



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/16886/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 22 February 2018**

**Promulgated**

**On 3 May 2018**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MOHAMMAD AMIR PRINCE**

Respondent

**Representation:**

For the appellant: Mr N. Bramble, Senior Home Office Presenting Officer  
For the respondent: Mr S. Abbas of Imperium Immigration Specialists

**DECISION AND REASONS**

1. For the sake of continuity, I refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant appealed the respondent's decision dated 24 June 2016 to refuse a human rights claim. The respondent noted that the appellant had not produced any evidence to show that he had a partner or children in the UK. He did not meet the private life requirements of the immigration rules because he had not lived in the UK for a continuous period of 20 years. In the alternative, he failed to show that there would be 'very significant obstacles' to his integration if he returned to Pakistan. The respondent considered that there were no exceptional circumstances to justify granting leave to remain outside the rules.

3. In preparation for the appeal, the appellant raised a new issue relating to his relationship with an EEA national. The issue was not raised in a section 120 notice or in the grounds of appeal. No application was made through the proper channels for a residence card as the extended family member (durable partner) of an EEA national.
4. First-tier Tribunal Judge Loughridge heard the appeal on 09 May 2017. There is no record to suggest that the Home Office Presenting Officer objected to the issue being considered. He cross-examined the witnesses to test their evidence regarding the relationship. He proceeded to make submissions on the issue. It seems that the Presenting Officer did not dispute the genuine nature of the relationship. The judge recorded his submission that the appellant only mentioned his relationship with an EEA partner in passing in a letter dated 05 January 2016. He noted that it did not form the basis of his human rights claim at the time. The judge goes on to record the following:

“[The Presenting Officer] accepts, however, that he is now entitled to do so, including arguing that he meets the requirements of the EEA Regulations and that this is a factor to potentially be taken into account in assessing proportionality.” [29].

5. The judge went on to assess the claim with reference to the relevant legal framework relating to Article 8 of the European Convention. He went on to find that the appellant did not meet the private life requirements of paragraph 276ADE of the immigration rules. He concluded that it would be reasonable to expect the appellant’s partner to continue their family life together in Pakistan. In other words, the judge rejected the private and family life claims in so far as they might relate to the provisions of the immigration rules that are said to reflect where the respondent considers a fair balance should be struck for the purpose of Article 8.
6. The judge went on to consider whether the decision was proportionate under Article 8 with reference to The Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations 2006”). He was satisfied that the appellant was in a durable relationship with an EEA national and therefore met the requirements of Regulation 8 of the EEA Regulations 2006. He noted “*the respondent should consider issuing a residence card under Regulation 17(4).*” [37].
7. The judge concluded that this was a weighty factor that rendered any decision to remove the appellant from the UK disproportionate. He concluded:

“As [the Presenting Officer acknowledged in his submissions, *Mustafah* indicates that the extent to which an individual meets the Rules is a weighty factor in the proportionality assessment (and the same can be said of the EEA regulations) and it is only in rare circumstances that an individual who meets those requirements will not succeed in an Article 8 claim. In my view there would need to be specific factors in favour of removal over and above general immigration

control, and yet none have been identified by the Respondent. Accordingly, I conclude that it would be disproportionate to remove the Appellant bearing in mind that he is in a durable relationship with an EEA national who is exercising treaty rights in the UK. Although immigration control is a weighty factor that in itself does not outweigh the expectation that an individual who satisfies the requirements of the EEA Regulations will be allowed to remain in the UK, and the fact is that if the Appellant makes the appropriate application he is likely to be granted a residence card.” [38]

8. The Secretary of State sought permission to appeal to the Upper Tribunal, but was only granted permission to appeal on the second ground:

“The FtTJ seems to allow the appeal with consideration of the EEA regulations, it is submitted that the appeal should therefore have been at least allowed to the limited extent that the Secretary of State can exercise her discretion under 17(4) of the EEA regulations.”

### **Decision and reasons**

9. Since the First-tier Tribunal decision the Upper Tribunal reported the decision in *Mahmud (s.85 NIAA 2002 - ‘new matters’)* [2017] UKUT 488. The Upper Tribunal found that the First-tier Tribunal must decide whether it has jurisdiction to determine a ‘new matter’ with reference to section 85(5) of the Nationality, Immigration and Asylum Act 2002 (“the NIAA 2002”). The judge could not be criticised for failing to appreciate this requirement because the decision pre-dated the Upper Tribunal decision in *Mahmud*.
10. The appellant did not raise the issue of his relationship with an EEA national until a late stage. The respondent did not object to the matter being determined by the First-tier Tribunal at the hearing. The judge makes no mention of the issue in his decision. In light of *Mahmud* it is at least arguable that the First-tier Tribunal might have erred in failing to consider whether it had jurisdiction to consider the matter with reference to section 85(5) NIAA 2002, despite the fact that the respondent acquiesced to the issue being considered. The point was not taken by the Secretary of State in the grounds of appeal to the Upper Tribunal, nor by Mr Bramble at the hearing. In light of *Mahmud*, the Upper Tribunal raised the issue of its own motion. For the avoidance of doubt, Mr Bramble confirmed that the respondent has no objection to the issue being considered as a ‘new matter’. For these reasons I find that any potential error on the part of the First-tier Tribunal is not material because the respondent impliedly consented, and now makes clear that she consents, to the issue being considered as a ‘new matter’.
11. The respondent did not raise the issue in the grounds, but in my assessment, the First-tier Tribunal judge was clearly right to say that rights of residence under European law could be considered as part of an overall proportionality assessment under Article 8.
12. The ground of appeal under section 84 NIAA 2002, which is relevant to a human rights claim, is whether removal from the UK would be unlawful

under section 6 of the Human Rights Act 1998 (“the HRA 1998”). The Supreme Court in *Hesham Ali v SSHD* [2016] UKSC 60 considered the proper approach to Article 8 in the context of deportation, but the general principles are equally applicable in other cases. A tribunal must decide whether removal is proportionate balancing the strength of the public interest in maintaining an effective system of immigration control against the impact on private and family life. In doing so, the tribunal must give appropriate weight to Parliament’s and the Secretary of State’s assessment of the strength of the general public interest, which in practice is reflected in the relevant rules and statutes. If the immigration rules are relevant to a proper assessment of where the Secretary of State considers a fair balance is struck with reference to the proportionality exercise under Article 8(2), I cannot see any reason why rights of residence arising under European law cannot be considered as part of an overall balancing exercise. If an appellant meets the requirements for residence under European law, as the judge found in this case, it must be given weight.

13. The appellant in this case could and should have made an application for an EEA residence card through the proper channels as soon as he knew that his circumstances had changed. In certain categories of cases, there is a separate right of appeal arising under the EEA Regulations. However, the fact that there is a separate scheme for appeals under the EEA Regulations does not mean that the issue cannot be considered as part of a broad assessment of the appellant’s rights in a human rights claim made under Article 8.
14. The Secretary of State’s grounds of appeal do not seek to challenge the judge’s findings of fact, nor his conclusion that the appellant met the requirements of regulation 8. Given that the issue was raised for the first time at a hearing held on 09 May 2017, after the coming into force of The Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations 2016”), the judge should have considered the terms of the EEA Regulations 2016. However, it makes no material difference because the terms of regulation 8(5) of the EEA Regulations 2016 are the same.
15. Turning to the sole ground of appeal as outlined above [8]. The judge was fully aware of the need for the respondent to consider whether it was appropriate to issue a residence card because he made specific reference to regulation 17(4) at [37] of the decision. The judge did not allow the appeal with a direction for a residence card to be granted. It was left open for the respondent to consider whether it was appropriate to issue a residence card. For this reason, the ground has no merit.
16. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.
17. The appellant raised the European law issue in an appeal on human rights grounds instead of making an application through the proper channels. Having raised the issue without objection from the respondent, it was open to the judge to give weight to the fact that the appellant met

the requirements of the EEA Regulations (whether the 2006 or 2016 Regulations is immaterial) as part of the overall balancing exercise under Article 8. The residence requirements for extended family members of EEA nationals, similar to the immigration rules, indicate where a fair balance is likely to be struck.

18. Although the matter was considered as part of a human rights appeal, it seems appropriate for the Secretary of State to consider whether to issue a residence card rather than considering an alternative form of leave to remain given the specific nature of the findings made by the First-tier Tribunal. That is a matter for the Secretary of State.

## **DECISION**

The First-tier Tribunal decision did not involve the making of an error of law

The decision shall stand

Signed   
Upper Tribunal Judge Canavan  
2018

Date 30 April