Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20342/2012

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 24 June 2013	**On 15 July 2013**
Delivered orally on 24 June 2013	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NICOL NSOBAM GEMUH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative, in person
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Cameroon who was born on 25 October 1980. On 11 April of 2012 he applied for a residence card as evidence of his permanent right of residence under the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). That was based upon a claimed retained right following the divorce of the appellant from an EEA national. On 11 September 2012 the Secretary of State refused the

appellant's application on the basis that the appellant had failed to establish that retained right under the 2006 EEA Regulations.

2. The appellant appealed to the First-tier Tribunal and following a hearing Judge Whiting dismissed the appellant's appeal under the 2006 EEA Regulations and also under Article 8 of the European Convention on Human Rights. On 27 February 2013 the First-tier Tribunal (Judge Ievins) granted the appellant permission to appeal to this Tribunal. The appeal initially came before me on 23 April. In a decision dated 17 May 2013, I concluded that the First-tier Tribunal's decision in relation to the appellant's claim for a retained right of residence did not disclose any error of law and that decision should stand. My reasons are set out in full in my decision and it is not necessary to repeat them here.

3. In addition to the claim based upon his previous marriage, an aspect of the evidence before Judge Whiting concerned the appellant's claimed relationship with a French national, Ms Livia Lienafa. Part of the appellant's claim was that he and Ms Lienafa had a 'durable relationship' and that he was therefore an extended family member of Ms Lienafa and that, therefore, he should be considered as such under regulation 8 of the 2006 EEA Regulations. As I made clear in my decision, the Judge failed to deal with that matter and so I set aside the Judge's decision to that extent only so that the decision under regulation 8 could be remade.

4. The hearing took place before me on 24 June 2013. The appellant was not represented and the respondent was represented by Mr Hibbs.

5. The appellant placed before me a number of documents including letters from the school of his claimed partner's children and from her college where, his case was, that she was studying together with a number of other documents which showed addresses at which the appellant claimed to live and at which Ms Lienafa claimed to live. In addition, I had a brief statement of 21 January 2013 from the appellant and also a statement from Ms Lienafa of that date together with a letter dated 21 June 2013. Ms Lienafa and the appellant both gave oral evidence.

6. Their evidence was in harmony as to their circumstances. They had both known one another for some time when they met in the summer of 2007. In April 2012 however their relationship developed such that they started to date and see one another. Ms Lienafa has two children (David and Samuel); their father is not the appellant. They are aged 5 and 3. Between April of last year and Christmas and the New Year of 2013, the evidence of both the appellant and Ms Lienafa was that their relationship developed further. The appellant began staying over at Ms Lienafa's property at 86 Letterstone Road, Rhymney in Cardiff. The evidence was that gradually the number of nights that the appellant stayed became more and more until in the end he was staying most nights and certainly around five nights each week. The appellant's evidence was that he had his own property in Grangetown in Cardiff and he would return there some nights but at some point before Christmas of last year, the appellant and

Ms Lienafa decided that they would move in together and as soon as the appellant was able to rent out his property which he said he had now done he moved in full time to live with Ms Lienafa at her address where she lives with her two children. They share the bills and outgoings. Ms Lienafa pays the council tax and for the food. The appellant pays the rent and the utility bills.

7. The evidence from both Ms Lienafa and the appellant was of the serious nature of their relationship and that the appellant was fully involved with the upbringing of her two children. He effectively fulfils the parental role of a father looking after them when Ms Lienafa is not around and she gave evidence of how when she was studying he had, when David the older child had become ill, called the ambulance and accompanied David to the hospital.

8. The documentary evidence which I will not set out in detail, since it is largely not contentious, shows either one or other party living at the address of 86 Letterstone Road or both parties living at the address in Letterstone Road. At the hearing, the appellant produced a P60 for the tax year ending April 2013 which also shows that address. Ms Lienafa's evidence was that she is a student at the Cardiff and Vale College. She is undertaking a BTech in Business Studies and has just completed Level 2. She told me that she had been informed through a phone call from her tutor that she had acquired a merit and was able now to move on next year to Level 3, beginning in September. That is a two year course and there is documentary evidence from the Cardiff and Vale College in letters dated 4 June 2013 and 15 May 2013 confirming her studies. Both witnesses confirmed that the appellant is employed working for a company providing satellite TV.

9. The relevant legal provision is regulation 8(5) of the 2006 EEA Regulations which states that an extended family member of an EEA national is:

> "…the partner of an EEA national…and can prove to the decision maker that he is in a durable relationship with the EEA national.

10. The burden of proof is upon the appellant to establish on a balance of probabilities that he meets the requirements of the 2006 EEA Regulations.

11. On behalf of the respondent Mr Hibbs cross-examined both the appellant and Ms Lienafa. Having done so, his submissions consisted of this: he relied upon the Secretary of State's guidance that a durable relationship normally requires a relationship to last for two years and for it to be one akin to marriage. He submitted briefly that the bills were in different names and could be obtained but there was no Government Department documents which would be perhaps more cogent. It was at this point that the appellant handed up his P60 showing the address claimed to be in common with Ms Lienafa.

12. In reaching my findings I have taken into account the evidence of the appellant and Ms Lienafa and the documents submitted by the appellant.

I had the benefit of hearing the appellant and Ms Lienafa give evidence and I formed a clear view on the credibility of the witnesses I heard. Mr Hibbs did not expose any defects in their evidence which lead me to doubt they were telling the truth. They both gave their evidence in a clear way without any suggestion of delay in order to contrive an answer and I accept what they say as being the truth. The substance of their evidence is supported by the documentary evidence. I make the following findings on the evidence.

13. I accept that Ms Lienafa (whom it is accepted is French) is a student and therefore an EEA national exercising Treaty rights.

14. The next question is whether the appellant has established that his relationship with Ms Lienafa is a "durable" one falling within Regulation 8. I have no doubt that their relationship is most certainly one "akin to marriage". They cohabit and have done so since Christmas 2012/New Year 2013; they share in effect parental responsibility for Ms Lienafa's two children; they share the costs of running the home that they share in common and the photographs I saw concerning a recent family event, namely the baptism of one of Ms Lienafa's sons, shows in my view that they live in a happy family environment. I have no doubt that they live together and that they are living in a relationship akin to marriage. The question of whether it is durable is not resolved simply by asking whether the relationship has lasted for two years. Although, of course, the duration of a relationship is relevant to its "durability". Their relationship has existed since April 2012. It has developed over that time to the present situation where they are a couple with the appellant performing a parental role towards Ms Lienafa's sons. A durable relationship means a lasting or continuing relationship for the future. It is one that because of its nature has continuing substance into the future. Both the appellant and Ms Lienafa told me about their plans to marry either at the end of this year or early next year when they are able to complete what they started, namely saving money to do that. I am satisfied that their relationship is an established one - one of substance and genuine and one intended to continue into the future and mature into marriage in due course. In my view their relationship is one that can properly be described as a "durable relationship" within the 2006 Regulations.

15. For these reasons I am satisfied on a balance of probabilities that the appellant is an extended family member of an EEA national exercising Treaty rights and falls within regulation 8(5) of the 2006 EEA Regulations.

16. That finding does not in itself entitle the appellant to a residence card. Rather it engages the provision in regulation 17(4) of the 2006 EEA Regulations which sets out the Secretary of State's discretion to grant a residence card to an extended family member of an EEA national exercising Treaty Rights. It is that which the appellant is entitled to in this appeal: see Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC). The appellant is an extended family member and it remains for the

Secretary of State to decide how to exercise her discretion under regulation 17(4) of the 2006 Regulations.

Decision

17. Consequently the decision of the First-tier Tribunal involved the making of an error of law to the extent that the Judge failed to decide whether the appellant was an extended family member of an EEA national exercising Treaty rights.

18. The First-tier Tribunal's decision to dismiss the appeal on the basis that the appellant had not established a right of permanent residence based upon a retained right derived in part from his former marriage stands.

19. I remake the decision allowing the appeal to the extent that I have indicated, namely that the Secretary of State's decision was not in accordance with the law as the appellant has proved that he is an extended family member of an EEA national. It is for the Secretary of State to consider whether discretion should be exercised in the appellant's favour to grant him a residence card under regulation 17(4) of the 2006 EEA Regulations..

Signed

A Grubb
Judge of the Upper Tribunal

Date: 15th July 2013