Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24420/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd September 2017	**On 29th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MISS DARIYA KRYSYUK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Joshi Counsel instructed by Solacexis Solicitors
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Ukraine whose date of birth is recorded as 7th January 1965. She appealed the decision of the Secretary of State of 26th May 2015 refusing her application made under Article 8 of the ECHR which hearing was heard by Judge of the First-tier Tribunal Metzer sitting

at Taylor House on 21st September 2016. Having regard to paragraph 276ADE(1)(vi) of the Immigration Rules he dismissed the appeal.

2. Not content with that decision, by Notice dated 22nd November 2016 the Appellant made application for permission to appeal to the Upper Tribunal. The basis upon which the application was made was that contrary to what appears in the decision of the judge, namely that the appeal was limited to a consideration of paragraph 276ADE(1)(vi), which would be determinative of the appeal, it was submitted that no such concession was made and that the judge erred in failing to go on to consider either properly, or at all, the wider application of Article 8 which, it is asserted, had that been done, may well have resulted in a different outcome in the appeal.

3. The application failed in the first instance when Judge Hollingworth refused it observing that the judge was entitled to proceed with the hearing on the basis of the issue as indicated to the judge and that such an indication or concession would supersede the content of papers such as a skeleton argument submitted for the purposes of the hearing.

4. It is not clear to me whether the attendance note of Counsel who appeared in the First-tier Tribunal was before Judge Hollingworth but a renewed application in any event was made to the Upper Tribunal and it would appear that the attendance note of Counsel was certainly placed before the judge of the Upper Tribunal, Deputy Upper Tribunal Judge Black who on 8th August 2017 granted permission in which it is stated, inter alia:

> *"3. Counsel for the Appellant at the First-tier Tribunal hearing has produced an attendance note relating to the First-tier Tribunal hearing. It refers, and she asserts in a brief accompanying statement, that the issues were '276ADE(vi) [sic] and Article 8 outside the rules'. The appellant's skeleton argument in the First-tier Tribunal also refers 'exceptional aspects of the Appellant's case'. There is a paragraph in the skeleton headed: 'exceptional circumstances' – Article 8 of the EXHR. The phrasing in the First-tier Tribunal Judge's decision is ambiguous in that the First-tier Tribunal Judge states: 'the parties agreed at the outset that were the Appellant not to succeed under the Immigration Rules, she would not be able to satisfy the test of 'exceptional circumstances' outside the Rules'. It is not clear who was party to the purported agreement. There is a potential error at [12] of the decision in that the First-tier Tribunal states 'there were no wider submissions in relation to Article 8 of the ECHR outside the Rules'. This statement is contrary to the skeleton argument in which this issue is covered."*

5. It is clearly a condition precedent to the appeal succeeding that it is established that the concession was not made. In granting permission Judge Black noted that at best what was being presented was ambiguous. The burden of course is upon the Appellant. If it is ambiguous or equivocal then the burden of proof simply is not met. The Secretary of State has

produced a typed note with the date of 21st September 2016 upon it. That is the same date as the hearing. It reads:

> *"No bundle for A, only served on the morning of the hearing. Upon reviewing this, IJ wished to clarify the issues and his consideration. Rep stated she would argue very significant obstacles and outside of the rules in the alternative. IJ indicated he could not see how this could be argued outside if it could not succeed in the Rules; rep eventually conceded that this would be advanced purely on 276ADE."*

6. That reads to me clearly to suggest that there was a discussion between the judge and the Appellant's representative at the beginning of the hearing to narrow the issues. That there may have been other documents going to a different part of the case does not help in establishing whether or not that evidence was going to be relied upon. If as is suggested from this document it was accepted that the case would turn on a consideration of 276ADE then there was no obligation on the judge to look at the evidence going to the wider application of Article 8.

7. In support of the contention that concessions were not made there is a file note produced in support of the appeal which states:

> *"Judge repeatedly stated that I do not want to rely on Article 8 outside the rules as he already has to decide an important issue. I confirmed yes and I also rely on the skeleton argument which is quite extensive and deals with 276ADE and Article 8 outside the rules."*

The fact that the skeleton argument dealt with Article 8 outside the Rules being part of the same document again does not help because the skeleton argument appears on its face to have been capable of being relied upon only with respect to 276ADE notwithstanding the fact that it made reference to Article 8 outside the Rules.

8. The judge's note which by the way is significantly longer than anything from Counsel who appeared for the Appellant, as is the Respondent's file note, (and I was grateful to Ms Joshi who conceded that there was insufficient evidence laid before me in respect of the contention that there was no concession) is here, referring to the judge's note again, consistent with what the Respondent contends was the position. The judge himself of course has set out in clear terms what the concession was and why he did not go on to consider the wider submissions.

9. So, in determining whether or not the concession was made I resolved that in the Respondent's favour, in other words the Appellant has not satisfied me on balance of probabilities that the judge has erred. There is no reason for me to go behind that finding. It is urged upon me that Ms Krysyuk is entitled to a fair hearing. She has not been denied one. She had an opportunity to be heard at the First-tier Tribunal and she has had an opportunity to present before the Upper Tribunal such evidence as was thought appropriate in order to make the point. The fact that Counsel has

not been willing to come forward, as I have been told, to assist those wishing to advance the matter before me may, I do not know, be consistent with the very short file note which was produced at the hearing. I say no more about that. In the circumstances the Appellant, having failed to establish the premise upon which the appeal is brought, the appeal is dismissed.

Notice of Decision

The appeal is dismissed

Signed **Date: 28 September 2017**

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Deputy Upper Tribunal Judge Zucker