Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21968/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 1 October 2014**
Prepared 27 August 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MRS L S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dutton, of Counsel instructed by Healys London
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Belarus born on 21 December 1966, appeals against a decision of the Secretary of State made on 22 May 2013 to refuse her leave to remain as the spouse of Mr I V H whom she had married on 12 February 2012. I V H, also a Belarusian national, had been granted refugee status in Britain and has now been granted indefinite leave to remain. The appellant and her husband had been married in Belarus but had divorced there in April 1999 before the appellant's husband

sought asylum in Britain. They have a daughter, K, who had come to Britain in July 2010 as a dependant of her father and as the family member of a refugee. She is studying part-time at the University of London and is in her third year of a four year course. She also works part-time here.

2. The appellant first married her husband in August 1988. K was born on 11 December 1990. I V H later became a member of the Belarus National People Party and in 2003 was arrested during a demonstration and sentenced to three years in prison. He had been released in October 2004 but the appellant's claim was that he and she were continually being harassed thereafter. Her husband had fled Belarus in 2007. In her witness statement the appellant had stated that the marriage had broken down because of her husband's social habits and they had become emotionally apart although they continued to live together and indeed did so after they had been divorced in August 1999. In recording the appellant's evidence in his determination Judge Grant stated that she had said that:

> "They divorced for her protection although the disagreements contributed to the breakdown of their marriage. She did not travel to the UK with her husband because he was seeking asylum and her parents and her daughter still lived in Belarus so she could not leave them behind."

3. The appellant had also stated in evidence that she had suffered a nervous breakdown following the deaths of her parents in 2011. Her evidence was that her relationship with her husband had continued on the basis of friendship notwithstanding the divorce.

4. The appellant came to Britain as a family visitor on 11 October 2011 and it was her evidence that thereafter she and her husband decided that they should remarry. She had always lived with her husband and daughter here.

5. Her application for leave to remain as a spouse was refused because the appellant was in Britain as a visitor and that her daughter was not under the age of 18. She therefore did not qualify under the "parent route" nor was it accepted that her private life under Article 8 of the ECHR would be infringed by the decision.

6. The grounds of appeal in the First-tier argued that the appellant's rights under Article 8 of the ECHR would be infringed by her removal asserting that the respondent had not considered the appellant's Article 8 rights under the "old" Article 8 provisions.

7. Judge Warren Grant considered the appeal and found that the appellant did not enjoy private and family life with her husband "over and above that which subsisted in Minsk" which he had found to be quite minimal and that their Registry Office marriage was "a mere piece of paper". He therefore found that Article 8 was not engaged.

8. When the appeal came before me I found that there were material errors of law in the determination of Judge Warren Grant, particularly with regard to whether or not the marriage was, in effect, subsisting. At the hearing I gave an oral judgment which is at Annex 1 of this determination. I indicated that given that the appellant and her husband were living together and were married it was difficult to see how the judge could have concluded that the marriage was not subsisting. I made it clear moreover that it would be of use if before the further hearing there was evidence to show that the other requirements of the Rules – those regarding subsistence and accommodation - were met.

9. At the hearing of the appeal before me the appellant relied on her witness statement and in answer to questions from Mr Tufan said that she had initially intended a visit when she had arrived. She accepted that having arrived in 2011 she had returned to Belarus for medical treatment before returning to Britain and stated that it was only when she returned to Britain that she and her husband decided to remarry. She said that she had thought there was no reason to return to make an application. She said that she would not want to separate from her family now although she did not fear persecution. She confirmed that she was living with her husband and daughter. She gave some details of her husband's work.

10. The appellant's husband gave evidence regarding his own business and confirmed that he was living with the appellant. Their daughter then gave similar evidence that she was living with both her parents here.

11. In summary Mr Tufan stated that it was beyond dispute that the appellant could not benefit from the Rules and that that really was the only issue that was engaged. He said that he was not going to argue that this was not a genuine marriage given that the appellant and her husband were married and living together. He did comment on the lack of evidence of taxes being paid by the appellant's husband and asked me to note that the appellant's husband had only been recently granted indefinite leave to remain. He stated that although he considered that Mr Dutton would rely on the judgment of the Court of Appeal in **Chikwamba** that was no longer relevant given that the new Rules applied. He emphasised that there were no minor children involved. He stated that it was not disproportionate to expect the appellant to apply for entry clearance. He also stated that of course the appellant had Section 3C leave and therefore she would not be prevented from making a further application abroad.

12. Mr Dutton emphasised that it had been accepted that there was a family life between the appellant and her husband and indeed her daughter and went on to state that there was evidence that the appellant would, aside from the issue of her having entered as a visitor, meet all the requirements of the Immigration Rules and that there was a subsisting marriage and that there was adequate maintenance and accommodation. Article 8 was moreover, he argued, engaged and on this he referred to his skeleton argument asserting that there were compelling circumstances as to why the appellant should be granted leave to remain. He emphasised that private and family life was a composite and moreover it was important to note not only the

infringement of family life but the importance of the potential to develop that family life for a married couple. He asked me to take into account that the appellant's husband was a post-flight refugee relying on the determination of Sedley LJ in **FH (Post-flight spouses) Iran [2010] UKUT 275 (IAC)**. This was a family which could not live together abroad.

13. His detailed skeleton argument argued that this was a compelling case in that the appellant was estranged from her brother who lived in Belarus, her mother had died in 2009 and her father in December 2010 and the appellant has no other relatives in Belarus. Her husband had fled Belarus in 2009 without the appellant and had then been granted asylum in Britain. She was supported financially by her husband and had undertaken courses in English. Her husband had set up his own business in January 2014 and her daughter was studying here. In the skeleton argument he referred to the composite right in Article 8 referring to the determination in **MM [2007] UKAIT 40** and other cases such as **Beoku-Betts [2008] UKHL 39**. With regards to Article 8 under the "new" regime he stated that it was clear that if an application did not succeed under the Rules it should be refused unless there were exceptional circumstances which mean that refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8 and argued that such factors existed. He referred to the cumulative effect of private and family life, the development of that family life, that removal of the appellant would affect and disrupt the family life of both her husband and her daughter and that no provision had been made under the Rules for granting leave to the spouse of a refugee when the marriage took place after the refugee had left his country of origin.

Discussion

14. I consider it important to set out my findings of fact in this case before considering the issue of the rights of the appellant under Article 8 of the ECHR. I consider that it is clear that this is a genuine and subsisting marriage. The appellant her daughter and her husband are living together in Brittan.

15. There were a number of factors which affected the relationship between the sponsor and the appellant before the sponsor left Belarus. Principally, it was his personal conduct which led to the divorce but thereafter the reality is that the couple continued to live together, albeit living separate lives but that the political involvement of the sponsor led to the appellant herself being harassed. Given that the sponsor was granted refugee status here I consider that it is clear that he did suffer such harassment – that has been acknowledged by the grant of status. However, the reality is that and she and her husband have remarried.

15. I have seen the tenancy agreement and note the evidence of the parties and accept that there is suitable accommodation for the appellant where she is living with her husband and daughter.

16. I also consider that there are ample funds within the criteria set out in Appendix FM to show that the appellant will not be a burden on public funds and indeed the capital sum available to her husband meets the requirements in that regard of the Rules - I note the terms of the letter of 20 August 2014 which stated that the sponsor had, at Barclays Bank, a current account the balance of which on 20 August 2014 was £63,513 and that he also had a savings account whose balance on that date was in excess of £85,000.

17. However, the appellant cannot succeed under the Rules because she entered Britain as a visitor.

18. I consider, taking into account the financial evidence, the evidence of accommodation and the fact that the marriage is subsisting, that the appellant would be able to make a successful application for entry as a spouse from her own country which is, indeed, a country to which she travelled in 2011. There is clearly sufficient money for her to be able to live there pending the issue of the visa. However, there are factors in this case which are exceptional. The principal one of which is that the sponsor, who was granted refugee status, now has indefinite leave to remain but this means that he would not be able to travel to Belarus with his wife when the application was made. There is also the factor that in the past the appellant had mental health problems after the death of her parents and that she suffered harassment, because of her husband's activities whilst she was in Belarus. I consider that she might well feel vulnerable returning there for an indefinite period while the application was processed.

19. The question before me is whether or not those factors make this an exceptional case which means that she should be granted leave to remain on Article 8 grounds.

20. I take into account the fact that she meets the requirements of the Rules and that I consider that her stay in Belarus might only be for a limited period although there is no evidence whatsoever before me to indicate that that is the case. However, on balance, I find that the exceptional factors which I have set out above do, just, weigh in favour of my concluding that the appellant's appeal should be allowed under Article 8.

21. I therefore, having set aside the decision of the Judge of the First-tier Tribunal, remake the decision and allow this appeal on human rights grounds.

Signed Date

Upper Tribunal Judge McGeachy