



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

Appeal Number: HU/05384/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2017**

**Decision & Reasons Promulgated
On 23 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**MR MUHAMMAD ADEEL MIRZA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, counsel
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Boyes (“the FTTJ”) promulgated on 16 January 2017, in which she dismissed the appellant’s appeal against the refusal of his application for leave to remain on human rights grounds.
2. No anonymity direction was made in the First-tier Tribunal and none has been requested before me. I do not make one therefore.

Background

3. The appellant entered the UK on 12 September 2004 with entry clearance as a student valid to 31 January 2009. He was granted further leave as a student until 31 October 2009. He applied for further leave to remain as a Tier 1 (post study work) migrant but this was refused; his application was reconsidered but maintained with a right of appeal. He withdrew his notice of appeal against that decision. On 8 April 2010 he made an application for an EEA residence card as the unmarried partner of a Slovakian national. A residence card was issued on 5 July 2010, valid to 5 July 2015. On 28 April 2015 he applied for indefinite leave to remain on the grounds of 10 years' lawful residence. That application was refused and gave rise to the appeal which was dismissed by the FTTJ.
4. The FTTJ noted that the decision was challenged on human rights grounds only [19]. The FTTJ nonetheless considered whether the appellant met the Immigration Rules, for the purpose of assessing the proportionality of the interference with his protected rights [20]. She found he did not meet the requirements of the Immigration Rules insofar as his family and private life were concerned: his partner was not settled in the UK and there were no very significant obstacles to his integration on return (paragraph 276ADE(1)(vi)). Notwithstanding, the FTTJ considered the position pursuant to the Article 8 jurisprudence, outside the Rules. She found Article 8 was engaged in respect of his private life. She bore in mind s117A-s117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). She found the appellant had not demonstrated he had a right to reside, pursuant to the Immigration (European Economic Area) Regulations 2006 ("the EEA regulations"), subsequent to 2012. She declined to make a finding as to entitlement to a residence card under the EEA regulations as a result of the appellant's claimed current relationship with another EEA national. The FTTJ found there were no compelling circumstances which warranted the grant of leave outside the Rules and that the decision was justified and proportionate to the public interest.

Submissions

5. The parties confirmed there was no cross-appeal by the respondent with regard to the finding of the FTTJ that the respondent had not demonstrated that the appellant had earlier used deception in support of a previous application for leave to remain (paragraph 322(2) of the Immigration Rules). That finding stands therefore.
6. I summarise as follows the appellant's grounds for permission to appeal to this tribunal and Mr Karim's oral submissions:
 - a. The judge had misapplied the test in the context of assessing whether there was a durable relationship under the EEA regulations. She had considered whether or not there had been a subsisting relationship; this was not appropriate in the context of the regulations; the tests and the Immigration Rules and EEA regulations were different. The test applied by the FTTJ had a higher threshold: there was no requirement for cohabitation.
 - b. As regards the assessment of long residence, the FTTJ had rightly set out the respondent's policy at [29]; the final paragraph required the respondent to apply discretion as regards time spent in the UK; the appellant had been granted a residence card; that period should have counted towards the calculation of long residence under the Rules. The FTTJ had failed to appreciate that by August 2014

the appellant had been lawfully resident in the UK for 10 years. The appeal should have been allowed on that ground.

- c. It was not clear on what basis the appellant's friend's evidence had been rejected; there was inadequate reasoning on this. Similarly the tenancy agreements were prima facie evidence of cohabitation, when taken with the other evidence, beyond 2012 (if cohabitation were required). No findings were made with regard to those. They demonstrated the couple had a clear intention to live together at the date of signature.
- d. Whilst it may not have been argued before the FTTJ, as a matter of law, if the FTTJ accepted the appellant had been lawfully resident until 2012, the appellant had acquired permanent residence status pursuant to the EEA regulations (i.e. 5 years). This had not been considered by the FTTJ. It was irrelevant that this was not an appeal under the EEA Regulations. This was relevant to the issue of proportionality; if the appellant were entitled to permanent residence, it could not have been proportionate to remove him. While it was accepted the appellant could not rely on human rights in an EEA appeal, there was no authority that the reverse did not apply.
- e. The FTTJ should have considered whether the appellant was entitled to a residence card as a result of his current relationship with another EEA national. Contrary to the assertion of the respondent, this was not a new matter; it was an issue akin the arrival of a baby post-decision. While it would be a matter of discretion for the respondent whether the appellant was granted a residence card as an extended family member on the basis of his new relationship, the FTTJ could have made a positive finding to enable the respondent to exercise her discretion. The FTTJ should have considered this despite the absence of a s120 notice.

7. For the respondent, Ms Pal relied on the rule 24 reply: the FTTJ had directed herself properly. She had been aware of the different test under the EEA regulations and addressed it at [31]. The use of words did not denote a higher standard than that in the EEA regulations. It was open to the FTTJ to assess the relationship on same basis as a British national's unmarried relationship and to consider whether there was a genuine relationship. The FTTJ was entitled to find the significant inconsistencies in the appellant's account could not be saved by the evidence of the witness. In any event, given the finding that the relationship had ended in August 2014 and rekindled later, the appeal was bound to fail in any event. The FTTJ had given adequate reasons as to why the appellant could not succeed on the basis of his new relationship; furthermore, the appellant's claimed current partner had not attended to give oral evidence. The appellant could not raise new matters in the appeal (s85(5) of the 2002 Act). The FTTJ was correct in finding she had no jurisdiction to decide whether the appellant was entitled to a residence card on the basis of his new relationship.
8. Ms Pal additionally made the point that the appellant had not raised in his application for permission to appeal to this tribunal the ground that the FTTJ had failed, in error, to consider whether the appellant was eligible for permanent residence under the EEA regulations. Nor had the grounds been amended to include this challenge.
9. Mr Karim replied in response to the latter point that it was clear from the original grounds of appeal to the First-tier tribunal that the claim was based on the extent to which the EEA regulations were engaged in the context of the long residence application.

Discussion

10. Insofar as the long residence claim was concerned, the FTTJ's starting point was the respondent's concession that the appellant had resided continuously and lawfully in the UK

between 12 September 2004 and 28 March 2010. The respondent's position was that the appellant had not demonstrated he was an extended family member of an EEA national for the subsequent period. The FTTJ stated that this was "because she is not satisfied that the Appellant and [the EEA national] were in a subsisting relationship". This is an accurate reflection of the reasons for refusal which refer to the appellant having failed "to establish that [he] lived with his former partner in a subsisting relationship between July 2010 and August 2014, as claimed" (page 3 of the reasons for decision appendix to the decision letter).

11. The issue to be decided by the FTTJ was whether the appellant and his former partner were in a durable relationship (within the meaning of regulation 8(5) of the EEA Regulations). The burden is on the appellant to demonstrate such a relationship existed and the use of the word "subsisting" is no more than a lay description of the nature of the relationship at the material time; the FTTJ might also have used the words "ongoing" or "existing". She was attempting to establish whether the relationship between the appellant and the sponsor was extant at the relevant dates. I am unable to accept the submission that the use of the word "subsisting" connotes a higher threshold than "durable". Indeed the reverse is true. The fact it is used in the Immigration Rules in the context of establishing whether a relationship exists is of no material relevance to consideration of whether there was a durable relationship at the material time, pursuant to the EEA Regulations.
12. Mr Karim submitted there was no requirement for cohabitation to establish a "durable relationship". He did not refer me to any authorities to support this proposition.
13. In **YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062** the Tribunal held inter alia that, in deciding whether to issue a residence card to an extended family member of an EEA national under reg 17(4) the decision-maker should adopt a three-stage approach so as to: (a) first determine whether the person concerned qualifies as an extended family member under reg 8 (in that case, to determine whether the appellant was "in a durable relationship"); (b) next, have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. This was to ensure the like treatment of extended family members of EEA and British nationals and so ensure compliance with the general principle of Community law prohibiting discrimination on the grounds of nationality. This means that, for reg 17(4) purposes, the comparable immigration rules cannot be used to define who are extended family members, but only to furnish rules of thumb as to what requirements they should normally be expected to meet. The fact that a person meets or does not meet the requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence card should or should not be issued; and (c) ensure there has been an extensive examination of the personal circumstances of the applicant/appellant. It may be that in many cases such an examination will have been made in the course of assessing the applicant's position vis a vis the immigration rules. But in principle the third stage is distinct, since the duty imposed by the Directive to undertake "an extensive examination of the personal circumstances..." necessitates a balancing of the relevant factors counting for and against the issuing of such a card. The comparable Immigration Rules are set out in Appendix FM; paragraph GEN.1.2 states that a partner includes a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application unless the contents otherwise requires. Appendix FM paragraphs E-ECP.2.6 and 2.10 require that the relationship of an applicant and a partner must also be genuine and subsisting and that they must intend to live together permanently in the United Kingdom.
14. Whether or not the parties were cohabiting at the material time is an issue which could

demonstrate the nature of a relationship between the applicant and their partner. In the light of **YB**, the FTTJ was entitled to consider whether or not the appellant and his sponsor were cohabiting at material times as part of her fact-finding process to determine whether they were in a durable relationship.

15. I do not accept the submission that the existence of a residence card in favour of the appellant, without more, was sufficient to demonstrate he had been in a durable relationship for the period of its validity. It was for the appellant to demonstrate that he was in such a relationship for the relevant period and the FTTJ was entitled to take into account other factors than the mere existence of the residence card which had been issued on the basis of the appellant's situation at the date of application. Indeed the appellant's own case was that his relationship with the EEA national had broken down before the expiry of the residence card.
16. The FTTJ identified at length various inconsistencies in the evidence relating to the nature and extent of the appellant's relationship with the sponsor. She states "The contradictions in the evidence before me, that I have referred to above, are such that that [sic] I consider that they should be given more weight than the witness evidence of [the appellant's friend], a long time friend of the Appellant". It is a matter for the FTTJ how much weight she gives to the evidence and she has given good reasons why she was not persuaded to accept that of the appellant's friend. While it was submitted the inference is that the FTTJ had found the appellant's friend was lying, I do not agree. Faced with contradictory evidence, the FTTJ was entitled, and indeed required, to draw conclusions and she did so on reasonable grounds. I reject therefore the submission that it was not clear on what basis the appellant's friend's evidence had been rejected.
17. The FTTJ notes there are "a considerable number of documents" [36] identifying the appellant and sponsor as living at 4 Horner Court between 2007 and 2010. She finds therefore that they did so and that they were in a "subsisting relationship" at the time the EEA residence card was issued. However, she notes the paucity of evidence placing the appellant at the subsequent property: 9 Templeton Court. She refers to the existence of documents in the sponsor's name but only three documents identifying the appellant as living there: the two tenancy agreements covering the period August 2012 to August 2014 and a letter dated 9 October 2012. The FTTJ was entitled to draw an adverse inference from this disparity and the "paucity of evidence to place the Appellant at 9 Templeton Court from August 2012 onwards". Given also that the appellant had used a different address for correspondence (his witness statement, paragraph 13), the FTTJ was entitled to treat the existence of the two tenancy agreements with circumspection and she did so. The FTTJ's reasoning for giving little weight to the two tenancy agreements and the letter of 9 October 2012 is adequate and sustainable on the evidence when taken as a whole. It was submitted that the tenancy agreements were prima facie evidence of an intention to reside together but the FTTJ was entitled to consider those agreements in the round with the remaining evidence, including the absence of any other documents (apart from one) to place the appellant at the premises.
18. As to whether the FTTJ erred in law in failing to recognise that the appellant qualified under the long residence provisions in August 2014, having entered the UK in September 2004, this cannot be an error of law because there is no finding to support it. The FTTJ found at [39] that she was not persuaded the appellant and sponsor resided together from August 2012 onwards. She identified concerns about the evidence regarding the appellant's and sponsor's relationship from that period onwards, including the date of the parties' Islamic divorce. She further concludes at [44] that she is not persuaded the appellant and sponsor lived together from August 2014 until February 2015. She confirmed at [61] her finding that the appellant

had not demonstrated he had a right to reside under the EEA regulations from 2012. For these reasons, her finding that the appellant had not shown he had resided lawfully for a continuous period of 10 years [46] is sustainable on the evidence.

19. Mr Karim submitted that, as a matter of law, the FTTJ, having accepted the appellant had been lawfully resident until August 2012, should have decided that he had acquired permanent residence under the EEA Regulations, i.e. he had lived in the UK for five years. Mr Karim conceded that this point may not have been argued before the FTTJ. However, this was not an appeal against an EEA decision refusing to grant a document certifying permanent residence, so the FTTJ had no jurisdiction to decide whether such a document should have been (or should be) issued (**NB and JN (right of permanent residence) France [2007] UKAIT 00039**). Whilst the FTTJ was required to consider whether the residence of the appellant had been lawful to enable her to consider whether he had acquired 10 years' lawful residence, it was not also incumbent on the FTTJ to make a finding as to whether he qualified for permanent residence under the EEA Regulations. That was outwith the jurisdiction of the FTTJ, given that this was not an appeal under the EEA Regulations. In any event, as this issue of entitlement was not cited in either of the grounds of appeal (see below) to the First-tier Tribunal or argued before the FTTJ, there was no requirement on her to address it.
20. Mr Karim also submitted the FTTJ should have addressed the issue of whether or not the appellant qualified for a residence card under the EEA Regulations on the basis of his current relationship with an EEA national. The appellant lodged two grounds of appeal in the First-tier Tribunal; the first was lodged by Khans solicitors and the second, the following day, by Law Lane Solicitors. The latter appear to have been lodged to address the decision under paragraph 322(2), on which the earlier grounds were silent. The latter solicitors represent the appellant in this appeal. In neither document is it averred that the appellant could rely on his current relationship with another EEA national or that this was an issue to be decided by the Tribunal. As the FTTJ noted at [47], it was claimed the appellant and his new partner had been in cohabiting since February 2016. This was a period of less than a year and it is therefore unlikely that she would have found it to be a durable relationship even if she had considered the issue. Her failure to do so could not therefore amount to a material error of law. Furthermore, as Mr Karim rightly accepted, a decision whether to issue a residence card on the basis of extended family membership requires the respondent to exercise her discretion pursuant to regulation 8(5).

Decision

21. The making of the decision of the First-tier Tribunal did not involve a material error of law and the decision is preserved.
22. This appeal is dismissed.

Signed
Deputy Upper Tribunal Judge A M Black

Date 20 October 2017