Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00505/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 April 2019	**On 08 May 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL
DR H H STOREY DEPUTY JUDGE OF THE UPPER TRIBUNAL

Between

MR AMAD WANES IMHMIAD TABABA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The appellant is a Libyan national who in 2012 entered into a relationship with a Spanish citizen whom he has now married. At the time they met the appellant had leave to remain as a student.

2. It is not in doubt that they had cohabited from 5 July 2012 and were married in April 2017. Prior to the marriage the appellant had applied for and obtained on 8 March 2015 a residence card on the basis that he is in a durable relationship with an EEA national.

3. In 2017 he applied for a document confirming that he has a right of residence. That was refused on 14 November 2017 on the basis that the time spent here prior to the issue of the card on 8 March 2015 could not be taken into account as it was not residence in accordance with the Immigration (European Economic Area) Regulations 2016.

4. The judge however concluded that properly interpreted paragraph 15(1)(b) was applied, such that the appellant could have succeeded on the basis that there were only two possible interpretations at paragraph 15(1)(b)

   (1) that the Rules require only that the appellant must be a family member at the point when the decision is made; or

   (2) the Rules require that he must have been a family member throughout the five year period.

5. The judge concluded if (2) was correct then he could not succeed but if (1) was correct that the appellant must succeed because he was a family member at the date of the hearing and the judge preferred the first reading.

6. The Secretary of State appealed on the grounds that the decision was contrary to the decision of the Court of Appeal in Macastena v Secretary of State [2018] EWCA Civ 1558 and permission was granted on that basis.

7. When the matter came before us this morning there was no appearance by or on behalf of the respondent. No explanation has been given for that and in the circumstances we are satisfied that it is fair and in the interests of justice to proceed to determine the appeal in his absence.

8. As a preliminary matter Mr Jarvis raised whether there had, as it appears to have been the case, a concession by the Secretary of State or rather his Presenting Officer at the appeal before Judge O'Hagan on 12 June 2018 as recorded in his decision at [6] and [7].

9. We do not conclude that it was a concession that the appellant was entitled to a residence card. Properly considered it was a concession that the appellant had been in a position whereby he could have been an extended family member, had he made the proper application, as the facts established that he was in a durable relationship. That explains the final sentence at [7] where the respondent's representative is recorded as saying that the appellant could reapply at a later date.

10. Further, and in any event, there could not be a concession as to law; that cannot be binding and whether the appellant was an extended family member is a question of law.

11. We turn to the decision of the Court of Appeal in Aibangbee [2019] EWCA Civil 339 at 36 to 38. We considered that the factual situation there is on all fours with the situation here. In Aibangbee the Court of Appeal approved Macastena, holding:

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. Only from that point in time do the Regulations confer upon the extended family member a right of residence because from that point they are treated as a family member and may if appropriate rely on the rights of residence recognised in Regulations 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 accordance with the 2006 Regulations for a continuous period of five years under Regulation 15(1)(b).

12. Whilst we accept that the case refers to the 2006 Regulations and this is a case under the 2016 Regulations, there is no material difference between the two and in any event the decisions of the Court of Appeal are underpinned by the Directive 2004/38 which has not changed in the intervening time.

13. Accordingly for these reasons we find that the decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

14. We remake the decision by dismissing the appeal under the EEA Regulations as on a proper construction of the law, the appellant cannot succeed as he has not resided in the United Kingdom under the EEA Regulations prior to his marriage in July 2017. He was not a family member prior to that as no residence card confirming his status as an extended family member had been issued.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decision by dismissing the appeal under the EEA Regulations.

No anonymity direction is made.

Signed Date: 1 May 2019

Upper Tribunal Judge Rintoul