Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05632/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision and Reasons Promulgated**
On 15 November 2018	**On 23 November 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHARLE TAKEM
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pipe instructed by trp Solicitors.
For the Respondent: Mr D Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a hearing on 18 April 2018 the Upper Tribunal found an error of law in the decision of the First-tier which allowed the appellant's appeal against the respondent's refusal to issue a residence card in recognition of a right to permanently reside in the United Kingdom pursuant to regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006.

2. The reasons for finding legal error are set out in that decision, including directions handed down in light of information subsequently received from Mr Mills.

3. On 1 August 2018 Mr Mills sent a further email to the Upper Tribunal, updating it of the current situation in accordance with directions. The text of that email is as follows:

> Dear Sir,
>
> Further to my email below, and your directions of May 22nd, I write to inform you of further developments.
>
> While the Court of Appeal have not yet handed down their judgement in JA (Liberia), they have recently answered the outstanding question the Tribunal has to decide in another decision - Macastena v SSHD [2018] EWCA Civ 1558.
>
> **Circumstances in which a durable relationship can be taken into account for purposes of acquiring a permanent right of residence**
> 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...
> 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.
> 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. 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.
> In the circumstances, I would invite the Tribunal to dismiss the appeal of Mr Takem.
> I would suggest that this outcome is now inevitable, and so the disposal of the appeal could simply be done on the papers. However, given that the appellant is unrepresented, I accept that fairness may dictate a further oral hearing for the situation to be explained and for him to have an opportunity to respond.
>
> Regards,
>
> **David Mills**
> Senior Presenting Officer

4. The matter comes back before the Upper Tribunal today for a Resumed hearing after which a decision shall be substituted to either allow or dismiss the appeal.

Submissions

5. In his written skeleton argument dated 14 November 2018 Mr Pipe argued the appellant's case is distinguishable from *Macastena* as the appellant has applied for, and received, residence card as an extended family member. Mr Pipe refers to [1] of Longmore LJ's judgement, set out below, and argues that this is a case where the 'or perhaps ought to have' applies to the conduct of the respondent.
6. Mr Pipe submits the respondent has repeatedly issued unlawful decisions and delayed unlawfully whilst the appellant has been exercising treaty rights and that the Secretary of State should not benefit from his unlawful conduct in the matter and that the appellant should not be penalised. Mr Pipe argues that repeated unlawful decision making, and delay, should not prevent the appellant from accruing the necessary residence in order to demonstrate a Permanent Right of Residence.
7. It is not disputed the appellant was issued a Residence Card on 1 May 2014 which, as Mr Pipe notes, is 2 years and 6 months and 20 days after he applied for it. The appellant claims he should have been issued with a residence card much earlier and would therefore have acquired the necessary 5-year period entitling him to a grant of permanent residence.
8. Mr Pipe argues the respondent's decision runs contrary to a teleological approach to EU law and is disproportionate.
9. Mr Pipe argues the appellant, in particular circumstances of this case, is entitled to a right of permanent residence.

Discussion

10. Whilst judgment in *AJ (Algeria)* has not yet been handed down, on July 2018 the Court of appeal handed down its decision in *Macastena v SSHD [2018] EWCA Civ 1558,* referred to above.
11. Lord Justice Longmore who gave the lead judgment, in his introduction, writes:

> 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"). The answer to this question is important for foreign criminals with ordinary rights of residence who can only be deported "on grounds of public policy or security"; if, however, they have a permanent right of residence they can only be deported on "serious grounds of public policy or security".

12. The Court of Appeal did not give definitive guidance in relation to the type of cases they considered are those in which the respondent 'ought to have' issued a person with a residence card as an extended family member although it is accepted that if the appellant established that the conduct of the respondent in delaying the issue of the card was unlawful, the test may be satisfied.

13. It is important to consider, therefore, the chronology of this matter as the Upper Tribunal were invited to do by Mr Pipe. That set out in his skeleton argument reads as follows:

    i. On 11 October 2011 the Appellant applied for an EEA Residence Card as an unmarried partner.
    ii. On 10 January 2012 the Respondent refused the application on the ground it would not be conducive to the public good to issue the Appellant a Residence Card. The Appellant appealed against this decision.
    iii. On 14 May 2012 Judge Cox held, with the Respondent's agreement, that the decision dated 10 January 2012 was not in accordance with the law. This is because the Respondent had failed to carry out the duty required by Regulation 17(5) to justify the decision following an extensive examination. The Respondent also failed to consider the decision in line with Regulations 20 and 21.
    iv. On 20 September 2012 the Respondent once again refused the application and the Appellant once again appealed this decision.
    v. On 7 December 2012 Judge Prickett held, at the suggestion of the Respondent, that the decision dated 20 September 2012 was not in accordance with the law. The Respondent had once again failed to carry out the consideration identified by Judge Cox.
    vi. On 25 October 2013 the Appellant issued judicial review proceedings to challenge the unlawful delay by the Respondent. The judicial review was later settled by consent with the Respondent paying the Appellant's costs.
    vii. On 11 December 2013 the Respondent once again refused the application. The Respondent contended that the Appellant was not an extended family member under Regulation 8(5) and also refuse the application under Regulation 17(4). The Appellant appealed this decision.
    viii. On 5 March 2014 Judge Obhi allowed the Appellant's appeal. She found that the Appellant and his partner had a durable relationship and that there was no justification under Regulations 20(1) or 21 for refusing to issue the Appellant with a residence card.
    ix. On 1 May 2014 the Appellant was issued with a residence card.

14. A further aspect of the chronology is revealed from the respondent's bundle before the First-Tier Tribunal, dated 3 January 2017, which has within it a copy of a decision promulgated on 30 May 2007 by Immigration Judge Atkinson and Dr A U Chaudhury (Non-Legal Member) (the Panel) who heard the appellant's appeal against an order for his deportation from the United Kingdom following his being sentenced on 3 November 2006 at the Coventry Crown Court to a 12 month term of imprisonment, having pleaded to possessing a false passport. The Sentencing Judge recommended the appellant for deportation. The Panel referred to an earlier decision dated 5 March 2003 which dismissed a claim for asylum made by the appellant, which was upheld on appeal to the Immigration Appellant Tribunal. (IAT). It was not found the appellant faced a real risk on return to Cameroon and did not find evidence submitted by the appellant to be reliable. The Panel also dismissed the appeal on human rights grounds.
15. On 18 June 2007 the appellant was served with a sign Deportation Order. The appellant could not be removed as a result of his disruptive behaviour and refusal to leave the Detention Centre. The appellant lodged a High Court Judicial Review application and removal directions were cancelled and the appellant given temporary lease to pursue a fresh application for asylum and on

human rights grounds. On 8 September 2008 the High Court refused the appellant's application for permission to apply for Judicial Review.

16. On 16 September 2008 the appellant absconded and did not adhere to reporting conditions. On 23 March 2009 the appellant was detained at Campsfield House Immigration Detention Centre from where he submitted further representations which were refused on 21 May 2009 and removal direction set for 9 July 2009. These were cancelled when an application for Judicial Review was lodged.

17. On 19 October 2009 the appellant applied under the Immigration (European Economic Area) Regulations 2006 which was rejected as invalid on 18 November 2009. Further submissions then made were treated as an application to revoke the Deportation Order which were refused. On 18 February 2010 the appellant was given temporary release from detention with twice-weekly reporting conditions and on 11 October 2011 made an application for a Residence Card as an extended family member of an EEA national exercising treaty rights in the UK. The application was refused on 10 January 2012 with a full right of appeal which the appellant exercised. It was this appeal which came before Judge Cox.

18. The decision of Judge Cox promulgated on 14 May 2012 considered the refusal of an application for a residence card as an extended family member of an EEA national exercising treaty rights in the United Kingdom. The Judge Cox notes at [1] of that decision the following "…. *On 10 January 2012 the Respondent refused that application by reference to Regulation 17(4)(b), it not appearing appropriate to her to issue a residence card. That was because in 2006 the Appellant had been convicted of possession of a false passport, for which offence he received a 12 month prison sentence with a recommendation for deportation. The Appellant has appealed under Regulation 26 against that decision".*

19. Judge Cox records at [2]:

> 2. The appeal was listed for substantive hearing before me today. The Appellant and his partner attended. However, at the outset of the hearing Ms Mepstead and Ms Rutherford put forward to me their common position on the matter, namely that the Respondent's decision as it stood was not in accordance with the law and that my proper course was to allow the appeal to that extent and remit the matter to the Secretary of State from whom the Appellant would await a lawful decision. Their common position was well justified and amounted in essence to this. There had been a failure to engage with Regulation 17(5) which requires the Secretary of State to undertake an extensive examination of the personal circumstances of the applicant and, if the application is to be refused, give reasons justifying the refusal unless that were contrary to the interests of national security (of which there is no suggestion here). Secondly, Regulation 17 is subject to Regulation 20(1), the effect of which is that any refusal of (inter alia) a residence card has to be justified on grounds of public policy, public security or public health. This in turn leads onto the consideration set out at Regulation 21, which I need not rehearse here. The fact of the matter was that no consideration had apparently been given to any of these matters and thus it was that the decision was not in accordance with the law. As I have already indicated, I found myself in complete agreement with those submissions.

20. The respondent made a further decision on 20 September 2012 which was the subject of the appeal before Judge Prickett when it was accepted by the respondent that the matter had still not been considered under the 2006

Regulations and would have to be remitted again. The decision was re-made on 11 December 2013 against which the appellant appealed. It is that appeal that came before First-tier Tribunal Judge Obhi who sets out findings of fact from [23 – 28] in the following terms:

> 23 The issue then arises as to whether the appellant is an extended family member of the EEA national. The respondent does not accept that he is for the reasons which are set out in the 20 September 2012 refusal letter. Those reasons amount to this; that the EEA national had previously supported a Non-EEA nationals application for a Residence Card through the marriage route; that she appeared to be married, as did the appellant; that the appellant had claimed that he was married when he first came to the UK and that he had a child in Cameroon. The fact that Ms Ndo did not want to marry him in the UK and wanted a wedding in France was considered to shed doubt upon her commitment to the relationship. It was also noted that for the majority of the time that they had been in a relationship the appellant had been in prison. The Secretary of State was not satisfied that the documents which had been provided to show cohabitation at the same address were reliable, as most were photocopies. However, it was accepted that whilst the appellant was at Campsfield House IRC Ms Ndo had visited him 8 times. It was considered that this was more in furtherance of a friendship than a relationship. The Secretary of State did not accept that there was a durable relationship under Regulation 8(5). If that is the case, then I am not satisfied that the Secretary of State needs to consider regulation 17(5) as the 'application' which is referred to in Regulation 17(4) is the application of 'an extended family member' - if the appellant is not an extended family member then Regulation 17(4) does not apply, nor does the remainder of the Regulation, or the EEA Regulations generally, and the application will be properly considered under the Immigration Rules, but the application made under the 2006 Regulations cannot be refused under the Immigration Rules - it can only be refused under the 2006 Regulations. I accept Mr Pipe's submission on this point.
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> 24. If on the other hand, the applicant is an 'extended family member' then Regulation 17(4) applies, and any refusal is subject Regulation 17(5) which requires a consideration of Regulation 20(1) and consequently Regulation 21 of the 2006 Regulations. In those circumstances the Secretary of State cannot refuse to issue a Residence Card unless she has carried out the proper enquiries, which under Regulation 17(5) require the Secretary of State to undertake *an 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.*
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> 25. The issue for me to determine therefore is whether there is a durable relationship between the appellant and the EEA national. I have been provided with a wealth of material, which should have been considered by the respondent and a decision made on whether there was a durable relationship. If the decision was that there is no durable relationship then the application should have been refused under the EEA Regulations on the basis that the appellant is not an extended family member. That would have left the Deportation Order, and the appellant could have made an application to set that aside giving rise to Article 8 considerations. The skeleton argument of Ms Rutherford in relation to the 20th September Refusal states that *'it therefore appears that the SSHD accepts that he is in a durable relationship with a qualified person'*. That is not however the case, as the refusal did not accept that the appellant was in a durable relationship. It seems to me that at every hearing it has been assumed that the respondent has accepted that there is a durable relationship, when that is not the case. The most recent refusal and Mr Box's representations

> confirm that to be the position of the Secretary of State. Unfortunately, I did not hear any evidence and therefore I am left to consider whether this is a genuine relationship based on the documentary evidence which has been filed, now over a longer period of time.
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> 26. The appellant went into custody following his conviction for an offence of using false ID. He has provided an explanation for that offence. It attracted an automatic deportation. The appellant has not been in trouble since he was released. When the deportation order was properly made, and an appeal against that order was dismissed by the Tribunal. Since the making of that order the appellant claims that he has been in a relationship with an EEA national. The evidence of that relationship is the visits that have been undertaken to see him whilst he has been in prison, there is documentary evidence of utility bills in the names of both parties at the same address, I have also seen the joint tenancy agreement in relation to the first appeal hearing. I have considered the statements of the parties, and the photographs which have been provided. While I accept that in September 2012, there was a viable issue about whether there is a durable relationship between the parties, that that issue has become increasingly resolved by the passage of time, and the fact that the couple have remained together. Based on the written material before me, and the fact that the respondent chose not to challenge this information by cross-examination, I find, on the balance of probabilities that there is a durable relationship between the appellant and the EEA national. Therefore Regulation 17(4) applies, this is subject to Regulation 17(5) which means that the Secretary of State must issue a Residence Card to the appellant, and can only refused to do so after extensive examination of the appellant circumstances, and then only for the reasons set out in paragraph 20 (1) (defined further in Regulation 21).
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> 27. The test under Regulation 21 is very high. There is no evidence to support refusal under any of the grounds set out in Regulation 21. Whilst I appreciate that there is an outstanding Deportation Order, that became subject to the provisions of the 2006 Regulations and should be reviewed in light of those provisions. It is for not for me to comment further in relation to the Deportation Order, as that is not before me.
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> 28. I intend to allow the appeal under the EEA Regulations.

21. Following the above decision the appellant was issued a residence card.
22. It is important to note the finding of Judge Obhi in [26] that there was a 'viable issue' about whether there was a durable relationship between the parties which was only resolved by the passage of time and the physical evidence of the parties continuing live to live together. It is the finding of Judge Obhi that resolved this issue in the appellant's favour on the basis of the material provided.
23. The refusal of 11 December 2013, following Judge Cox's decision and 25 October 2013 judicial review application, was made on the basis Judge Cox was incorrect in his assessment that persons who are not considered to qualify as family members (or extended family members which have not previously been accepted as such under the Regulations), are subject to Regulation 20(1) and 21. The position of the respondent at that stage was always that the appellant was not in a durable relationship.
24. A party to an application is entitled to state their case. The respondent's position, based on cogent evidence, is that the appellant was not in a durable

relationship. It has not been established this is a decision that amounted to an abuse of process or was in any way arguably unlawful. The respondent was entitled to continue to refuse to issue a residence card after the decision of Judge Cox had been made, if the basis on which Judge Cox made his finding was itself arguably tainted by legal error, notwithstanding it appears that the position adopted was agreed by the advocates.

25. The appellant was entitled to issue the judicial review proceedings on 25 October 2013 alleging unlawful delay, but the decision was made shortly thereafter, and the judicial review proceedings were settled by way of a consent order. This likely to have been on the basis that at that stage the proceedings were arguably academic. There is no evidence the respondent accepted that any delay was unlawful or any finding from the High Court or Upper Tribunal to this effect. It is not made out that delay for the period referred to in Mr Pipe's submissions would of itself warrant a finding the respondent's actions were unlawful.

26. Whilst the respondent did not agree with the decision of Judge Obhi the Specialist Appeals Team Minute Note, dated 2 April 2014, did not identify any material error of law and that there was nothing in the case to show the Judge had reached findings to which she was not entitled. As no onward appeal was lodged the respondent was arguably required to issue the appellant with a Residence Card, which he did on 1 May 2014.

27. Whilst the appellant may have been frustrated by the actions of the Secretary of State I do not find it made out when the facts of this matter are considered as a whole that the appellant has made out that this is a case in which the respondent ought to have issued a residence card in recognition of a right to reside in the United Kingdom as an extended family member any sooner than he did.

28. There is no absolute right to an extended family member to be issued with a residence card even if they prove their status, in the same way that a family member has.

29. Mr Pipe's submission that, notwithstanding that 5 years having not passed since the issuing of the residence card, the appellant should succeed by reference to a teleological approach has been considered but does not arguably assist him on the facts of this matter. Such submission is based upon a need to consider the provisions of the Regulations involving the explanation of phenomena in terms of the purpose they serve rather than of the cause by which they arise. Paragraph 17 of the recital to the Directive states:

> (17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

30. It has not been made out that the appellant has resided in the UK in compliance with the conditions laid down in the Directive for the requisite period. The appellant is also subject to expulsion measures.
31. Giving the phrase 'or perhaps ought to have' it's normal meaning it is a term used to indicate 'duty or correctness', something that is 'probable'. The material relied upon by Mr Pipe does not support the claim of unlawful decision making. The respondent's actions have not been shown to be disproportionate under European law or contrary to the Regulations.
32. As noted above, the appellant will be entitled to apply for permanent residence on basis of accepted facts in spring 2019 in any event.
33. No arguable legal error is made out in the respondent's decision to refuse to issue the appellant a residence card in recognition of a right of permanent residence in the United Kingdom on the facts of this matter and application of the law as it currently stands at the date of this decision.

Decision

34. **I remake the decision as follows. This appeal is dismissed**

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 16 November 2018