



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/31630/2015

THE IMMIGRATION ACTS

Heard at Field House

On 26th March 2019

**Decision & Reasons
Promulgated
On 2nd May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**JANE [N]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Palmer, Counsel

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Uganda born on 14th March 1979. On 3rd December 2012 the Appellant was issued with a residence card as the unmarried partner of Mr [CD], an EEA national exercising treaty rights in the United Kingdom. On 9th September 2014 the Appellant applied for leave to remain on the grounds of domestic violence and this application was refused with no right of appeal on 14th November 2014. On 14th September 2015 the Appellant was served with notice of revocation of her EEA residence card on the basis that as the Appellant had confirmed she no longer was the unmarried partner of Mr [D] she did not meet the

requirements of Regulation 8(5) of the Immigration (EEA) Regulations 2006.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Cameron sitting at Taylor House on 1st December 2017. In a decision and reasons promulgated on 14th December 2017 the Appellant's appeal was dismissed.
3. Grounds of Appeal were lodged to the Upper Tribunal on 5th January 2018. Those grounds contended firstly that there had been a failure to consider the right of permanent residence and that an error had been made placing the burden of proof on the Appellant and secondly, that there had been a failure to consider domestic violence under the Charter of Fundamental Freedoms and a failure to carry out a proportionality assessment.
4. On 8th May 2018 First-tier Tribunal Judge Lambert granted permission to appeal.
5. That appeal came initially before Deputy Upper Tribunal Judge Hall sitting at Field House on 6th July 2018. In a decision and reasons dated 15th July 2018 Judge Hall found that the decision of the First-tier Tribunal contained an error of law and was set aside and he substituted a fresh decision allowing the appeal.
6. On 6th August 2018 pursuant to Rule 44 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the Secretary of State wrote to the Tribunal. The Secretary of State noted that Judge Hall had allowed the appeal by reference to the fact that the Appellant had been held to have acquired a permanent right of residence under the EEA Regulations and Directive but that unfortunately the submission accepted by Judge Hall was legally misconceived in a manner recently confirmed by the Court of Appeal in *Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558* in that the decision misunderstood the domestic framework giving effect to the facilitation of entry and residence of other family members under Article 3.2 of the Directive. The Secretary of State pointed out that unlike the position of family members defined in Article 2.2 of the Directive transposed by Regulation 7 extended family members (Regulation 8) did not enjoy a right of residence as soon as the bare criteria in the Regulation were met and that what in fact happens is that following extensive examination of their circumstances they are issued with documentation and are held to be residing as family members for so long as they continue to meet the requirements of the relevant part of Regulation 8 and have a valid and uncancelled document.
7. The Secretary of State noted that whilst there had been a previous finding back in 2012 by Immigration Judge Pullig that the Appellant had been in a durable relationship for five years before his determination but this did no more than hold that the requirements of Regulation 8(5) had been met for that period. It was submitted by the Secretary of State that the finding did not, and could not, establish that there had been five years' residence as a

“family member”, as such residence under Regulation 7(3) was contingent upon holding a valid document throughout.

8. Those submissions were considered by Upper Tribunal Judge Dawson on 7th September 2018. Judge Dawson noted that it appeared that the Court of Appeal decision in *Macastena* had not been drawn to the attention of the judge and that in his view had it been it could have had a material effect upon his decision. In such circumstances he set aside the decision of Judge Hall and directed that the appeal by the Appellant remained pending to be listed in due course.
9. At my findings in the error of law decision at paragraphs 17 to 19 inclusive I found that whilst noting the submissions made by the Secretary of State the correct approach was not for the Appellant to make a fresh application and that the most practical method of dealing with the appeal was to set aside the decision of the First-tier Tribunal Judge solely so far as it relates to the judge’s failure to consider the issue of domestic violence and the extent to which it was bound up with the judge’s discretion on the EU principle of proportionality. It is that issue alone that comes back before me for hearing.
10. The Appellant appears in this matter by her instructed Counsel Mr Palmer. Mr Palmer is very familiar with this matter. Indeed, he appeared before me at the last hearing. On this occasion the Secretary of State appears by his Home Office Presenting Officer Mr Whitwell.

Documents

11. I am provided with the following documents that were not before the First-tier Tribunal.
 - (i) An Appellant’s bundle of subjective evidence for the rehearing extending to 25 pages.
 - (ii) A supplemental bundle (marked Appellant’s third supplemental bundle) consisting of 8 pages.
 - (iii) An Appellant’s principal bundle consisting of 136 pages made up of a skeleton argument, a chronology and a substantive bundle of authorities.
12. Mr Whitwell provides me with his recent Home Office guidance on victims of domestic violence and abuse dated February 2018 and extracts from the Home Office Guidance on Free Movement Rights: retained right of residence relating to domestic violence cases published on 14th February 2019.

Evidence

13. The Appellant confirmed her witness statements dated 8th September 2014 and 27th September 2016 as being her evidence-in-chief. Mr Palmer poses one additional question to her enquiring as to how long she has

been attending Crisis and the Appellant advises she has been attending since January 2016. She states she has an appointment every two weeks and that she sometimes attends for additional therapy or to attend activities.

14. In cross-examination Mr Whitwell enquires as to how the Appellant is aware that she is a victim of domestic violence and the Appellant responds by stating as a result she found herself homeless and she then had to go through a friend to find somewhere to live. When he enquired as to whether there are any police reports of the violence the Appellant merely states that her husband was intimidating her.
15. Mr Whitwell turns to the Appellant's first witness statement and the Appellant confirms that she has tolerated abuse from her partner since 2006 but comments that she may not initially have taken it seriously.
16. I am referred to the letter from Look Ahead Care and Support Charitable Housing Association dated 31st October 2013 and the Appellant confirms that this was the first organisation that she turned to. It is put to her by Mr Whitwell that the Appellant has explained three incidents of physical abuse and as to whether that represents all that took place. The Appellant responds that that is an inaccurate assessment and that the abuse had been ongoing since 2006 and that she was, when interviewed, crying and unable to give a detailed account. He refers to the rape in 2007 and that she had not mentioned it because it was very difficult for her to talk about it. She emphasises that her account is not exaggerated and I note that she became extremely distressed during the questioning.

Submission/Discussion

17. Mr Whitwell divides his submissions into two areas. Firstly, by addressing the facts of domestic violence in this case and secondly by looking at the law. On the factual scenario Mr Whitwell accepts that there is evidence from a number of sources and that the Appellant has given her testimony consistently. However, he contends there is no evidence from the time that the abuse allegedly took place that is produced and that all the evidence comes at a later date from the Appellant herself. He submits that the case turns on my assessment of the Appellant's evidence. He asked me to consider the letter from Look Ahead submitting there is a difference expressed therein as to when evidence of the abuse first appeared and also that the letter from Look Ahead implies a lower level of severity of abuse. He asked me to consider a Home Office document on retained rights of residence dated 14th February 2009 and in particular the section on decision-making and the revoking of an existing registration certificate or registration card emphasising that letters provided need to be given weight although he accepts that I have discretion and that I am entitled to apply my own weight to the evidence that has been provided. He refers to the medical evidence and submits that it does not mean necessarily that that Appellant's conditions were attributable to domestic

violence but they could have been caused by homelessness. He asked me to find that factually domestic violence has not been made out.

18. Secondly, he turns to the law and points to submitting that there is no provision in the Regulations as the Appellant was neither a civil partner nor married, he submits that any differing treatment between married and unmarried partners is not in direct breach of the EU principle of equal treatment. He submits that the correct approach is for the Appellant to make a fresh application for relief as an unmarried partner of a victim of domestic violence and that the 2016 Regulations only provide for a retained right of residence to former spouses and civil partners and that consequently there is no basis for a durable partner to retain a right of residence for reasons of domestic violence. He submits that the Appellant is not for the purpose of the Regulations a family member.
19. In response Mr Palmer submits firstly looking at the facts that the Appellant is a victim of domestic violence and invites me to say that she is on the balance of probabilities. He points out that the evidence from Look Ahead is not flawed nor has discrepancies and that their evidence is detailed and that the Appellant's testimony is accepted as being credible. He points out that in the documents provided for the error of law hearing there was evidence that was provided in the bundle that professional organisations have assessed the Appellant and that she has been found to be a credible victim of domestic violence. On the facts he asked me to make such a finding.
20. On the law he accepts that the Appellant cannot succeed under the Regulations and consequently it is necessary to look at EEA law generally and to address the principles of equal treatment and proportionality. He submits it is possible to have leave to remain under domestic violence rules as an unmarried partner. He refers me to the documentation that was made available before the First-tier Tribunal. He submits that it is appropriate to conclude that it is a rational decision based on a proper interpretation of EEA law and proportionate to allow the appeal and he refers me to the findings of First-tier Tribunal Judges Simpson and Fountain in an unreported decision from 2012. He acknowledges that such a decision is neither authoritative nor can be binding upon me.
21. He also makes reference to *R (Lumsdon and Others) v The Legal Services Board [2015] UKSC 41* and submits it would be disproportionate to revoke the Appellant's residence card in these circumstances. He asked me to allow the appeal.
22. In brief response Mr Whitwell reminds me that domestic violence has not been considered at any point and that the best approach would be to remit the matter back to the Secretary of State to reconsider.

Findings

23. The first issue before me is to determine whether or not the Appellant is or is not a victim of domestic violence. I heard the oral testimony of the Appellant and I have considered the documentation that has been provided including correspondence from Look Ahead dating back to 2013. I am satisfied having read all the documents and heard the oral testimony of the Appellant that she is a credible witness, that her evidence is consistent and that she is a victim of domestic violence.
24. The question then arises as to whether or not the Appellant can succeed in this action as a matter of law. I have found previously that the First-tier Tribunal Judge had failed to consider the issue of domestic violence and the extent to which it was bound up within his discretion on the EU principle of proportionality. It is that issue and that alone that I have reheard. I concluded previously based on paragraph 14 of Judge Cameron's decision that it was before him albeit that it has not been in any way addressed. It does however appear to have been at the forefront of the original application. On 9th September 2014 the Appellant had applied for leave to remain on the ground of domestic violence and this was refused with no right of appeal on 14th November 2014. Consequent to that the Secretary of State reconsidered the Appellant's application for a residence card (previously issued on 3rd December 2012) and reasons for revocation of the residence card were sent out on 10th September 2015.
25. There is an acceptance by Mr Palmer that the Appellant cannot succeed under the Regulations. As is set out clearly in the 2019 free movement rights guidance to the Immigration (European Economic Area) Regulations 2016, the 2016 Regulations only provide for a retained right of residence to former spouses and civil partners and there is no basis for a durable partner to retain a right of residence for reasons of domestic violence. When the relationship between a family member and their EEA national Sponsor has ended due to domestic violence or other circumstances, then an application can be made to retain a right of residence under Regulation 10(5)(d)(iv) of the 2016 Regulations.
26. Mr Palmer makes two submissions to the approach he considers I should take in the event that I find the Appellant is a victim of domestic violence. Firstly, he submits that I can revoke the original decision as being unlawful as the only matter to be taken into account was the ceasing of the Appellant's relationship and therefore it should be considered proportionate or alternatively under EU law that she has a right of residence. It is his submission that I could either remit the matter to the Secretary of State for reconsideration or allow the appeal outright.
27. It is Mr Whitwell's contention that the judge had not considered domestic violence at any stage and consequently the correct approach is to remit the matter back to the Secretary of State.
28. I agree with the contention made by Mr Whitwell. The Regulations are clear and effectively are not challenged. There has been no finding on domestic violence. I have concluded that the Appellant is a victim of

domestic violence. The Appellant cannot succeed under the Regulations and consequently there are two courses of action open. Either the Appellant has to submit a fresh application or alternatively the matter needs to be considered by the Secretary of State. Bearing in mind my finding on domestic violence on the facts the preferable approach is the latter. I consequently remit the matter back to the Secretary of State for reconsideration.

Notice of Decision

On finding that the Appellant is a victim of domestic violence on the facts the appeal is remitted back to the Secretary of State for reconsideration.

No anonymity direction is made.

Signed

Date 29th April 2019

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT FEE AWARD

No application has been made for a fee award and none is made.

Signed

Date 29th April 2019

Deputy Upper Tribunal Judge D N Harris