluding paragraphs. Decisions have to be read sensibly and not in a manner that descends to narrow textual analysis, if the decision can be read in a manner that is sustainable then that is the approach to follow and that is the position with the decision in this appeal.

## CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

### **Anonymity**

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

### **Fee Award**

In dismissing the appeal I make no fee award.

Signed:



Deputy Judge of the Upper Tribunal (IAC)

Dated: 12<sup>th</sup> January 2018

