Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07592/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 without a Hearing On 15 July 2020	**Decision & Reasons Promulgated On 28 July 2020**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

SOFIYA VOLKOVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Introduction

This is an appeal against a decision of First-tier Tribunal Judge Clapham promulgated on 24 August 2019. Permission to appeal was granted by Upper Tribunal Judge Coker on 27 February 2020.

Decision without a Hearing

In light of the need to take precautions against the spread of COVID-19 and with regard to the overriding object set out in the Upper Tribunal Procedure

Rules to decide matters fairly and justly, directions were sent out by the Vice President of the Upper Tribunal by email seeking written submissions on the assertion of an error of law from both parties with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were received from the appellant and respondent and the appellant responded to the respondent's submissions.

Neither party objected to the error of law issue being determined without a hearing. I am satisfied that both parties have had an opportunity to make full submissions on the grounds. On this basis I find that it is fair and in the interests of justice to determine the appeal without an oral hearing of the appeal.

Background

The appellant is a Russian national who arrived in the United Kingdom on 1 September 2008 aged 13 in order to undertake full-time education in the United Kingdom at boarding school. The previous year she undertook an English language course in the UK. The appellant was granted leave until 2013 as a child student and then subsequently as a Tier 4 Student, her last period of leave being from 6 October 2017 to 11 January 2019. On 11 January 2019 the appellant made an in-time application for indefinite leave to remain in the United Kingdom on the basis of ten years' continuous lawful residence.

The appellant's application for indefinite leave to remain was refused on 11 April 2019 by way of a decision to refuse her human rights claim. The sole reason for the refusal was that her accrued absences exceeded 540 days during the previous ten years. The respondent decided not to exercise her discretion to overlook the appellant's excess absences and went on to consider paragraph 276ADE of the Immigration Rules. The respondent concluded that there would be no very significant obstacles to the appellant's integration in Russia and that there were no exceptional circumstances which would warrant a grant of leave outside of the Immigration Rules.

The appellant's position is that she has remained lawfully in the United Kingdom for a period of ten years and any excess absences were because, as a child at boarding school, she had to return home for the holidays and she spent a year studying Spanish as part of a four year degree course at the University of Edinburgh. She further asserts that there are very significant obstacles to her reintegration to Russia because of her immersion in British culture and her objections to the regime in Russia as well as an estrangement from her family. Finally, she asserts that it is not in the public interest to remove her from the United Kingdom given the strength of her private life ties to the United Kingdom. In view of all the circumstances, the balance of proportionality should fall in her favour because her removal to Russia would be unduly harsh.

The Decision of the First-tier Tribunal

The judge found that the appellant did not meet the Immigration Rules in respect of ten years' continuous lawful residence and that there were no compelling or compassionate features which meant that the respondent should have exercised her discretion in the appellant's favour to overlook the excess absences. The judge then turned to Article 8 ECHR, finding that the appellant did not meet the Immigration Rules and that her private life was built up at a time when her immigration status was precarious. The judge concluded that it would not be a disproportionate breach of Article 8 ECHR to return the appellant to Russia.

Grant of Permission

Upper Tribunal Judge Coker granted permission on the basis that it is arguable that the judge failed to address paragraph 276ADE(vi) of the Immigration Rules given the evidence that was before him and arguable that the judge failed to have adequate regard to the evidence that impacted upon the issue of proportionality. Upper Tribunal Judge Coker also extended time to admit the application for permission.

The Grounds of Appeal

Ground 1

> The judge misdirected himself in law by failing to determine the appeal with regard to paragraph 276ADE(vi) of the Immigration Rules.

Ground 2

> The judge failed to take into account material considerations when considering Article 8 ECHR outside the Rules.

Respondent's Position

The respondent accepts that the judge failed to consider paragraph 276ADE(1)(vi) of the Immigration Rules and concedes that this was an error but submits that the error was not material. The position of the respondent in respect of Ground 2 is that the judge took into account all of the relevant public interest considerations when considering Article 8 ECHR.

Decision on Error of Law

Ground 1 - Failure to take into consideration paragraph 276ADE(1)(vi) of the Immigration Rules.

It is accepted by the respondent that the judge failed to consider paragraph 276ADE(1)(vi) of the Immigration Rules. I am in agreement. It is manifest from the decision of the judge that he did not give this issue any consideration. He neither referred to the paragraph nor did he refer to the legal test of "very significant obstacles".

I am satisfied that the question of whether there were very significant obstacles to the appellant's integration in Russia was a live issue which required determination. The issue was raised in the refusal decision of 11 April 2019 at pages 4 to 5 and the skeleton argument dealt with this provision of the Immigration Rules at length from paragraphs 27 to 42. The appellant's representative made oral submissions on this issue. It is recorded at [30]:

> "Mr Basra said it could not be argued that there were very significant obstacles to the appellant's reintegration into Russia as she has cultural links with Russia, has a family there and has visited the country. The appellant's partner is Russian. Mr Basra said that the appellant did not meet the Immigration Rules."

At [33] it is said:

> "The appellant's representative relied on his skeleton argument which he adopted."

Nevertheless, in his decision the judge neither refers to paragraph 276ADE(1)(vi) of the Rules nor makes any findings in respect of it.

The respondent's submission in respect of Ground 1 is that the error was not material to the outcome of the appeal because the judge had, throughout the decision, despite not referring specifically to paragraph 276ADE(1)(vi), made findings on relevant factors from which the logical conclusion would be, if he had turned his mind to the issue, that the appellant would not face very significant obstacles on return to Russia. For instance, when considering whether the appellant's removal from the United Kingdom breached her Article 8 ECHR rights the judge stated at [57]:

> "There is no doubting that the appellant is an extremely talented individual; however, it cannot be said that she could not return to Russia. Her parents are there. She speaks the language. I quite accept that it is the appellant's position that she would have fewer opportunities in Russia than she would have in the United Kingdom."

Earlier in the decision the judge noted the appellant's evidence that she spoke to her parents a couple of times every month and had last visited them in Russia more than one year ago. The judge noted at [18] that her father had his own company and at [16] that she had a Russian boyfriend as well as at [43] that the appellant had previously returned to Russia during school holidays. The position of the respondent is that having made these findings, it was not properly open to the judge to conclude that the appellant was now such an "outsider" that she could not understand how life in Russian society was carried on; that she would not have the capacity to participate in life there; nor that she would be at real risk of prosecution, significant harassment or significant discrimination in Russia; nor that her rights and freedoms would be so severely restricted in Russia so as to restrict her ability to establish a private life there.

Despite the respondent's assertion that there was no evidence before the judge that the appellant was an outsider who did not understand how life in

Russian society was carried on and did not have the capacity to participate in life in Russia, there was in fact substantial evidence from the appellant in her statement which was referred to by the judge at [9] clearly setting out her concerns as to her ability to participate in Russian society. The appellant gave evidence that having spent ten years growing up in the United Kingdom she had been integrated into British society from the age of 13. She had attended Cheltenham Ladies' College and the University of Edinburgh. She had adopted British culture and values and was fearful of returning to Russia because of the misogynistic attitudes to women. In Russia she would want to exercise her right to freedom of speech and her aim of working as an international human rights lawyer would potentially bring her into conflict with the Russian authorities of whom she is critical. Her family have different values from her now and she is now estranged from them. The judge refers to this evidence briefly at [17] and at [21] notes that the appellant was re-examined on the issue of being estranged from her family if returned to Russia.

However the judge failed to go on to make any findings on these matters in particular as to the extent to which the appellant is estranged from her family and as to the potential difficulties she would face in Russia as a result of her immersion in British culture. The judge failed to analyse this evidence and failed to make any findings as to whether or not the evidence considered as a whole showed that there were very significant obstacles to the appellant's integration in Russia which was an issue which was potentially determinative of the appeal.

On this basis I am satisfied that the failure of the First-tier Judge to consider paragraph 276ADE(1)(vi) was material to the outcome of the appeal.

> Ground 2 -Failure of the First-tier Tribunal Judge to take into account material considerations when considering Article 8 ECHR outside of the rules.

The judge commences his consideration of Article 8 ECHR at [56] with the words;

> "Parliament has indicated that weight has to be given to the legitimate end of the maintenance of immigration control".

I agree with Ms Chapman that this is not an accurate reflection of the provisions of Section 117B(1) of the Nationality, Immigration and Asylum Act 2002, which states:

> "(1) The maintenance of effective immigration controls is in the public interest."

In the respondent's submissions it is conceded that the judge did not refer to proportionality or balancing exercise in his consideration of Article 8 outside the Immigration Rules and I am satisfied that the judge did not self-direct himself to Section 117A(2)(a) and the fact that he was bound to apply the statutory public interest considerations set out at Section 117B of the Nationality, Immigration and Asylum Act 2002. Nevertheless, I accept the

respondent's argument that the judge did, when assessing proportionality, take into account that the appellant spoke very good English and could support herself independently.

However, I am concerned that there were errors in the judge's approach to proportionality. In essence, the judge's conclusion at [57] is that:

> "I am not persuaded that the appellant has shown that her appeal should succeed in a situation where the Immigration Rules are not met. … I am satisfied that the requirements of the Immigration Rules are not met and I do not consider the appellant's argument outside the Immigration Rules is sufficiently strong to enable this appeal to succeed."

In my view, the judge has erred in two respects. The judge has correctly identified that the appellant's private life was established when she was in the United Kingdom with a 'precarious' immigration status in accordance with Rhuppiah [2018] UKSC 58**.**

At [49] to [50] of Rhuppiah it is said in relation to weighing the public interest considerations where an applicant's immigration status is precarious;

> 49. It was in section 117A(2)(a) of the 2002 Act that Parliament introduced the considerations listed in section 117B. So, in respect of the consideration in section 117B(5), Parliament's instruction is to "have regard … to the consideration [that] [l]ittle weight should be given to a private life established by a person at a time when the person's immigration status is precarious". McCloskey J suggested in para 23 of the Deelah case, cited in para 21 above, that the drafting "wins no literary prizes". But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general Page 17 terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:
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> > "53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …" "such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question".

The judge, in my view, failed to acknowledge that there was a limited degree of flexibility in respect of assessing private life. The evidence from the appellant was that her private life was built up over a long period when she was here

both as a child student and a university undergraduate and that her integration into the United Kingdom, as acknowledged by the judge in numerous paragraphs, was significant and very strong indeed given that she had been educated in the UK from a young teenager. The judge did not consider precisely what weight should be given to the appellant's private life in these circumstances. It was not enough for the judge to make a bare assertion that the private life was precarious when the judge had acknowledged elsewhere in the decision the strength of the private life.

Secondly, the judge has erred in that having decided that the appellant did not meet the Immigration Rules in respect of ten years' lawful continuous lawful residence, failing to consider other factors (aside from her ability to speak English and be financially independent) which weighed in the appellant's favour in the balancing exercise and which might reduce the public interest in removal. This is partly as a result of the judge's error as set out above at Ground 1 in failing to examine the appellant's evidence about the difficulties she would face in Russia and the failure to make findings on the evidence before him.

It is submitted by the respondent that it is clear from [56] to [59] that whilst the judge accepted that the appellant had established a private life in the United Kingdom, he did not consider that her interests outweighed the public interest considerations in circumstances in which she did not meet the Immigration Rules.

I am not satisfied that it is correct to impute from the judge's findings at [56] to [59] that he did not consider that the appellant's interests outweighed the public interest considerations when no or no clear or meaningful reference is made to those interests or considerations. The judge in particular when carrying out the proportionality balancing exercise manifestly failed to take into consideration the length of the appellant's residence, which was of more than ten years, the fact that it was lawful throughout, the fact that the appellant had never remained in the UK in breach of the immigration laws and the quality of her residence.

The test when considering Article 8 ECHR outside the Rules is whether there are exceptional circumstances which would render removal from the UK a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for the appellant. I am satisfied from the judge's reasoning and conclusion from [56] to [59] that this was not the test that he applied but rather he dismissed the appeal because the Immigration Rules were not met.

I am satisfied that the judge erred in his consideration of the weight to be given to the appellant's private life in accordance with Rhuppiah, failed to apply the correct test when considering Article 8 ECHR outside the Rules and failed to conduct a balancing exercise pursuant to Article 8 ECHR when determining the proportionality of the respondent's decision by failing to take into consideration relevant factors including the appellant's length of residence and strong private life in the United Kingdom. I am satisfied that these errors were material to the outcome of the appeal because had the judge taken them into account and

carried out a proper proportionality balancing exercise the judge may have come to another conclusion.

I am satisfied that both Ground 1 and Ground 2 are made out and that the decision contains errors of law which were material to the outcome of the appeal.

Remaking

The appellant submits that the decision should be set aside and that there should be a rehearing. The respondent does not give a view on disposal.

I am satisfied that the most appropriate way to proceed given that there are extensive factual findings to be made in respect of the appellant's situation in Russia is for the appeal to be set aside in its entirety and remitted to the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal dated 7 August 2019 involved the making of a material error on a point of law. The decision is set aside in its entirety.

The decision is remitted to the First-tier Tribunal to be heard de novo in front of a differently constituted Tribunal at a future date.

Anonymity Direction

No anonymity direction is made.

Signed R J Owens Date 15 July 2020

Upper Tribunal Judge Owens