IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002216

First-tier Tribunal No: EA/09340/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th October 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Drilon Domi
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S Sobowale of Counsel, instructed by Acuity Law
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard remotely at Field House on 18 October 2023

DECISION AND REASONS

1. To avoid confusion, the parties are referred to as they were at the First-tier Tribunal appeal hearing.
2. By a decision of the First-tier Tribunal (Judge Singer) dated 6.6.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Dieu) promulgated 27.4.23 allowing the appellant's appeal against the respondent's decision of 25.9.22 to refuse the application made on 21.8.21 for Indefinite Leave to Remain on the basis of settled status under the European Settlement Scheme (EUSS).
3. The application was refused because the appellant failed to provide sufficient evidence to demonstrate the necessary period of five years' continuous qualifying residence in the UK.

4. In summary, the respondent's grounds argue that the First-tier Tribunal materially erred in law by finding that the appellant satisfied the requirements for settled status under paragraph EU11 of Appendix EU of the Immigration Rules.

5. In particular, it is asserted that the judge overlooked the provisions of Article 3.2(b) of Directive 2004/38/EC the consequence of which is that for residence as a 'durable partner' to be considered, it has to have been 'facilitated' in accordance with national legislation (i.e. the 2016 Regulations).

6. After hearing the helpful submissions of both legal representatives, I reserved my decision to be provided in writing, which I now do.

7. On the chronology, it is clear that the appellant's lawful residence was not facilitated until 6.9.17 and he was not recognised as a durable partner until that date. The First-tier Tribunal found that the relationship ended in 2019. It follows that the appellant ceased to be an Extended Family Member (EFM) in 2019, and therefore could not meet the requirement of lawful residence in accordance with EU law for a continuous period of 5 years as he only had two years' facilitated lawful residence before he and his partner separated.

8. The point made by the respondent is confirmed by the Court of Appeal's decisions in Macastena [2018] EWCA Civ 1558, and Aibangbee [2019] EWCA Civ 33, and by that of the Upper Tribunal in Kunwar (EFM – calculating periods of residence) [2019] UKUT 00063 (IAC).

9. I am satisfied that the First-tier Tribunal Judge confused de facto residence in a durable relationship from 2013 with a right to reside on that basis which dates only from the issue of an EEA Residence Card in 2017. Before 2017, the appellant's residence was not being facilitated 'in accordance with' national legislation. As the headnote of Kunwar explains:

> *(1) An "extended family member" ("EFM") of an EEA national exercising Treaty rights in the UK (such as a person in a durable relationship) has no right to reside in the UK under the Immigration (EEA) Regulations until he or she is issued with the relevant residence documentation under reg 17(4) of the 2006 Regulations (now reg 18(4) of the 2016 Regulations).*
>
> (2) *Following Macastena v SSHD [2018] EWCA Civ 1558, it is clear that it is not possible to aggregate time spent in a durable relationship before the grant of a residence document with time spent after a residence document is issued, for the purpose of the calculating residence in accordance with the Regulations.*
>
> *(3) Once such a document is issued however, then the EFM is "treated as a family member" of the EEA national and may then have a right to reside under the Regulations (reg 7(3)).*
>
> *(4) Consequently, a person in a "durable relationship" with an EEA national can only be said to be residing in the UK "in accordance with" the Regulations once a residence document is issued. Only periods of residence following the issue of the documentation can, therefore, count towards establishing a 'permanent right of residence;' under reg 15 based upon 5 years' continuous residence "in accordance with" the Regulations.*
>
> (5) *The scheme of the 2006 and 2016 Regulations in respect of EFMs is consistent with the Citizens' Directive (Directive 2004/38/EC). The Directive does not confer a right of residence on an individual falling within Art 3.2 including a person in a "durable relationship, duly attested" with an EU national but only imposes an obligation to "facilitate entry and residence" following the undertaking of an "extensive examination of the personal circumstances" of individuals falling within Art 3.2.*

10. It follows from the above, that the appellant did not have the necessary five years continuous residence to qualify for settled status under EUSS pursuant to EU11 of Appendix EU based on his relationship with his partner until 2019.

11. I note the skeleton argument put before the First-tier Tribunal argued that the appellant had been granted leave as a partner in 2017 but that he retained the right residence through his child, a Lithuanian national, born in 2017. It was not argued in that skeleton that the five years had accrued from residence with his partner since 2013. However, that argument appears to have been advanced by Mr Sobowale at the First-tier Tribunal appeal hearing, as noted at [7] of the decision. For the reasons explained above, I am satisfied that argument could not succeed; he cannot combine periods of residence before and after the issue of leave in 2017.

12. Mr Sobowale also argued before the First-tier Tribunal, as he did before me, that the right of residence established with his former partner continued beyond 2019 on the basis of a derivative right as a primary carer of his son, sharing that responsibility with his partner, pursuant to Regulation 16(8) of the 2016 Regulations.

13. I am satisfied that the appellant has no *Zambrano* right on the facts of this case, as the child would not be required to leave the UK if the appellant were no longer present. Neither can the appellant meet the definition of a family member of his child under Regulation 7, nor the definition of a family member with a retained right of residence under Regulation 10. It would be stretching the evidence to find that he and his former spouse shared the primary care responsibility equally, but even if they did, it does not assist the appellant. Whilst I accept that under Regulation 16(8) a person can be the primary carer of another person if he is a direct relative and shares equally the responsibility for that other person's care with one other person, the appellant cannot meet the crucial remaining requirements of Regulation 16, namely that the child would be unable to remain in the UK if the appellant left the UK. It follows that the appellant cannot qualify for a derivative right to reside. Furthermore, Regulation 15(2) provided that residence as a result of a derivative right to reside does not constitute residence for the purpose of acquiring a right of permanent residence under Regulation 15.

14. Ms Cunha also made the point, which I accept as fatal to the application made, that the appellant's residence was never facilitated by the respondent prior to 31.12.20, either as durable partner or as a family member on the basis of his relationship with his son, and therefore he does not come within the scope of Article 10(2) the Withdrawal Agreement: "Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter." The finding at [11] of the First-tier Tribunal decision that the appellant was a family member of an EEA national is wrong in law with reference to the 2016 Regulations and in any event cannot assist the appellant's application for settled status. As he ceased to be a family member of his former spouse in 2019 and cannot meet the definition of a 'family member' under the Regulations based on his relationship with his son, and had made no application as such, his residence was not being facilitated at the relevant date in 2020.

15. It follows that on any version of the arguments raised by Mr Sobowale, the appellant could never have succeeded in establishing five years' continuous lawful residence for the purpose of obtaining settled status and Indefinite Leave to Remain.

16. The appeal could not and should not have succeeded in the First-tier Tribunal and allowing the appeal was a material error of law.

17. In the circumstances, the Upper Tribunal must set aside the decision of the First-tier Tribunal and remake the decision by dismissing the appeal outright, there being no basis upon which the application made to the respondent could have succeeded.

Notice of Decision

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The decision in the appeal is remade by dismissing the appeal.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 October 2023