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**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/52037/2013
IA/52063/2013

THE IMMIGRATION ACTS

At Field House
On 27th May 2015

Decision and Reasons Promulgated
On 15th July 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

**MR ABBAS MAHMOOD MOUSTAFA ALY
MRS HANNA ABBAS MOUSTAFA ALY**
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Cross of Duncan Lewis and Co, Solicitors.
For the Respondent: Ms E. Savage, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The first appellant was born on 8 October 1950. The second appellant is his daughter, born on 19 January 1978. Both are citizens of Egypt. For convenience I will refer to them respectively as Abbas and Hanna.
2. Their joint appeal was allowed in part by First-tier Tribunal Judge Harris and they have been given permission to appeal to the Upper Tribunal. I will set

out the background in some detail to put the European Treaty obligations and freestanding Article 8 assessments in context.

History

3. Hanna's parents separated when she was a child and both established their own families. Hanna went to live with her mother but was sexually abused by her stepfather. At around the age of 14 she then went to live with her father. Unfortunately, she did not have a good relationship with her father's new wife. Time passed and she and her father went to France and then in or about 2002 to London. There they were joined by a relative whom Hanna married on 11 April 2003. She was granted a family residence card valid until 7th May 2008 as his family member on the basis her husband was exercising Treaty rights. Her father also obtained documentation as a dependent relative.
4. Her relationship with her husband was not happy and he was abusive. In or around 2006 he left her and ended the relationship by a *talek* divorce. There has been no contact since and no details are available as to what has become of him.
5. A relationship developed between Hanna and a man called Melvit whom she had known for a number of years. He was born on 10 February 1962. He is Turkish Cypriot and has British nationality. On 27 July 2011 Hanna went through an Islamic ceremony of marriage to Melvit. They subsequently had a child, born on 24 July 2013.
6. All of the parties have health problems. Abbas has mental health issues, arthritic knees and stomach problems. Hanna has visual impairment and has self harmed in the past. Melvit is profoundly deaf and has a hearing implant. He has various other health conditions, including cardiac problems; difficulties with his back; and shortness of breath. He is a heavy smoker, consumes excess alcohol and is overweight. He is unemployed and in receipt of State benefits, including disability living allowance. Abbas and Hanna were in employment until around 2012. Abbas then enrolled in English courses and Hanna took courses in beauty therapy.
7. Various immigration applications were made by Abbas and Hanna. Applications under Treaty provisions were made in May 2012. The parties complained of delay on the part of the respondent in reaching a decision. Their representatives advised the respondent that a judicial review of the delay was being considered. A decision was taken on 23rd November 2012 to refuse the applications. Their appeals were heard by First tier Judge Archer on the 6th March 2013 who focused on domestic violence and found the respondent's decisions not in accordance with the law because policies had not been referred to and referred the matter back to the respondent. The respondent then made decisions on 19 November 2013 again refusing the applications. This then led to the appeals before First tier Judge Harris. By that stage Hanna had obtained a decree absolute on 24 April 2013 in respect of her first marriage.

The First tier Tribunal.

8. In respect of Abbas the argument in the First tier Tribunal was solely on Article 8 grounds outside the immigration rules. The existence of family life was relied upon. A close relationship with his daughter Hanna and their support for each other was emphasised. Added to this was the prospect of his relationship with his grandson. Private life was also raised. He had been in this country since 2002; he had lawfully entered; and had been in employment until 2012. His various health problems were referred to.
9. Judge Harris applied the sequential approach in Razgar and dismissed Abbas's appeal on the basis the decision was proportionate. The judge accepted that family life existed as did private life. The judge progressed to the proportionality assessment and concluded the respondent's decision was proportionate.
10. The judge referred to the fact that Hanna now had family life with her husband, with whom she enjoyed a good relationship. It was accepted that Abbas provided emotional support for his daughter and some childminding duties. However, it was considered this did not render the decision of the respondent disproportionate. The health of Abbas was considered but the judge concluded this would not render the decision disproportionate. The judge suggested that Hanna's husband could provide some financial support to Abbas when he returned to Egypt which would help his resettlement.
11. Regarding Hanna, the focus was her rights under the Treaty relating to freedom of movement. The first claim was that she had a retained right of residence further to regulation 10(5)(d) of the Immigration (European Economic Area) Regulations 2006 (hereinafter referred to as 'the 2006 regulations'). A difficulty she faced was in obtaining proofs about her former husband situation given the acrimonious background. The respondent did carry out some checks and there were no PAYE records in respect of him from 2005 onwards. Judge Harris concluded that because it could not be established he was exercising Treaty rights then she could not establish a retained right of residence.
12. The next argument advanced was that Hanna had derived rights of residence through her child, who was a British citizen. Judge Harris concluded that the requirements of Regulation 15A(4) were satisfied. Hanna was the mother of a British child. She had primary responsibility for the care of the child. If Hanna had to leave the United Kingdom then in reality so would her child. The judge found that Hanna's husband could not care for the child on his own in the United Kingdom. One feature was that his hearing impairment created safety issues in relation to the infant's care. Consequently, Hanna's appeal was allowed on the basis she had a derived right of residence. This does not confer a permanent right of residence.

The Upper Tribunal.

13. The appellant's representative prepared detailed grounds over several pages as to why leave to appeal to the Upper Tribunal should be granted. I have an extensive skeleton argument which largely repeats the points made upon which leave was granted. The grounds are under four headings. At hearing the appellant representative set out the points made in the skeleton argument.
14. The first challenge relates to the adequacy of the findings made by Judge Harris in relation to regulations 10 (5)(d)(i)(iv) and (6)(a) and regulation 15 (1)(f)(i) of the 2006 regulations. The complaint is that the judge did not adequately deal with the domestic violence suffered by Hanna from her stepfather and from her first husband. Reference was made to the findings of Judge Archer in the original appeal decision of 22 March 2013.
15. The next three challenges relate to the proportionality assessment under Article 8. It was contended that the history of domestic violence suffered by Hanna and her relationship with, and the mutual dependence between her and Abbas, was not adequately considered. It was also submitted that the judge had not had adequate regard to the actual and potential relationship between Abbas and his grandchild. Finally, it was contended that the private life of Abbas had not been adequately dealt with bearing in mind his health, the passage of time and the delay in reaching a decision.

Consideration

The 2006 regulations.

16. With regard to the 2006 regulations, the judge found that Hanna had a derived right of residence. In order to have a retained right of residence she had to meet the conditions set out in regulation 10. Under reg 10(5) (a) "termination of the marriage" means the lawful ending of the marriage by legal proceedings (i.e. divorce); it does not mean the breakdown of the relationship. (see OA (EEA - retained right of residence) Nigeria [2010] UKAIT 00003). Therefore, following her divorce in April 2013 she ceased to be a family member of her former husband.
17. To achieve a permanent right of residence on the strength of a retained right of residence it is necessary to show residence in the UK for a continuous period of five years. To count as a qualifying period of residence under reg 15(1)(b) she must show, inter alia, that the five years are ones in which residence has been in accordance with the Regulations. During those five years the EEA national on whom the family member relies in order to establish their right must have been continuously in the UK exercising Treaty rights. Reg 15(1)(f) provides a route for acquiring a permanent right of residence based on a retained right of residence. But, as under Reg 15(1)(b), so under Reg 15(1)(f) the family member has to show that the EEA national concerned was exercising Treaty rights continuously over the relevant period of five years.

18. The spouse of an EEA national citizen does not acquire a retained right of residence upon divorce unless the EEA national was in the United Kingdom and exercising Treaty rights at the date of the lawful termination of the marriage. (Amos [2011] EWCA Civ 552). It is not known were the appellant's former husband is. At paragraph 14 of the decision Immigration Harris finds a lack of evidence to demonstrate her former husband was exercising Treaty rights. The respondent had tried to facilitate the appellant in obtaining proofs and the enquiries did not indicate any employment from 2005. Therefore, the judge's conclusion was in accordance with the law as it is currently understood.
19. Section 6.2 of the skeleton argument suggests that the immigration judge erred in concluding it was Hanna's husband who had to be exercising Treaty rights at the termination of the marriage. Reference was made to Amos [2011] EWCA Civ 552 as supporting the proposition that appellant's should not be required to show that their former partners were working for a continuous period of five years prior to their applications. In Amos, following Land Berlin, it was said that separation short of divorce does not affect the right of the non-national spouse under Article 16 of the Directive if both the EEA national and his or her non-national spouse continue to reside in the same Member State. Applicants were not required to show that their former spouses were working for a continuous period of 5 years prior to their applications for the right of permanent residence. However, were the marriage terminated and reliance was on retained rights then to acquire a permanent right they must show their former spouse was a qualified person up to the divorce. There has been a referral to the CJEU by the Court of Appeal as to whether a third country national ex-spouse must be able to show that their former spouse was exercising Treaty rights at the time of their divorce in order to retain a right of residence under Article 13(2) of Directive 2004/38/EC (see NA v Secretary of State for the Home Department & Anor [2014] EWCA Civ 995).
20. Regulation 10(5)(iv) is dealing with a situation where there were particularly difficult circumstances when the marriage was subsisting, such as domestic violence. At paragraph 16 of the grounds of appeal to the First-tier Tribunal there was reference to Hanna having been the victim of domestic violence and an explanation given for the lack of proofs on this.
21. Immigration Judge Harris does not specifically refer to this but in paragraph 10 states "I am not satisfied that the second appellant has retained the right residence in any manner under regulation 10(5) of the 2006 regulations." I imply from this wording that not only was regulation 10(5)(b) considered but also the other provisions in 10(5).
22. I note from paragraph 8 of Judge Harris's decision that the earlier decision of First-tier Tribunal Archer, promulgated on 19 April 2013, had been supplied. That decision is contained at page 132 of the appellant's bundle with the covering letter dated 19 May 2015. First-tier Tribunal Archer under 'findings of fact' dealt in detail with the allegation of domestic violence. This is set out at paragraph 24 through to 30 of the decision and

accepts this occurred and concludes that the respondent had not given any consideration to regulation 10(5)(d) (iv) beyond rejecting the claim. It was for this reason and the reference to domestic violence policies that the matter was referred back to the respondent.

23. The respondent's letter of 19 November 2013 is a response to Judge Archer's referral. It states that regulation 10(5)(d)(iv) does not assist Hanna as it refers to the situation at the time her marriage terminated on the 24 April 2013. As I read regulation 10 (5) this is correct. Regulation 10 (5) provides a retained right of residence in specific circumstances when the person ceases to be a family member of a qualified person on the termination of the marriage. They must be residing in accordance with the regulations *at the date of termination and 10(5)(d) is satisfied* (my emphasis) . The latter is subdivided into four categories, the last of which, (iv), deals with difficult circumstances such as domestic violence. Consequently, the domestic violence provisions would not have assisted due to the failure to demonstrate a qualified person within the meaning of regulation 6. Consequently, the fact Judge Harris did not reach specific findings here was not material.
24. My conclusion is that there is no material error in relation to how Judge Harris dealt with the 2006 regulations.

Article 8

25. The applications made by both appellants was for confirmation of their right to permanent residence further to Treaty provisions. Consequently, they were seeking a declaratory document. There were no removal directions and if these were issued they would confer rights of appeal. The grounds of appeal did raise Article 8 at paragraph 18 onwards. It is arguable it was premature to consider Article 8. It is always open to the appellant to make a fee-based application under the immigration rules in respect of their private and family life. An authoritative view on the correct way to proceed in this situation is awaited. Judge Harris referred to JM Liberia [2006] EWCA Civ 1402 and based on this proceeded to consider Article 8.
26. The focus in relation to Article 8 was upon Abbas. However, his situation could not be considered in isolation as it interacts with his relationship with Hanna and her husband and their child.
27. The judge referred to the immigration rules dealing with family and private life and that these were not being relied upon. The new rules only accommodate certain types of Article 8 claims. A judge must still consider whether the decision is in compliance with a person's human rights under s.6 of the Human Rights Act (see s.84(1)(c), (g) and (e) and s.86(2) and (3) of the 2002 Act). It remains the case, as before, that 'exceptional circumstances' is not to be regarded as a legal test and 'insurmountable obstacles' is to be regarded as an incorrect criterion.

28. Judge Harris referred to Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC) which held there is no presumption that the rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed.
29. The judge then proceeded to carry out a freestanding Article 8 assessment applying the sequential approach set out in Razgar [2004] UKHL 27. The family dynamics were set out, noting that the relationship was between a parent and adult child and the judge referred to the decision of Ghising [2012] UKUT 160. The judge referred to the submission that the appellants were mutually dependent, particularly because of childhood and domestic abuse suffered by Hanna. The judge accepted that there is a close emotional tie going beyond that normally expected (See para 33). At paragraph 39 the judge also referred to Abbas's relationship with his grandson. The judge concluded that Hanna was her child's primary carer and this was recognised in the finding of a derivative right. The judge referred to the emotional support given between father and daughter and concluded that Abbas nevertheless was capable of fending for himself, including tending to his medical needs. Having set these factors out the judge accepted there was family life. Judge Harris also accepted that Abbas had established a private life in the United Kingdom. The judge acknowledged that the consequence of the decision was of such gravity as to engage Article 8.
30. The determinative issue was proportionality. Judge Harris did not refer to the new Part 5A of the Nationality, Immigration and Asylum Act 2002, which specify public interest provisions to be taken into account. However, Part 5A does not apply to appeals brought under Regulation 26 of the Immigration (European Economic Area) Regulations 2006. Consequently, Judge Harris was correct in making no reference to these provisions when considering proportionality.
31. Ultimately, Judge Harris concluded that the decision was proportionate and did not breach the right to family life. Each case depends upon its specific facts and it is essential that a judicial decision be reached applying an even-handed application of the proportionality test. The judge set out the considerations and also referred to the health issues raised and Abbas's ties with Egypt. I have considered the points made by the appellant's representative but find they amount to a disagreement with Judge Harris's conclusions. I find that Judge Harris correctly applied the sequential approach set out in Razgar. The judge referred to the relevant factors in carrying out the proportionality exercise and made an evaluation. I do not see any error of law in how this was done.

Decision.

32. The decision of Immigration Judge Harris does not contain a material error of law and shall stand.

FJFarrelly
A Deputy Judge of the Upper Tribunal