Neutral Citation Number: [2019] EWCA Civ 339

Case No: C5/2017/2205

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Juss
1A/27029/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

LADY JUSTICE SHARP
LORD JUSTICE BAKER
and
SIR STEPHEN RICHARDS

- -

Between :

Secretary of State for the Home Department	**Appellant**
- and -	
Jefferey Aibangbee	**Respondent**

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- -

William Irwin (instructed by the **Government Legal Service**) for the **Appellant**
Ramby de Mello (instructed by **JM Wilson Solicitors**) for the **Respondent**

Hearing date : 20 February 2019

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Approved Judgment

Sir Stephen Richards :

1. The respondent, a citizen of Liberia, applied in February 2015 for a permanent residence card under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") as the family member of an EEA national. Regulation 15(1)(b) provided that the right to reside in the United Kingdom permanently was acquired by "a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years". The respondent was the unmarried partner of a Czech national with whom, as was subsequently found, he had been residing in the United Kingdom in a durable relationship since 2008. It was only in May 2013, however, that he had been issued with a residence card. His application for a permanent residence card was refused by the Secretary of State on the ground that time began to run only from May 2013 when the residence card was issued, since that was the time from which he was to be treated as a family member in accordance with the Regulations. On that basis the earliest date when the five year requirement could be met would be May 2018.

2. The respondent appealed successfully to the First-tier Tribunal ("the FTT"), which rejected the Secretary of State's argument that time began to run only from the date of issue of the residence card. The FTT judge held by reference to article 25(1) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive") that a residence card *confirms* status rather than granting it. The judge held further that "although the State may in the exercise of its discretion impose particular requirements, those requirements must not deprive the original provision of its effectiveness (*SSHD v Islam & Anor* [2012] EUECJ C-83/11) and to conclude that [the respondent] would only qualify for permanent residence in 2018 would in my view do so". The case referred to by the judge is reported as *Secretary of State for the Home Department v Rahman* (Case C-83/11) [2013] QB 249 ("*Rahman*").

3. An appeal by the Secretary of State to the Upper Tribunal ("the UT") was dismissed by Deputy Upper Tribunal Judge Juss, who found no material error of law in the FTT's determination.

4. The Secretary of State now appeals to this court against the UT's determination, with permission granted by Upper Tribunal Judge Gill. The issues in the appeal relate to the construction of the Directive and the 2006 Regulations. The issues have been enlarged by a respondent's notice which argues that the respondent was eligible to be considered for permanent residence pursuant to article 16 of the Directive, as well as enjoying procedural rights under article 25.

5. Whilst the 2006 Regulations govern this case, they have since been replaced by the Immigration (European Economic Area) Regulations 2016. It is said that those later regulations largely reproduce the 2006 Regulations as amended, but it has not been necessary for us to consider them.

6. We were informed during the hearing of the appeal that the respondent had in fact been issued with a permanent residence card in July 2018, following his completion of the five-year period required on the Secretary of State's approach to the law. As between

the parties, therefore, the present appeal has become moot. But in view of the importance of the issues and the stage that proceedings had reached, we decided that it would be appropriate to continue to hear and determine it.

The Directive

7. As its title indicates, the Directive confers rights of free movement and residence on Union citizens and their family members.

8. Article 2(1) defines "Union citizen" as "any person having the nationality of a Member State". Article 2(2) defines "family member" as follows:

> "'Family member' means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partners as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)."

9. Article 3, headed "Beneficiaries", draws a distinction between, on the one hand, family members as defined in article 2(2) and, on the other hand, other family members and partners:

> "3(1) This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of article 2 who accompany or join them.
>
> (2) Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

10. Chapter III of the Directive concerns the right of residence. In summary, article 6 confers on Union citizens and their family members an initial right of residence on the territory of another Member State for up to three months; article 7 confers a right of residence for longer than three months if specified conditions are met; article 8 provides that the host Member State may require Union citizens (including family members who are themselves Union citizens) to register and to be issued with a registration certificate; and articles 9 and 10 provide for the issue of a residence card to family members of a Union citizen who are not nationals of a Member State, and prescribe the documents to be presented for the residence card to be issued.

11. Chapter IV concerns the right of permanent residence. Article 16, headed "General rule for Union citizens and their families", provides:

> "16(1) Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> (2) Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years …."

12. Chapter V contains provisions common to the right of residence and the right of permanent residence. It includes the following, in article 25:

> "25(1) Possession of a registration certificate as referred to in article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof …."

13. Those are the most important provisions of the Directive for the purposes of this case, though it will be necessary to refer to certain others when considering the parties' submissions.

The 2006 Regulations

14. The 2006 Regulations implemented the Directive.

15. Regulation 7(1) provided:

> "Subject to paragraph (2) [which is immaterial], for the purposes of these Regulations the following persons shall be treated as the family members of another person:
>
> "(a) his spouse or his civil partner;
>
> (b direct descendants of his, his spouse or his civil partner who are (i) under 21; or (ii) dependants of his, his spouse or civil partner;
>
> (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
>
> (d) a person who is to be treated as the family member of that other person under paragraph (3).
>
> …
>
> (3) Subject to paragraph (4) [which is immaterial], 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 the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked."

16. It will be seen that regulation 7(1)(a)-(c) reflected the definition of "family member" in article 2(2) of the Directive. Regulation 7(1)(d) and (3), by contrast, were part of the machinery by which the 2006 Regulations gave effect to the obligation in article 3(2) of the Directive to facilitate entry and residence for other family members and partners. An "extended family member" as referred to in regulation 7(3) was defined in regulation 8:

> "8(1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> …
>
> (5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.
>
> (6) In these Regulations 'relevant EEA national' means, in relation to an extended family member, … the EEA national who is the partner of the extended family member for the purpose of paragraph (5)."

17. The Regulations contained detailed provisions relating to rights of residence and to residence documentation. Regulation 13 covered the initial right of residence for EEA nationals and their family members, whilst regulation 14 covered an extended right of residence. As to the right of permanent residence, regulation 15 provided:

> "15(1) The following persons shall acquire the right to reside in the United Kingdom permanently:
>
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
>
> (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years …."

By regulation 18(2), the Secretary of State was required to issue a permanent residence card to a person who was not an EEA national and who had a right of permanent residence under regulation 15.

18. The issue of a residence card at an earlier stage was dealt with by regulation 17. In particular, the issue of a residence card to an extended family member in circumstances such as applied to the respondent in May 2013 was governed by regulation 17(4) and (5):

> "17(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if:
>
> (a) the relevant EEA national in relation to the extended family member is … an EEA national with a permanent right of residence under regulation 15; and
>
> (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
>
> (5) Where the Secretary of State receives an application under paragraph (4) 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."

The rival submissions

19. For the Secretary of State, Mr Irwin submitted that the FTT and the UT had fallen into error in their approach to the Directive. Article 3 of the Directive reflected a crucial distinction whereby substantive rights of entry and residence were conferred by the Directive only on Union citizens and their family members as defined in article 2(2), not on other family members and partners as described in article 3(2): for convenience, I will refer collectively to those other family members and partners as "extended family members" even though that terminology is derived from the 2006 Regulations, not from

the Directive itself. Article 3(1) provided that the Directive was to apply to Union citizens and their family members. Article 3(2) imposed only a limited procedural obligation on Member States to *facilitate* residence for extended family members. This was confirmed by the judgment of the Court of Justice of the European Union ("the CJEU") in *Rahman*, cited above. A few other provisions of the Directive also gave procedural rights to extended family members, but none of them affected the basic structure of the Directive. Neither article 16 nor article 25 conferred substantive rights on extended family members or, therefore, on the respondent.

20. In his written skeleton argument, Mr Irwin relied on *Secretary of State for the Home Department v Ojo* [2015] EWCA Civ 1301 for the proposition that residence "in accordance with" the 2006 Regulations for the purposes of regulation 15(1)(b) was legal residence in the United Kingdom in a qualifying status. He submitted that an extended family member had the relevant qualifying status only when that person fell to be treated as a family member pursuant to regulation 7(3), which was dependent in turn on the issue of a residence card under regulation 17(4). In his oral submissions, however, Mr Irwin found it unnecessary to develop the argument based on *Ojo*. He relied instead on the recent decision of this court in *Macastena v Secretary of State for the Home Department* [2018] EWCA Civ 1558, [2019] 1 WLR 365 (*"Macastena*") as establishing that a period of residence by an extended family member prior to the issue of a residence card does not count towards the period of five years' residence required by regulation 15(1)(b).

21. For the respondent, Mr de Mello submitted that the conclusion reached by the FTT and the UT was correct. The respondent enjoyed advantages as a beneficiary under the Directive in relation to substantive as well as procedural rights and was eligible for permanent residence under article 16 as well as for the protection conferred by article 25. In support of that submission he referred to provisions of the Directive where the term "family members" covers extended family members as well as family members as defined in article 2(2), and to other provisions which confer benefits on extended family members as well as to family members as so defined. He placed particular weight upon the judgment of the CJEU in *Secretary of State for the Home Department v Banger* (Case C-89/17) [2019] 1 CMLR 6 and the court's finding in that case that article 31 of the Directive applied to extended family members within article 3(2)(b). His various alternative submissions as to how article 16 conferred a right of permanent residence upon the respondent are best considered in the course of the discussion below.

22. Whilst Mr de Mello's arguments concentrated on the rights said to be conferred on the respondent by the Directive, it was also his case, as I understood it, that regulation 15(1)(b) could and should (in order to achieve compatibility with the Directive) be construed in such a way that time began to run in the respondent's case from April 2008 when he started to reside in a durable relationship with his Union citizen partner.

Discussion

23. In my judgment, the case advanced for the Secretary of State as to the proper construction of the Directive is plainly correct, and the approach taken by the FTT and the UT as to the effect of the Directive was equally plainly wrong.

24. That the substantive rights of residence conferred by the Directive are enjoyed by family members as defined in article 2(2), but not by extended family members as

referred to in article 3(2), is clear from the wording of the relevant provisions and the structure of the Directive and is confirmed by the judgment in *Rahman*, where the court said this:

> "19. As contended by the governments which have submitted observations to the court and by the European Commission, it follows both from the wording of article 3(2) of Directive 2004/38 and from the general system of the Directive that the European legislature has drawn a distinction between a Union citizen's family members as defined in article 2(2) of Directive 2004/38, who enjoy, as provided for in the Directive, a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in article 3(2) of the Directive, whose entry and residence has only to be facilitated by that Member State.
>
> 20. That interpretation is borne out by recital (6) in the Preamble to Directive 2004/38, which states that:
>
> > 'In order to maintain the unity of the family in a broader sense …, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'.
>
> 21. Whilst it is therefore apparent that article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compare with applications for entry and residence of other national of third states, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.
>
> 22. In order to meet that obligation, the Member States must, in accordance with the second sub-paragraph of article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first sub-paragraph of article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons."

25. The obligation on Member States in article 3(2) can also be expressed as a *right* of the extended family member for his or her application to be facilitated by the Member State; but it is a limited procedural right, distinct from the substantive rights of residence conferred by the Directive.

26. The FTT judge cited *Rahman* for the principle of effectiveness (see the quotation from the FTT's determination at para 2 above). The judge seems to have had in mind paras 36-40 of the judgment in that case, but those paragraphs concern a point which in my view does not bear upon the present issue, let alone assist in its resolution. It is unfortunate that the relevant analysis in the earlier paragraphs of the judgment in *Rahman* was apparently overlooked.

27. Nothing in the later authorities cited on the present appeal casts doubt on the analysis in *Rahman*. The Supreme Court in *SM (Algeria) v Entry Clearance Officer* [2018] UKSC 9, [2018] 1 WLR 1035 was evidently basing itself on *Rahman* when it stated at para 18 that "[t]he obligation of the host Member State is to facilitate entry and residence in accordance with its national legislation, to undertake an extensive examination of the personal circumstances, and to justify any denial of entry and residence"; and nothing turns on the gloss added by the court at para 21 that in making the evaluation decision-makers must bear in mind that the purpose of the Directive is to simplify and strengthen the right of free movement and residence for all Union citizens.

28. The CJEU in *Banger* held that article 3(2) must be applied by analogy in respect of an unregistered partner of a Union citizen in circumstances where the Union citizen has exercised his right of freedom of movement to work in another Member State and returns with the partner to the Member State of which the Union citizen is a national in order to reside there. Again, the court incorporated reference to *Rahman* as an integral part of its reasoning and said nothing inconsistent with that judgment (see in particular paras 30-33; see also paras 37-40).

29. The judgment in *Banger* went on to deal with various provisions of the Directive on which Mr de Mello relied in his submissions but which in my view do not provide the assistance he sought to derive from them. The question in that part of the case was "whether article 3(2) of Directive 2004/38 must be interpreted as meaning that third-country nationals envisaged in that provision must have available to them a redress procedure whereby matters of both fact and law may be reviewed by the court, in order to dispute a decision to refuse a residence authorisation taken against them" (para 43). In answering that question, the court reasoned as follows:

> "44. According to article 15(1) of Directive 2004/38, the procedures provided for by articles 30 and 31 of that directive are to apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health. Under article 31(1) of that directive, the persons concerned are to have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

> 45. However, those provisions do not expressly mention the persons envisaged, in particular, in point (b) of the first subparagraph of article 3(2) of Directive 2004/38.
>
> 46. In that regard, as the Advocate General observed in point 87 of his Opinion, the concept of 'family members' is used in other provisions of Directive 2004/38 also to include the persons envisaged in article 3(2) of that directive. In particular, article 10 of that directive, which concerns the issuance of residence cards to 'family members of a Union citizen', mentions in paragraph 2(e) and (f) the documents to be presented, in order for that residence card to be issued, by the persons envisaged in points (a) and (b) of the first subparagraph of article 3(2) of that directive. Similarly, article 8(5) of Directive 2004/38, which concerns the documents to be presented for the registration certificate to be issued to 'family members' mentions, in paragraphs (e) and (f), the persons referred to in article 3(2) of that directive.
>
> 47. In addition, according to the Court's case-law cited in paragraph 38 above, Member States must, in accordance with the second subparagraph of article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of article 3(2) of that directive to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.
>
> 48. Since the provisions of Directive 2004/38 must be interpreted in a manner which complies with the requirements flowing from article 47 of the Charter of Fundamental Rights of the European Union …, those persons must have available to them an effective judicial remedy against a decision, under that provision, permitting a review of the legality of that decision as regards matters of both fact and law in the light of EU law ….
>
> 49. Consequently, it must be found that the procedural safeguards provided for in article 31(1) of Directive 2004/38 are applicable to the persons envisaged in point (b) of the first subparagraph of article 3(2) of that directive …."

30. Thus, article 31(1) of the Directive was given an expansive scope of application for the purpose of ensuring that extended family members had the benefit of *procedural safeguards* in relation to decisions concerning them under article 3(2). As part of its reasoning, the court referred to parts of articles 8 and 10 in which the expression "family members" is used to include extended family members; but those are narrow procedural provisions, relating to the documents to be presented for specified purposes, and there was no suggestion by the court that they undermined the fundamental distinction between family members and extended family members as found in articles 2(2) and 3(2) and confirmed in *Rahman*. Nothing in *Banger* supports Mr de Mello's contention

that the substantive rights of residence conferred by the Directive on family members as defined in article 2(2) are also conferred on extended family members.

31. Accordingly, the right of permanent residence conferred by article 16(2) on family members who meet the specified conditions is in my view a right conferred only on family members as defined in article 2(2). I reject Mr de Mello's argument that the provision is to be read as applying also to extended family members.

32. Mr de Mello had an alternative submission that if an extended family member has been issued with a residence card under the 2006 Regulations and can demonstrate that he meets the condition in article 16(2) as to legal residence with a Union citizen for a continuous period of five years, then he is treated as a family member for the purposes of article 16(2) and acquires a right of permanent residence under that provision, either because he is treated as a family member under national law or because the residence card attests that he is a person in a durable relationship. I found the submission difficult to follow but I have no hesitation in rejecting it. What happens under the national Regulations cannot affect the position under the Directive: as Mr Irwin tellingly observed, it would be surprising if by secondary legislation the UK Government could grant free movement rights under EU law to those who did not otherwise have them. The fact that an extended family member is granted a residence card and is then treated as a family member for the purposes of the 2006 Regulations cannot turn him into a family member within the meaning of the Directive so as to enable him to acquire a substantive right of permanent residence under article 16(2). Mr de Mello referred to article 37 of the Directive, whereby the provisions of the Directive are not to affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by the Directive. But that simply permits more favourable treatment under national law; it does not mean that national law can produce a more favourable result under the Directive.

33. Article 25(1), relied on by the FTT and UT for their conclusions in the respondent's favour, takes matters no further. It prevents a Member State from making possession of a residence card a precondition for the exercise of a right of residence, but it tells one nothing about how or by whom the substantive right is acquired under the Directive. For acquisition of a right of permanent residence one has to go back to article 16 which, for the reasons already given, does not apply to extended family members and therefore confers no such right upon them even if they can prove that they have resided legally with a Union citizen in the host Member State for a continuous period of five years.

34. I turn to the 2006 Regulations. I am satisfied that on their proper construction and so far as material they are consistent with the Directive and produce the result for which the Secretary of State contends. They lay down the conditions for extended family members to acquire rights of residence under national law, in accordance with the duty of facilitation imposed on Member States by article 3(2) of the Directive. Their effect is that an extended family member acquires a right of permanent residence under regulation 15(1)(b) only if he has resided in the United Kingdom with the relevant EEA national for a continuous period of five years *since being issued with a residence card*.

35. In my view, Mr Irwin was right to rely on *Macastena* as decisive of this issue in the Secretary of State's favour. Mr Macastena was a Kosovan national who entered the United Kingdom unlawfully in July 2005 and formed a relationship with a Polish national, Ms L, living and working lawfully here. They became engaged in December

2007 and went to Kosovo where they married in August 2008. He was then granted an EEA family permit as the spouse of Ms L and, after re-entry to the United Kingdom in September 2008, he was issued with a five-year residence card as a family member under the 2006 Regulations. He and Ms L were subsequently divorced but he received a new residence card as an individual who retained a right of residence. In July 2013 he was convicted of an offence of unlawful wounding, for which he was sentenced in August 2013 to 24 months' imprisonment. The Secretary of State then made a deportation order against him. The conditions that had to be satisfied under the 2006 Regulations to justify his deportation depended on whether he had acquired a permanent right of residence in the United Kingdom pursuant to regulation 15. His period of residence after being issued with a residence card as a family member fell a few days short of the five years' continuous residence required by that provision. He argued, however, that before his marriage he had been an extended family member because he was in a durable relationship with Ms L, and that such time could be added to the period of residence as a spouse. The court rejected that argument.

36. Longmore LJ, giving the leading judgment, with which the other members of the court agreed, said this:

> "15. It may well be that, if Mr Macastena had applied for (and received) a residence card as an extended family member pursuant to regulations 17(4) and (5) of the 2006 Regulations on the basis of his durable relationship with Ms L, the time of that durable relationship could count towards an acquisition of permanent right of residence, just as time spent with a retained right of residence after his divorce did so count. But Mr Macastena never made such an application …
>
> 16. Mr Macastena now argues that the Secretary of State knew of his durable relationship with Ms L and has never contested that it existed for some time before his marriage. That, it is said, is enough for that durable relationship to be added to his time as a spouse for the purpose of acquiring a permanent right of residence.
>
> 17. That cannot be right. 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. 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 FTT itself was satisfied that there had been a durable relationship before the marriage.

> 18. This is confirmed (if confirmation is needed) by the analogous case of *CS (Brazil) v Secretary of State for the Home Department* [2009] 2 FLR 928 which considered regulations 8(5) and 17(4) of the 2006 Regulations, along with the relevant provisions of [the Directive] …
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> …
>
> 20. Likewise, in the present case there was, in my judgment, no duty on the Secretary of State to take into account, when considering whether Mr Macastena should be deported, the fact that he could have applied for a residence card pursuant to regulation 17(4) during his durable relationship with Ms L and would have been entitled to an extensive examination of his personal circumstances which might well have resulted in the issue of a residence card to him. Not only is the definition of extended family member in regulation 8(5) expressed in the present tense, so also is regulation 17(4)."

37. Mr de Mello submitted that the first sentence of para 15 of that judgment ("It may well be …") was to be understood as meaning that if a residence card is at some point applied for and received, as here, one can then look back and take into account the time spent in a durable relationship *prior to* the issue of the residence card. I do not accept that the sentence is to be read that way. On the contrary, the whole thrust of Longmore LJ's reasoning is that time spent in a durable relationship prior to the issue of a residence card cannot be taken into account at all.

38. The same argument in respect of *Macastena* as that advanced by Mr de Mello was considered and rightly rejected by Upper Tribunal Judge Grubb in *Kunwar (EFM – calculating periods of residence)* [2019] UKUT 00063 (IAC). The judge concluded his discussion of the issue as follows:

> "39. In my judgment, the Court of Appeal's decision in *Macastena* confirms, and applies, the scheme of the 2006 Regulations and Directive which I have set out above, drawing the distinction between the right of residence of a 'family member' and the absence of any right of residence for an 'extended family member' until a residence card is issued by the Secretary of State under reg. 17(4) of the 2006 Regulations. Only from that point in time do the 2006 Regulations confer upon the 'extended family member' a right of residence because from that point in time they are treated as a 'family member' and may, if appropriate rely upon the rights of residence recognised in reg. 13(2) and 14(2). Then and only then, does the individual begin to acquire a period of lawful residence under the 2006 Regulations which can count towards establishing a 'permanent right of residence' on the basis of residing in the UK in accordance with the 2006 Regulations for a continuous period of five years under reg. 15(1)(b)."

That is a neat encapsulation of the effect of the relevant provisions, giving proper effect to the judgment in *Macastena*.

Conclusion

39. For the reasons given I would allow the Secretary of State's appeal and would make an order setting aside the UT's determination and substituting a decision by which the FTT's determination is itself set aside and the respondent's appeal to the tribunal against the Secretary of State's original decision is dismissed. The details of the order can, however, be left in the usual way for agreement between counsel or for written submissions in the event that agreement is not possible.

Lord Justice Baker :

40. I agree.

Lady Justice Sharp :

41. I also agree.