



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

Appeal Number: IA/38317/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 28 April 2016**

**Decision & Reasons
Promulgated
On 7 June 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**TARIK ADDECHE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance

For the Respondent: Mr C Avery, Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-Tier Tribunal Judge Behan, dismissing his appeal against the decision of the respondent made on 29 August 2013 to refuse him leave to remain on the basis of 14 years' residence in the United Kingdom.

2. The appellant is a citizen of Algeria who entered the United Kingdom on 1 September 1995, illegally; he claimed asylum on 22 September 1995, but his application was refused on 19 March 1996 when he was served with form IS 151A. His appeal was unsuccessful.
3. In 1999 the appellant began a relationship with Ms Reicher, an Austrian citizen; they were married on 20 May 2000, and an application for an EEA Residence card was made. The card was issued on 25 March 2002, valid until October 2005. The marriage ran into difficulties and the couple separated in April 2005. Ms Reicher then, at some point returned to Austria. The couple were not divorced until 30 January 2012.
4. Although the appellant's residence card had expired in 2005 he remained in the United Kingdom, and continued to work.
5. On 5 July 2012, the appellant made an application for leave to remain under the 14 year residence rule. His application was refused on 28 August 2013; a few days earlier, on 15 August 2013, the respondent was informed the appellant that the outcome of the legacy review was that he had no basis of stay in the United Kingdom.
6. The respondent refused the application for leave to remain on the grounds that:
 - (a) He did not meet the requirements of paragraph 276B of the Immigration Rules as he had not accrued 14 years' residence as he had been served with Form IS 151A in March 1996, which "stopped the clock";
 - (b) He did not meet the requirements of paragraph 276 ADE of the Immigration Rules as he had not, at that point, lived in the United Kingdom for 20 years, and had not shown he had no ties to Algeria;
 - (c) There were no reasons to grant the appellant leave to remain outside the Immigration rules.
7. The appellant appealed on the grounds that:
 - (a) The service of the IS 151A notice did not prevent him from accruing time thereafter, and that he had resided here for more than 14 years after that notice had been served;
 - (b) His stay in the United Kingdom had been regularised at the date of his marriage to an EEA national on 9 June 2000, not on 25 March 2002, the date of issue of the residence card;
 - (c) His removal would be in breach of his article 8 rights.
8. In light of later developments in this case, it is notable that it is not argued in the grounds of appeal to the First-tier Tribunal that he had acquired permanent residence under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), or that he currently had any other right of residence, derived or otherwise, pursuant to European law.

9. Judge Behan heard evidence from the appellant and another witness. She found:
- (a) The fact that the appellant had spent time in the United Kingdom as the spouse of an EEA national exercising Treaty rights did not affect the application of paragraph 276B of the Immigration Rules to the appellant; the fact that the respondent treated, on a discretionary basis, time so spent as lawful residence for the purposes of the 10 year rule was not of assistance [44];
 - (b) The applicant had not shown that he has “no ties” to Algeria, and thus did not meet the requirements of paragraphs 276 ADE (vi) of the Immigration Rules [47]-[49];
 - (c) the removal of the applicant would, having had regard to section 17B of the Nationality, Immigration and Asylum Act 2002, be proportionate [50]-[57].
10. The appellant was granted permission to appeal on the grounds, as amended, that the First-tier Tribunal had erred in law in that:
- (a) The appellant had acquired the permanent right of residence pursuant to the EEA Regulations, as he had lived in the UK as the family member of an EEA national for at least five years, that period commencing either:
 - (i) When the appellant his wife had begun cohabiting, thus entering a durable relationship, that status counting as membership of a family for the purposes of article 16 of the Citizenship Directive; or,
 - (ii) On 20 May 2000, the date of marriage
 - (b) At all material times during the relevant five year period, the appellant’s wife had been exercising Treaty rights either:
 - (i) As a worker, including as a job-seeker, the basis on which she entered the United Kingdom; or,
 - (ii) As a self-sufficient person, relying as she was entitled to do on her husband’s earnings (see Singh [2015] EUECJ C-218/14 at [76])
 - (c) As the appellant had acquired permanent residence in 2005 at the latest, he did not need to show that his wife had been exercising Treaty rights at the date of divorce, or to demonstrate that he had retained rights of residence;
 - (d) The appellant had retained his rights of residence due to his personal circumstances including and pursuant to articles 7 and 15 of the Charter of Fundamental Rights;
 - (e) As the appellant’s residence had been lawful since his marriage, the conclusion that he had been here without leave was wrong in law;
 - (f) The appellant had established that he had been here lawfully from the date of his marriage for a period of ten years (that is, having acquired

permanent residence and/or having retained rights of residence) in 2010, and so was entitled to Indefinite Leave to Remain;

- (g) The judge had erred in concluding [44] that the respondent had only a discretion to accept residence under EU law when calculating the 14 year period; the respondent was in fact under a duty to do so; and, in consequence, the conclusion that the applicant had not met the 14 year rule was perverse;
- (h) The judge had erred in applying the 20 year rule and in concluding that the appellant did not meet the requirements of paragraph 276 ADE of the Immigration Rules; and, in concluding that his removal was proportionate.

11. The appeal first came before the Upper Tribunal on 12 May 2015 when it was adjourned after permission had been granted to amend the grounds of appeal, and pending the resolution of the reference to the CJEU in NA (Pakistan) [2015] EWCA 140. Subsequent to that, and in the light of Singh (C-218/14), the following directions were given:

- 1. It is considered that, given the apparent absence of findings about the appellant's right of permanent residence under the Immigration (European Economic Area) Regulations and/or European law, that it would be appropriate to list the matter for the issue of whether the decision of the First-tier Tribunal involved the making of an error of law to be determined.
- 2. The parties are directed to address in submissions what evidence there was before the First-tier Tribunal of the appellant's former wife's economic activity as a worker or otherwise.

12. The parties were also directed to provide skeleton arguments 14 days prior to the hearing.

13. Neither party has complied with the directions given, and on 26 April 2016, the appellant's solicitors wrote to the Upper Tribunal stating:

We write to inform you that the Appellant would request the appeal be considered based on the documents already provided without oral submissions.

In the circumstances, the Appellant and his legal representatives will not attend the court on 28 April 2016.

The law

14. Paragraphs 276A and 276B of the Immigration Rule which, by virtue of the transitional provisions, applied to the appellant's application, provided so far as is relevant:

276A. For the purposes of paragraphs 276B to 276D:

- (a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United

Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:

(i) has been removed under Schedule 2 of the 1971 Act, Section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i)

(a) he has had at least 10 years continuous lawful residence in the United Kingdom; or

(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999 Act, or of a notice of intention to deport him from the United Kingdom; and

15. The appellant, through the grounds of appeal, is advancing an entirely different case from that put to the First-tier Tribunal. As noted above, at no stage prior to the grounds of appeal to the Upper Tribunal was it his case that he has acquired permanent residence. It cannot therefore have been

an error on the part of the judge not to make findings in respect of whether he had acquired permanent residence.

16. The submission in the grounds that the appellant had formed a durable relationship with Ms Reicher prior to marriage is untenable. There is insufficient evidence to show when they started cohabiting or when the relationship became durable. Further, the submission that being in a durable relationship with an EEA national means that the non-EEA national, in this case the appellant, is a “family member” of that person as defined, is without foundation, and ignores the consistent jurisprudence of the CJEU which demonstrates that there is a clear difference between those who are family members as defined in the Directive 2004/38/EC (“the Citizenship Directive”) at art. 2 and those who are not but fall within art. 3, not least as in this case, it had never been put to the respondent that the couple were in a durable relationship and for the relevant checks and enquiries to be undertaken as mandated by the Citizenship Directive and the EEA Regulations. Moreover, the Directives in place at the relevant time did not provide for durable relationships, and while there was in place a policy of giving residence rights to the unmarried partners of EEA nationals, that policy was aligned to the Immigration Rules then in force which permitted a grant of leave to an unmarried partner only after 2 years’ cohabitation and only then after an application had been made.
17. There is, I accept, merit in the submission that the appellant became the family member of an EEA national at the date of marriage. The fact that the residence card was issued some 2 years later is not relevant; the card is declaratory of the right of residence, not constitutive. But being a family member of an EEA national is not sufficient for there to be rights of residence; the EEA national must also be exercising Treaty rights or have acquired permanent residence. There is, however, no documentary evidence of the appellant’s wife’s employment, self-employment, or of her having comprehensive sickness insurance a necessary precondition to her right of residence as a student or a self-sufficient person. The oral evidence is at best limited and indirect, and there has been no attempt by the appellant to identify evidence relating to his ex-wife’s economic activity in the United Kingdom, despite the clear directions made and which are set out above.
18. That said, it can be inferred from the issue of a residence card that she had been satisfied at some point that Ms Reicher was a qualified person. When, and for how long is equally unclear, given the lack of evidence. It follows that the respondent may have erred in calculating the earliest day from which the appellant’s lawful residence started; it may have been the date of marriage, but again, it could have been a later date, and it is for the appellant to prove his case.
19. Further, it is unclear when the appellant’s ex-wife ceased to be resident in the United Kingdom. There is no indication that divorce proceedings were started prior to that point, and indeed they were not concluded until

several years later in 2012. It is evident that, in these circumstances, even assuming that Ms Reicher was exercising Treaty rights and was entitled to residence here up until she left (and there is, as is noted above, insufficient evidence of that), the appellant's right to remain which was dependent on his wife, ceased. Given the decision in Singh, it is not arguable that the appellant had retained any rights; those rights had ceased to exist with his wife's departure. The facts here are different from those in NA (Pakistan); there is no allegation of domestic violence, or submission that there are rights retained on account of children. The submission in the grounds that rights have been retained, either under the Citizenship Directive or, fancifully, under the Charter of Fundamental Rights and Freedoms, is without foundation.

20. It is simply not arguable that on the material before the judge that the appellant had acquired the right of permanent residence either while his wife was here or on the basis of taking into account any retained rights.
21. Turning to the Immigration Rules, the natural meaning of paragraph 276B is that once a notice of the class referred to has been served, no time accrued after that event can be counted to accrue 14 years' residence; that does not, however, mean that lawful residence up to 10 years cannot be taken into account, as paragraph 276B (1) (a) is expressed as an alternative.
22. There is a degree of ambiguity in the refusal letter at page 2:

Although you were granted a residence document on 25 March 2002, the period from the service of the IS151A until the issue of the residence document cannot be counted as continuous leave to remain.
23. Although there is an evident error here in referring to a "grant" of a residence card, implying that it is constitutive rather than declaratory, compounded by the assumption that lawful residence flows from the date of issue, it cannot be inferred that the respondent has accepted that the resumption of lawful status "starts the clock" again, contrary to the clear language of the rule. Rather, it is an acceptance that a person in such a situation can start to accrue periods of lawful residence leading to a possible grant of settlement after 10 years' lawful residence. There is no suggestion that the decision by the respondent to serve the notice on the appellant was unlawful at the time.
24. While the judge errs in her assessment of the respondent's discretion at [44], given that the policy says caseworkers must treat periods spent as lawful residence under the EEA Regulations, that does not constitute a material error. Even starting at the date of marriage, the applicant would not have acquired 10 years' lawful residence until 2010, by which point Ms Reicher was no longer resident here and he had thus lost his right of residence well before that point. There is simply no basis for the

submission that the judge's reasoning was infected by any consideration of the 20 year rule, contrary to what is averred in the grounds.

25. Contrary to what is averred, the judge gave adequate and sustainable reasons for concluding that the appellant had not shown he had no ties to Algeria. As she noted at [48], he had lived there until he was a young adult, had returned for holidays, spoke the language, and that he has some friends and family there. The judge was, in the circumstances, manifestly entitled to conclude that the appellant had not met the requirements of paragraphs 276 ADE (vi).
26. The challenges to the judge's approach to article 8 outside the parameters of the Immigration Rules are hopeless. The judge properly applied the relevant test set out in Razgar. The submission in the grounds at [21] is in substance a near miss case, and takes no account of the effect of section 117B of the 2002 Act and that the applicant's private life had been developed for the most part when his status here was precarious and in any event, the length of time here was considered as a material factor [54]. There is simply no merit whatsoever in the challenges put forward in the grounds at [21] to [24] and they fail to identify how the conclusion was one which the judge was not entitled to reach.
27. In conclusion, the decision of the First-tier Tribunal did not, for the reasons set out above, involve the making of an error of law, and I uphold it.

SUMMARY OF CONCLUSIONS

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

Signed

Date: 29 April 2016

Upper Tribunal Judge Rintoul