Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/05548/2019

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing	**Decision & Reasons Promulgated**
At Field House	
On 1 October 2020	**On 7 October 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

GBENGA HANSON ADEWOLE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge G Clarke, dismissing his appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), against a decision of the respondent made on 1 October 2019 to refuse to issue him with a residence card confirming his permanent right of residence as the family member of an EEA national.

2. The appellant is married to [JM], a Latvian citizen. That marriage took place on 10 October 2015. Prior to that, the appellant had made an application for confirmation of his right of residence as the durable partner and so an "extended family member" of Ms [M]. That application was refused on 2 September 2015, and the appellant exercised his right of appeal against that decision but, before the hearing, he had obtained

permission to marry and he and his wife had done so. Following the hearing, the appellant was granted an EEA residence card valid until 29 November 2021 on the basis that he satisfied regulation 7 of the EEA Regulations.

3. The appellant's case is that he is entitled to a card confirming his permanent right of residence as he has completed a continuous period of five years residence ("the qualifying period") and that this period began on 1 September 2014 when he began cohabiting with his now wife.

4. The respondent considered that as the appellant had not previously been accepted under regulation 8(5) of the EEA regulations, the time spent in a claimed durable relationship prior to the marriage could not be taken into account in assessing whether he had completed the qualifying period of five years. That started on the date of his marriage.

5. On appeal, the judge identified the issue as whether the appellant can be simultaneously a family member under reg 7 of the EEA regulations and an extended family member under reg 8 of the Regulations, concluding [21] that the definition of "extended family member" excludes those who are family members. The judge concluded that the appellant could not, given the provisions of those regulations, be both an extended family member and a family member [23] and that [24] there was no basis in law for him to rely on any rights he may have accrued as an unmarried partner from 1 October 2014 to the date of his marriage.

6. The appellant sought permission to appeal on the grounds that the judge had erred in that he had not considered whether the appellant had resided in the United Kingdom lawfully under the EEA regulations on the basis he had met the requirements of being in a genuine and durable relationship, and that this period, prior to marriage, should have been taken into account; that is, that the periods spent in different capacities under reg 8 and then reg 7 should be added together.

7. On 13 May 2020, First-tier Tribunal Judge Davidge granted permission to appeal.

8. On 31 July 2020, my directions in this matter were issued. Those directions are annexed to this decision, but it is relevant to note that they provided as follows:

> "3. On a preliminary view of the case, it appears that the author of the grounds was unaware of Kunwar (EFM - calculating periods of residence) [2019] UKUT 63 (IAC) where the Upper Tribunal held:
>
> > *Following Macastena v SSHD [2018] EWCA Civ 1558 , it is clear that it is not possible to aggregate time spent in a durable relationship before the grant of a residence document with time spent after a residence document is issued, for the purpose of the calculating residence in accordance with the Regulations.*
>
> 4. Kunwar was approved by the Court of Appeal in SSHD v Aigbangbee [2019] EWCA Civ 339.

> 5. In the circumstances, the appellant will need to explain why these decisions do not apply to this appeal."

9. Neither party has objected to this appeal being determined without a hearing. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where no objection to a decision being made in the absence of a hearing that it would be right to do so.

10. The response from the appellant – that it is factually correct to assert that the facts of Kunwar apply in this case, is in effect an admission that the appeal cannot succeed. There is no purpose in delaying my decision until 10 October 2020 as the appellant requested. While it is not in doubt (and the respondent accepts) that the appellant will have acquired five years' lawful residence on 10 October 2020, as there is no material error of law in the decision of the First-tier Tribunal, there is nothing to be remade. The appellant can make a fresh application to the respondent in due course.

11. In essence, in claiming to have completed the five-year qualifying period, the appellant argues that all time spent as an extended family member prior to the issue to him of any residence card can be taken into account. That is simply wrong in law as is clear from Macastena [2018] EWCA Civ 1558 and Aibangbee [2019] EWCA Civ 339; and, Kunwar (EFM - calculating periods of residence) [2019] UKUT 63 (IAC).

12. The headnote in Kunwar, a decision approved by the Court of Appeal in Aibangbee states:

> *(1) An "extended family member" ("EFM") of an EEA national exercising Treaty rights in the UK (such as a person in a durable relationship) has no right to reside in the UK under the Immigration (EEA) Regulations until he or she is issued with the relevant residence documentation under reg 17(4) of the 2006 Regulations (now reg 18(4) of the 2016 Regulations).*
>
> *(2) Following Macastena v SSHD [2018] EWCA Civ 1558 , it is clear that it is not possible to aggregate time spent in a durable relationship before the grant of a residence document with time spent after a residence document is issued, for the purpose of the calculating residence in accordance with the Regulations.*
>
> *(3) Once such a document is issued however, then the EFM is "treated as a family member" of the EEA national and may then have a right to reside under the Regulations (reg 7(3)).*
>
> *(4) Consequently, a person in a "durable relationship" with an EEA national can only be said to be residing in the UK "in accordance with" the Regulations once a residence document is issued. Only periods of residence following the issue of the documentation can, therefore, count towards establishing a*

'*permanent right of residence;*' *under reg 15 based upon 5 years*' *continuous residence* "*in accordance with*" *the Regulations.*

(5) The scheme of the 2006 and 2016 Regulations in respect of EFMs is consistent with the Citizens' *Directive (Directive 2004/38/EC). The Directive does not confer a right of residence on an individual falling within Art 3.2 including a person in a* "*durable relationship, duly attested*" *with an EU national but only imposes an obligation to* "*facilitate entry and residence*" *following the undertaking of an* "*extensive examination of the personal circumstances*" *of individuals falling within Art 3.2.*

13. The law is clear. In order to qualify for permanent residence, an individual must have spent five years residing in accordance with the EEA regulations. The EEA Regulations, and Directive 2004/38/EC on which they are based draw a distinction between a "family member" whose right of residence starts when the individual become a family member on, for example as here, marriage and an "extended family member" whose right of residence arises only once the Secretary of State has issued the appropriate residence card. The Court of Appeal has made it abundantly clear that time spent prior to the issue of a card to an extended family member cannot be counted towards lawful residence under the EEA Regulations.

14. Further, in this case, the appellant was never issued with a residence card as an extended family member. That is because, as the First-tier Tribunal judge correctly noted, the definition of "extended family member" expressly excludes those who are family members which the appellant had become on 10 October 2015, well before any residence document was issued.

15. Accordingly, while the decision of the First-tier Tribunal did not address the relevant case law and appeared to assume wrongly [23]that the appellant might have accrued rights prior to his marriage, the conclusion it reached was unassailably correct. The appellant could not, as a matter of law, succeeded in his appeal

16. For these reasons, the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Endnote

17. It is worrying that the application made in this case was made after Macastena, Kunwar and Aibangbee were handed down. It is not at all clear how the appellant could have been advised to proceed with the application, let alone the appeal. Neither could, as a matter of law, have succeeded. It is equally of concern that neither party drew the relevant decisions to the attention of the First-tier Tribunal either at appeal or in applying for permission to appeal, despite the parties being under a duty to assist the Tribunal. The net result is that a significant amount of judicial time and public funds, as well as the appellant's costs, have been wasted.

Notice of Decision & Directions

1 The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date 1 October 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – DIRECTIONS ISSUED ON 31 JULY 2020

1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[1], I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:

   (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so

   (b) whether that decision should be set aside.

2. I therefore make the following DIRECTIONS:

   (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);

   (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;

   (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.

   (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.

3. On a preliminary view of the case, it appears that the author of the grounds was unaware of Kunwar (EFM - calculating periods of residence) [2019] UKUT 63 (IAC) where the Upper Tribunal held:

   Following Macastena v SSHD [2018] EWCA Civ 1558 , it is clear that it is not possible to aggregate time spent in a durable relationship before the grant of a residence document with time spent after a residence document is issued, for the purpose of the calculating residence in accordance with the Regulations.

4. Kunwar was approved by the Court of Appeal in SSHD v Aigbangbee [2019] EWCA Civ 339.

5. In the circumstances, the appellant will need to explain why these decisions do not apply to this appeal.

6. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

the Tribunal. The directions in paragraph 2 above must be complied with in every case.

7. If this Tribunal decides to set aside the decision of the First-tier Tribunal for error of law, further directions will accompany the notice of that decision.

8. Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.