Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/10103/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th June 2017	**On 29th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR SID ALI SEBTI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Paraskos (Counsel)
For the Respondent: Mr T Wilding (Senior Home Office Presenting Officer)

DECISION AND REASONS ON ERROR OF LAW

1. On 4th August 2016, the Secretary of State refused to issue a permanent residence card to the appellant. His appeal against that decision was dismissed by First-tier

Tribunal Judge Shergill ("the judge") in a decision promulgated on 22nd November 2016.

2. In his application, the appellant relied upon his relationship with an EEA national, which began in March 2010 and broke down on 2nd May 2015. On 21st March 2012, the Secretary of State issued a residence card to him. In assessing whether the appellant could bring himself within regulation 15 of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"), and in particular the requirement that a continuous period of five years' residence in the United Kingdom with the EEA national in accordance with the 2006 Regulations be shown, the judge found that the period of five years was to be calculated from the date of application, in this case 11th February 2016. As the appellant's durable relationship had come to an end almost a year beforehand, he had no permanent right of residence under the 2006 Regulations and so his application could not succeed.

3. In an application for permission to appeal, it was contended that the judge erred in relation to the assessment of the relevant period of five years. There was nothing in regulation 15(1)(b) requiring a family member to show residence with the EEA national as at the date of application for a permanent residence card. The requirement was met so long as the relationship had lasted for five years, subject to residence being in accordance with the 2006 Regulations. The Secretary of State acknowledged that the relationship began in March 2010 and issued a residence card to the appellant valid from 31st March 2012 until 21st March 2017. The five years fell to be calculated from the date the relationship began.

4. Permission to appeal was refused on 23rd March 2017. The judge refusing permission found that although the decision contained a misdirection in relation to the calculation of the relevant period of five years, the error was not material. The appellant was not a family member of a qualified person and never had been. As the 2006 Regulations made no provision for permanent residence by an extended family member such as the appellant, or for the issue of a permanent residence card to such a person, there was no arguable material error of law.

5. The application was renewed. An Upper Tribunal Judge granted permission on 25th April 2017, again finding that the judge misdirected himself in relation to the period of five years, on the basis that if the appellant were able to show such a continuous period of residence, he might fall within regulation 17(4) and (5) of the 2006 Regulations as a person who might benefit from the exercise of discretion by the Secretary of State. As the judge appeared not to have made findings of fact regarding whether or not the sponsor was exercising treaty rights for the relevant period, the misdirection arguably deprived the appellant of the benefit of regulation 17 and so the error was material.

6. On 5th May 2017, the Principal Resident Judge at Field House made directions, sent to the parties on that date. They were advised to prepare for the hearing on the basis that if an error of law were found, the decision would be remade at the same hearing.

The fresh decision would be made in the light of the evidence before the First-tier Tribunal and any further evidence admitted and the parties were to prepare accordingly.

7. In a rule 24 response, the Secretary of State opposed the appeal. The appellant could not succeed, not least because there was no evidence that the EEA national he relied upon, his former partner, had been present in the United Kingdom as a qualified person during the relevant period of five years. In a response from the appellant's representative, it was asserted that any evidential requirement regarding the sponsor could be met and that the Secretary of State had recognised part of this requirement in issuing a residence card to the appellant in 2012. On 2nd June 2017, the appellant's solicitors sent a skeleton argument to the Upper Tribunal, prepared by counsel, Mr Paraskos. Attached to it was a copy of the decision of the Upper Tribunal in Samsam [2011] UKUT 00165. In the course of the hearing, Mr Paraskos handed up a copy of Directive 2004/38, transposed into domestic legislation by the 2006 Regulations.

Submissions on Error of Law

8. Mr Paraskos said that the period of five years fell to be assessed from the date the appellant's relationship with his partner began, in March 2010. A residence card was issued in 2012, the Secretary of State accepting that he was in a durable relationship for the purposes of regulation 8(5) of the 2006 Regulations. From the date of issue, the appellant fell to be treated as a family member of an EEA national under regulation 7(3). Once he was able to show five years' continuous residence, he acquired a right to reside here permanently and was entitled to a permanent residence card, by operation of law under regulation 15 and Directive 2004/38. There was an evidential requirement as the appellant had to show that he was living with a person exercising treaty rights but, subject to that, he was entitled to succeed. Mr Paraskos accepted, however, that the evidential requirement could not be met on the day of the hearing. Nonetheless, the Tribunal had before it five years' worth of P60s in the sponsor's name. If a decision were made not to adjourn, the Tribunal would need to take into account these items to assess the position of the EEA national. The appellant would say that she fell within regulation 6 of the 2006 Regulations and was a qualified person during the relevant years.

9. Mr Wilding said that even though the Secretary of State accepted as a broad principle that in assessing the period of five years, there was no counting back from the date of application, the appellant could not succeed. It was important to bear in mind how he said that he had acquired a right to reside here permanently. Regulation 15 applied in terms to an EEA national or the family member of such a person. An extended family member could not bring himself within scope unless issued with a residence card first. Once such a document was issued, an extended family member would fall within regulation 7(3) and only then was that person in a position to begin to acquire the relevant right. The precise terms of regulation 7(3) were important. The requirement was that an extended family member "… has been issued …" with a residence card and, if so, that person "shall be treated as the family member … for as

long as he continues to satisfy the conditions in regulation 8 … (5) in relation to that EEA national and the … card has not ceased to be valid or been revoked".

10. It followed that the appellant was not able to argue his case on the basis of accrued residence before 2012, the year he was issued with the residence card. Before the date of issue, he did not fall to be treated as the family member of an EEA national, for the purposes of regulation 15. There was a broad contrast between the rights accruing to family members and the position of extended family members able to benefit from the exercise of discretion under regulation 17(4). A similar difference between the two categories was found in regulation 10, where there was a certain protection of rights after divorce but no similar protection where a durable relationship came to an end.

11. The First-tier Tribunal Judge who refused permission erred in finding that an extended family member was simply unable to qualify for permanent residence but was otherwise correct in relation to the general principle that an extended family member without more was unable to start the clock running, prior to issue of a residence card or similar document. The relationship the appellant relied upon lasted from March 2010 until early May 2015 but he was unable to rely on the years between 2010 and 2012. The relationship ended in May 2015 and so he ceased to be a person falling within regulation 8(5) on that event.

12. As a secondary point, Mr Wilding said that as a durable relationship was one akin to marriage, the very fact that it ended would show that it was not durable. Again, regulation 10 of the 2006 Regulations revealed a sharp distinction between those who were married and who had protection on divorce and those whose durable relationships ended. Thirdly, save for the five P60s, there was no evidence of the whereabouts or the activities of the EEA national relied upon. If those items were considered, the amounts earned were not sufficient to show that she had been working continuously during the relevant period of five years. The evidence did not reveal precisely what the economic activity was but the Secretary of State accepted that she was working at the time the residence card was issued. Similarly, the Secretary of State accepted that the appellant was, at the time, in a durable relationship but nothing could be read into the period beforehand. The P60s showed that she earned about £10,000 in each year, with a new employer annually. There was an obvious evidential gap. It was no answer to say that the appeal should be remitted. Even if a material error was shown, there was nothing to prevent the Upper Tribunal from remaking the decision today, in the light of the evidence before it.

13. In response, Mr Paraskos drew attention to Directive 2004/38 and, in particular, Article 25. This made it perfectly clear that possession of a registration certificate or a 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". Once the Secretary of State provided for an extended family member to be treated as a family member and once a period

of five years' continuous residence was shown, the Secretary of State was not able to say that a claimant had no right to permanent residence merely because the residence card issued to him or her bore a date falling within that period of five years. The Secretary of State recognised the existence of the durable relationship. Also relevant was Article 3, defining beneficiaries at 3.2. Subparagraph (b) referred to a partner with whom a Union citizen has a durable relationship, "duly attested". The 2006 Regulations provided that such a partner, being a non-EEA national, would be treated as the family member once a residence card was issued. An entitlement to permanent residence would follow after five years.

14. In response to the submission that the ending of a durable relationship showed that it was not durable, the same might be said about a marriage. In the present appeal, in order to issue the residence card to the appellant in 2012, the Secretary of State determined that the relationship was durable. The appellant's case was that the notional "start date" for the acquisition of a right to reside permanently was March 2010, when the relationship began. It was not possible to issue the residence card on the basis that the relationship was recognised as beginning only as at the date of issue as this would conflict with Article 25 of the Directive. The period before the issue of the residence card fell to be taken into account, which was also made plain by the words "duly attested" at the end of Article 3.2(b) of the Directive. The residence card was evidence of the relationship, including the period of time in which it subsisted before issue. In issuing the residence card, the Secretary of State accepted the pre-existing facts or circumstances. The spirit of the Directive fell to be applied, in favour of those entitled to be beneficiaries. The Secretary of State had, through the 2006 Regulations, tied herself to treating extended family members as family members in certain circumstances.

15. Article 16 of the Directive, in paragraphs 1 and 2, provided a general rule for Union citizens and their family members, so that extended family members could benefit.

16. Mr Wilding responded briefly on the Directive, saying that Articles 25 and 16 were concerned with family members, as was Article 2, which defined the term. Extended family members fell within Article 3, as beneficiaries in a distinct category. Mr Paraskos said briefly that Article 2 was indeed concerned with the definition of family members but where a person was treated as such, that person's rights under the Directive and the 2006 Regulations applied.

Conclusion on Error of Law

17. It is appropriate to start with the Directive and to observe that, as submitted by Mr Wilding, Article 2(2) defines family members. They are bearers of rights. Article 3 identifies beneficiaries, including the partner with whom a Union citizen has a durable relationship, as those in relation to whom member states shall, in accordance with national legislation, facilitate entry and residence. Article 16 and Article 25, referred to by Mr Paraskos in his submissions, apply to family members. The transposition of the Directive into our domestic law, by means of the 2006

Regulations, provides for extended family members, falling within the category of beneficiaries under Article 3, to acquire rights as persons treated as family members falling within Article 2 of the Directive. The mechanism by which this is achieved is, for the purposes of this appeal, contained in regulation 7(3) of the 2006 Regulations. Without this mechanism, extended family members have merely the benefit of regulation 17(4), which provides that the Secretary of State may issue a residence card to a person falling within that category, not falling within regulation 7(3), so long as the EEA national relied upon is a qualified person or an EEA national with a permanent right of residence under regulation 15 and so long as it appears to the Secretary of State in all the circumstances appropriate to issue the residence card.

18. The precise terms of regulation 7(3) are important. This part of our domestic law does not seek to transpose any part of Directive 2004/38 and there is no discrete Article within that Directive providing for beneficiaries falling within Article 3 to be treated as family members falling within Article 2.

19. In order for an extended family member to be treated as the family member of the relevant EEA national, regulation 7(3) requires him or her to show that he or she "has been issued with" a residence card. If so, he or she "shall be treated as the family member", "for as long as he continues to satisfy the conditions" in regulation 8(5), in other words so long as the appellant in this case continues to be in a durable relationship, and the residence card "has not ceased to be valid or been revoked". Taking into account the particular phrase "for as long as he continues to satisfy the conditions", it is clear that an extended family member will cease to be treated as the family member of an EEA national if the durable relationship comes to an end, as will be the case also if the residence card ceases to be valid.

20. There is nothing in regulation 7(3) to suggest that an earlier period of time, before the residence card is issued, may be taken into account in calculating the period of time in which the extended family member "shall be treated as the family member of the relevant EEA national", for the purposes of establishing whether such a person acquires the right to reside permanently under regulation 15(1)(b) of the 2006 Regulations. That right accrues where a family member can show relevant residence for a continuous period of five years but as an extended family member is only treated as the family member of an EEA national in circumstances where he or she has been issued with a residence card, continues to satisfy the relevant conditions in regulation 8 and so long as the residence card has not ceased to be valid or been revoked, earlier periods of time in which the relationship may have existed fall outside scope. During the years March 2010 to March 2012, the appellant was simply unable to show that he was a person to whom a residence card "has been issued". Being able to show that the relationship with his partner existed in those years is not enough.

21. Is this analysis compatible with Article 25 of the Directive? In my judgment, it is. In the first place, as Mr Wilding submitted, Article 25 applies to registration certificates for Union citizens, documents certifying permanent residence and residence cards or

similar items. All of these may be issued to family members and Union citizens but not, under the Directive, to beneficiaries falling within Article 3.2. Article 25 provides that under no circumstances may possession of such a document be made a precondition for the exercise of a right or the completion of an administrative formality. In the appellant's case, the residence card issued to him in 2012 cannot sensibly be viewed as a precondition for the exercise of a right or the completion of an administrative formality. The residence card was instead confirmation or evidence that he was in a relationship with an EEA national and, as such, and importantly having been issued with the residence card, fell to be treated as the family member of his EEA national partner, under regulation 7(3). An extended family member falling within regulation 7(3) may apply to the Secretary of State for a residence card and invite the exercise of discretion under regulation 17(4) in any period of time before five years' continuous residence can be shown. There is no entitlement to be issued with a residence card in these circumstances but, insofar as access to the exercise of discretion may broadly be described as a right, the issuing of a residence card is plainly no precondition for the exercise of it. Once the period of five years' continuous residence has been shown, so long as the extended family member has fallen within regulation 7(3) during that period of time, he or she will acquire the right to reside in the United Kingdom permanently under regulation 15 but, again, the issuing of the residence card or possession of it is no precondition for the acquisition or exercise of the right. Nor does the residence card amount to any barrier to an application.

22. Mr Paraskos submitted that the words "duly attested" at the end of Article 3.2(b) suggest that a period of time before a residence card is issued might be taken into account. I do not accept that submission. The words "duly attested" simply mean that what is required is some form of evidence or confirmation of the relationship. There is no inconsistency or incompatibility between the requirements of regulation 7(3) of the 2006 Regulations and Article 3.2(b) or any other part of the Directive.

23. It follows that I accept Mr Wilding's submission that the error made by the judge in relation to the calculation of the period of five years is not a material error. The appellant was unable to rely on the years between 2010 and 2012, prior to the issuing of the residence card, and the relationship came to an end in May 2015, before five years had passed from the date of issue. Once the relationship came to an end, the appellant was unable to bring himself within regulation 8(5) and so ceased to be an extended family member altogether.

24. Turning briefly to the grant of permission by the Upper Tribunal Judge, as the appellant's durable relationship came to an end in May 2015, his application in February 2016 was doomed to failure, whether or not it was intended that he would seek the exercise of discretion in his favour under regulation 17(4) of the 2006 Regulations. Nothing more need be said on this aspect. I have taken into account the Upper Tribunal decision in Samsam but find that this is of no assistance to the appellant.

25. For these reasons, I find that although the decision of the First-tier Tribunal contains an error of law, it is not a material error. I find that the decision of the First-tier Tribunal, dismissing the appeal, shall stand.

Notice of Decision

The decision of the First-tier Tribunal shall stand as it contains no material error of law.

Signed Date 28 June 2017

Deputy Upper Tribunal Judge R C Campbell

ANONYMITY

No application for anonymity has been made in these proceedings and I make no direction on this occasion.

Signed Date 28 June 2017

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed Date 28 June 2017

Deputy Upper Tribunal Judge RC Campbell