Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/25164/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 7 December 2018

Decision & Reasons Promulgated
On 18 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SIDALI BENNOUI
(ANONYMITY DIECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Cutting, RC Immigration Services
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Thew promulgated on 01/03/2018, which dismissed the

Appellant's appeal against refusal of an application for indefinite leave to remain in the UK.

Background

3. The Appellant was born on 16/04/1978 and is a national of Algeria. On 20/10/2016 the Secretary of State refused the Appellant's application for indefinite leave to remain in the UK on the basis of 10 years continuous lawful residence.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Thew ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 01/11/2018 Upper Tribunal Judge Smith gave permission to appeal stating inter alia

> "2. Although the appeal is on human rights grounds, the challenge to the decision relates to the appellant's EEA rights. He asserts that he can demonstrate ten year's lawful residence based on his EEA rights deriving first from his continued status as the family member of an EEA national and then as a person entitled to permanent residence.
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> 3. It is arguable that there is an inconsistency between on the one hand [11] of the decision where the Judge records the submission by the appellant's representative that the appellant had obtained a right to permanent residence and [14] recording the evidence that the appellant 's EEA national sponsor was exercising Treaty rights between 2008 and 2013 (when the appellant was still married to her) and on the other [19] where the Judge records that the appellant might be able to establish a right of permanent residence but did not rely on such a right.
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> 4. That inconsistency arguably impacts on the issue whether the appellant's residence has been lawful throughout the period asserted and in turn whether the article 8 claim should succeed."

The Hearing

5. (a) For the appellant, Mr Cutting moved the grounds of appeal. He explained that the appellant applied for indefinite leave to remain under the 10 years long residence route. The appellant had previously been granted EEA residence cards covering a period from 2004 to 2012. The appellant had previously been married to a French national who left the UK in 2013. There had been evidence of the French national's employment in the UK for five years until she left in 2013.

(b) Mr Cutting told me the respondent refused the appellant's application because there is an undocumented gap in his residence between 2012 and 2014. At [16] the Judge finds that the appellant was granted EEA residence cards between March 2004 and June 2012. At [17] the Judge finds that the appellant was granted leave under the immigration rules between February 2014 and August 2016. Mr Cutting told me that the

Judge's findings at [14] and [15] demonstrate that there is evidence of EEA residence, but at [19] the Judge shies away from finding the appellant was entitled to permanent residence under the Immigration (EEA) Regulations.

(c) Mr Cutting told me that the Judge's failure to make a finding that the appellant was entitled to permanent residence is a material error of law. If the Judge had made that finding the appellant's appeal would have succeeded. He urged me to set the decision aside.

7. For the respondent, Mr Walker took me to [8] and [9] of the decision where the Judge quotes correctly from paragraph 276A of the immigration rules and from the respondent's guidance on applications for indefinite leave to remain. He told me that the decision makes it clear that the Judge was aware that she could not step into the shoes of the decision maker, and that the application was not for confirmation of a right to permanent residence; it was an application for indefinite leave to remain. He told me that the decision does not contain a material error of law and asked me to dismiss this appeal and allow the decision to stand.

Analysis

8. At [8] and [9] of the decision the Judge correctly sets out the definition of continuous lawful residence contained in the immigration rules and then correctly quotes from the respondent's own guidance. Page 23 of the respondent's guidance confirms that a caseworker may include time in the UK as an EEA National or family member at their discretion. Evidence would need to be provided to show when the applicant became an EEA family member and that the EEA national was exercising treaty rights during that period. Any Residence Cards held during this time would need to be provided.

9. It is common ground (and the Judge correctly records at [16]) that the appellant held residence cards between 15 March 2004 and 6 June 2012. Reading [16] and [17] together, there is a gap between 6 June 2012 and the grant of leave to remain on 18 February 2014.

10. The appellant's argument is clearly that his residence card establishes lawful residence from 15 March 2004. In his witness statement the appellant explains that he and his French wife separated in 2008, but divorce proceedings did not start until 2017. He says that his French wife left the UK in 2013.

11. In the appellant's bundle there is a letter from HMRC confirming that the appellant's French wife has left the UK. That letter is dated 14 June 2013. The appellant's French wife's P60 for the tax year ending April 2013 is also produced.

12. The Judge's findings of fact between [14] to [17] are drawn from that evidence. At [18] the Judge clearly focuses on the perceived gap between

June 2012 and February 2014, but then falls into error by saying that there is no evidence of the continued exercise of treaty rights by the EEA national after April 2013. There is no need for such evidence because the appellant had established a permanent right of residence prior to April 2013.

13. In simple terms, the appellant's residence between June 2012 and February 2014 was lawful because he had acquired a permanent right of residence. At [19] the Judge draws a false distinction between the Immigration Rules and the Immigration (EEA) Regulations, and then chooses not to grapple with the legality the appellant's presence in the UK. The determinative question is the legality of the appellant's presence in the UK. On the facts as the Judge found them to be between [14] and [17] of the decision, the only conclusion that could be reached is that the appellant's presence in the UK was lawful for a continuous period from 15 March 2004.

14. The appellant can only appeal on article 8 ECHR grounds. After considering s.117B of the 2002 Act at [25], the Judge finds at [26] that the appellant's inability to meet the immigration rules is a significant factor in the proportionality exercise. On the facts as the Judge found them to be, the judge should have reached the conclusion that the appellant met the immigration rules - as a result the proportionality exercise is flawed. That is a material error of law.

15. I set the decision aside. I am able to substitute my own decision.

16. For the reasons given between [9] and [13] I find that the appellant establishes more than 10 years lawful residence in the UK. If the respondent had followed his own guidance the appellant's application would have been successful under the immigration rules.

Article 8 ECHR.

17. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…"

18. In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

19. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

20. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

21. The weight of reliable evidence indicates that the appellant has established both family and private life. The appellant produces a contact order to his children. There is clear evidence of family life. On the facts as I find them to be the appellant has lived in the UK for more than 14 years. His home, his employment, his ordinary routines and activities of daily living are all focused on the UK. He establishes the component parts of article 8 private life.

22. If the respondent had followed his own guidance, enquiry would have been made into the appellant's status under the Immigration (EEA) regulations, and the appellant's application would have met with success. In SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120 (IAC) it was held that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.

23. As the appellant meets the substantive requirements of the immigration rules. The respondent's decision must be a disproportionate interference with article 8 rights.

24. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

25. I find that this appeal succeeds on article 8 ECHR grounds.

CONCL

26. The **al promulgated on 1 March 2018 is tainted by a material error of law. I set it aside.**

27. I substitute my own decision.

28. The appeal is allowed on article 8 ECHR grounds.

Signed Date 10 December 2018
Deputy Upper Tribunal Judge Doyle