Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/06767/2013
OA/06770/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 30 June 2014	**On 11 August 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER – NICOSIA

Appellant

and

LARISA KELLER
MILNA KELLER

Respondents

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondents: Mr I Ahmed, Bankfield Heath, Solicitors

DETERMINATION AND REASONS

1. I shall refer to the respondent in this appeal as the "appellants" and to the appellant as the "respondent" (as they were before the First-tier Tribunal). The appellants Larisa Keller and Milna Keller, were born respectively on 19 November 1969 and 8 October 2003. They are citizens of Russia and are

currently residing in Cyprus. The sponsor is Mr Kevin Bowen, a British citizen currently residing with the appellants in Cyprus. On 30 January 2013, the Entry Clearance Officer (ECO) Nicosia refused the applications of the appellants for a family permit confirming their right to reside in the United Kingdom as a family member of an EEA national (the sponsor). Their application was made subject to the provisions of paragraph 9 of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The sponsor is the partner of the first appellant and the second appellant is the natural daughter of the first appellant.

2. The appellants appealed to the First-tier Tribunal (Judge Grimshaw) which, in a determination promulgated on 5 February 2014, allowed the appeal. The respondent now appeals, with permission, to the Upper Tribunal. There are two grounds of appeal. The first ground asserts that the judge failed to make findings of fact in respect of the intentions (as regards her relationship with the sponsor) of the first appellant. Mr Diwnycz, for the respondent, told me that he no longer sought to pursue that line of argument. Secondly, the respondent asserts that the judge failed to provide adequate reasons for finding that the relationship between the sponsor and the first appellant was durable, especially in light of the "less than positive immigration history" of the first appellant. The third ground of appeal refers to the second appellant. The respondent asserts that the second appellant does not fall to be considered under paragraph 7 of the 2006 Regulations because she is not a family member of the sponsor. Judge Grimshaw found that the second appellant was entitled to an EEA family permit as a family member under paragraph 7 of the 2006 Regulations [25].

3. Judge Grimshaw summarised the reasons for the refusal of the appellants' applications as follows:

> The Respondent refused the Appellants' applications for an EEA family permit after applying the provisions of Regulations 7 and 8 (5) of the EEA Regulations.
>
> The reasons for refusal are set out in the refusal notices. In essence the Respondent had considered if the first Appellant could qualify for a family permit under Regulation 8 as an 'extended family member'. This Regulation allows an applicant to demonstrate that they are an extended family member of an EEA national by proving that they are in a durable relationship with their sponsor.
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> The Respondent noted that the first Appellant had met her sponsor in 2012. The documentation she had submitted showed that her relationship with the sponsor had subsisted since 2012. However, the first Appellant had stated that she was separated from her spouse but provided no evidence that she had pursued divorce proceedings. It was unclear if she was still in a marriage when she met the sponsor. The Respondent concluded that the first Appellant had not provided sufficient evidence of a durable relationship in line with paragraph 295A of the Immigration Rules.
>
> It followed that because the first Appellant had not shown she was in a durable relationship the second Appellant could not be treated as a family member under Regulation 7. She was not entitled to an EEA family permit.

4. The judge found the sponsor to be a "clear and credible witness." She recorded that the sponsor and first appellant met in January 2012 at the time when the first appellant was a failed asylum seeker, having exhausted her appeal rights by 2011. She had separated from her husband after a marriage which had lasted less than four months. The sponsor and first appellant began to cohabit soon after their first meeting and the judge records that "the second appellant was part of their household." [17] The appellants were removed to Russia in April 2012. Thereafter, the sponsor and the appellants relocated to Cyprus where the sponsor obtained work. Judge Grimshaw recorded that "[The sponsor] has now been offered a good job in the United Kingdom. Understandably, he seeks to return with the appellants as a family unit."

5. Judge Grimshaw found that the first appellant had obtained a decree absolute in her divorce in January 2014 thereby dispelling "the doubts that have been raised by the respondent in relation to the steps she has taken to sever her ties with her husband and her marital status." [19] The judge noted [21] that "the first appellant's immigration history is unlikely to excite much public sympathy. ... her request for asylum was refused on the grounds that she was not a genuine refugee and there was no risk on her return to Russia." The judge noted that the sponsor and first appellant had lived together in the United Kingdom and in Cyprus for a total of two years by the date of the hearing in the First-tier Tribunal. She found that "the first appellant cannot erase her immigration history. It is for the sponsor to make of it what he will." She found that it was unlikely that the sponsor (described by the judge as "a gentleman of mature years") is unlikely to have exercised poor judgment in his dealing with the appellant. She found it unlikely that the sponsor would have been manipulated into a relationship by the first appellant. At [24] the judge concluded:

> On the totality of the evidence before me I am satisfied that the first appellant and the sponsor are in a durable relationship. The first appellant meets the conditions of Regulation 8(5) of the EEA Regulations. She is entitled to an EEA family permit.

6. Granting permission, Judge Simpson wrote:

> ... As this relationship has only endured for a period of twelve months at the date of decision it is arguable that this does not amount to a "durable relationship".

7. Mr Diwnycz did not argue that Judge Grimshaw was not entitled to conclude that the relationship between the sponsor and first appellant was not durable because it had lasted for a period of less than two years before the date of the ECO's decision. As the Upper Tribunal concluded in *Dauhoo* (EEA Regulations – Regulation 8(2)) [2012] UKUT 79 (IAC) "the concept of a durable relationship is a term of EU law and, as such, it does not impose a fixed time period." The European Commission has also

issued guidance concerning with the implementation of Directive 2004/38 (Communication COM (2009) 313 final):

> The requirement of durability of the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense. National rules on durability and partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case national rules would need to foresee that other relevant aspects (such as for example a joint mortgage to buy a home) are also taken into account. Any denial of entry or residence must be fully justified in writing and open to appeal.

8. There was, therefore, no black letter law requirement for the first appellant and sponsor to prove that they have been cohabiting or in a durable relationship for a specified period of time. What the first appellant and sponsor were required to show was that they continued to be engaged in a durable relationship. The determination of that issue was purely a question of fact and Judge Grimshaw made a clear and unequivocal finding that the first appellant and the sponsor continue to engage in a durable relationship with each other. In reaching that finding, the judge took account of all the relevant evidence. She certainly did not underplay the first appellant's immigration history but gave clear and cogent reasons for finding that, notwithstanding her poor immigration history, both the first appellant and the sponsor were in a genuine relationship which they intended should continue. Importantly, the judge found that the sponsor had entered into the relationship fully aware of the first appellant's immigration history; there is no suggestion in her findings of naivety or wishful thinking. I cannot identify any error in Judge Grimshaw's approach to analysis of the evidence and I find that her conclusion was available to her and was fully supported by adequate reasoning.

9. I find, however, that the judge did err in concluding that the second appellant, the non-EU child of an unmarried partner of an EEA national, was entitled to a family permit under paragraph 7 of the 2006 Regulations. The second appellant is not, as the grounds of appeal state, either "a child of an EEA national or their spouse/civil partner" because the sponsor and the first appellant were not married at the date of the decision. Further, paragraph 8 ("Extended Family Members") does not, on the face of the Regulation, appear to offer the second appellant any assistance since it refers to "a relative of an EEA national, his spouse or civil partner [who] is a member of his household." However, I accept that there appears to be some tension between the provisions of the 2006 Regulation and Article 3(2)(a) of Directive 2004/38 which provides:

> Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having

the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

10. The European Court of Justice in case C-83/11 (*Rhaman*) found that the Directive concerns "persons who are family members, in the broad sense, dependent on a Union citizen [21]. The course also noted that the preamble of the Directive [6] recorded one of the objectives of the Directive as the maintenance of "the unity of the family in a broader sense ... taking into consideration [the non-EU citizen] relationship with the Union citizen or any other circumstances such as their financial or physical dependence on the Union citizen." The court had already found [case C-127/08 *Metock*] that the provisions of the Directive should not be "interpreted restrictively and must not, in any event, be deprived of their effectiveness." [84] In the present appeal, it would appear that the application of the 2006 Regulations (paragraph 8) does not serve to promote the objective of the Directive "to maintain the unity of the family in a broader sense" since paragraph 8 applies only to the relatives of an EEA national, his spouse or civil partner; the first appellant does not fall into any of those latter categories being the partner of the sponsor but not his spouse.

11. National courts within the EU are obliged to interpret domestic law "so far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the results sought by the Directive" (see case C-212/04 *Adeneler* [108]). I find that, on a proper construction, Directive 2004/38 does apply to the second appellant who is the non-EU relative (daughter) of the partner of the sponsor. Insofar as she does not fall within the definition of an "extended family member" for the purposes of paragraph 8 of the 2006 Regulations, she is entitled to the issue of a family permit by the application of Directive 2004/38.

12. I find that (i) Judge Grimshaw did not err in law in finding that the first appellant and the sponsor are in a durable relationship; (ii) whilst she did err in law in finding that the second appellant is entitled to a family permit under the provisions of paragraph 7 of the 2006 Regulations, the second appellant is entitled to receive such a permit by a correct application of Directive 2004/38 and notwithstanding the provisions of the 2006 Regulations. In consequence, I exercise my discretion by refraining from setting aside the First-tier Tribunal determination. Accordingly, this appeal is dismissed.

DECISION

13. This appeal is dismissed.

Signed Date 20 July 2014

Upper Tribunal Judge Clive Lane