Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14191/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2017	**On 7 March 2018**
And 5 March 2018	

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

IRYNA VALDAYEVA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy (counsel instructed by OTS Solicitors)
For the Respondent: Ms A Fujiwala (Senior Home Office Presenting Officer) (2017)
Mr I Jarvis (Senior Home Office Presenting Officer) (2018)

DECISION AND REASONS

1. This is the appeal of Iryna Valdayeva, a citizen of Ukraine born 8 October 1988, against the decision of the First-tier Tribunal dismissing her appeal against the Respondent's refusal (on 9 December 2015) of her human rights claim, dated 21 January 2016.

2. She was granted entry clearance as a student, entering the UK on 18 July 2005, her leave being subsequently extended until 31 October 2011; an application for further leave as a Tier 4 student was refused, on 12 January 2012. She lodged an appeal on 1 February 2012 which was allowed on 19 June 2012. An administrative error by the Home Office meant that that decision was not implemented so that her student leave was not reinstated. She subsequently applied for leave to remain as the spouse of a settled person, which was granted until 19 May 2016. On 24 November 2015 she applied for indefinite leave to remain on the basis of having lived in the UK lawfully for ten years.

3. Her application was refused, because she had been absent from 23 December 2010 to 9 September 2011 studying abroad, which amounted to an excess absence exceeding the permitted 540 days over a five year period, being 633 days. This was not considered to have been an absence that should be treated as exceptional, so her application failed under the Rules. Her application, in so far as it fell to be considered under the Partner route, was otiose, as she retained leave at the date of decision. Regarding her private life, she had not shown that she would face very significant obstacles to integration in Ukraine were she to return there.

4. She lodged an appeal on the basis that she had been required to study abroad, under the Erasmus programme, as part of her UK university course. It was her case that this essential study abroad amounted to an exceptional circumstance that rendered the exercise of discretion appropriate when the Secretary of State considered her application for indefinite leave to remain.

5. The Appellant had put a written submission before the First-tier Tribunal, unheaded but nevertheless setting out her case in full. Following her studies in the UK she had worked with a German stock-listed company and now for an investment litigation fund in the City of London.

6. She had retained no ties with Ukraine, a country she had not visited for many years, and where her family had left a long time ago to migrate to the Czech Republic. She had lived there herself from the age of ten, though the length of time taken by the Home Office to consider her application had meant that she had been unable to continue her visits there, and her residence rights had lapsed. She had not lived in Ukraine since the age of ten, a country which was now riven by civil war and corruption scandals; she had no family or friends there, and did not even speak the language well enough to find employment. She had spent over a decade in the United Kingdom as a tax-paying adult. She opined that the man on the Clapham omnibus would be likely to think her claim well founded.

7. The First-tier Tribunal recorded her evidence that she had been awarded an upper second Honours degree in History and German Language, with a compulsory year's placement abroad, from Queen Mary University, London. The Tribunal found that she would face return to Ukraine rather than the Czech Republic,

where her family lived, given that her own right to reside there had been extinguished by her absence. The First-tier Tribunal was under the impression that her evidence was that she had not enquired into whether she could reinstate her leave again; she had managed to do so in December 2013 (it will be seen that this impression appears to be inconsistent with the evidence placed before it, set out above).

8. The First-tier Tribunal upheld the Respondent's reasons for refusing the application under the Rules; she had indeed accumulated excess absence. Her course had been a matter of her own choice and did not represent a relevant exceptional circumstance. She was no longer in a relationship and accordingly had no relevant family life in play. She had had some education in Ukraine, could speak the local language, as well as German and English, and her family could tell her about life there notwithstanding that they themselves did not live there, even if their information was not up-to-date. She was intelligent and articulate and could be expected to make enquiries of relevant organisations to familiarise herself with the situation there. She was in good health and educated to degree level. All this indicated that she face no very significant obstacles to integration in Ukraine. Considering her claim outside the Immigration Rules, there was nothing in the evidence, having regard to her time in the United Kingdom as a student and in a failed relationship, to reach the threshold for engagement of the right to private and family life.

9. The Appellant appealed, on the basis that it was irrational to find that Article 8 ECHR was not engaged given her connections with this country, and that the operation of the long residence Rule and the discretion that lay alongside it was relevant to her ability to demonstrate that it would be disproportionate to require her departure from the United Kingdom.

10. Judge Grant-Hutchinson granted permission on 8 November 2017 on the basis that it was arguable the Judge had failed to give adequate reasons as to whether the Appellant fell within Rule 276ADE(vi) and by failing to apply section 117B.

Error of law hearing

11. The Respondent provided a Rule 24 notice in setting out that the disposition of the appeal was perfectly compatible with the approach to precarious residence identified in *AM Malawi*, and that full reasons had been given; the reference to insurmountable obstacles as the appropriate test was not a material error of law as there was no real difference between that and very significant obstacles to integration, and no matter relevant to the ultimate issue had been left out of account.

12. Before me Ms McCarthy argued that the connections held by the Appellant could not rationally be rejected as constituting private life in the United Kingdom, and that her length of lawful residence was plainly highly relevant to the

proportionality of her removal. She would face very significant obstacles to integration in Ukraine and the finding to the contrary was perverse. Ms Fujiwala countered that the reasoning was generally adequate and in no way perverse, and compatible with decisions such as *AS* (EWCA) which showed that reasoned assumptions as to a person's ability to integrate based on their education and family connections were a legitimate mode of assessing ability to integrate.

Findings and reasons: error of law hearing

13. Having considered the matter with care, I agreed that the decision of the First-tier Tribunal was flawed for the reasons given in the grounds of appeal.

14. Within the Rules, the question for the First-tier Tribunal was to evaluate whether or not the Appellant faced very significant obstacles to her integration in Ukraine. As stated by Sales LJ in *Kamara* [2016] EWCA Civ 813, the concept of integration

> "... is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

15. It was correct, as Ms Fujiwala noted, that Moylan LJ stated in *AS* [2017] EWCA Civ 1284 that "generic" factors such as intelligence, employability and general robustness of character are relevant to the "broad evaluative judgment" required in assessing whether there are very significant obstacles to integration abroad and may demonstrate that the person is "enough of an insider" in the *Kamara* sense. However, generic factors are unlikely to trump more precise evidence in the case that relates to an individual's general circumstances. Passing familiarity with current affairs reminds one that Ukraine has suffered significant changes since the time when the Appellant left the country. She had only lived in Ukraine for the first decade of her twenty-eight years, and her family have lived abroad for a similar period. This combination of circumstances does not necessarily render it impossible for her to integrate in Ukraine, but it seems to me that rather more was required of the First-tier Tribunal than its generalised reference to her potential recourse to "national bodies and relevant organisations" in determining whether she would be able to operate there on a daily basis and meaningfully interact with other people.

16. Lord Sumption stated in *Hayes v Willoughby* [2013] UKSC 17 at [14]:

> "A test of rationality … applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a

> requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

It seemed to me that there was no clear logical connection between the evidence relied upon by the First-tier Tribunal and its reasons for its decision. It was not discernible from the relatively brief reasoning how it was that "national bodies and relevant organisations" and information which the Tribunal itself acknowledged would "not be up to date" could make good the disadvantages caused by having lived outside a country for her formative years and her entire adult life, the total absence of direct and extended family and friends, and her limited language proficiency.

17. Accordingly I ruled that the First-tier Tribunal's reasoning with regard to Rule 276ADE(vi) was legally flawed.

18. For completeness it was also appropriate to address, at the error of law stage, the First-tier Tribunal's approach outside the Rules. As indicated above, it found that the relatively low threshold for the engagement of Article 8 ECHR was not met. As stated by Underhill LJ in *Ahsan and Ors* [2017] EWCA Civ 2009 at [86], concisely summarising the authorities governing the approach to private life in recent years, "persons admitted to this country to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage article 8."

19. Given that starting point, it was somewhat surprising for more than a decade of lawful residence, including work and studies at a professional level in the City of London, to be found not to constitute private life. The fact that the Appellant had formed a sufficiently serious relationship to marry a British citizen was also indicative of the extent to which she saw her life as having effectively transferred to the United Kingdom, even though that relationship had not endured. The First-tier Tribunal failed to give adequate reasons for determining that these very strong connections did not amount to private life in the light of the authorities such as *Ahsan* indicating the contrary.

20. Clearly the First-tier Tribunal would have approached proportionality differently had it found that the Appellant had established private life in the United Kingdom. In these circumstances I found that the First-tier Tribunal materially erred in law in its approach to Article 8 outside the Rules.

21. I accordingly concluded that the First-tier Tribunal decision was flawed by material errors of law on each head of the appeal. As only limited fact-finding remained, it was appropriate to retain the matter in the Upper Tribunal.

Continuation hearing

22. Further evidence was provided for the continuation hearing. Ms Migula-Gawron, the Appellant's best friend, wrote of their lengthy friendship and how she admired her perseverance in her studies; she had witnessed her studying in Cambridge every weekend whilst she worked in the week in the City. The Appellant's divorce had been "an incredibly difficult and painful time for her". A letter from a friend of the Appellant, Ms Gibbons of Barnes, SW13, stated that the Appellant would be sorely missed by herself, friends and neighbours, if she left the country; she had shown kindness and patience in her relationship with Ms Gibbon's daughter, and had bonded with Ms Gibbons's own social network and indeed had taught German to one of her colleagues.

23. The Appellant's further witness statement set out that when she came to this country, she had necessarily left her friends in the Czech Republic and had initially found that very hard. But she made friends at her boarding house in Cambridge where she completed her secondary education, and had gone on to read German and History at the University of London, and become immersed in every aspect of British culture, from roast dinners to arts and culture. She had been working in the City for a litigation funder. Her relationship with her former partner had broken down in "a horrid way", and she had lived in the UK for nearly fourteen years, since she was sixteen, and she felt her life here had great merit. She had now formed a new relationship with a partner and they were saving for a house, but she did not presently feel able to rely on that as part of her claim to remain in this country. Her best friend Ms Migula-Gawron had provided "amazing" emotional support to her throughout her time here.

24. The Appellant had been unable to complete her legal training as her lack of permanent residence in the UK was held against her by employers. She had not visited Ukraine since her grandmother's funeral some sixteen years ago. She knew nothing of the country save for the unstable political situation; she did not know how people spent their spare time, the holidays they celebrated, or what was socially acceptable: she had read online that women did not shake hands there. She had no family in the little village in Lviv where she was born, and she had come to appreciate, from watching YouTube videos, that the dialect spoken in her family home was a particular local form of the language, known as Galician.

25. She had investigated job opportunities where speaking Czech, German or English would be an asset, but in all those circumstances, it was very clear that one would be expected to speak Ukrainian well. The only work available for expatriates was of an uncertain kind, such as work in the charitable sector, for example helping internally displaced persons (IDPs). She feared the prospect of being unable to support herself and effectively being forced into the position of an IDP and requiring humanitarian aid. The only thing that made her Ukrainian was her passport. She said that she did not claim to be British, but she felt like a Londoner.

26. Also before me was the Secretary of State's *Country Policy and Information Note - Ukraine: Crimea, Donetsk and Luhansk* (29 September 2017) which materially states:

> "7.6.3 The same report added, 'UN agencies reported that the influx of IDPs led to tensions arising from competition for resources. Critics accused internally displaced men who moved to western areas of the country of evading military service, while competition rose for housing, employment, and educational opportunities in Kyiv and Lviv.'"

27. The Appellant gave oral evidence. She adopted her witness statement. She said that her parents still lived in the Czech Republic; she was in touch with them by telephone. Her parents could not really assist her: although they worked, they earned very little. She financed herself via her £52,000 salary; additionally she held £10,000 savings in a joint account. Whilst she thus had £5,000 to use towards re-establishing herself in Ukraine, she queried how long those funds would last, given she had no ability to find work, and no family or friends there to fall back on. She had made enquiries regarding work there, but had resolved that this would be hard, given she had grown up speaking Czech and had since spent many years in the UK. She spoke some Ukrainian, like that of a child; at home during her youth they spoke Czech.

28. For the Respondent, Mr Jarvis submitted that the reasoning of the Secretary of State when refusing the application on long residence grounds was essentially a matter for the Home Office; there was no longer any power to review cases on "not in accordance with the law" grounds. *AS Afghanistan* showed that generic considerations were potentially relevant, and Rule 276ADE did not posit an investigation into whether circumstances abroad matched a person's lifestyle in this country; rather the Rule measured whether core private life interests could survive abroad, allowing for the prospect of a young person forming new friendships in their country of origin. The Home Office Guidance on the internally displaced was not necessarily relevant to an educated returnee, but nevertheless suggested that many IDPs had relocated successfully. Outside the Rules, whilst the Appellant had doubtless established private life given her long lawful residence, it was not established that she would face unjustifiably harsh consequences using the test in 276ADE as a starting point, bearing in mind that there had been no legitimate expectation of permanent residence in this country if the Appellant had been unable to meet the Rules at any particular time, and her claim was essentially based upon a desire to work and live in UK.

29. Ms McCarthy submitted that the Appellant only spoke a dialect of the Ukrainian language and that could not be relied upon to communicate adequately in areas of possible relocation. The Home Office decision maker had failed to consider whether there were compelling circumstances justifying the exercise of discretion vis-á-vis her excess absence from the UK, having regard to the fact that the Appellant would have been in breach of her conditions of leave had she failed to study abroad in line with the terms of the Erasmus Programme.

Findings and reasons: continuation hearing

Very significant obstacles to integration in Ukraine

30. As set out above, the test for very significant obstacles to integration should take account of considerations such as the ability of a returnee to build relationships within a meaningful period and to participate in society as an insider. Generic factors, such as language proficiency, and reasonable assumptions as to an availability to form new friendships in the context of work and otherwise, and perhaps resume old ones depending on one's personal history, are relevant; it is not open to a person to deny their own adaptability without putting an evidence-backed case.

31. The Appellant has lived outside the Ukraine for much of her life, and for all of that portion of her life which she can reasonably be expected to remember in any great detail. Her formative years have been spent wholly abroad. Language skills are clearly central to the ability to negotiate a society where one has never lived during adolescence and adulthood. So too is social capital: it is normally to be expected that a returnee will have the benefit of family and something by way of a friendship network to assist them in negotiating society. But those possibilities are denied the Appellant by the departure of her immediate family from Ukraine, the death of her grandmother, and the fact that she herself left the country at a young age.

32. Whilst the Appellant clearly has some aptitude in learning languages, I do not think that one can readily assume that she would be able to learn mainstream Ukrainian with the speed and facility that would be necessary to be able to find work in the rather difficult circumstances that the country presently endures. The Home Office's own country evidence shows that the available opportunities there are constrained by the consequences of armed conflict, and it notes the "shortage of employment opportunities and the generally weak economy". It seems to me that the Appellant's lack of social capital and connections to draw upon would put her at a particular disadvantage. She has not lived amongst a diaspora community in the UK and nor did she live there at a time when she could reasonably be expected to have absorbed the cultural norms (both factors highlighted by the UKVI Guidance as relevant).

33. It is doubtful that she would be driven into the abject situation of many IDPs, but the fact that many people have had to uproot in the aftermath of the armed conflict does suggest that the country's capacity to absorb new arrivals will inevitably be limited. It is difficult to see how the prospect of deploying her modest savings plus any remittances from parents who are plainly not well off could meaningfully ameliorate her circumstances; she would speedily need to find work, and her inability to speak the mainstream language is plainly going to seriously disadvantage her in finding work in any of the professional roles for

which her background qualifies her. The prospect of her being able to compete for manual labour with the indigent population seems simply unrealistic.

34. For these reasons, I find the Appellant would face very significant obstacles to her integration into the Ukraine.

Article 8 claim outside the Rules

35. I should also address her claim outside the Rules. As pragmatically accepted by Mr Jarvis, it would be very difficult to dispute the conclusion that the Appellant has established private life in the United Kingdom. She has lived here lawfully for many years. As stated by Underhill LJ in *Ahsan* [2017] EWCA Civ 2009, "persons admitted to this country to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage article 8."

36. Furthermore she has clearly formed significant relationships, with close friends upon whom she clearly has some degree of emotional dependency, and her degree of integration in this country is shown by the fact that she married a British citizen, her former husband, and the undisputed fact that she is again in a long-term relationship here. She has a professional career in this country. In *Niemietz v Germany* [1992] ECHR 80 at [29] the ECtHR recognised that private life goes beyond one's "inner circle" of relationships onwards to the "outside world" which one inhabits: one's "private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

37. Plainly she has established the very strongest form of private life in the United Kingdom, based on lengthy residence over a period which has comprised her most significant formative years: her recent schooling, university studies and professional development have wholly taken place here, and all her significant relationships are here, save for those with her parents and perhaps with school friends in the Czech Republic, a country to which it is not proposed to return her and to where there is no evidence to show she is admissible.

38. The real question in this appeal is whether her departure would be disproportionate to her private life interests having regard to the public interest. Section 117B Nationality Immigration and Asylum Act 2002 posits a series of questions which the Tribunal must confront, regarding the Appellant's English language proficiency, financial independence, and the precariousness of her residence.

39. The Appellant speaks fluent English and earns a very reasonable salary from which she supports herself, so considerations of language and finance do not count against her. The question of whether her residence is precarious must be approached on an evaluative basis. Sales LJ in *Rhuppiah* [2016] EWCA Civ 803 §44 stated that it was doubtful that it was correct that any grant of limited leave to enter or remain short of ILR qualifies as "precarious" for the purposes of section

117B(5). As is clear from the decisions of the Supreme Court in *Hesham Ali*, *MM Lebanon* and *Agyarko,* the question of precariousness is not simply resolved by the possession of leave short of indefinite leave to remain: rather it is an evaluative exercise. as demonstrated by the Supreme Court's recent ruling in *Hesham Ali (Iraq)* [2016] UKSC 60, epitomised by Lord Wilson at [108] (and Lord Reid at 25-27, 33-45) that:

> "The fact that an applicant is or is not a settled migrant - *a settled migrant being someone who has been granted some form of residence, whether temporary or indefinite* - is likewise a relevant factor".

40. This is not a case where I consider that the Appellant's residence can be treated as precarious. She entered the country as a student, which is a short-term form of residence, though she was of course sent here by her parents. Then she lawfully switched into a settlement category, that of spouse, albeit that the relationship broke down. I do not consider that her successful efforts to fully integrate here can be held against her in these circumstances. Her behaviour has consistently been a natural human response to difficult circumstances.

41. The statutory factors aside, whether or not the difficulties she faced in Ukraine technically qualify as very significant obstacles to integration, they would plainly represent a very different future to her life here. She has close friends here upon whom she has become emotionally dependent during traumatic life events, she has a professional career ahead of her, and it is readily apparent that she would be an asset to the community. Abroad she would be forced to start from scratch without social capital to support her and very distant from anyone to whom she is emotionally close. Whereas in this country, she would plainly be an asset to the community, contributing via her strong language skills to her chosen profession and more generally, given her earning potential, to tax revenues.

42. She has achieved a length of lawful residence in this country which would normally qualify her for settlement in its own right; her application to such effect was defeated only by a period of residence abroad for reasons that were essential to the very studies for which she was granted leave. It is of course open to the Secretary of State to administer the immigration system so as to exclude persons from the automatic grant of leave where a spell abroad was for reasons falling short of some humanitarian compulsion. However this does not mean, when a case is evaluated having regard to all relevant considerations, that the motivation for a period of study abroad is irrelevant. I do not consider that her perfectly reasonable adherence to the strictures of the Erasmus Programme can be viewed as undermining the very strong ties with this country that she subsequently developed.

43. For all these reasons, I find that the Appellant's departure from this country would be disproportionate to her Article 8 rights.

Decision

The appeal is allowed on human rights grounds.

Signed: Date: 5 March 2018

Deputy Upper Tribunal Judge Symes