**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: VA/04447/2014**

**THE IMMIGRATION ACTS**

**Heard at Manchester Piccadilly** **Decision Promulgated**
**On 1 February 2016** **On 9 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**NATALIYA POPADYUK**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr G Singh counsel instructed by GMIAU
For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant, a national of Ukraine was born on 26 August 1964 and is thus 51 years old. The Appellant appealed against the decision of the Secretary of State

dated 8 July 2014 to refuse to grant an application for entry clearance to the United Kingdom as a family visitor to see her husband of 12 years standing, the sponsor, Wasyl Bonk who is 89 years old. First-tier Tribunal Judge Foudy allowed the appeal on human rights grounds and the Appellant now appeals with permission to this Tribunal.

3. The Respondent refused the application. The ECO considered the evidence produced of the Sponsors finances in the UK and the Appellants in Ukraine and found that he was unable to determine their circumstances. As a result, he refused under paragraph 41 (i) and (ii) asserting that she was not coming for a limited visit nor did she intend to return at the end of her visit. The refusal noted that there was a limited right of appeal in this case. The Appellant appealed on human rights grounds.

4. The First-tier Tribunal Judge Foudy heard oral evidence from the Sponsor. The Judge concluded that The Appellant had visited the Appellant in the UK on 13 occasions since 2004 and the sponsor had visited the Ukraine regularly to see his wife. The Appellant and the sponsor have established family life by way of regular visits rather than living together permanently. The parties are aware they cannot meet the requirements of the Rules and therefore their only option is to keep up regular visits. The decision interferes with family life and the interference is disproportionate.

5. The grounds argue that the Judge misdirected herself because there is no interference with the family life the parties enjoyed as they had chosen to live in separate countries and have visited each other and would be able to continue their family life if the Sponsor visited the Appellant.

6. At the hearing before me Ms Johnstone on behalf of the Respondent relied on the grounds of appeal. She submitted that the there was no interference as the Appellant and the Sponsor had maintained their family life by way of regular visits and the Judge had failed to consider why they could not continue in this way. She also suggested that the proportionality assessment was defective as the Judge had failed to engage with the provisions of section 117B of the Nationality Immigration and Asylum Act 2002.

7. Mr Singh on behalf of the Appellants argued that the Judge had made clear findings and considered both caselaw and the Rules. He suggested that paragraph 41 of the Immigration Rules did not provide that an application could be refused just because it was possible for the sponsor to visit the applicant. He suggested that the Judge had accepted the evidence of the Sponsor who said it was easier for her to come to the UK than for him to go to Ukraine.

8. Both parties accepted that if an error of law was found I should remake the decision.

The Law

9. I was referred to the cases of Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) and Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC) and have taken them into account in so far as they are relevant to this decision.

**Error of Law**

10. This was an appeal against a refusal of entry clearance made by the Appellant on 20 June 2014 and refused in a notice dated 8 July 2014.

11. Section 52 of the Crime and Courts Act 2013 amended s88A of the 2002 Act so as to remove the right of appeal for persons visiting specified family members. Although they are still able to bring an appeal on the residual grounds in s 84(1) (b) and (c) of the 2002 Act, namely on human rights and race relations grounds.

12. The Respondent's grounds of appeal focus on a narrow issue and argue that the Judge has failed to engage with the argument that there is no interference with the parties family life as they could continue to enjoy family life as the Sponsor could visit his wife in Ukraine. The Judges determination is extremely brief and the only possible assessment of whether there has been an interference is in paragraph 6(ii) and that is the comment that *'interruption in those visits would have a significant effect upon their family life'* without stating why. I am satisfied that the reasoning is inadequate and that the error of law is material as had the Judge considered this the outcome could have been different.

13. Ms Johnstone also argued that the assessment of proportionality was inadequate and given that there was no reference to section 117B and that the balancing exercise consists simply of an assertion that the decision is disproportionate it is inadequate.

14. I therefore set aside the decision in relation to the Article 8 assessment and in accordance with my discussion with the parties I go on to remake the decision.

Remaking the Decision

15. The Appellant sought entry clearance to the UK to visit her elderly husband the sponsor who lives in the UK. That application was considered by the Respondent by reference to paragraph 41 of the Rules and the application was refused.

16. It is argued that the decision to refuse the Appellant entry clearance to the UK engages Article 8. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27. If I find that Article 8 is engaged I will consider whether the Appellant can meet the requirements of the Rules as this is relevant to the public interest and proportionality.

***Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?***

17. In this case I am satisfied that the Appellant and his wife enjoy family life together as they have been married since 2004.

18. Since their marriage they acknowledged that they could not meet the requirements of the Rules and they have therefore maintained their relationship by visiting each other for periods of time every year. The Appellant has apparently made 13 visits to the UK between 2004 and 20012 but after the expiration of her last visa in 2013 her applications for entry clearance were refused. Although Mr Bonk is 89 he confirms that he has nevertheless continued to visit Ukraine and has indeed done so once a

year since 1994 (paragraph 29 witness statement dated 18 December 2014) and sometimes he has visited twice a year.

19. At the time of the appeal he had visited Ukraine most recently in September 2014 and indicated that he intended to visit his wife again the following year whether or not his wife was granted a visa provided his health was alright. While it was easier for the Appellant to come to the UK there was no evidence before me to suggest that his health had deteriorated since that time and that he was unable to travel. While I note Mr Singh's argument that an application under paragraph 41 of the Rules could not be refused simply because the sponsor could visit the applicant I am satisfied that the questions I must ask in relation to Article 8 are different and that question is relevant to the issue of whether there is an interference.

20. An interference with private or family life must be real if it is to engage Art 8(1). While the threshold of engagement is low I am not satisfied on the basis of the clear evidence before me, which was that the Sponsor could and indeed intended to continue to visit his wife in Ukraine and enjoy family life there as he had done previously, there was any interference with family life.

21. Therefore, Article 8 is not engaged by the refusal decision.

**Decision**

22. **There was an error on a point of law in the decision of the First-tier Tribunal that the decision is set aside**

23. **I remake the appeal.**

24. **I dismiss the appeal on human rights grounds.**

Signed Date 3.2.2016

Deputy Upper Tribunal Judge Birrell