**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/09152/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 20 November 2018** | **On 25 January 2019** |

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**CHRISTOPHER IKECHUKWY CHUKWUEMEKA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr A Adewoye, of Prime Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of judge of the First-tier Tribunal Nicholls (the judge), promulgated on 16 August 2018, dismissing the appellant's appeal against the respondent's decision dated 13 November 2017 refusing to issue him a permanent residence card under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

## Background

2. The appellant, a national of Nigeria, was born in 1992. He entered the UK on 21 January 2011 with entry clearance valid to 30 April 2012. He claims to have met his former wife, Ms M Teixeira, in April 2011 and that they began to cohabit in August 2011. He applied for a residence card as an extended family member of an EEA national on 27 April 2012. This application was however rejected on 22 May 2012. A further application was made on 12 June 2012. The appellant and Ms Teixeira married on 7 July 2012 and he was issued with a residence card as the family member of an EEA national on 4 October 2012.

3. The applicant's relationship with Ms Teixeira broke down and he moved out of the matrimonial home in 2014/2015. Divorce proceedings were commenced on 3 May 2017. On 18 August 2017 the appellant applied for a permanent residence card.

4. In his decision refusing the application the respondent noted that the appellant and Ms Teixeira were not divorced. The only evidence provided to the respondent that Ms Teixeira had been exercising EEA Treaty rights were a letter from her employer dated 24 April 2012 and wage slips issued by a previous employer covering the period 31 December 2011 to 31 March 2012. The respondent was not therefore satisfied that Ms Teixeira had been exercising EEA Treaty rights for a period of 5 years. The application was additionally refused on the basis that the appellant failed to provide original ID documents relating to Ms Teixeira.

5. The appellant had commenced a new relationship with another EEA national and had, in the meantime, been issued with an EEA residence card valid until 2023.

## The decision of the First-tier Tribunal

6. At the commencement of the hearing the judge directed the Presenting Officer to contact HMRC to obtain basic information concerning Ms Teixeira income tax history. The Presenting Officer obtained some information about her income tax history for the tax years 2012/2013 to 2016/2017. There was no information in respect of her tax years 2017/2018.

7. The judge considered written and oral evidence from the appellant to the effect that Ms Teixeira had been working at Heathrow Airport but he had been informed around April or May 2017 that she had left the UK to go to Ireland. Because the divorce was acrimonious Ms Teixeira had been unwilling to provide any documentary evidence to support the appellant's application.

8. In his findings the judge directed himself in accordance with Reg 15(1)(b) of the 2016 Regulations (the appellant had to demonstrate that he was a family member of an EEA national who is not an EEA national but who had resided in the United Kingdom with the EEA national in accordance with the 2016 Regulations for a continuous period of five years). Although noting the appellant's evidence that he and Ms Teixeira had cohabited from 2 August 2011, the judge found that the appellant had given no real details to show that their relationship at the time was akin to marriage. The judge found that the most probable date for the commencement of the requisite 5-year period in Reg 15(1)(b) was the date of the marriage (7 July 2012), and that the 5-year period would therefore end on 6 July 2017. The judge found that the information obtained from HMRC was consistent with the appellant's evidence that it was around April 2017 that he learnt that Ms Teixeira had held a leaving party before going to Ireland. The judge found that Ms Teixeira has therefore left the UK before July 2017. The judge was however satisfied that the respondent had seen Ms Teixeira's passport and was aware of her nationality given that the appellant had previously been issued with a resident card. As the appellant could not fulfil the requirements of Reg 15(1)(b) of the 2016 Regulations the appeal was dismissed.

## The challenge to the First-tier Tribunal's decision

9. Mr Adewoye's grounds, amplified by him at the hearing, contend that the judge erred in law by taking the date of the appellant's marriage to Ms Teixeira as the start of the relevant 5-year period. The appellant and Ms Teixeira began cohabiting on 2 August 2011 and, as Ms Teixeira was exercising her free movement rights at this time, the judge should have calculated the five-year period from this date. It was submitted that the judge failed to consider evidence of the appellant's cohabitation with Ms Teixeira including, *inter alia*, the tenancy agreement dated 2 August 2011, Ms Teixeira's employer's letter dated 24 April 2012, wage slips covering the period 31 December 2011 to 31 March 2012, Ms Teixeira's bank statement, and a direct debit for a health club dated 19 March 2012, all relating to an address in Willow Tree Close, where the appellant also lived. It was submitted that the judge was wrong to conclude that there was insufficient evidence that the appellant and Ms Teixeira lived together in a durable relationship akin to marriage since August 2011. The assertion in the grounds, that an application for a residence card had been made on 27 April 2012 and refused on 22 May 2012, was confirmed by Mr Whitwell who explained that the application had been refused because the documents provided were insufficient to establish a right of residence.

10. Having been made aware of the decision in Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558, Mr Adewoye submitted that the further application for a residence card made in

June 2012 contained more evidence of the relationship between Ms Teixeira and the appellant and, if the respondent was not satisfied that the relationship was genuine, then a residence card would not have been issued to the appellant after his marriage to Ms Teixeira. He submitted that the application for a residence card based on the appellant being in a durable relationship with Ms Teixeira would have succeeded and this was demonstrated by the actual grant of a residence card after the marriage.

## Discussion

11. There is no dispute that the appellant married Ms Teixeira on 7 July 2012. As the spouse of an EEA national the appellant would, for the purposes of Reg 7 of the 2016 Regulations, be a 'family member' of an EEA national. Prior to his marriage he was not a 'family member'. The most he could have been was an 'extended family member', as defined in Reg 8(5) of the 2016 Regulations. Being an extended family member of an EEA national does not, of itself, bestow upon a person a right of residence.

12. A person who meets the definition of extended family member may be granted an EEA residence card, after 'an extensive examination' of their personal circumstances (Regs 18(4) and (5) of the 2016 Regulations). Reg 7(3) reads,

> A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—
>
> (a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and
>
> (b) the EEA family permit, registration certificate or residence card remains in force.

13. Reg 7(3) therefore acts as a gateway to the acquisition of rights of residence of extended family members on the basis that, once the relevant document has been issued, the extended family member is to be treated as a family member. It is unambiguously clear that the treatment of an 'extended family member' as a 'family member' is conditional on the issuance of, *inter alia*, a residence card, and that the treatment is coextensive with and dependent upon the validity of that residence card.

14. It follows that an extended family member of an EEA national will only be considered as a family member after the issuance of a residence card. Unless and until a residence card is issued, the extended family member cannot be treated as a family member and does not have a right of residence. This conclusion is supported by the recent Court of Appeal decision in Macastena.

15. In his introduction to the Court's decision Lord Justice Longmore stated, at [1],

> "This appeal raises the question whether time spent by a man in a durable relationship with a woman who is an EEA national with a permanent right of residence in the United Kingdom can be added to subsequent time as a spouse to meet the requirement of 5 years continuous lawful residence before the man can himself acquire a permanent right of residence. The answer is that time so spent cannot be added unless the Secretary of State for the Home Department has (or perhaps ought to have) issued the man with a residence card as an "extended family member", pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations")."

16. At [17] His Lordship explained,

> "An extended family member can only be issued with a residence card on the basis of his durable relationship with an EEA national if the Secretary of State has undertaken "an extensive examination of the personal circumstances of the applicant". That has never happened and can only happen after an application for a residence card is made. Merely notifying the Secretary of State that one is in a durable relationship is nowhere near enough either to constitute such extensive examination or to require such examination to be undertaken. FTT Judge Clark was with respect wrong to think that time spent in a durable relationship with Ms L could just be added to time spent as her spouse, provided that the First Tier Tribunal itself was satisfied that there had been a durable relationship before the marriage."

17. Mr Adewoye submits that Macastena can be distinguished on the facts. There was no application at all in that case for a residence card as an extended family member, whereas the appellant made not one but two applications (on 27 April 2012 and 12 June 2012), and that the respondent ought to have issued the appellant with a residence card in respect of his first application because he was ultimately issued with a residence card after his marriage.

18. Whilst I agree that there is a factual difference in that the appellant did make a prior application for a residence card, and that there must have been 'an extensive examination' of the applicant's personal circumstances, the result of that assessment was that the appellant was not entitled to a residence card. On the information available to me, this is most likely to have been because the respondent was not satisfied there was sufficient evidence that the appellant and Ms Teixeira were in a durable relationship.

19. Although a second application was made for a residence card on the basis that the appellant was in a durable relationship with Ms Teixeira, this was ultimately varied to become an application for a residence card based on the appellant's marriage to Ms Teixeira and his new status as a 'family member'. There is no requirement for 'an extensive examination' of the appellant's personal circumstances for a residence

card to be issued in these circumstances. It does not however follow that the issuance of a residence card to the appellant as a 'family member' means that he would have been issued a residence card as an extended family member. The tests for the issuance of a residence card are quite different and, while the evidence provided by the appellant in his applications of April and June 2012 supported his assertion that he cohabited with Ms Teixeira, they did not necessarily demonstrate that he was in a durable relationship with her. In these circumstances I find that, although the judge's reasoning is a little opaque, he did not materially err in law in taking the starting point for the calculation of the relevant 5-year period as the date of the marriage.

**Notice of Decision**

**The decision of the First-tier Tribunal does not contain a material error of law.**
**The appeal is dismissed.**

Signed Date 14 January 2019
Upper Tribunal Judge Blum