Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03072/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2019	**On 10 May 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

AHSAN ASIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

UK BORDER FORCE, HEATHROW

Respondent

Representation:

For the Appellant: Mr A Jafar of Counsel, Lee Valley Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Pakistan, has permission to challenge the decision of Judge Malcolm of the First-tier Tribunal sent on 15 November 2018. In that decision the judge found that the appellant, an extended family member in a durable relationship with an EEA national, had not shown that he met the requirements of the EEA Regulations because he had not established "the required five year period". The judge went on to further find that the appellant's current relationship with his British

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national wife was not a matter which required to be taken into consideration when considering the appeal under the EEA Regulations.

2. The appellant's grounds contend first of all that the judge incorrectly identified the decision under challenge in the current appeal. At paragraph 1 of the decision the judge stated that "The appeal is against the decision of the Respondent dated 12th September 2018 refusing his application for a Permanent Residence Card". It was said that the decision under challenge was in fact one made by the respondent on 9 April 2018 to refuse admission to the appellant and revoke his residence card. The second ground of challenge was that the judge had wrongly concluded that it was not open to him to consider the appellant's Article 8 circumstances.

3. I am grateful to the submissions I heard from both Mr Jafar and Mr Tufan.

4. Despite agreeing with the grounds that the judge erred in two respects, I am not persuaded that either was material.

5. The judge was clearly in error in relation to the decision under challenge. That decision was one dated 9 April 2018. In that decision the respondent, Border Force, Heathrow Airport, decided to revoke the appellant's residence card, to refuse his admission to the United Kingdom and to give directions for his removal. In that decision the respondent stated that the appellant had sought admission on the basis that he was the extended family member of V M a Latvian national but that on his own admission he was not joining her in the United Kingdom and she was no longer exercising treaty rights. It was also noted by the respondent that the appellant was considered under Regulation 10 of the EEA Regulations as to whether or not he had a retained right of residence. The respondent concluded that he did not because he did not meet the requirements of Regulation 10: "[i]n order to be admitted on this basis you need to show you have been in a durable relationship with V M and that she has been in the United Kingdom exercising treaty rights during that period". The respondent stated that the appellant had not shown that he had lived together with the sponsor and had not provided any documentation or evidence of their life together, for example joint bills or joint ventures. It was also stated that although the appellant had reiterated that he had split up in November 2017, on arrival in the UK on 7 March of that year he stated that the relationship between him and V M had ended in March 2017. He had also told the Immigration Officer that he had started a relationship with a British national in January or February 2017.

6. It is clear that the appellant's appeal was against that decision.

7. It appears that the judge took the view that the decision under appeal was one of September 2018 on the basis that on 12 September 2018 the respondent had noted an application made by the appellant on 6 April 2018 for a permanent residence card and that this had been refused

because it was considered that he had not resided in the United Kingdom as the family member of his sponsor for a continuous period of five years. However, there is nothing to show that the appellant appealed against that decision. Nor is it submitted by Mr Jafar that that was a decision which should have been taken into account by the judge alongside the decision of April 2018.

8. However, such an error would only be material, if on the judge's findings, it was possible for the appellant to have succeeded in his appeal against the April 2018 decision. For that to be the case, it would have to be shown that the appellant continued to reside as the extended family member in accordance with the documentation issued. (By virtue of regulation 7(3) and 8(5) of the Immigration (European Economic Area) Regulations 2006, the appellant was entitled to be treated as a family member if he continued to meet the requirements of regulation 8(5)). On the appellant's evidence he had received a residence card dated 19 November 2014 giving him a period of three years' residence until 19 November 2019, but to resist the decision to revoke his residence card he was required to produce evidence that the couple had continued to be in a subsisting relationship. However, on the evidence before the judge, the EEA national partner ceased living together with the appellant in December 2016, at which point they lived in separate rooms. Further, on the appellant's own evidence, before then the partner had gone to Singapore in March 2016 to complete her internship following her degree and by that time the appellant (as recorded by the judge) "was of the view to terminate the relationship". The fact that the appellant and the sponsor did not enter into a separation agreement until 28 November 2017 did not, in the circumstances, establish that their relationship remained durable until that time. On the evidence of the appellant, there was no longer any substance to the relationship from December 2016/January 2017, if not indeed March 2016. He had also stated that he had begun a relationship proper with a British citizen national, NY, in December 2017 and did not suggest that he maintained any relationship with the EEA sponsor once he began this relationship. Hence, I can see no material error in the judge's decision. The evidence before the respondent did not establish that there was a durable relationship between the couple at the date of decision. Indisputably he had ceased to be in a durable relationship when he sought to be admitted to the UK on 9 April 2018. On the basis of this evidence, I consider that the respondent has established that the EEA right accorded to the appellant as an extended family member no longer existed and that there was a sufficient basis to revoke the residence card. The burden of proof for the decision to revoke rested on the respondent, but I am entirely satisfied that this was discharged on the basis of the evidence that was before the respondent at the date of decision.

9. I would add two further observations. First, there was in any event a further difficulty in the way of the appellant being able to rely on his durable relationship with an EEA national. In order to be able to rely on this relationship it would have to be shown that the sponsor had been in

the UK exercising treaty rights except for permitted periods of absence up to a maximum of six months. On the appellant's own account in interview with the Immigration Officer, his sponsor had spent only ten days in the UK since March 2017. Second, to the extent that the appellant appeared to seek to rely on regulation 10 on the basis that he was entitled to be treated as a family member for the purposes of retained rights, the relevant requirement as set out in regulation 10 (5)(d)(i) for the marriage/partnership [which would have in this context to be read as simply 'relationship'] is for it to have 'lasted for at least three years…" On the evidence before the judge the relationship with the EEA partner had not lasted for three years. Hence there could be no retained rights on this basis.

10. In relation to Ground 2, Mr Tufan accepted that in April 2018 the respondent had made a removal decision. In that circumstance it was clearly wrong of the judge to state at paragraph 27 that "the appellant's current relationship with his British national wife is not a matter which requires to be taken into consideration when considering this appeal under the EEA Regulations. Where there is a removal decision it is incumbent on a judge to consider the appellant's Article 8 circumstances. Indeed, in this case the respondent had considered the appellant's Article 8 circumstances. The judge's failure to consider Article 8 was plainly an error of law.

11. However, in this respect also I am unpersuaded that this error was material. On the appellant's own evidence, his relationship with the EEA national sponsor had broken down prior to the date of decision of 9 April 2018: even the formal separation agreement between them as unmarried partners was 28 November 2017. On the appellant's own evidence, he had met frequently with NY in January and February 2017 but the relationship did not start until December 2017.They had married on 13 February 2018. In relation to that relationship, the appellant has made no application to the respondent. The decision of 9 April 2018 did not constitute an interference in the appellant's Article 8 rights as regards that relationship, whether considered under the rubric of private or family life, since he had an available avenue to seek to stay in the UK on the basis of that relationship, an avenue that he had not yet pursued. The Immigration Rules require that any such application is made in a prescribed form on payment of a prescribed fee.

12. For the above reasons I conclude that, despite two errors, the judge did not materially err in law.

No anonymity direction is made.

Signed Date: 8 May 2019

Dr H H Storey
Judge of the Upper Tribunal