



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

Appeal Number: EA/00148/2018

THE IMMIGRATION ACTS

Heard at Field House

On 18th December 2018

**Decision & Reasons
Promulgated**

On 18th January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR MAJID HUSSAIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Asanovic (Counsel)

For the Respondent: Mr S Kandola (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Andonian, promulgated on 3rd September 2018, following a hearing at Taylor House on 17th August 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 3rd September 1986. He appealed against the decision of the Respondent.

The Appellant's Claim

3. The essence of the Appellant's claim is that he was in a durable relationship previously with a Latvian national, whom he had married in a religious ceremony on 13th September 2009. He claimed that he had five years of continuous residence in this country from September 2009 when the cohabitation started (and not 11th August 2011 when the Secretary of State granted the Appellant a five year residence card until August 2016), so that if the period is taken from September 2009 until 14th September 2014, he would have completed five years cohabitation, and was entitled now to a permanent residence card, for which he had now applied. This was notwithstanding the fact that the relationship broke down thereafter. The Appellant claimed that there had been a break in his relationship earlier from June 2015 until September 2015, because the parties were not getting on, but they had subsequently then come together again, after September 2015 and remained together until January 2017, when the relationship finally broke down completely.

The Judge's Findings

4. The judge was not satisfied that the Appellant was in a credible relationship as maintained. This is clear from his concluding remarks. These are as follows:

"I do not believe that the Appellant has had a durable relationship with his partner for a five year period from the date of the grant of the residence card in August 2011 qualify for the grant of permanent residence. I do believe that the time starts clocking up for the five year residence from the date of the resident's permit, here 11th August 2011. I do not believe that the Appellant has had five years habitation with the Appellant as partners akin to marriage. I did not find this evidence credible. I found his evidence and the evidence of his brother contradictory. His brother had also referred to himself as the Appellant's cousin in the Explanatory Statement of 15th August 2015. I did not find Mr Latif a credible witness. He had not seen the Appellant in all practical reality since 2011, and he was confirming to me that the Appellant had been in a genuine relationship, until they broke up in 2017. I do not believe that the burden of proof has been discharged by the Appellant on the civil balance of probabilities."

5. The judge was of the view that to take the five year period as beginning from September 2009 when the cohabitation started, and not from 11th August 2011 as maintained by the Secretary of State, would not be technically correct as this would

"... make a mockery of the Regulations and the law, if the start date for cohabitation was the date when the Appellant states he first started cohabiting from September 2009 to September 2014, because this

would imply that anything that happened after and between August 2011 when the residence card was issued and always 2016 when it expired, some of the period in between was irrelevant in terms of what happened to the relationship, as the five years had been clocked up by September 2014” (see paragraph 14).

6. The judge dismissed the appeal.

Grounds of Application

7. The grounds of application state that the Appellant could complete the five year continuous residence period if the starting date was taken by 13th September 2009. This is because on 13th September 2009 the Appellant performed an Islamic marriage with his partner. He then entered into a durable relationship. He completed his continuous five years of residence on 13th September 2014.
8. On 24th October 2018 permission to appeal was granted by the Tribunal on the basis that there may be some merit in the submission that the Appellant may well have completed a 5-year period of cohabitation in accordance with the Regulations as a family member of an EEA national before the expiry of the residence permit, but that this will depend very much on the underlying evidence put before the judge, as to residence in accordance with the Regulations, from November 2009 onwards.

The Hearing

9. At the hearing before me, Ms Asanovic, appearing as Counsel on behalf of the Appellant, handed up a well-crafted and a very helpful skeleton argument. Basing her submissions on this. She stated that there were three grounds of application before this Tribunal.
10. First, there was the question of the Appellant’s relationship with the Latvian national. The Appellant’s application for permanent residence had been refused on the basis that the relationship had broken down after three years and ten months, after the Appellant was issued with a residence card on 16th August 2011 (which was in June 2015), but it had to be borne in mind that there had been no allegation that the relationship had never subsisted or that it had been false. Ms Asanovic submitted that the proper time for the purpose of assessing the period as a durable partner started from the date of the issuing of the residence card in June 2015. It was not correct that an alternative period prior to the issue of a residence card could not be taken into account because this would “make a mockery of the Regulations and the law” (see paragraphs 14 to 15).
11. This conclusion arose, submitted Ms Asanovic, from the Court of Appeal judgment in **Macastena [2018] EWCA Civ 1558**, where the question before the Court of Appeal was that there had been no applications for a residence card, and the period spent in a durable relationship, stood to be taken into account. Longmore LJ stated that,

“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 new relationship with Ms L, the time of that new relationship could count towards an acquisition of permanent right of residence”.

12. Ms Asanovic submitted that what was not addressed by the Court of Appeal was whether time spent in a durable relationship prior to the issuing of a residence card, as in the case of this Appellant, could count towards the finding in favour of the Appellant, that he was in compliance with EEA law. In this case the judge had made no findings as to whether the couple were in a durable relationship since 13th September 2009 (the date of the Islamic marriage or any other alternative dates).
13. Second, submitted Ms Asanovic, the judge had made an adverse credibility finding against the Appellant as to whether the relationship continued after September 2015 (at paragraph 8). The evidence before the judge was not summarised or explained in a comprehensive and organised fashion. The judge placed weight on the failure of the Appellant to apply for permanent residence in 2014, and yet he ruled as a matter of law, that the correct qualifying period would have been one which with the issue of the residence card between August 2011 and 11th August 2016 (which was in line with the decision of the Secretary of State as set out in the refusal letter of 28th November 2017).
14. However, if the judge was correct about this then the absence of application in 2014 was immaterial. The judge has also criticised the Appellant on the basis that there was an inconsistency between the Appellant’s witness statement of 11th August 2018, where he had stated that he had lived and remained with his partner between 2009 and 2017, but which overlooked two parts of the statement. The first part adopted the content of the previous statement and the second part described the nature of the difficulties in the relationship (at paragraph 7) such that there would be no inconsistency, because the Appellant had explained that there had been an interruption in the relationship.
15. The judge had also referred to evidence that was not before him “in other places in his interview” (at paragraph 61), which was perplexing as there were no interviews before the judge, and the judge had two witness statements by the Appellant, the first was submitted with the application on which the refusal of 28th November 2017 was based, after the Appellant had been issued a residence card on 16th August 2011.
16. Third, in relation to the interruption of cohabitation, the judge had erred in treating this to be a cessation of the relationship. The judge had ruled with respect to the Appellant that, “if during that period he cannot show cohabitation, then he is not entitled to permanent residency” (paragraph 16) when referring to the five year period between 11th August 2011 and 11th August 2016 (at paragraph 8), the focus of cohabitation aims to give effect to the requirement that the judge had to assess the totality of the

circumstances so as to establish whether the relationship was a durable one.

17. Even if the relationship had entered into difficulties for three months, the assessment of the totality of the circumstances, was such that it would have led the Appellant to have concluded that the break of the relationship was not dispositive since the absence of three months would not have had an impact on residence.
18. For his part, Mr Kandola made the following submissions. First, in relation to reliance being placed upon **Macastena** in the Court of Appeal, Mr Kandola submitted that this case was not relevant for two reasons. First, that **Macastena** was a case where the person in question had applied as an extended family member. The present case did not involve a “extended” family member but a “family member”. Second, and in any event, whereas Ms Asanovic relied upon paragraph 15, the real answer lay at paragraph 17, when Longmore LJ explained that,

“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 an open relationship is nowhere near enough either to constitute such extensive examination or to require such an examination to be undertaken” (paragraph 17).
19. Second, there was no automatic right to a permanent residence card, even if there had previously been the grant of a residence card, because it was very much a matter of proof as to whether the Appellant had been in a durable relationship. The judge’s clear finding (at paragraph 82) was that he did not find the witnesses appearing before him to be credible and that the Appellant had not been in a durable relationship. That was a finding that the judge was entitled to make, notwithstanding anything that was set out in the refusal letter.
20. Third, in relation to the question that the judge’s assessment of the evidence was such that he had not found the Appellant to be credible, in a determination where the evidence had not been properly summarised or explained, containing inconsistencies of approach, the following would be said. This is that there was an immigration report from the airport, which the judge referred to specifically under a heading in the determination (at paragraph 21).
21. In a separate section, what the judge had said under the heading of The Introduction of refusal/cancellation of leave to enter/remain report that an immigration report from the airport (which it was now claimed has come as a surprise to the Appellant on the day of the hearing), had shown that the Appellant and his former partner were not in a durable relationship

“... and that the UK Border Force officials had verified, the position and was satisfied that the Appellant’s application to the Home Office in 2011 for a residence card of a family member of an EEA national indicated that they were no longer in a durable relationship” (paragraph 21).

The judge had taken the view that this was

“A relevant matter which I was entitled to take into account in this EEA appeal”. The judge observed that, “although therefore there was some mistakes in the refusal letter, they were not fatal, and in fact dealt with the reason why the Appellant had been refused permanent residence, and it was a relevant factor for me to take into account the statement of 15th August 2015 by the UK Border Agency Immigration Service following the interview of the Appellant in January 2015 when his residence card issued in August 2011 was revoked”.

22. The judge considered the argument that the Appellant claimed not to know anything of this. He claimed not to know anything about the residence permit having been revoked, “as there was no mention of this in the refusal letter of November 2017”. The Appellant had maintained that the UK Border Agency had not informed him of the revocation of his residence card. However, as the judge went on to say this was not credible because, “he withdrew his appeal without any credible explanation. The appeal therefore did not go ahead” (paragraph 21).
23. Fourth, as for Ground 3 that had been put forward by Ms_Asanovic, Mr Kandola submitted that there was no substance in this either. It was being said that the judge had failed to take into account the break of three months in the relationship of the Appellant which had started soon after his Islamic religious ceremony marriage on 30th September 2009, and after he had shifted in with his Latin partner on 15th September 2009. In discussion, however, about when the relevant five year period should be taken into account, and whether it could predate the grant or revocation of the residence card, as the case may be, was irrelevant. This was because the judge had come to the firm conclusion, on the basis of evidence that he had looked at, and not least on the basis of evidence from the UK Border Force officials (at paragraph 21), that the Appellant had never been in a durable relationship with his Latvian national partner. He did not find the Appellant to be credible. He did not find his cousin as a witness to be credible. Therefore, any consideration of the situation after the temporary interruption in January 2015 was otiose and irrelevant. One had to start with the issuance of the residence permit in August 2011, in fact, and any other suggestion was not defensible as a matter of law.
24. In the reply, Ms Asanovic submitted that there had actually been no revocation of the residence card. The judge had in fact recognised this (see paragraph 22). In these circumstances, the credibility findings mattered, because if the Appellant could then have been found credible, on the relevant issues that he required a decision on, then he would succeed.

No Error of Law

25. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. I come to this conclusion notwithstanding Ms_Asanovic's measured and carefully constructed submissions before me.
26. This is a case where the Appellant had been issued with a residence card on 11th August 2011 such that it stood to expire on 13th September 2016. The issue was whether the Appellant and his Latvian partner were in a durable relationship. Whatever may have been the position at the time of the grant of the residence card, by the time that the appeal arose before the judge, there was evidence in the form of the UK Border Force Official's report, which cast a flood of light on the Appellant's application to the Home Office in 2011 for a residence card, which strongly pointed to this not being a durable relationship. The judge was entitled to take this report into account because it was relevant and because there had been no application on the part of the Appellant for an adjournment to take time to consider such a report.
27. On the contrary, the Appellant had appealed the decision on 2nd February 2015 that it had been made against him, and this suggested that the Appellant was fully aware of the allegations made by the Respondent Secretary of State against him. Remarkably, however, he then went on to withdraw the appeal in circumstances, which as the judge explained, were "without any credible explanation" (paragraph 21).
28. Second, the fundamental issue here is whether there is a "qualifying period" on the basis of which the Appellant can apply for a permanent residence card. For the reasons that the judge has given, the Appellant is unable to demonstrate that this is a case, when his entire relationship has been thrown into question by the judge, on the basis that the Appellant was not in a durable relationship.
29. Third, the judge is correct to conclude that the proper period to take into account for the purposes of a durable relationship is "for a five year period from the date of the grant of residence card in 2011" (paragraph 82).
30. Fourth, any suggestion that a three month gap in the Appellant and his partner's relationship, which indicated an interregnum, could be properly taken into account, as not being dispositive of the Appellant's case, is irrelevant, given that the judge had found that the relationship was not a genuine one.

Notice of Decision

There is no material error of law in the judge's determination. The determination shall stand.

No anonymity direction is made.

This appeal is refused.

Signed

Date

Deputy Upper Tribunal Judge Juss

10th January 2019