



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

Appeal Number: EA/05066/2016

THE IMMIGRATION ACTS

**Heard at Newport
On 6 November 2018**

**Decision & Reasons Promulgated
On 28 December 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD ASIF SAEED KUNWAR
(anonymity direction not made)**

Respondent

Representation:

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr R H Rashid instructed by Marks & Marks Solicitors

DECISION AND REASONS

Introduction

1. The respondent (whom I shall refer to as “the claimant”) is a citizen of Pakistan who was born on 4 April 1981.
2. On 21 September 2015, he applied for a permanent residence card under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended) (“the 2006 Regulations”). That application was refused by the Secretary of State on 4 March 2016.

3. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 7 March 2018, Judge R E Barrowclough allowed the claimant's appeal.
4. The Secretary of State sought, and was granted, permission to appeal to the Upper Tribunal by the First-tier Tribunal (Judge Simpson) on 26 April 2018.

The Background

5. The claimant relied upon his durable relationship with an EEA national, Ms Marlena Opara who is a Polish national. The uncontested evidence, which was accepted by the judge, was that the claimant and Ms Opara began their relationship in September 2006 and started living together in January 2007. They lived together until March 2014 when their relationship broke down and Ms Opara returned to Poland.
6. The claimant contended that he had resided in the UK in accordance with the 2006 Regulations for a continuous period of five years, in a durable relationship with Ms Opara, between March 2009 and March 2014. The claimant relied on the fact that he had been granted a residence card as an "extended family member" in September 2009 and that prior to that, and at least back to March 2009, he had been in a durable relationship with Ms Opara. Those two periods, when added together, amounted to five years' continuous lawful residence in accordance with the 2006 Regulations.
7. Judge Barrowclough accepted that Ms Opara had been exercising Treaty rights during that period. That is no longer in issue and I need say no more about it.
8. Further, Judge Barrowclough accepted the basis upon which the claimant's case was put as giving rise to a permanent right of residence based upon the claimant's relationship, as a durable one, between March 2009 and March 2014. The judge's reasons are succinctly set out in paragraph 7 of the determination as follows:

"7. Put shortly, I accept and agree with Mr Rashid's submissions on the appellant's behalf. On the basis of the uncontested evidence before me that the appellant and his EEA sponsor Ms Opara were cohabiting from January 2007 until their relationship ended in March 2014, and in the light of the respondent's concession that Ms Opara was exercising Treaty rights in the UK for a continuous period of five years before leaving the UK and returning to Poland, I find that the appellant acquired the right to reside in the UK permanently as a family member of an EEA national with whom he resided in the UK in accordance with the 2006 Regulations for a continuous period of five years, pursuant to Regulation 15(1)(b). Accordingly, and for these reasons, his appeal succeeds and is allowed. In my judgment the appellant is entitled to a permanent residence card as confirmation of a right to reside in the UK, pursuant to the 2006 Regulations".

The Issue

9. It was accepted by Mr Howells, who represented the Secretary of State, that the claimant was resident in the UK in accordance with the Regulations from the date he was issued with a residence card as an extended family member in September 2009 until his relationship broke down in March 2014. That is a period of four years and six months. However, Mr Howells did not accept that the claimant could rely upon his durable relationship prior to the issue of that card so as to 'bolt on' a further period between March 2009 and September 2009 in order to establish a period of five years' continuous residence in accordance with the 2006 Regulations. Mr Howells submitted that, until the Secretary of State exercised his discretion to issue a residence card under reg 17(4), the claimant was not a "family member" as defined in reg 7(3) read with reg 8(5). He could not, therefore, establish for the purposes of reg 15(1) (b) that he was a "family member" of an EEA national residing in the UK in accordance with the 2006 Regulations for a continuous period of five years.
10. Mr Rashid, who represented the claimant, relied upon the Court of Appeal's decision in Macastena v SSHD [2018] EWCA Civ 1558. He submitted that, in that case, the court had accepted that an individual could rely upon the period of his durable relationship even prior to the issue of a residence card once a card had been issued. He submitted that the outcome in Macastena, where the individual had not been entitled to rely upon his durable relationship, was dependent upon the fact that in that case no card had ever been issued. Here, the Secretary of State had exercised his discretion to issue a residence card in September 2009. Mr Rashid submitted that, given that the application was made in May 2009, the Secretary of State must have been satisfied that the claimant was in a durable relationship with his partner at least from March 2009. Indeed, the judge had found that as a fact in his decision.

The Law

11. The relevant domestic provisions are found in the 2006 Regulations. These have subsequently been superseded by the Immigration (EEA) Regulations 2016 (SI 2016/1052) which are materially the same as those applicable to this appeal.
12. The claimant relies upon reg 15(1)(b) as the basis for his permanent right of residence. That provides as follows:
 - "15. (1) The following persons acquire the right to residence in the United Kingdom permanently -
...
(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years; ..."

13. A “family member” of an EEA national is defined in reg 7 of the 2006 Regulations. Regulation 7(1) sets out a number of individuals who will be “treated as the family members” of another person. These include a spouse or civil partner; the direct descendants of an individual or of his spouse or civil partner who are under 21 or who are dependent upon that individual, his spouse or civil partner; and dependent direct relatives in the ascending line of that individual, his spouse or civil partner.
14. Regulation 7(1)(d) goes on to state a further situation where: “a person who is to be treated as the family member of that other person under paragraph (3)”.
15. Regulation 7(3) provides as follows:

“Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in Regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked”.
16. The claimant does not fall, and this is not contentious, within any of the categories in reg 7(1)(a)–(c) so as to be treated as a “family member” of his partner. His entitlement is said to flow from the fact that he is an “extended family member” as defined in reg 8(5) of the 2006 Regulations which provides as follows:

“A person satisfies the condition in this paragraph [and is therefore an ‘extended family member’] if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national”.
17. The judge, of course, accepted that the claimant and his partner were in a durable relationship and, therefore, the claimant falls within reg 8(5). However, unless and until he is issued with a residence card under reg 17(4) of the 2006 Regulations, the claimant is not a “family member” of his partner by virtue of reg 7(3).
18. This distinction is important for two reasons. First, the 2006 Regulations only confer a right of residence on a “family member” of an EEA national exercising Treaty rights. That is the case in relation to the ‘initial right of residence’ under reg 13(2) and in respect of the ‘extended right of residence’ after three months under reg 14(2).
19. Secondly, a ‘permanent right of residence’ under reg 15(1)(b) is only acquired by a “family member” of an EEA national who has been residing in the UK in accordance with the 2006 Regulations for a continuous period of five years. Regulation 15(1)(b) provides as follows:

“The following persons shall acquire the right to residence in the United Kingdom permanently –

...

- (b) *a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years; ...* (my emphasis)

20. The scheme of the 2006 Regulations is, therefore, clear. Only “family members” as defined in reg 8 have a right of residence and can, therefore, ‘clock up’ a period of five years’ continuous residence under the 2006 Regulations in order to acquire a permanent right of residence under reg 15(1)(b) of the 2006 Regulations.
21. By contrast, a person who does not fall within the definition of a “family member” in reg 7(1)(a)–(c) but, instead, is an “extended family member” falling within reg 8, and for the purposes of this appeal in particular reg 8(5) because he or she is the partner of an EEA national in a durable relationship, has no right of residence in the UK until issued with a residence card under reg 17(4) which is in the following terms:
 - “17. (4) The Secretary of State may issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application if –
 - (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under Regulation 15; and
 - (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card”.
22. Regulation 17(5) goes on to state:
 - “17. (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security”.
23. Once the document is issued, and it is a discretionary decision, by virtue of reg 7(3) the “extended family member” is “treated as the family member of the relevant EEA national” for so long as he or she satisfies the condition that makes him or her an “extended family member” under reg 8 – in this case, he remains in a durable relationship with their partner.
24. Although I was not taken directly to the Citizens’ Directive (Directive 2004/38/EC) (“the Directive”) which the 2006 Regulations seek to give effect to, the distinction between “family members” and “extended family members” is replicated, and derived from, the Directive. The definition of a “family member” found in reg 7 is derived from the definition of ‘family member’ in Art 2.2 of the Directive. The Directive is stated to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national and to their ‘family members’ as defined in Art 2.2 when those “family members” accompany or join them (see Art 3.1).

Likewise, the initial right of residence, the right of residence after three months and the acquisition of a permanent right of residence are applicable only to “family members” of EU nationals (see Arts 6.2, 7.2 and 16.2 respectively).

25. What are termed “extended family members” in the 2006 Regulations are dealt with in the Directive in Art 3.2 which provides as follows:

“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;
- (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people”.

26. As will be clear, Art 3.2 covers those “extended family members” as defined in reg 8 of the 2006 Regulations referring to them as “other family members” or, and importantly for the purposes of this appeal, the partner of a Union citizen who has a “durable relationship, duly attested”.
27. It is clear from the jurisprudence of the Court of Justice that only “family members” as defined in Art 2 of the Directive have a right of residence derived from the EU national. Those “other family members” or individuals in a “durable relationship, duly attested” with the EU national do not, by virtue of the Directive, have a right of residence. In SSHD v Rahman and Others (Case C-83/11) [2013] Imm AR 1, the CJEU concluded that Art 3.2 did not oblige Member States to accord a right of entry or residence to those “other family members” or those in a “durable relationship” with the EU national. Rather, the CJEU recognised that the Directive imposes an obligation to “facilitate entry and residence” following the undertaking of an “extensive examination of the personal circumstances” of the individuals (see also SSHD v Banger [2018] EUECJ C-89/17 (12 July 2018) at [31]). That is to be effected by national legislation, which confers a wide discretion upon the Member States when selecting the criteria but that those criteria must be consistent with the normal meaning of the terms “facilitate” (also Banger, at [38]-[40]).
28. That scheme precisely mirrors what is contained in the 2006 Regulations. Those Regulations require, when an individual who claims to be an “extended family member” such as the claimant makes an application, that there be “an extensive examination of the personal circumstances” of

that individual (see reg 17(5)) in order to determine whether the individual has established they are a “extended family member” and whether it is appropriate to issue a residence card (see reg 17(4)). It is only once the residence card is issued that the 2006 Regulations recognise that an individual who has established that they are an “extended family member” has a right of residence because they are then (but only then) treated as a “family member”. There is nothing, in my judgment, in that scheme which is contrary to the Directive. The Directive does not confer any right of residence upon an “extended family member” but recognises that their right of residence must be facilitated after an “extensive examination” of their personal circumstances. That is exactly what occurred in this case following the application for a residence card relying upon reg 8 of the 2006 Regulations. There is nothing in the Directive which requires a Member State, following that process, to confer retrospectively a right of residence upon the “extended family member”.

29. The position is, of course, otherwise for an individual who asserts a right of residence as a “family member”, e.g. as the spouse of an EEA national. Both the 2006 Regulations and the Directive confer a right of residence upon a family member of an EEA/EU national who is exercising Treaty rights. That right exists irrespective of whether the “family member” is issued with a residence card. Any residence card is merely evidence of the right of residence already conferred by the 2006 Regulations and Directive.
30. However, the Directive confers no right of residence upon “other family members” or those in a “durable relationship, duly attested” falling within Art 3.2. Under the 2006 Regulations a right of residence is conditional upon the issue of a residence card under reg 17(4). Consequently, a person in a durable relationship with an EU national will not have a right of residence in the UK until issued with a residence card.
31. In the case of the claimant, his right of residence, therefore, only arose in September 2009 when he was issued with a residence card. That residence card did not purport to, nor did it, retrospectively grant the claimant a right of residence backdated, on the claimant’s case, at least to March 2009. He could not, therefore, establish that he had resided in the UK in accordance with the 2006 Regulations for a continuous period of five years as a “family member” (which he did not become until September 2009 when the residence card was issued) in order to establish a permanent right of residence under reg (15)(1)(b).
32. That conclusion is, in my judgment, entirely consistent with the scheme of the Directive. In particular, Art 16.2, using language reflected in reg 15(1) (b) of the 2006 Regulations, only confers a permanent right of residence upon “family members” who have legally resided with the Union citizen in the Member State for a continuous period of five years (although it is not necessary that they actually reside together: PM (EEA – spouse – “residing with”) Turkey [2011] UKUT 89 (IAC)). Of course, a “family member” is defined in Art 2.2 of the Directive and does not include an individual, such as the claimant, who is in a durable relationship.

33. Mr Rashid, however, sought to counter that interpretation of the 2006 Regulations and the Directive by reliance upon the Court of Appeal's decision in Macastena. In that case, the claimant sought to assert a "permanent right of residence" based upon, what he claimed was, a period of five years lawful residence in accordance with the Regulations, some of which time he was a spouse of an EEA national and some of which time he had been in a durable relationship with the EEA national. He claimed that he had a permanent right of residence in order to contend that he could only be deported on "serious grounds of public policy or security" (rather than merely on the grounds of public policy, security or public health) under reg 21(3) of the 2006 Regulations.
34. In Macastena, the claimant had not applied for, nor been issued with, a residence card under reg 17(4) of the 2006 Regulations. He had, however, married the EU national and sought to rely upon a period prior to his marriage, when it was accepted he was in a durable relationship, which, when added to the relevant period of his marriage, amounted to a period of five years' residence in the UK. The period of time in a durable relationship which he needed to 'add on' in order to succeed was only 5 days.
35. The Court of Appeal rejected the claimant's reliance upon any period of residence in the UK prior to his marriage when he was in a durable relationship. Longmore LJ (with whom King and Coulson LJ) agreed) rejected the claimant's contention at [15]-[20] as follows:
- "15. It may well be that, if Mr Macastena had applied for (and received) a residence card as an extended family member pursuant to regulations 17(4) and (5) of the 2006 regulations on the basis of his durable relationship with Ms L, the time of that durable relationship could count towards an acquisition of permanent right of residence, just as time spent with a retained right of residence after his divorce did so count. But Mr Macastena never made such an application. All that had happened before he left for Kosovo to get married to Ms L was that he had entered the United Kingdom unlawfully on 3rd July 2005 and he had unlawfully remained here. It is true that Mr Macastena's solicitors, in the light of his wish to marry Ms L in August 2008, on 29th July 2008 notified the Secretary of State of his unlawful presence in the United Kingdom and informed her that he had been living with Ms L since September 2007. They did not, however, ask for a residence card on that basis; they asked and were granted a Visa Disclaimer form so that Mr Macastena (with Ms L) could return to Kosovo and get married there. It was only after the marriage that Mr Macastena was issued first with an EEA Family Permit as Ms L's spouse (enabling him to re-enter on 5th September 2008) and in due course with a residence card as the spouse (family member as per the 2006 regulations) of an EEA national working in the United Kingdom.
16. Mr Macastena now argues that the Secretary of State knew of his durable relationship with Ms L and has never contested that it existed for some time before his marriage. That, it is said, is enough for that durable relationship to be added to his time as a

spouse for the purpose of acquiring a permanent right of residence.

17. That cannot be right. An extended family member can only be issued with a residence card on the basis of his durable relationship with an EEA national if the Secretary of State has undertaken 'an extensive examination of the personal circumstances of the applicant'. That has never happened and can only happen after an application for a residence card is made. Merely notifying the Secretary of State that one is in a durable relationship is nowhere near enough either to constitute such extensive examination or to require such examination to be undertaken. FTT Judge Clark was with respect wrong to think that time spent in a durable relationship with Ms L could just be added to time spent as her spouse, provided that the First Tier Tribunal itself was satisfied that there had been a durable relationship before the marriage.
18. This is confirmed (if confirmation is needed) by the analogous case of CS (Brazil) v SSHD [2009] EWCA Civ 480; [2010] INLR 146 which considered regulations 8(5) and 17(4) of the 2006 regulations, along with the relevant provisions of the Citizens Directive, Directive 2004/38/EC pursuant to which the regulations were enacted. The applicant in that case was not a foreign criminal asserting a right of permanent residence but a Brazilian homosexual who had a durable relationship with an Italian man which had come to an end at the same time as CS's own three year leave to remain expired on 17th January 2007. He then applied for further leave to remain on the ground that, if he had applied for a residence card while the durable relationship existed, he would have obtained one which would have been valid for 5 years pursuant to regulation 17(6). His application was refused in July 2007. He submitted that, since he had had an available putative right before the end of his relationship, that right should have been a powerful factor for the Secretary of State to take into account when deciding in July 2007 whether to extend his leave to remain.
19. Laws LJ (with whom Hooper and Toulson LJ agreed) held that CS's argument failed, saying (para 13):-

'In July 2008 the appellant had no rights under the Directive nor under the Regulations. It is obvious, but important, that article 3(2)(b) [of the Directive] and reg 8(5) are both expressed in the present tense. By July 2007 the appellant clearly had no entitlement to be considered for residence as an extended family member as such, for at that time he did not possess that status. In my judgment, the Secretary of State was simply not required in July of that year to undertake the art 3(b) exercise ... I do not accept that the appellant's potential or putative rights, that could have been made good during the durable relationship, give rise as a matter of law to a duty after that relationship was over upon the shoulders of the Secretary of State to address the historic fact of those putative rights in making her discretionary decision in July 2007 ...'

20. Likewise, in the present case there was, in my judgment, no duty on the Secretary of State to take into account, when considering whether Mr Macastena should be deported, the fact that he could have applied for a residence card pursuant to regulation 17(4) during his durable relationship with Ms L and would have been entitled to an extensive examination of his personal circumstances which might well have resulted in the issue of a residence card to him. Not only is the definition of extended family member in regulation 8(5) expressed in the present tense, so also is regulation 17(4)".
36. At [22]-[24], Longmore LJ dealt with the position under the Citizens Directive and the case of Rahman to which I have already referred as follows:
- "22. Mr Gill's argument was that Article 3(2) of the Citizens Directive requires the host Member State, in accordance with its national legislation, to 'facilitate entry and residence' for
- 'a partner with whom the Union citizen has a durable relation, duly attested'
- and that the Secretary of State did not facilitate such residence if he ignored the durable relationship which Mr Macastena had with Ms L.
23. Such facilitation, however, is a matter for national legislation; moreover, the host Member State is mandated by Article 3(2) itself to 'undertake an extensive examination of [the applicant's] personal circumstances'. Mr Gill did not contend that the UK's national legislation was incompatible or inconsistent with the Citizens Directive and, for that reason, I have referred only to the 2006 regulations.
24. Mr Gill also relied on the decision of the Court of Justice of the European Union in Rahman v SSHD [2013] QB 249 for the propositions (1) that (as per para 22) the Member States must make it possible for persons in a durable relationship to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons and (2) that (as per para 24) the Member State had to ensure that its legislation contained criteria which are consistent with the normal meaning of the word 'facilitate' and which do not deprive Article 3(2) of its effectiveness. But Mr Gill could not point to criteria contained in the legislation which are inconsistent with the word 'facilitate' or which deprived Article 3(2) of its effectiveness. In para 22 of its decision, the CJEU itself envisaged that an application had to be made if Article 3(2) was to be invoked. That is confirmed as a matter of English and European law by Aladeselu v SSHD [2013] EWCA Civ 144; [2014] INLR 85 in which Richards LJ said (para 65):-
- 'It should be emphasised that a finding that an applicant comes within reg 8 does not confer on him any substantive right to residence in the UK. Whether to grant a residence card is a matter for decision by the Secretary of State in the

exercise of a broad discretion under reg 17(4), subject to the procedural requirements in reg 17(5). All this is underlined by the observations of the court in Rahman as to the nature of the host Member State's obligations under Art 3(2) of the Directive (see para [29] above). In the present case, as the Upper Tribunal noted, the Secretary of State has yet to consider the applicants' cases pursuant to reg 17(4) and (5)".

37. Mr Rashid relied upon, in effect, the first sentence of Longmore LJ's judgment at [15] which, he submitted, indicated that, although Mr Macastena could not rely upon his period of residence in a durable relationship prior to his marriage, the position would have been different if he had applied for and received a residence card. He submitted that Longmore LJ accepted that in those circumstances "the time of that durable relationship could count towards an acquisition of a permanent right of residence". In this case, Mr Rashid submitted that the claimant had been issued with a residence card in September 2009 and, therefore in accordance with the judge's factual finding that the durable relationship existed at least from March 2009, the claimant had established the necessary five years' continuous residence.
38. I do not accept that argument. First, there is nothing in the passage relied upon in Longmore LJ's judgment to suggest that he was accepting that even a period before the residence card was issued could be taken into account towards the acquisition of a permanent right of residence. Secondly, the substance of Longmore LJ's reasoning runs counter to Mr Rashid's submission. The Court of Appeal repeatedly emphasised the distinction drawn in the Directive between the rights of residence conferred upon "family members" and the (lesser) right to 'facilitate entry and residence' for, inter alia, those in a durable relationship (at [22]-[23]) together with the reinforcement of that distinction by the CJEU in Rahman (at [24]). Further, Longmore LJ cited with approval at [24] what was said by Richards LJ in the case of Aladeselu (at [65]) that:
- "It should be emphasised that a finding that an applicant comes within Reg 8 does not confer on him any substantive right to residence in the UK".
39. In my judgment, the Court of Appeal's decision in Macastena confirms, and applies, the scheme of the 2006 Regulations and Directive which I have set out above, drawing the distinction between the right of residence of a "family member" and the absence of any right of residence for an "extended family member" until a residence card is issued by the Secretary of State under reg 17(4) of the 2006 Regulations. Only from that point in time do the 2006 Regulations confer upon the "extended family member", a right of residence because from that point in time they are treated as a "family member" and may, if appropriate, rely upon the rights of residence recognised in reg 13(2) and 14(2). Then, and only then, does the individual begin to acquire a period of lawful residence under the 2006 Regulations which can count towards establishing a "permanent right of residence" on the basis of residing in the UK in


accordance with the 2006 Regulations for a continuous period of five years under reg 15(1)(b).

40. For these reasons, therefore, Judge Barrowclough erred in law in finding that the claimant had established the required period of residence under reg 15(1)(b) of the 2006 Regulations and so was entitled to a permanent residence card.

Decision

41. Consequently, the decision of the First-tier Tribunal to allow the claimant's appeal involved the making of an error of law. That decision is set aside.
42. I re-make the decision dismissing the claimant's appeal under the 2006 Regulations.

Signed



A Grubb
Judge of the Upper Tribunal

14 December 2018

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal. there can be no fee award.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb". The signature is written in a cursive style and is positioned above a horizontal line.

A Grubb
Judge of the Upper Tribunal

14 December 2018