Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02348/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 September 2018	**On 7 May 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

IRYNA SYCH
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr W Rees, Counsel instructed by Sterling & Law Associates, Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought against a decision of the First-tier Tribunal dismissing the appeal of the appellant against a decision of the respondent refusing her a residence card as an extended family member of an EEA national.
2. The grounds of appeal essentially make two points. They contend that the First-tier Tribunal fundamentally misapplied the law and that it conducted an unfair hearing.
3. The second point, contending that the proceedings were unfair, adds nothing to the case. I heard full argument from the parties, particularly Mr

Rees, about the law and how it should be applied. It is regrettable if there was any unfairness at the First-tier Tribunal hearing but it was immaterial because the case was argued fully before me.

4. The essential facts of the appeal are set out helpfully in Mr Rees' skeleton argument.

5. This shows that the appellant is a citizen of Ukraine. She appeals a decision dated 14 February 2017. She entered the United Kingdom sometime in 2004 and in April 2007 started to cohabit with a Latvian national, Mr A--- K---, who is, plainly, an EEA national. They married on 6 January 2012 but the marriage soon became unhappy and they divorced on 22 October 2013. It follows that although they were living together as a couple for about six and a half years they were married for only (almost) one year and eleven months.

6. When the appellant married she applied for and was given a residence card as the wife of an EEA national. The card was valid from 14 June 2012 until 14 June 2017. When her marriage broke down she made a further application for a residence card based on her alleged retained rights of residence. That application was refused on 24 June 2014 and the existing residence card was revoked. On 28 July 2016 she applied for permanent residence in the United Kingdom. That application refused on 14 February 2017 and the decision to refuse that application is the decision that led to appeal before the First-tier Tribunal which is challenged before me.

7. The Respondent gave only brief reasons for his decision. The explanatory letter noted that there was satisfactory evidence that the marriage to the EEA national had been dissolved. The Secretary of State then said, correctly, that to retain the right of residence under the rules the appellant would have to show evidence that the marriage had lasted for three years and that she had lived in the United Kingdom for one of those years. The Secretary of State was satisfied that the appellant could not satisfy the required Rule and refused to issue a residence card.

8. The decision was made with reference to the Immigration (European Economic Area) Regulations 2016, and particularly Regulation 15(1)(f) with reference to 10(5). Regulation 10 is headed "Family member who has retained the right of residence" and 10(5) identifies as a condition for retaining the right of residence at (5)(d)(i):

> "Prior to the initiation of the proceedings for the termination of the marriage or civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration".

9. There are other qualifying conditions but patently none of them apply here.

10. It is settled law that the words of the Directive guide the interpretation of the Regulations. Article 13 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, commonly called the "Citizens Free Movement Directive", gives Article 13 the heading

"Retention of the rights of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership". There is a condition under 2(a) that:

> "prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted three years, including one year in the host Member State".

11. In short, the Regulations correctly embody the words of the Directive. It is plain from the agreed facts identified by the appellant that she does not qualify under the terms of the Directive or the Rules for a residence card.

12. This much is unarguably correct. The appellant's case is that the position is more complex and the First-tier Tribunal erred by failing to engage with the complexities.

13. It is also right to acknowledge that the Directive and the Regulations recognise the idea of "durable partnership" which is a relationship without the formalities of marriage. It is not defined but it is essentially characterised by at least two years' cohabitation.

14. It was the appellant's contention that she should be treated as if the durable partner and the spouse are the same and equal weight should be given to the respective periods of cohabitation and she should therefore be entitled to a Residence Card like a person with retained rights of residence after divorce.

15. Both the Regulations and the Directive provide for people to retain a right of residence in certain circumstances, including the divorce but they do not provide expressly for the retention of rights of a former partner in a durable relationship.

16. The First-tier Tribunal understood that it was the appellant's argument that societal change required the law to re-frame its definitions to give the kind of protection to durable partners that should be given to family members.

17. The appellant claimed to find support in the decision of the European Court of Justice in **Secretary of State for the Home Department v Banger (Article 21(1) TFEU – Directive 2004/38/EC) Case C-89/17**.

18. This was a decision of the European Court of Justice following a referral from this Tribunal. The essential point in that case is that an EEA national (he happened to be a British citizen) had established a durable partnership in South Africa with a South African national. They removed from South Africa to the Netherlands where the British national exercised treaty rights and obtained employment. His partner was given a residence card in the Netherlands confirming her right to reside there as an extended family member of a Union citizen. It then suited them to remove again, this time to the United Kingdom. The appellant's husband was entitled to enter the United Kingdom but his wife was not, or at least was thought not to be. It was clear law that he would have been able to bring his wife with him and it was argued that his durable partner should be similarly allowed.

19. Contrary to the contention of the Appellant, I find that her case is not assisted by the decision in **Banger**. There the Court of Justice of the European Union was concerned with a Union Citizen exercising his right to enter the United Kingdom and for his partner in a durable relationship to enter with him. Article 3 of Directive 2004/38 provides unequivocally at 2(b) that the partner of a Union citizen in a durable relationship shall benefit from facilitated entry and residence. This falls short of creating a *right* of entry for people in durable relationships but it does provide that member states "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people". The decision in Banger was about giving effect to that obligation. It does not illuminate the construction of the Regulations or the Directive as they define the *retained* rights of residence, if any, of a former partner in a durable relationship.

20. Mr Rees, no doubt anticipating this difficulty, argued that, following Article 21(1) of the Treaty on the Functioning of the European Union, the Directive should be construed liberally. Article 21(1) states that "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." This is uncontroversial but circular. The right to free movement is limited by the Treaties. The Directive provides for the rights of unmarried partners in durable relationships and for the rights of former partners who have been divorce. It does not give rights to people who had been in durable relationships.

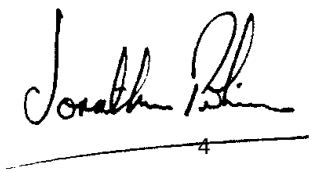
21. In this case the application has been considered under the appropriate provisions, that is the provisions relating to a spouse in a short marriage.

22. At paragraph 3 of the grounds of appeal it is said that the "couple lived together in a durable relationship until they divorced". This is wrong. The couple lived together in a durable relationship and then in a marriage. A durable relationship is not descriptive of a marriage but of a looser relationship that does not have to be created in a particular way and which cannot be dissolved formally. The contention that people who used to be in a durable relationship have acquired rights is not an argument about the construction of the Directive but an argument for a change in policy which is not the proper function of this Tribunal.

23. However, even if this analysis is wrong, there is a secondary argument advanced by Mr Whitwell which illustrates that pre-marriage cohabitation cannot be relied upon here. This was based on the decision of the Court of Appeal in Macastena v SSHD [2018] EWCA Civ 1558. Even if a person appears to qualify for a residence card on the basis of being an extended family member such qualification cannot be assumed because there is discretion to be exercised by the Secretary of State. Here the appellant did not seek a Residence Card as an extended family member. She should not be treated if she had applied for a Residence Card successfully.

24. It follows that the First-tier Tribunal clearly did not err in law materially.

Notice of Decision



25. This appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 1 May 2019