



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

Appeal Number: EA/05262/2018

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

Promulgated

On 24th July 2019

On 15th August 2019

**Given orally at Field House on 24th July
2019**

Before

**THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT**

Between

**MR MOHAMMAD SHAFIQ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W Malik, WH Malik Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of a Judge of the First-tier Tribunal who, following a hearing at Hatton Cross on 11 February 2019, dismissed the appellant's application under the Immigration (European Economic Area) Regulations 2016, whereby the respondent had refused to issue the appellant with a residence card. The basis upon which the appeal was made was that the appellant contended that he was an extended family

member of an EEA national, who had been residing with that national for the requisite five-year period, and who therefore was entitled to recognition of a permanent right of residence in the United Kingdom.

2. The judge heard evidence from the appellant and it is common ground that he accepted that evidence so far as the length of time was concerned that the appellant had been residing with his partner.
3. The First-tier Tribunal granted permission to appeal to the Upper Tribunal on the following basis. It was considered by the First-tier Tribunal to be arguable that the judge had in effect acted in a procedurally unfair manner in dismissing the appeal, in that he had indicated at the hearing that he would be allowing the appeal. That was said to accord with brief typewritten notes on the file. It was also considered to be arguable that the judge, having taken the appellant's evidence as read without in fact calling upon him to speak to it at the hearing, made adverse findings which had not been put to him.
4. So far as the issue was concerned of what the judge said the decision would be at the hearing, we do not find that there is any material problem with the decision. The brief typewritten notes to which the judge who granted permission made reference make it plain that the judge's decision was "reserved". It is true that what he said thereafter indicated that the judge might have been minded to allow the appeal; but so far as the decision was concerned, it was not communicated to the parties at the hearing pursuant to the First-tier Procedure Rules in such a way as to amount to a decision to allow the appeal.
5. So far as the second matter is concerned, we note that in the rule 24 notice, prepared by Mr Kotas for the respondent in connection with this hearing, reference is made to relevant case law, which is binding upon the Upper Tribunal and the First-tier Tribunal. The notice says that the appellant is said to have demonstrated that he resided in the United Kingdom in accordance with the Regulations for five years because he had been the extended family member of an EEA national since October 2012. That was the date upon which the appellant started living with the sponsor, which was accepted by the First-tier Judge.
6. We agree with Mr Kotas that the case law in question is determinative of the matter because the appellant cannot and could not demonstrate to the judge that, at the relevant time, he had acquired a permanent right of residence. In Secretary of State for the Home Department v Aibangbee [2019] EWCA Civ 339 Sir Stephen Richards, giving judgment, said as follows:

"I turn to the 2006 Regulations. I am satisfied that on their proper construction and so far as material they are consistent with the Directive and produce the result for which the Secretary of State contends. They lay down the conditions for extended family members to acquire rights of residence under national law, in accordance with

the duty of facilitation imposed on member states by Article 3(2) of the Directive. Their effect is that an extended family member acquires a right of permanent right of residence under regulation 15(1)(b) only if he has resided in the United Kingdom with the relevant EEA national for a continuous period of five years since being issued with a residence card.”

7. The words “since being issued with a residence card” are plainly important. In the present case, looking at the evidence, the appellant could not demonstrate to the First-tier Tribunal Judge that he had been living for five years since being issued with a residence card. It was the case that he could show that he had been living together from an earlier point in time; but that is not relevant to the legal issue to be determined by reference to the Regulations.
8. For these reasons, we do not consider that there has been any material error on the part of the judge. Even if we had come to a contrary conclusion, however, and set aside the decision, it would have been inevitable that the result of re-making would have been the same.
9. For these reasons, we dismiss the appellant’s appeal. We do note, however, that it is possible for the appellant to make a fresh application if so advised.

No anonymity direction is made.

Signed
2019

Date: 05 August

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber