Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02048/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 May 2019	**On 18 June 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ZAHEER AHMED
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Richardson, Counsel, instructed by Nasim & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Pakistan against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent on 19 October 2015 refusing him a Residence Card. In May 2015 the appellant applied for a permanent residence document on the basis that he had retained a right of residence as the former unmarried partner of an EEA national exercising treaty rights in the United Kingdom. Previously he had been given a Residence Card as an extended family member "in a durable relationship with a European Economic Area (EEA) national" but the durable relationship had broken down in about March 2015.

2. The rules do not provide for *former* partners to have a Residence Card as former partners but (broadly) a former partner will be entitled to a residence card if he has established 5 years continuous residence in accordance with the rules. The respondent decided that the appellant did not qualify on the basis of 5 years' residence because his residence in accordance with the rules did not start until he was given a residence card as an extended family member in July 2010 and he ceased to be an extended family member in March 2015 when the partnership broke down. This was about 4 months short of the required time.

3. The grounds of appeal to the First-tier Tribunal make it plain that the appellant had applied for a "retained right of residence" as the former unmarried partner of an EEA national exercising treaty rights.

4. In outline it was the appellant's case before the First-tier Tribunal that the appellant had previously applied for a Residence Card as an unmarried partner in a durable relationship and he had been given such a card following an appeal. The appellant said that the relevant relationship began some time before 2006. He made an application for a Residence Card as an unmarried partner on 3 October 2008 but the application was not decided until 20 July 2010. He was then given a Residence Card confirming his right to reside until 20 July 2015 on the basis of that partnership. He had been in a relationship with his partner for more than nine years but his partner left him in March 2015. If he had still been a partner in July 2015 he would probably have been entitled to permanent residence because he would have completed five years residence in accordance with the regulations. He argued that the start date of the five years qualifying period should be backdated to commence when the Appellant applied for his residence card as a partner on 2 October 2013 or, possibly, 12 October 2013 when the respondent issued a Certificate of Application.

5. Before the First-tier Tribunal the appellant additionally claimed that he had been the victim of domestic violence and he was wrongfully treated less favourably than a married partner in similar circumstances and that the decision was contrary to his rights under article 8 of the European Convention on Human Rights. These arguments failed in the First-tier Tribunal and were not pursued before the Upper Tribunal.

6. The grounds of appeal to the First-tier Tribunal are not signed. In the First-tier Tribunal the appellant was represented by Ms Jane Heybroek of Counsel who served a skeleton argument. The skeleton argument is not based closely on the grounds.

7. Ms Heybroek's skeleton argument then drew attention to the decision of the Court of Appeal in **Macastena v SSHD [2018] EWCA Civ 1558**. It was the respondent's case that, following **Macastena**, an appellant does not become an extended family member simply by being a durable partner. He had to apply for a Residence Card.

8. Ms Heybroek argued that the decision in **Macastena** determined that an extended family member had no status until an application had been made but she argued that the relevant date for qualification under the Regulations was the date of the

application. Her point was that the date on which the application was made was the date when the evidence supporting the application was disclosed and the decision to allow the application was made on the facts at the time that the application was made. She said at point 11:

> "It could arguably lead to legal uncertainty, and is arguably absurd, to contend – especially in circumstances where there has been a long period of delay on the part of the respondent – that lawful leave only begins at the date of issue of the Residence Card and it is not retrospectively applied to the date the application is made or, at the very least, to the date at which the respondent issues a Certificate".

9. The First-tier Tribunal did not address the argument that the relevant date was the date of application. That is the substantial criticism made in the grounds of appeal to the Upper Tribunal. Indeed, before me, Mr Richardson emphasised that the appeal to the Upper Tribunal was not based on any human right, disproportionality or unfairness argument but on the clear assertion that the First-tier Tribunal did not deal with the main point in the appeal and, at least by implication, that if the judge had dealt with the point it would have been resolved in the appellant's favour.

10. Correctly, in accordance with his professional obligations, Mr Richardson drew my attention to the case of **Kunwar (EFM – calculating periods of residence) [2019] UKUT 63 (IAC)**. This is a decision of Upper Tribunal Judge Grubb. Mr Richardson particularly drew my attention to the fourth paragraph of the judicial headnote saying:

> "Consequently, a person in a 'durable relationship' with an EEA national can only be said to be residing in the UK 'in accordance with' the Regulations once a residence document is issued. Only periods of residence following the issue of the documentation can, therefore, count towards establishing a 'permanent right of residence;' under Reg 15 based upon five years' continuous residence 'in accordance with' the Regulations."

11. Mr Richardson argued that although the headnote was drawn by the Tribunal and was part of the decision it was wider than the ratio in the case of **Kunwar** and, he submitted respectfully, it was wrong. I have reflected on this. I have come to the conclusion that it is Mr Richardson's submissions that are misconceived.

12. Building on the skeleton argument for the First-tier Tribunal Mr Richardson argued that the relevant date for the purpose of calculating the length of residence is the time either when the application is made or when a formal acknowledgment is received.

13. In **Kunwar** Judge Grubb had made much of the provisions of rule 17(5) requiring the Secretary of State on receipt of an application from an extended family member to "undertake an extensive examination of the personal circumstances of the applicant". It is only when that examination had been carried out that the applicant became entitled to a card.

14. Mr Richardson argued that the decision to issue a card was based on the facts at the date of the application and so must reflect the state of affairs at the time of the application, and therefore, for the purposes of assessing the length of residence in the United Kingdom, the time should run from the time disclosed in the evidence, that is from the date of the application.

15. Mr Richardson did not need to distinguish between the date when the application was made and the date that it was acknowledged because there is only something like ten days between them and for the appellant's purposes either date would suffice. However the delay in making the 2008 application, which would probably have succeeded earlier if it had been processed earlier, means that the appellant cannot not satisfy the requirements of the Rules when he asserted a retained right of residence. Mr Richardson submitted that the contention that the Appellant's retained right of residence depended not on his making an application but on the Respondent considering it has such obviously absurd consequences that the contention was likely to be wrong.

16. Surprisingly I was not referred to **SSHD v Aibangbee** [2019] EWCA Civ 339 (07 March 2019) where the Court of Appeal approved the reasoning in **Kunwar**.

17. As is clear from **Macastena**, and reinforced in **Kunwar**, two quite different categories of people are entitled to benefit from the Immigration (European Economic Area) Regulations 2006. These rules have now been succeeded by the Immigration (European Economic Area) Regulations 2016 but the argument here would apply equally to a cause under the 2016 Regulations.

18. Under EU treaties various people who are not British nationals have an unqualified right to be in the United Kingdom. Typically they are nationals of EEA states exercising their treaty rights. Such people do not need to have a Residence Card to be in the United Kingdom but some such people find it convenient or reassuring to have one.

19. However the Regulations also contemplate people who do not have such a right but who can be treated as if they have such a right. Such people are typically "extended family members" and that very often means a person who is a partner in a durable relationship with an EEA national. However, as is explained in **Kunwar**, the right of the extended family member does not exist until it is recognised by the Secretary of State issuing the prescribed documentation.

20. As is explained in **Kunwar**, an applicant's rights as an extended family member are not created by the relationship but by the relationship being recognised in a decision following an application of the Rules. It is clear from the 2006 Regulations that there are certain rights extended to family members. However there are also rights extended to people who are *treated* as family members under the Regulations and typically these are extended family members who are partners in durable relationships.

21. Directive 2004/38/EC of the European Parliament (Citizens' Free Movement) recognises the need to maintain "unity of the family in a broader sense" and anticipates "family members" who are not included in the definition of that phrase under the Directive, and who do not enjoy an automatic right of entry or residence under the Directive, being entitle to reside in an EEA state where they are not nationals. Paragraph 6 requires the member state to make provisions under its own legislation for such people to be admitted. The United Kingdom has done just that. Paragraph 8 of the 2006 Regulations is concerned with "extended family members". These are defined and they are people who meet certain specific characteristics. Paragraph 8(5) provides the meaning of extended family member includes a person who shows himself to be in a durable relationship with an EEA national. The procedure for issuing a Residence Card is prescribed under Regulation 17. This obliges the Secretary of State to issue a Residence Card to a person who is a "family member" who has retained the right of residence on application and production of a valid passport and proof that he is an entitled person. Significantly Regulation 17(5) provides that where the Secretary of State receives an application "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".

22. The difficulty for this appellant is that Regulation 7(3) sets out the circumstances in which a person who is an extended family member shall be treated as a family member of the relevant EEA national. The relevant words of the regulation are that 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 a family member".

23. The conjunctive "and" is crucial. In order to be a family member for the purpose of the regulations it is not sufficient to have the necessary cohabitation and partnership. In order to be treated as a family member, an extended family member must have obtained an appropriate Residence Card or similar document. The "right", if that is the word to use, is only created when the card is issued however much a person might be entitled to a card on an earlier occasion. This is the clear meaning of Regulation 7(3) and the point has been emphasised in the cases that I have indicated.

24. Regulation 15(1)(b) provides that a "family member of an EEA national who is not himself an EEA national but who as resided in the United Kingdom with the EEA national in accordance with these regulations" shall, by reason of regulation 15(1) acquire the right to reside in the United Kingdom permanently".

25. Mr Richardson argued that once the applicant has made his claim his alleged status is known to the Secretary of State and the applicant will not (normally) be removed until the application has been decided. It, must, he argued, follow that such a person is living in accordance with the Regulations and therefore the relevant date is the date that the application was made, or at least received.

26. I do not agree. A person is not living in the United Kingdom "in accordance with the regulations" merely by making an application. An applicant could hardly expect to be treated as living in accordance with the regulations merely by my making an application, however misconceived, weak or even dishonest it might be.

27. Further, regulation 15(1)(b) applies to a "family member of an EEA national" but the phrase "family member" is defined and in the case of an extended family member it means someone who has a Residence Card.

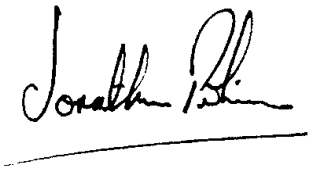
28. Even if I agreed with Ms Heybroek and Mr Richardson's suggestion that there is something profoundly unsatisfactory about time running from the date of decision rather that the date of application I would be against them. The plain meaning of the rules permits no other interpretation.

29. However I do not accept that there is anything unsatisfactory in time beginning to run when, and only when, the decision maker has considered the evidence and has decided in the applicant's favour. Any other interpretation would undermine the recognised need to give careful consideration to an application.

30. I am satisfied that there is at the heart of this appeal an essentially a simple point and it has to be resolved in the Secretary of State's favour. It follows therefore that although the First-tier Tribunal erred by not engaging with the point the error is immaterial because if it had been considered the result would have been the same.

Notice of Decision

31. I dismiss this appeal.



Jonathan Perkins
Judge of the Upper Tribunal

Dated 13 June 2019