



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21049/2016

THE IMMIGRATION ACTS

Heard at Field House
Heard on 24 April 2018
Prepared on 3 May 2018

Decision & Reasons Promulgated
On 15 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS VIRA [Z]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie of Counsel

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Ukraine born on 10 April 1946 and is now 71 years of age. She appeals against a decision of the Respondent dated 27 July 2016. That decision was to refuse to grant the Appellant entry clearance as the adult dependent relative of her daughter Galina [Z], a British citizen (“the sponsor”) pursuant to paragraph

EC-DR 1 (1) (d) of Appendix FM and paragraphs 34 to 35 of Appendix FM-SE. It was accepted at first instance that the Appellant could not succeed under the Rules and the appeal was brought outside the Rules under Article 8 (right to respect for private and family life) of the Human Rights Convention. Before me counsel sought to argue that the Appellant could in fact satisfy the Immigration Rules following the Court of Appeal decision in **Britcits [2017] EWCA Civ 368**.

2. Judge of the First-tier Tribunal Plumptre sitting at Harmondsworth on 18 August 2017 dismissed the Appellant's appeal but for the reasons which I gave in my decision dated 25th of January 2018 I set that decision aside and directed that the appeal should be reheard by me. Attached to this determination is a copy of my error of law decision in which I accepted that the factual basis of this claim was largely established. By adjourning the 2nd stage of the appeal I gave the Appellant the opportunity to file further evidence upon which she might wish to rely in support of her Article 8 claim.

Documentation Considered

3. For the hearing the Appellant relied upon the documentation previously before the Tribunal at first instance which included statements of the Appellant, the sponsor and the sponsor's sister Tetiana. In response to my direction made in the error of law determination the Appellant submitted a medical report dated 15 February 2018 from Dr Ivanov in Ukraine together with over 100 pages of Viber logs evidencing communications between the Appellant and her two daughters, a supplementary unsigned statement of the sponsor, medical record and a letter from the sponsor's GP stating that the sponsor's low mood and mental health would benefit greatly from the Appellant being able to visit her in the United Kingdom.
4. The Appellant relied upon a skeleton argument prepared by counsel (see below at [24]). I also had copies of various authorities provided by both sides including **Britcits; Ribeli [2018] EWCA Civ 611; Dasgupta [2016] UKUT 28; Agyarko [2017] UKSC 11; Hesham Ali [2016] UKSC 60** and **Ghising [2012] UKUT 160**.
5. The Respondent's bundle comprised the immigration decision and Entry Clearance Manager's review; medical reports on the Appellant; a record of the Appellant's entry clearance application. The medical reports in this bundle confirmed that the Appellant had varicose veins in the lower extremities and needed to limit her physical activity particularly not standing on her feet for more than 30 to 40 minutes before sitting down. Assistance was required with the dressing of the compression underwear.

The Appellant's Evidence

6. The Appellant's statement said that she used to visit her daughters regularly in the past but travelling had become dangerous for her because of her varicose veins and the risk of bleeding on the aeroplane. The sponsor's statement said that the Appellant had been a very active and independent person in the past who retired in 2010 after

a successful career spanning over 41 years. The Appellant was a well-known microbiology and genetics scientist. The sponsor left Kiev in 2000 and came to the United Kingdom with her husband and son. The Appellant was deeply traumatised by the death of her own husband in 2007.

7. When the Appellant visited the United Kingdom in 2016 she became ill. Her vein started bleeding and she lost a large amount of blood. She received urgent treatment and was seen privately by a vascular surgeon, Sophie Renton. The doctor recommended that the Appellant should wear special bandages around the affected area of the leg. It was impossible to get a paid nurse to come and visit the Appellant daily in Ukraine and apply the bandages to the Appellant because she did not want to wear them and/or she did not want a stranger giving her this intimate service. She could not be forced to have such care. The emergency services in Ukraine would be quite inadequate if the Appellant had another episode similar to what she experienced in the United Kingdom. Tetiana said in her statement that she had visited the Appellant in July 2017 but had to postpone her departure because the Appellant was so depressed to see her leave.
8. The Appellant required long-term personal care to perform everyday tasks due to acute health problems and her age. She needed help with cooking, shopping and cleaning as she was unable to stand for prolonged periods of time or carry weight in excess of 3 kg. She suffered from depression which was aggravated by loneliness. Medical evidence confirmed her care requirements and the need for attention from other family members. Those requirements could not be met by paid care and the Appellant had no relatives in Ukraine who would be able to support her.

The Explanation for Refusal

9. The Respondent refused the application as he was not satisfied that help would be unavailable for the Appellant since there was no evidence that the Appellant had no other family or friends in Kiev. Her condition could be treated there. It might be necessary to pay for help but the sponsor had supported the Appellant financially up until now and there was no reason why this could not continue. The Appellant had previously visited the United Kingdom and there seemed to be no reason why she could not continue to do so provided the necessary precautions were taken. The sponsor was able to visit the Appellant in Ukraine. The Appellant's loneliness could be alleviated by visits. The Respondent accepted that the sponsor was able to support the Appellant financially and had been doing so.

Immigration Law and Rules relevant to the Appellant

10. As from 9 July 2012 the right of an adult dependent relative to apply for indefinite leave to enter is contained in section E-ECDR 2.1 to 2.5 of Appendix FM to the Immigration Rules. The applicant must (inter-alia) be a parent aged 18 years or over and the sponsor must be (inter-alia) aged 18 years or over and either a British citizen or present and settled in the United Kingdom. The applicant must as a result of age,

illness or disability require long-term personal care to perform everyday tasks. They must be unable even with the practical and financial help of the sponsor to obtain the required level of care in the country where they are living because either it is not available and there is no person in that country who can reasonably provide it or it is not affordable.

11. The burden of proof of establishing these provisions rests on the Appellant and the standard of proof is the usual civil standard of balance of probabilities. Appendix FM-SE sets out the evidence that must be submitted in order to demonstrate that the Appellant meets the above requirements. The evidence should take the form of independent medical evidence that the Appellant's physical or mental condition means that they cannot perform everyday tasks and must be from a doctor or other health professional. Independent evidence that the Appellant is unable even with the practical and financial help of the sponsoring United Kingdom to obtain the required level of care in Ukraine should be from a central or local health authority, a local authority or a doctor or other health professional.
12. These provisions were considered by the Court of Appeal in **Britcits** which cited the relevant immigration directorate instructions given by the Respondent to entry clearance officers when applying these provisions. Rejecting the argument that this section of the Rules was ultra vires the court found the policy implemented by the Rules was firstly to reduce the burden on the taxpayer for the provision of health and social care services to adult dependent relatives whose needs could reasonably and adequately be met in their home country and secondly to ensure that those adult dependent relatives whose needs could only be reasonably and adequately met in the United Kingdom were granted fully settled status and full access to the NHS and social care provided by local authorities.
13. The provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant and the standard of care must be what is required for that particular applicant. The needs were capable of embracing emotional and psychological requirements verified by expert medical evidence. What was reasonable was to be objectively assessed. There was not necessarily family life which engaged Article 8 of the Human Rights Convention whenever a UK citizen with an elderly parent resident outside the United Kingdom wished to bring that parent into the United Kingdom in order to look after the parent. Whether or not there was family life at the time of the application depended on the facts.
14. The Court of Appeal approved **Kugathas [2003] EWCA Civ 170**, which held that in order to establish protected family life between adults there had to be shown more than normal emotional ties. Thus, while fewer dependents including parents would be able to satisfy the conditions in the Rules, that was always the intention (see [68]). The position was summarised at [88] by Lord Justice Sales who stated: "if the care required by an elderly relative cannot reasonably be provided overseas the relative may well be able to succeed in gaining leave to enter under the ADR Rules;

conversely if the required care can reasonably be provided overseas, it is likely that it will not be disproportionate to apply the ADR Rules with full force and effect in such a case”.

15. When considering Article 8 outside the Rules, assistance in determining the approach to the proportionality exercise was provided by the Supreme Court in the case of Agyarko, see [57] where it was said: “the critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.”
16. In the instant case before me the Appellant is outside the jurisdiction. In the case of Ahmed [2017] CSIH 63 it was held that the status of a person outside the jurisdiction was similar to a person within the jurisdiction whose status was precarious. The test as set out in Agyarko applies in this case *mutatis mutandis*.

The Hearing Before Me

17. At the rehearing of this appeal before me neither of the Appellant’s daughters gave evidence and the supplementary witness statement of the sponsor in the supplementary bundle was not signed before me. The Appellant relied on the letter from Dr Ivanov dated 15 February 2018 which listed the 12 consultation dates of the Appellant between 9 December 2015 and 15 February 2018 (the last date being when Dr Ivanov himself examined the Appellant). The report stated that the Appellant had not seen the doctor often during 2017 due to her refusal to attend consultations on her own. During her last visit she was accompanied by her daughter. She had a long history of anxiety depressive syndrome and had a chronic progressive varicose veins disease which needed treatment.
18. The main cause of the Appellant’s anxiety/depressive syndrome was chronic stress associated with separation from her family. Since the previous consultation in July 2017 there had been no positive changes. She had become more withdrawn, experiencing apathy and a lack of motivation. She had refused to take medicine and had become more emotionally dependent on her family. The doctor listed the medicine that the Appellant was taking.

Closing Submissions

19. As there was no oral testimony, I invited the Presenting Officer to make her closing submissions. Reference was made to [16] of my decision finding a material error of law in which I had said that the Appellant may file further evidence in support of her claim under Article 8. Instead of that the new bundle of evidence was limited to a medical report and evidence of contact between the Appellant and her daughters who had chosen not to give evidence at the hearing. In particular there was no new

evidence addressing the availability of alternative care in Ukraine and how the Appellant would manage.

20. I pause to note here that at [16] of my previous determination I had noted that the Article 8 evidence the Appellant might wish to produce at the resumed hearing might relate to the non-availability or inadequacy of paid care. The report from Dr Ivanov was criticised by the Presenting Officer on the basis that the doctor had not seen the Appellant for seven months and yet said there were no positive changes even though there were no proper medical records to support that view. The doctor was evidently relying on what the Appellant and her daughters had told him. Given that seven months had elapsed it was difficult to see how the Tribunal could be sure that the Appellant had refused to take her medicine throughout that period. The doctor would not be in a position to know that, he had to rely on what he was being told and that undermined the weight that could be given to the medical report.
21. Reliance was placed on the Court of Appeal decision in **Ribeli** whose facts were similar to this case. It was the choice of the Appellant's daughters that they did not wish to return to Ukraine to look after the Appellant. In particular the Appellant's daughter, Tetiana, chose to leave the Appellant (in 2009) to improve her own life. This claim would not meet either the Rules or Article 8. There was no time when the Appellant was constantly with a family member and she was obviously managing. The Appellant had had an incident whilst in the United Kingdom but there was no evidence whether the Appellant needed further operations. The Appellant had had emergency treatment for which she was not billed by the NHS. The evidence did not confirm that the Appellant needed long-term personal care and did not meet the Rules. There had been no proper explanation of what was unavailable in Ukraine.
22. In **Ribeli** the Court of Appeal had said that what was crucial in that case were the Appellant's physical needs. The medical evidence had spoken of a failure to meet emotional needs leading to a deterioration in physical health. Taken by itself the mental health problems in **Ribeli** which were described as anxiety and mild depression could not possibly be regarded as being so serious that the Appellant could not be cared for in South Africa. The Court of Appeal had also noted that there was insufficient evidence as to what particular steps had been taken to obtain a place at a care home elsewhere in South Africa even if one was not available in the Appellant's home area. The test under Article 8 was an objective one whatever the subjective feelings of a person might be.
23. For understandable reasons the sponsor in **Ribeli** wanted to continue to have the professional and social life she had built up in the United Kingdom and did not wish to return to South Africa. That did not come close to establishing that the Respondent's refusal to grant the Appellant entry clearance constituted a disproportionate interference with Article 8 rights. In the instant case the sponsor could not expect her mother to come to the United Kingdom. There were no more than no more normal emotional ties in this case. The Appellant received a pension in

Ukraine and had her own property. The family would continue to visit her. There was no evidence that the Appellant had to go to a doctor with her daughter.

24. In response counsel relied upon his skeleton argument which set out the basis of the evidence and commented on the case of **Britcits**. That case had acknowledged that if there were psychological and emotional needs of a parent which could not be met by a paid carer that could be a basis to qualify under the Rules as they were capable of embracing emotional and psychological requirements verified by expert medical evidence. The Rules on adult dependent relative claims should be broadly interpreted. If one was assessing the claim outside the Rules, the Rules merited considerable weight in the assessment of proportionality but were not determinative. If the Appellant met the Rules her appeal must succeed. Within the Rules the issue was whether the Appellant's emotional and psychological requirements could be met without the presence of her family.
25. It was not correct to say that the Immigration Rules were per se compliant with Article 8 and that a test of exceptionality had to be applied. Could the Appellant's emotional and psychological needs be reasonably met without the presence of her family? The evidence was that they could not. The Appellant had a family life with her daughter, the sponsor, which constituted more than normal emotional ties. The Appellant had no other family in Ukraine and was facing her 8th decade of life on her own. It was not an answer to say that others could be paid to help the Appellant with care. Nor was it an answer that family members could visit the Appellant from time to time in Ukraine. The Appellant could not visit United Kingdom as her application to do so in March 2017 had been refused on the grounds that her intention was to settle in the United Kingdom. Although the Appellant did not accept that at that time she was intending to settle now and thus was not eligible for a visitor's visa.
26. In oral submissions it was argued it was not necessary to call the sponsor but that was not an opportunity for the Respondent to open up the sponsor's credibility. The sponsor's evidence had not been challenged on appeal. It was fallacious to say that the doctor would simply write down what patients were telling him. He had reached a professional view. The Respondent was overlooking what had been said in the **Britcits** case about underlying emotional needs. The criticism that had been made in **Britcits** that the Rules made no mention of psychological problems had been dismissed by the Court of Appeal who found psychological problems did come within the Rules. Counsel acknowledged that his skeleton argument had not referred to the case of Ribeli which he sought to distinguish on its facts. It was not a factual precedent. Choice was not an issue under the Rules it only arose in the question of Article 8. There were more than normal emotional ties in this case. The Appellant would not receive free medical treatment under the NHS.

Findings

27. The first issue in this case is whether the Appellant can meet the Immigration Rules as an adult dependent relative. If she can then she is entitled to succeed in this appeal.

If she cannot then I must go on to consider whether she can succeed outside the Immigration Rules under Article 8 and whether the effect of the Respondent's decision is so grave that it engages the Human Rights Convention. If it is then thirdly I must decide whether the interference is proportionate to the legitimate aim being pursued.

28. The first issue, whether the Appellant can meet the Rules, breaks down into a series of questions because of the test prescribed by Appendix FM. Does the Appellant require long-term personal care to perform everyday tasks as a result of her age illness or disability? As the Respondent points out in submissions, there are long periods of time when there is no member of the family with the Appellant in Ukraine but evidently, she is able to cope with everyday tasks. She has received advice for example not to lift weights above 3 kg but it is not being said she cannot lift any weights at all. That she must exercise a degree of care in her everyday life how she approaches tasks around the house for example does not of itself indicate that she requires long-term personal care.
29. Her health problems concentrate around two areas. The first is her varicose veins which caused an emergency attendance at hospital while the Appellant was visiting the United Kingdom. There is no indication on the papers that there has been a repetition of this incident in Ukraine since the visit to the United Kingdom two years ago. Whilst the family are concerned as to how prompt the emergency services would be in responding to a call from the Appellant were she to have a repetition of something similar, I do not consider that that is sufficient to indicate that the Appellant requires long-term personal care. I do not have the evidence before me to indicate what response times and hospital care would be available for the Appellant in the event of a further episode but the burden is on the Appellant to establish any concerns in that regard which has not been done.
30. The second requirement that the Appellant must show in order to meet the Rules is that she must be unable to obtain the required level of care in Ukraine even with the practical and financial help of her daughters because such care is either not available or is not affordable. There is a marked lack of evidence on these issues. The evidence put forward on the Appellant's behalf has concentrated on the emotional ties between the Appellant and her daughters, their degree of concern for their mother and their desire that their mother should come to the United Kingdom where she would be much closer to them than she is now. Those may be issues of relevance to be considered outside the Rules under Article 8 but at this stage I am considering whether the Appellant can meet the Rules.
31. There is very little evidence beyond the sponsors' assertions about what care in Ukraine is available. By contrast I am told that the Appellant has her own house and has an income from a pension. The Respondent accepts that the two daughters send the Appellant sums of money, to supplement the Appellant's income. I deal with the issue of whether the sending of money of itself creates a dependency below. In adjourning this case for a stage 2 hearing I gave the Appellant the opportunity to put

in further evidence which could have included evidence about the cost and availability of carers and privately paid nursing staff. No such evidence has been forthcoming. The burden of proof of establishing that she meets the Immigration Rules rests upon the Appellant. It is not possible for me to say from the limited evidence I have that care is not available in Ukraine on a privately paying basis nor that the Sponsor would be unable to afford such care.

32. The argument is made in the skeleton argument that care from a family is better than care from strangers again is an issue under Article 8 not an issue for the Rules but under the Rules what the Appellant has to show that is there is no person in Ukraine who could reasonably provide the care that the Appellant might need. The evidence falls far short of demonstrating that. I have no indication how much such care would cost. I only have the reluctance of the Appellant and her family to engage such care but that is insufficient. It is quite clear that the Appellant cannot satisfy the Immigration Rules. The case at first instance appears to have proceeded on the basis that the Appellant could not meet the Rules and it is something of an addition at this late stage that the Appellant now seeks to argue that she can meet the Rules. To meet the Rules the Appellant has to show some evidence to satisfy them but this she cannot do.
33. The test under the Rules includes psychological ill-health and it is argued in this case that the Appellant suffers from anxiety and is reluctant for strangers to assist her. She has depression because she is on her own after the death of her husband, she misses her family and her spirits would be cheered were she to have rather more contact with them than she does at present, for example by living with them. The question at this stage is whether that health issue brings the Appellant within the Rules. I cannot see that it does. There is no evidence to show what impact on the Appellant there would be were someone to come in and assist the Appellant because as far as I can tell there is no evidence to suggest it has been tried. The issue under the Rules is whether an Appellant can demonstrate that practical help in the country of origin would make no difference to the need for care whether that need arises from a physical or a psychological cause. The family's preference to deliver help in the United Kingdom rather than engage help in Ukraine is irrelevant. It is not for me to speculate on whether a nurse going in regularly to see the Appellant would not only physically assist the Appellant but also alleviate her depression and loneliness. What the Appellant has to show is that it would not and this has not been shown.
34. I would make one further comment in relation to the Rules. It was submitted by counsel that the choice of the sponsor and her sister not to return to Ukraine to look after the Appellant is not an issue which arises under the Rules. What the rule requires at subsection E-ECDR.2.5 is that the Appellant must be unable to obtain the level of care even with the practical and financial help of that sponsor. There is no definition as such of what is meant by practical help but it must mean more than the sponsor simply sending funds to the Appellant for her to pay nursing care. Practical help could mean the sponsor physically assisting the Appellant in the tasks she needs to perform and this would be done by the sponsor being in Ukraine. That the sponsor

does not wish to go to Ukraine is a matter of choice but it means that the Appellant cannot demonstrate under that part of Appendix FM that she the Appellant cannot manage because she cannot obtain the required level of care. That level of care might be achieved if the sponsor, one or other of the Appellant's daughters, was in Ukraine with the Appellant. That too is a matter on which the Appellant must demonstrate the circumstances of the case and she has failed to do this too because neither daughter is prepared to travel to Ukraine and look after the Appellant permanently there.

35. Having found that the Appellant does not meet the Rules I proceed to consider whether the Appellant can succeed outside the Rules. There is family life between the Appellant and her daughters. They are in regular contact with their mother and they have concerns for her. They have travelled to Ukraine to see her and in 2016 the Appellant came to the United Kingdom to see them. However, all three are adults. As I explained at [14] of my previous determination if the family life did not go beyond normal emotional ties the Respondent's decision would not be an interference because the family life would not be such as to acquire protection and Article 8 is not engaged.
36. Although the evidence is sparse it appears that the sponsors who have apparently well-paid jobs in this country do assist their mother from time to time with some financial support. It is difficult to say however that that creates a financial dependency by the Appellant on her daughters given that she has an income of her own and her own home. In order to establish a financial dependency, I would expect to see far more evidence that has been produced demonstrating the need the Appellant has for whatever monies are actually sent to her.
37. In terms of an emotional dependency, the evidence I have are the concerns expressed by the sponsor for her mother but again it is difficult to say that this goes beyond normal, emotional ties. The sponsors have made their choice to come to the United Kingdom to pursue their professional careers here. The question of whether there is a family life between adults over and above normal emotional ties will invariably be intensely fact sensitive. In the case of Dasgupta it was noted that the father daughter relationship in that case had continued and flourished notwithstanding the factors of distance and marriage and had if anything strengthened during recent years following the demise of the Appellant's wife and in conjunction with his gradually deteriorating health. In that case the Appellant's physical needs could possibly have been met by a programme of care but the emotional needs would not have been met.
38. In this case it is also difficult to say that the Appellant's emotional needs would be unmet if arrangements for the Appellant's care were put into place. Dr Ivanov referred to the Appellant becoming more emotionally dependent on her family due to the age factor but he equated that with the Appellant maintaining interest in life and needing to be among people she was interested in and therefore required constant attention and help from her family. That of course the Appellant does not receive because her two daughters are not in Ukraine they are in the United

Kingdom. By contrast a carer could potentially assist the Appellant with these difficulties particularly if they were sufficiently skilled. Improvement in the Appellant's depression comes about when her family is around but since no alternatives have been tried it is difficult to say that is the only possibility for the Appellant or that it is such a compelling factor that it weighs heavily in the proportionality exercise.

39. As the Court of Appeal pointed out in **Ribeli**, it is well established that there is no relevant family life for the purpose of Article 8 simply because there is a family relationship between two adults such as a parent and her child who live in different countries. In **Ribeli** it was said as it is said in this case that the Appellant needed to be close to her daughter so that she could receive the care and support she needed. The problem for the Appellant in **Ribeli** and for the Appellant in the instant case before me is what is described at paragraph 69 of the Court of Appeal's decision as the crucial point. The Appellant's daughter in **Ribeli** could reasonably be expected to go back to South Africa to provide the emotional support that her mother needed as well as to provide practical support, for example if the concern was that the Appellant might be cared for in her home by people who may turn out to be not trustworthy.
40. The Court of Appeal decided there was no reason why the Appellant's daughter in **Ribeli** could not live and work in South Africa to supervise the care arrangements made for her mother. That position is very much the case the case here. There is no reason why one or both of the Appellant's daughters could not travel to Ukraine where they were born and brought up in order to supervise the care being provided to their mother. This case as in the case of **Ribeli** is about the choice which the daughters have exercised and which they wish to continue to exercise, living and working in a major international centre like London rather than in Ukraine which is their country of origin. They are entitled to make that choice as the sponsor in **Ribeli** was entitled to make that choice but the Tribunal could not be faulted for having come to the conclusion that any interference with the Appellant's right to respect for family life should conform to the principle of proportionality. The choice exercised by the Sponsor and her sister in this case does not attract great weight for the reasons given in **Ribeli**.
41. It is unfortunate that counsel for the Appellant chose not to deal with the case of **Ribeli** in his skeleton argument. I do not accept the attempt to distinguish **Ribeli** from the instant case before me. In **Ribeli** what was crucial was the Appellant's physical needs. That is also crucial in this case because of the difficulties which the Appellant has had with her varicose veins. The Appellant's mental health in **Ribeli** was described as anxiety and mild depression. In the instant case before me the Appellant's mental health and psychological problems are described as anxiety, loneliness and depression. There are strong parallels between **Ribeli** and the case before me.

42. It was argued before me that the Appellant had not taken her medication. This was queried by the Respondent, because of the seven-month gap between consultations. The doctor it was said was merely relying on what he had been told by the family as he would not be in a position to know what had been happening in that intervening period. The counter argument was that the doctor formed his own professional view. My concern with the state of the medical evidence and its sparsity is that there is no indication what would be the effect on the Appellant if she were to fail to take her medication for a significant length of time as is claimed here. Would there have been side effects? Would they have been noticeable by Dr Ivanov? If there would have been effects if medication had not been taken but no side effects have been noted by Dr Ivanov does this undermine the claim that the Appellant does not take her medication unless her family prompt her? Has she in fact been taking her medication? These were matters upon which it was reasonable to have expected the doctor to have dealt with if they were considered significant. If they were not commented upon because they were not significant that would undermine the claim that the Appellant is unable to manage.
43. Even if the Appellant can show that her relationship with her daughters goes beyond normal emotional ties, which I do not accept for the reasons I have given, the interference with the family life between the Appellant and her daughters is proportionate to the legitimate aim of immigration control. That legitimate aim arises partly because the United Kingdom has the right to control its own borders and partly because given the Appellant's age and ailments it is difficult to see how the Appellant would not require the services of the National Health Service at some point. Whilst the treatment she received in 2016 is not necessarily to be held against her as a reliance on public funds it is difficult to see how some NHS involvement would not occur in the future that would mean a reliance on public funds.
44. The Appellant's status is akin to someone whose status in the United Kingdom is precarious, see Ahmed. On the Respondent's side of the scales is that the Appellant cannot meet the Rules. There are no compelling reasons why the Appellant should be granted entry clearance which outweigh the respect which must be given to the public interest in the enforcement of immigration control. Either one or other of her daughters can go to Ukraine to look after the Appellant or she can seek paid help.
45. The interference with the family life of the Appellant and her daughters is proportionate to the legitimate aim being pursued. This case is in effect on all fours with the case of Ribeli and just as the Court of Appeal found in that case that the Respondent's decision was proportionate (for the reasons which I have set out in some detail above) so I find the Respondent's decision in this case was also proportionate to the legitimate aim pursued. The Appellant cannot show that she meets the Immigration Rules or that her appeal should be allowed outside the Rules under Article 8. There are no such circumstances in this case which would render the Respondent's decision disproportionate. I therefore dismiss the Appellant's onward appeal against the Respondent's decision to refuse entry clearance.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeal.

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 10 May 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

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

Signed this 10 May 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21049/2016

THE IMMIGRATION ACTS

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Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS VIRA [Z]
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - WARSAW

Respondent

Representation:

For the Appellant: Mr A Mackenzie
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS FOR FINDING AN ERROR OF LAW

The Appellant

1. The Appellant is a citizen of Ukraine born on 10th of April 1946 and is now 71 years of age. She appeals against the decision of Judge of the First-tier Tribunal Plumptre sitting at Harmondsworth on 18th of August 2017 who dismissed the Appellant's

appeal against a decision of the Respondent dated 27th of July 2016. That decision was to refuse to grant the Appellant entry clearance as the adult dependent relative of her daughter Galina [Z], a British citizen (“the sponsor”) pursuant to paragraph EC-DR 1 (1) (d) of Appendix FM and paragraphs 34 to 35 of Appendix FM-SE. It was accepted at first instance that the Appellant could not succeed under the Rules and the appeal was brought outside the Rules under Article 8 (right to respect for private and family life) of the Human Rights Convention.

The Appellant’s Case

2. The Appellant stated that she required long-term personal care to perform everyday tasks due to acute health problems and her age. She needed help with cooking, shopping and cleaning as she was unable to stand for prolonged periods of time or carry weight in excess of 3 kg. She suffered from depression which was aggravated by loneliness. Medical evidence confirmed her care requirements and the need for attention from other family members. Those requirements could not be met by paid care and the Appellant had no relatives in Ukraine who would be able to support her. The Respondent accepted that the sponsor supported the Appellant financially and emotionally and that funds were available for the Appellant settlement in the United Kingdom to ensure that she would not be a burden on the public purse.
3. The Respondent refused the application as he was not satisfied that help would be unavailable for the Appellant as there was no evidence that the Appellant had no other family or friends in Kiev. Her condition could be treated there. It might be necessary to pay for help but the sponsor had supported the Appellant financially up until now and there was no reason why this could not continue. The Appellant had previously visited the United Kingdom and there seemed to be no reason why she could not continue to do so provided the necessary precautions were taken. The sponsor was able to visit the Appellant in Ukraine. The Appellant’s loneliness could be alleviated by visits.

The Decision at First Instance

4. The Judge heard evidence from the Appellants’ two daughters, the sponsor herself and Tatiana [Z] (also a British citizen) both of whom lived in the United Kingdom. There was a brother who lived in Ukraine but contact with him had ceased some time ago due to family dispute. The Appellant received a pension in Ukraine, owned a house there and had been widowed since 2007. Whilst on a visit to the United Kingdom in April 2016 the Appellant had suffered a severe emergency varicose vein bleed for which she received medical treatment and a report thereon was available to the Judge.
5. The Judge rejected the Respondent’s argument that the Appellant could continue to visit her daughters in the United Kingdom because an application for a visit visa was refused on 19 April 2017. The refusal was on the grounds that since the Appellant

had made an application to settle as an adult dependent relative the requirements of the immigration Rules were not met.

6. In dismissing the appeal the Judge found: (i) that the Appellant's emotional and psychological needs could be met by visits from her two daughters; (ii) the Appellant's needs could be met by help from outside her family; (iii) paid care had not been attempted; (iv) full and adequate medical treatment for the Appellant's varicose vein condition and other arguably psychological conditions was available in Ukraine as was established by the Appellant's medical records; (v) such Article 8 issues as arose in the determination were adequately considered under the Immigration Rules and it was not necessary to proceed to a further full separate consideration of Article 8 outside the Rules.
7. The difficulty with the determination was what the Judge said at [32] about her approach to the assessment under Article 8. She wrote: "I accept that the refusal constitutes an interference with family life and Article 8 is engaged. It is difficult to find that more than normal emotional ties have been established between the Appellant and her two adult daughters as these family members have been living apart either for 17 years or some 8 years as per the reasoning in Kugathas".

The Onward Appeal

8. The Appellant appealed against this decision in grounds settled by counsel who appeared at first instance and before me. The grounds argued that there had been an incorrect approach to family life under Article 8. The test of whether there were more than normal emotional ties went to whether there was a protected family life at all. The Judge had already decided the test by saying that the refusal constituted an interference with family life and Article 8 was engaged. The Judge then failed to go on to decide whether the interference which existed would be proportionate. It was arguably wrong for the Judge to proceed to a full separate consideration of Article 8 outside the Rules as that approach misunderstood the function of the First-tier. The correct approach was to embark from the outset on a wide-ranging balancing exercise under Article 8. The Article 8 analysis was not completed by the Judge.
9. The Judge had not explained how the Appellant's emotional and psychological well-being could be met by visits from her daughters to Ukraine as she had acknowledged the submission that such visits did not provide any degree of permanence for the Appellant and could not be a realistic long-term solution. The daughters were both working in the United Kingdom and had families here and so could not travel to Ukraine frequently or for any length of time. The evidence of the psychiatrist was that the Appellant's psychological condition only stabilised when the Appellant was surrounded by her immediate family. The Judge had confused companionship, attention and love (which could only be given by family members) with care provided on a transactional basis. A further ground relating to the payment of an NHS charge was not pursued before me.

10. Permission to appeal was granted by Judge of the First-tier Tribunal Hollingworth on 8th of November 2017. He found it arguable that the Judge having found that family life was engaged should have proceeded to conduct a proportionality exercise yet had declined to undertake this. It was unclear whether the Judge had in fact embarked upon a proportionality exercise or not. If she had it was incomplete. If she had not it was arguable that she should have carried it out given her finding the Article 8 was engaged.
11. The Respondent replied to the grant of permission accepting it was unclear whether the Judge found at [32] that Article 8 was engaged between the Appellant and her daughters. However, the Judge might have been suggesting that the family life that existed was of a limited nature.

The Hearing Before Me

12. At the hearing before me counsel reiterated the arguments made in the grounds of onward appeal. The daughters' evidence was that both had careers and family in this country and could not go to Ukraine on a long-term basis. Visits were thus ruled out. The Appellant needed the support of her daughters not just day-to-day care for her practical needs. For the Respondent it was argued that the Judge was making a finding on the Appellant's situation at [31]. There was no issue with the determination from [32] onwards after the contentious sentence in that paragraph. The Judge had looked at Article 8 in the round. In conclusion counsel referred back to the Respondent's own rule 24 response which appeared to acknowledge that the Judge had made an error of law. It was not just one offending sentence in [32]. The Judge had misapplied the test.

Findings

13. The issue I have to decide at this stage is whether the Judge made a material error of law in her determination. I accept the argument made on the part of the Appellant that [32] of the determination is contradictory in nature. The Judge accepted that the Respondent's refusal constituted an interference with the family life which the Appellant had with her two daughters and thus that Article 8 was engaged. That conflated two separate parts of the appropriate test. The first part was whether family life existed at all. It is not a particularly high threshold to cross to establish that family life exists between a mother and her daughters. The important part is the next stage as to whether that family life can be continued elsewhere in which case the decision does not interfere with family life. If it cannot then there is an interference with the right to respect for family life.
14. The Judge appeared to find that there were no more than normal emotional ties between the Appellant and her two adult daughters. This would mean that there was no interference with protected rights since the family life was not of such character that the Respondent's decision was interfering with it. That may have been a conclusion open to the Judge, depending on the underlying evidence, but it could not be a valid conclusion if she had found that the refusal interfered with family life.

That central issue needed to be resolved but it was not. I find that that was a material error of law in the Judge's decision and I set it aside.

15. It was argued that the Judge had not properly analysed the medical evidence that was before her which she appeared otherwise to accept. Given that this was an Article 8 claim outside the Rules the evidence had to be looked at in a holistic way and since it was not clear from the determination the basis on which the Judge was looking at the Article 8 claim, I accept that the analysis of the medical evidence also needs to be carried out again. I therefore set aside the decision of the First-tier.
16. I considered whether I should remit the case back to the First-tier to be heard again. I do not consider that is necessary since the factual basis of this claim is largely established. I therefore propose to adjourn the 2nd stage of this appeal, the rehearing, to a later date before me. This will give the Appellant the opportunity to file any further evidence she may wish to rely upon in support of her claim under Article 8. This may relate to the non-availability or inadequacy of paid care, difficulties for the sponsor and her sister to travel to Ukraine or any other relevant matters. The Judge's conclusions which I have summarised at paragraph 6 above are not preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error or errors of law and I have set it aside. I direct that the rehearing of the appeal will take place on the first available date before me, Deputy Upper Tribunal Judge Woodcraft, with a time estimate of one hour 30 minutes.

Any further evidence which the Appellant wishes to file and serve in this appeal should be filed and served at least 21 days before the renewed hearing date.

Appellant's appeal allowed to this limited extent

I make no anonymity order as there is no public policy reason for so doing.

Signed this 25th of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

Although I have set aside the determination in this case I make no further decision regarding fees at this stage. I will consider the issue of a fee award following completion of the re-hearing.

Signed this 25th of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge