**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/23534/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House UT** | **Decision & Reasons Promulgated** |
|---|---|
| **On 13th May 2019** | **On 03 June 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**MRS OKSANA BAS**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Ms Bustani of Counsel
For the Respondent: Miss Pal, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a citizen of Ukraine (date of birth 2nd January 1956) appeals with permission against the decision of First-tier Tribunal Judge Chohan dismissing her appeal against the Respondent's decision of 6th November 2018 refusing her application for leave to remain. The Respondent was not satisfied that the Appellant met the Immigration Rules. The appeal is brought under Article 8 family/private life grounds.

2. In summary the Appellant made her application for leave to remain on the basis that she first entered the UK in 1995 and has remained here continuously ever since. The Secretary of State considered that the Appellant did not meet the requirements of paragraph 276ADE(1)(iii) to (iv) because she failed to meet paragraph 276ADE(1)(iii) as she had not shown that she had resided continuously in the UK for at least twenty years. Also she did not meet paragraph 276ADE(1)(iv) because the Secretary of State did not find that there would be very significant obstacles to her integration in Ukraine, the country to which she would have to go if required to leave the UK.

3. The Secretary of State considered that there were no exceptional circumstances in this case which would render refusal in breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for the Appellant. The Secretary of State further considered that the Appellant did not fall for a grant of leave to remain outside the Immigration Rules on the basis of compassionate factors.

**The Appellant's Case**

4. It is not disputed that the Appellant entered the UK on 17th November 1995 in possession of a valid visit visa with leave until April 1996. Thereafter, she claims, she has remained in the UK continuously. In November 2001, she met her husband, the Sponsor, in a chance meeting at Kentish Town train station. She and he stayed in touch but did not start a relationship until June 2006. She moved in with the sponsor in November 2013 and they married in June 2017. The Sponsor's date of birth is 2nd September 1950.

5. The Appellant has claimed that there would be insurmountable obstacles for her in any return to Ukraine. This is because of her physical and emotional health, the fact that she looks after her husband who is dependent on her physically and emotionally and who is a British citizen. She claims that she would struggle to reintegrate in Ukraine and would become destitute. Finally she claims that she is the registered carer for her 94-year-old mother-in-law and her removal would cause her mother-in-law emotional distress and hardship.

**The First-tier Tribunal Hearing**

6. When the Appellant's appeal came before the First-tier Tribunal, the FtTJ heard evidence from both the Appellant and the Sponsor. He took into account documentary evidence which included a copy of the Appellant's Ukrainian divorce certificate, her marriage certificate to the Sponsor, and a short letter from her mother-in-law simply stating that she had known the Appellant for 5 years prior to the wedding to her son.

7. The FtTJ noted that the Respondent's case was that he accepted that the Appellant entered the UK in November 1995 but did not accept that there was credible evidence to show that she had remained here continuously since that time. The FtTJ then set out in [2] that the Appellant met her husband, Michael Roberts, in 2001 but that the relationship only commenced in 2006 and they moved in together in 2013.

Ultimately the FtTJ was not satisfied that there was evidence sufficient to show on balance that she had resided continuously within the UK for at least 20 years.

8. He then looked at whether there were any insurmountable obstacles which would prevent the Appellant from returning to Ukraine. He noted that she had lived most of her life in Ukraine. She has family there including a daughter and grandchildren, and there was evidence of her owning a property there.

9. So far as her family life was concerned, the FtTJ accepted that she and the Sponsor are married and there may be hardship for the Sponsor in accompanying the Appellant to Ukraine but he found there was no justifiable evidence that any such hardship would amount to insurmountable obstacles. So far as the Appellant's 94-year-old mother-in law is concerned, the judge considered the Appellant's evidence relating to this lady, but concluded that as a British citizen, her mother-in-law would be entitled to public/social services care if the need arose. He dismissed the appeal.

**Onward Appeal**

10. The Appellant sought permission to appeal on three grounds:

    i. the FtTJ did not deal fully with the Article 8 Family Life claim which arose between the Appellant, her husband and his mother, in a **Kugathas** sense (more than normal emotional ties);
    ii. the FtTJ failed to properly consider whether his finding at [14] that the Appellant could return to Ukraine and make the appropriate entry clearance application, would of itself be proportionate; and
    iii. the FtTJ made a material error of fact. At [17] the judge misinterpreted the Sponsor's evidence in that the Sponsor confirmed at the hearing that he had personally known the Appellant to be present in the UK since 2001, when they had first met. Additionally he failed to take proper account of the Appellant's explanation for the lack of documentation for the period 1995-2001.

11. Permission having been granted, the matter comes before me to decide if the decision of the FtTJ contains such error of law that the decision must be set aside and remade.

**Error of Law Hearing**

12. Before me Ms Bustani appeared for the Appellant and Miss Pal for the Respondent. Ms Bustani began her submissions saying that the judge was wrong in his assessment of the Sponsor's evidence concerning the length of time that the Appellant had been in the UK (ground 3). There were two strands to her submission on this point.

13. Firstly it was accepted by the FtTJ that the Appellant entered the UK on 17th November 1995. Her passport shows entry. There is no exit stamp shown. The lack of an exit stamp supports the Appellant's case that she has remained here since the time of her entry. When this evidence was coupled with the Appellant's evidence of the chaotic lifestyle she was leading then, these factors should have been given

greater consideration. Secondly and following from this the FtTJ had also erred in his assessment of the Sponsor's evidence of having been in regular contact with the Appellant from 2001.

14. Additionally the FtTJ had not given adequate consideration to a number of factors (ground 1). This was especially with regard to the evidence of the care that the Appellant provided for the Sponsor's elderly mother, the fact that the Sponsor worked in the UK, his age and the length of their relationship.

15. Finally Ms Bustani submitted that the judge had found at [14] that the Sponsor appeared to be "in a position to support" an application for entry clearance. In these circumstances, she said it would be disproportionate to expect the Appellant to leave. These factors cumulatively meant that the decision was unsustainable. It should be set aside and returned to the First-tier Tribunal for a fresh hearing.

16. Miss Pal on behalf of the Respondent replied. A Rule 24 response had been served by the Respondent but this did not appear in my papers until it was brought to me at the end of the hearing. In any event Miss Pal's submissions followed the lines of the Rule 24 response.

17. She said firstly that she would respond to ground 3 which deals with the submission that the FtTJ had made an error of fact. She submitted that even if the judge had erred in his factual assessment of whether the Sponsor's evidence was sufficient to support the Appellant's claim that she was present in the UK in 2001, that would not of itself be enough to show continuous residence for at least twenty years. There would still be an evidential shortfall. The FtTJ gave adequate reasons for discounting the Appellant's explanation that her chaotic lifestyle being responsible for the lack of evidence in those early years 1995-2001 [17].

18. Miss Pal submitted that the FtTJ's decision was correct in that the Appellant could not fulfil the Immigration Rules under either EX1 or 276ADE(1)(iii). The judge's findings were more than adequate to show that there were no insurmountable obstacles to a return to Ukraine for her. The judge clearly kept all factors in mind including the position of the Sponsor and her mother-in-law and decided that this was a case where there was nothing to show that the Appellant, who is an overstayer, could not return to Ukraine and make an application for entry through the proper channels. The grounds amount to no more than a disagreement with the judge's findings. Those findings were open to the judge to make and the appeal should therefore be dismissed.

19. At the end of submissions I reserved my decision which I now give with reasons.

## Consideration

20. In setting out my consideration, it appears to me that the challenge in this case to the judge's findings is essentially a reasons based challenge in that it is said that the judge gave inadequate reasons for his findings and/or placed insufficient weight on other evidence given by supporting witnesses.

21. It is apparent from a fair reading of the decision that the FtTJ was fully aware of the approach to be taken in cases such as this. He sets out and identifies the correct Immigration Rule and shows an awareness that the only ground of appeal open to the Appellant is an Article 8 private/family life one.

22. The first issue that he had to resolve was whether or not the Appellant had shown that she had resided in the UK continuously for at least 20 years. Therein lies the tension in this appeal. The judge found that the Appellant's evidence did not satisfactorily resolve this and I agree with that assessment. The available evidence can be distilled into four different time periods:

    i. 1995 – 2001: this covers the time between the Appellant's entry to the UK and her first meeting with the Sponsor.
    ii. 2001 – 2006: during this time the Sponsor and Appellant "stayed in contact"
    iii. 2006 – 2013: the Sponsor and Appellant were in a continuing relationship
    iv. 2013 – present: the Sponsor and Appellant have been living together, latterly as husband and wife

23. In documenting my findings, I must first point out that I consider that some of the FtTJ's reasoning in [17] and [18] may be regarded as unclear. In [17] he has stated that, "The appellant has *not been able to provide any evidence of residence* in the United Kingdom prior to 2012. That is a significant period of 17 years." Later in the same paragraph he has stated, "From 1995 to 2012/2013, which is a significant period of time, *not to have any evidence to support residence* in the United Kingdom, simply does not make sense" (my italics). It may be that the FtTJ considered that the Sponsor's evidence, in which he said that he saw the Appellant's regularly between 2001 and 2013, merely demonstrated that she was present in the UK at unspecified intervals but was insufficient to establish continuous residence here. If such is the case, it would have been preferable if he had stated this overtly.

24. I agree with the FtTJ that the Sponsor's evidence provides corroboration of the Appellant's continuous residence in the UK for the fourth period outlined above in paragraph 22, i.e. since 2013. The second and third periods are more problematic in that the Sponsor's evidence is vague and it is not clear how robustly he can attest to the Appellant's residence in the UK (especially during the second period). Nonetheless, even taken at its highest value the Sponsor's evidence could only provide corroboration of the Appellant's continuous residence from November 2001, which remains insufficient to meet the 20-year requirement. There is still an evidential gap from the entry date in November 1995 to 2001.

25. Turning to the first period, Ms Bustani submitted that the judge had not given proper consideration to the lack of an exit stamp in the Appellant's passport. The lack of an exit stamp together with evidence of the Appellant's chaotic lifestyle should have prompted the judge into making a different interpretation to that which he did. I disagree. The burden of proof is on the Appellant to show that she was residing in the UK continuously during this period. The conspicuous lack of any evidence whatsoever beyond a passport entry stamp to show residence from 1995 to 2001 is

sufficient in my view to allow the FtTJ to draw the conclusion that he did and which encompasses these particular years, namely that "I find it incredible that the appellant does not have any evidence of her presence in the United Kingdom" [17].

26. So far as the remaining issues are concerned, I find that the FtTJ was correct to look at the evidence before him through the lens of the immigration rules. I find he has considered the question of whether there would be insurmountable obstacles to family life with the Sponsor continuing together outside the UK. He has looked at the evidence before him including the age and health of the parties and the surrounding circumstances and given adequate reasons for concluding that there are no insurmountable obstacles to family life continuing outside the UK. The assessment of the weight to be given to the evidence is a matter for the trial judge; he is the one who saw and heard from the witnesses. I find that the findings made on the question of insurmountable obstacles were ones that were open to him to make.

27. Following on from this, the FtTJ has turned his mind to whether or not removal would entail hardship pending an entry clearance application and found it would not. The Appellant is an overstayer and both she and the Sponsor must have been aware of her lack of status at the time they entered into their marriage.

28. So far as the Sponsor's elderly mother is concerned he noted the Appellant and Sponsor's evidence that social services did not provide help but equally said it was unclear why not. There is no reason put forward as to why, as a British citizen, she would not be entitled to the care that the public services would provide. The judge correctly directed himself on this point. He was entitled to assess the evidence on the basis that Social Services would perform their duties under the law.

29. Overall I find that the grounds of onward appeal in this matter amount to no more than a disagreement with the decision. It follows that I do not find that there any material error of law in this decision and the decision therefore stands.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

No anonymity direction is made.

Signed C E Roberts Date 28 May 2019

Deputy Upper Tribunal Judge Roberts

**TO THE RESPONDENT**
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed C E Roberts Date 28 May 2019

Deputy Upper Tribunal Judge Roberts