Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13183/2014

THE IMMIGRATION ACTS

Heard at Manchester Crown Court	**Decision & Reasons Promulgated**
On 12 August 2015	**On 8 December 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER – MOSCOW

Appellant

and

NADZEYA BLIZNETS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Harrison, Senior Home Office Presenting Officer
For the Respondent: Not present or represented

DECISION AND REASONS

1. The Respondent, Nadzeya Bliznets, was born on 6 August 1979 and is a female citizen of Belarus. I shall hereafter refer to the appellant as the respondent to the respondent as the appellant (as they appeared respectfully before the First-tier Tribunal). The appellant appealed against the respondent's decision dated 9 September 2014 to refuse to grant entry clearance to her as a visitor with a view to marriage. The appellant appealed to the First-tier Tribunal (Judge Birrell) which, having considered the appeal on the papers and without a hearing, allowed the appeal in a decision promulgated on 14 May 2015. The Entry Clearance Officer (Moscow) now appeals, with permission, to the Upper Tribunal. The appellant's representatives (Henrys, Solicitors) had written to the Upper Tribunal to indicate that

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they would not attend the hearing and that the appellant was happy for it to proceed in the absence of the sponsor and her United Kingdom representative.

2. The judge had allowed the appeal under Article 8 ECHR. The judge cited *Mostapha (Article 8 in entry clearance)* [2015] UKUT 112 (IAC). In particular, the judge cited [23] of *Mostapha*:

> We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control. However it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case.

3. At [26], the judge found:

> I have already found that Article 8(1) is engaged. I consider that the appellant and Mr Scriven [the sponsor] have been open and honest in their engagement with the immigration process and tried to do things properly but have been let down in the past by poor advice. I am satisfied, contrary to the view of the ECO and ECM, that in fact the appellant did meet the necessary requirements of paragraph 56D for leave as a visitor with a view to marriage and while this is of course, not an appeal against that decision that finding is, I am satisfied, a weighty factor in their favour in assessing proportionality.

4. The appeal before Judge Birrell was, of course, not an appeal in respect of paragraph 56D since there was a limited right of appeal in this instance in respect of human rights (Article 8) only. The judge acknowledged that fact at [12]. The judge also recorded [at 17] that an application had been made and refused under Appendix FM as a partner because the appellant did not meet the definition of partner as she and the sponsor had not been living together for at least two years. The judge was satisfied that the appellant and sponsor were in a "serious relationship" [18].

5. The judge refers more than once to "removal" as a factor in determining proportionality under Article 8, for example at [28] ("*In determining whether the removal would be proportionate to the legitimate aim of immigration control ...*"). As the grounds point out, there will be no "removal" of the appellant as a result of the immigration decision because she has been and will remain resident abroad. The grounds also point out that the judge did not consider the possibility that the appellant might apply to enter the United Kingdom as a fiancée under the Immigration Rules or, indeed, marry the sponsor in Belarus or elsewhere. I note that the judge recorded [19] that "The sponsor can meet all the requirements for a spouse or fiancée visa even if one of the children came with her ..." she also recorded in the same paragraph that:

> There appears to be no issues therefore that would prevent an application being made by the appellant for settlement if that was what she wanted to do at this time and indeed it was put to the sponsor as a positive assertion in cross-examination that if he applied for the appellant to come as a spouse or fiancée they could meet the Rules.

However, rather than consider those possibilities (which were clearly raised before at the hearing) the judge simply observed that the appellant could meet the requirements of paragraph 56D for leave to enter as a visitor with a view to marriage and then made the substantial leap from that finding concluding that the appeal should be allowed under Article 8 ECHR. She found that "The facts underpinning the appellant's relationship with Mr Scriven a citizen of the United Kingdom taken together where the legitimate purpose for the refusal of entry clearance." The judge appears to have considered that, given the appellant could meet the perhaps more stringent requirements for entry as a spouse (if she were married to Mr Scriven) or as a fiancée, there was little or no public interest in denying her entry as a visitor with a view to marriage. I do not agree with that reasoning. The appellant chose to make an application for entry as a visitor with a view to marriage and she only had a right of appeal to the First-tier Tribunal following refusal on human rights grounds. There was nothing, in my view, exceptional about the circumstances of the appellant. Her circumstances are not rendered exceptional simply by her ability to meet the requirements of the Immigration Rules in a category in which she had not applied. Furthermore, whilst her ability to meet paragraph 56D may have been a "weighty factor" her circumstances are characterised by an absence of any other weighty factors which demand a grant of entry clearance under Article 8. Indeed, any factors in favour of the appellant are counterbalanced by the failure of the appellant and sponsor to consider other means by which they might pursue their family life together (living together or married abroad; application as a fiancée or spouse). I agree with the respondent's grounds of appeal to the Upper Tribunal that the judge has, in effect, used Article 8 as a general dispensing power in the case of a couple for whom she has felt sympathy and who she has considered should not be put to the cost of inconvenience by making another application under the Immigration Rules. By doing so, I find that the judge has erred in law. Consequently, I set aside her decision and have remade the decision dismissing the appeal on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 14 May 2015 is set aside. I have remade the decision. The appellant's appeal against the decision of the ECO dated 9 September 2014 is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date 10 November 2015

Upper Tribunal Judge Clive Lane