IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003724

First-tier Tribunal No: EA/51356/2022
IA/09218/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 December 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Akinsanya John Akinwuyi
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P. Paraskos, Counsel instructed by AO Associates Solicitors
For the Respondent: Mr M. Parvar

Heard at Field House on 31 October 2023

DECISION AND REASONS

1. By a decision dated 3 May 2023, First-tier Tribunal Judge Chana ("the judge") dismissed an appeal against a decision of the Secretary of State dated 9 November 2020 revoking a residence card issued to the appellant under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") as the durable partner of an EEA national. The judge heard the appeal under regulation 36 of the 2016 Regulations.

2. The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Grimes.

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Procedural background

3. The appeal to the First-tier Tribunal was almost two years out of time. By a decision dated 21 October 2022, First-tier Tribunal Judge Leighton Hughes granted an extension of time. Judge Hughes accepted that the Secretary of State's decision dated 9 November 2020 had been sent to the appellant's old address and that he had not received it until 8 September 2022 when it was provided to him directly by an official of the Secretary of State. Judge Hughes was "just persuaded" to extend time, despite being unimpressed with the appellant's apparent failure to notify the Secretary of State of the change in his address. This explains why an appeal against a decision taken on 9 November 2020 was not heard by the First-tier Tribunal until 21 April 2023.

4. The appellant's delay in bringing the appeal may also explain why I respectfully consider that the judge fell into error by addressing concepts relating to the EUSS, Appendix EU of the Immigration Rules and the EU Withdrawal Agreement which were of no relevance to the central issues in this appeal under the 2016 Regulations. By the time the judge heard this appeal, appeals challenging decisions under the 2016 Regulations were a comparative rarity, and most EU related immigration appeals focussed (and continue to focus) primarily on the EUSS and the related legal instruments.

Factual background

5. The appellant is a citizen of Nigeria. He was born in 1975. On 15 January 2016, he applied for a residence card as the durable partner of a French citizen, MH. The application was refused on 6 July 2016. He would make further three unsuccessful applications for the same documentation, all in relation to MH. On 3 May 2018, the appellant made a fifth application for a residence card as the durable partner of MH. That application was granted on 3 August 2018.

6. The relationship between the appellant and MH subsequently broke down. MH made allegations of domestic violence against the appellant, and a criminal investigation commenced. It concluded and no charges were brought. On 9 September 2020, MH wrote to the Home Office to state that her relationship with the appellant was no longer genuine and subsisting. Consequently, the Secretary of State decided to revoke the appellant's residence card under regulation 24(3) of the 2016 Regulations. The decision said that appellant was no longer in a genuine and subsisting relationship with his former durable partner and, as such, the residence card previously issued to him in that capacity was to be revoked.

Proceedings before the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. The appellant was represented by Mr Paraskos. The Respondent did not appear and was not represented.

8. The appellant did not dispute that his relationship with MH had broken down. His case was that that did not matter because, by 9 November 2020, he had acquired the right of permanent residence through five years' continuous lawful residence. He claimed that his durable partnership with MH commenced in January 2015. By January 2020, he had accrued five years' residence in that capacity, and so enjoyed the right of permanent residence under the 2016 Regulations. To make this submission, the appellant sought to rely on the periods of his relationship with MH that pre-dated the grant of the revoked residence card, issued to him on 3 August 2018.

9. The judge dismissed the appeal. Her operative analysis began at para. 36 with Appendix EU of the Immigration Rules. The appellant could not succeed under para. EU11, she found, because his qualifying residence did not commence until the issue of the residence card on 3 August 2018. Pre-recognition periods of durable partnership did not count towards the continuous qualifying period under para. EU11. She reached similar conclusions based on the EU Withdrawal Agreement directly (para. 39ff). At para. 41 she addressed *Secretary of State for the Home Department v Aibangbee* [2019] EWCA Civ 339 and concluded that it supported her conclusion that the appellant's continuous residence under EU law did not begin until his status as MH's durable partner was recognised by the Secretary of State upon the issue to him of a residence card in that capacity.

10. The judge added "for completeness" at para. 45 that she did not find the appellant to be credible in any event and did not accept his evidence that he had been in a relationship with MH since 2015: para. 45.

Issues on appeal to the Upper Tribunal

11. The grounds of appeal criticise the judge's decision for applying Appendix EU and the EU Withdrawal Agreement, which, they contend, were of no application to the decision. As formulated by Mr Paraskos in his submissions, there are essentially two main issues.

12. First, the judge failed to address whether the appellant had accrued the right of permanent residence at the point his relationship with the sponsor broke down. The judge should have determined whether the appellant's pre-recognition periods as MH's durable partner counted towards the acquisition of that status. It was on this basis that Judge Grimes granted permission to appeal.

13. Secondly, it was perverse for the judge to reach, and take into account, adverse credibility findings concerning the appellant. The issue was whether he had accrued the right of permanent residence, not whether he was credible. Those findings, and that aspect of the judge's analysis, were not relevant considerations.

14. The Secretary of State submitted a rule 24 notice dated 15 September 2023, resisting the appeal.

Submissions

15. Mr Paraskos accepted before the judge and in this tribunal that the appellant's relationship with MH had broken down. His primary submission was that, by the time the residence card was revoked, the appellant had acquired the right of permanent residence as a result of the appellant's pre-recognition residence as a durable partner. By the time the Secretary of State purported to revoke the appellant's residence card, he had already accrued the right of permanent residence. There was, in his submission, nothing to revoke. The periods of the appellant's relationship with MH that predated the Secretary of State's decision of 3 August 2018 to recognise him as her durable partner counted towards the acquisition of the right of permanent residence. To make good this submission, Mr Paraskos relied on para. 15 of *Macastena v Secretary of State for the Home Department* [2018] EWCA Civ 1558, where Longmore LJ said:

> "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 Immigration (European Economic Area Regulations) 2006] on the basis of his durable relationship with Ms L, the time of that durable relationship could count towards an acquisition of permanent right of residence, just as time spent with a retained right of residence after his divorce did so count."

16. In relation to the judge's credibility findings, such findings were irrelevant, Mr Paraskos submitted. Whether the appellant had acquired the right of permanent residence was a matter of law, not of personal credibility.

17. Mr Parvar relied on the Secretary of State's rule 24 notice, para. 2 of which states:

> "Unusually, it is accepted that Judge Chana's determination <u>is</u> flawed by errors of law but the respondent's position is that a single issue properly held against the appellant on his case as argued is unarguably dispositive of the appeal." (Emphasis original)

18. The remainder of the rule 24 notice submitted that it was well established that pre-recognition periods of residence as a durable partner are incapable of counting towards the acquisition of the right of permanent residence, or otherwise counting as any form of qualifying residence under the 2016 Regulations. That being so, while the judge erred by addressing Appendix EU and the EU Withdrawal Agreement, any errors on that account were immaterial.

19. Para. 12 of the rule 24 notice raises what it describes as an "academic" point concerning the precise way in which the 2016 Regulations were preserved by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the Transitional Regulations"). The issue there identified is that, upon the revocation of the 2016 Regulations at the conclusion of the implementation period under the EU Withdrawal Agreement, there were no proceedings pending before the First-tier Tribunal, the appellant's appeal having been brought out of time (by a considerable margin) with permission. The point is academic, the notice states, because pursuant to *Aibangbee* the appeal was bound to fail in any event, as correctly identified by the judge.

Legal framework: the 2016 Regulations

20. The 2016 Regulations were revoked following the UK's withdrawal from the EU. For the purposes of the analysis in this decision, I will describe the Regulations as though they remain in force.

21. Regulation 8 of the 2016 Regulations defines an "extended family member" to include a person who meets a condition pertaining to being a "durable partner", in the following terms:

> "(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national or the child (under the age of 18) of that partner and is able to prove this to the decision maker."

22. Regulation 8 is a definition provision. Where a person meets the definition of "extended family member", that paves the way for the Secretary of State to

consider issuing a "residence card" to him or her, under regulation 18. See regulation 18(4):

> "(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—
>
> (a) the application is accompanied or joined by a valid passport;
>
> (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
>
> (c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

23. Where the Secretary of State receives an application under regulation 18(4), an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and, if the application is refused, the Secretary of State must give reasons justifying the refusal: see regulation 18(5).

24. Under regulation 18(7)(c), a residence card is no longer valid if the holder ceases to have a right to reside under the 2016 Regulations.

25. Once a residence card has been issued to an extended family member under regulation 18(4), the recipient must be treated as a "family member" of the EEA national in relation to whom their application was based. The significance of so being treated is that pursuant to regulation 15(1)(b), a "family member" who has resided in the United Kingdom with the EEA national *in accordance with the 2016 Regulations* for a continuous period of five years accrues the right to reside in the United Kingdom permanently (emphasis added).

Jurisdiction: preservation of the 2016 Regulations

26. The Transitional Regulations preserve the 2016 Regulations in relation to "any appeal which has been brought under the EEA Regulations 2016 [which] has not been finally determined before commencement day" (see para. 5(1)(b) of Schedule 3). As Mr Deller, the author of the rule 24 notice, identified, the appeal in these proceedings was not "pending" at 11.00PM on 31 December 2020, since the appeal had not been brought, and was not to be brought until 19 September 2022, a considerable period out of time, albeit with an extension of time.

27. In my judgment, this is not an issue. Para. 5(1)(c) of Schedule 3 provides that the specified provisions of the 2016 Regulations continue to apply "in respect of an EEA decision... taken before commencement day." The decision under appeal in these proceedings *was* taken before commencement day. The provisions of the 2016 Regulations specified in para. 5 of Schedule 3 therefore continued to have effect in relation to these proceedings.

Preliminary observations: immaterial errors in the judge's decision

28. It was common ground that the judge did not need to address Appendix EU and the EU Withdrawal Agreement in her decision. This was an appeal brought under the 2016 Regulations against a decision taken under those Regulations. Neither the EUSS, the Immigration Rules which establish it, nor the EU Withdrawal

Agreement were relevant to the judge's analysis. As explained above, the appellant's significant delay in bringing the appeal may have given rise to some confusion. The judge may also have had concerns of the sort identified by Mr Deller at para. 12 of the Secretary of State's rule 24 notice since the appeal in these proceedings was not "pending" at the conclusion of the "implementation period" under the EU Withdrawal Agreement, and she may well have considered it appropriate to address the appellant's entitlement, under the EU Withdrawal Agreement, to EUSS leave out of an abundance of caution.

29. While, for the reasons identified above, the EUSS, Appendix EU and the Withdrawal Agreement, were of no relevance to the dispute under appeal, alongside the judge's analysis of those issues she addressed the central issue in the case, namely whether the appellant's pre-recognition periods of residence as a claimed durable partner counted towards the acquisition of the right of permanent residence under the 2016 Regulations. That being so, whether her decision involved the making of a *material* error of law is to be determined by reference to her analysis of the 2016 Regulations alone.

Issue (1): pre-recognition residence incapable of counting towards the acquisition of permanent residence

30. In this decision, I use the term "pre-recognition residence" to refer to the period of the appellant's residence that pre-dated the Secretary of State's recognition of him as MH's durable partner, on 3 August 2018.

31. I reject Mr Paraskos' submissions that pre-recognition periods of residence as a claimed durable partner count towards the acquisition of the right of permanent residence under the 2016 Regulations, for the following reasons.

32. First, a textual analysis of the 2016 Regulations does not admit of that conclusion:

a. Regulation 18(4) anchors a decision to issue a residence card to an "extended family member" (of which a durable partner is a sub-category) to a positive decision of the Secretary of State that it is "appropriate to issue the residence card" (regulation 18(4)(c)), following an "extensive examination of the personal circumstances of the applicant" (regulation 18(5)). There is no suggestion that such a decision has retrospective effect.

b. Under regulation 7(3), where an extended family member has been issued with a residence card, that person must be treated as the family member of an EEA national, provided (a) he or she continues to satisfy the regulation 8(5) condition (that is, as a durable partner of an EEA national), and (b) the residence card remains in force. The Secretary of State's act of issuing a residence card to the durable partner is a condition precedent to the bearer of the card being treated as a "family member" under the 2016 Regulations. Again, there is no suggestion in the drafting that the issue of a residence card is capable of having retrospective effect, or otherwise to confer status on the pre-issue residence of the applicant. By definition, it could not have that effect. The thrust of the regime established by the Regulations is prospective, not retrospective. There is no requirement on the Secretary of State to back-date the issue of a residence card, and no express power to do so.

c. Once issued, a residence card is valid for five years from the date of issue: regulation 18(6)(a). Again, there is no suggestion that a residence card has retrospective validity. Without a valid residence card, there is nothing in the Regulations requiring a durable partner to be treated as a family member, or otherwise enabling them to accrue the right of permanent residence under regulation 15(1)(b).

33. Secondly, the authorities do not admit of that conclusion, either. Mr Paraskos' reliance on *Macastena* is misplaced. Mr Macastena was a third country national who faced deportation proceedings for unlawful wounding, contrary to section 20 of the Offences Against the Person Act 1861. He was married to an EEA national, and before the marriage had been in durable relationship with her, but the relationship had not been recognised as a durable partnership under the Immigration (European Economic Area Regulations) 2006. Those Regulations preceded the 2016 Regulations, but implemented the same EU-level legal framework, and the relevant provisions in the 2006 Regulations correspond with those in the 2016 Regulations. The length of Mr Macastena's residence under the 2006 Regulations would determine the level of protection he enjoyed from deportation; the longer his residence under the 2006 Regulations, the greater the protection from removal. Accordingly, Mr Macastena sought to pray in aid his pre-marriage residence as a durable partner in order to secure the application of a higher threshold for removal.

34. Mr Paraskos relies on the "it may well be" formulation adopted by Longmore LJ at para. 15 of *Macastena* (quoted above at para. 15, above), contending that this appellant falls squarely within the scenario which Longmore LJ posited as a possible basis upon which pre-recognition residence as a durable partner counted as residence under the Regulations. That submission is without merit, for the following reasons.

35. This point was addressed in express terms by *Kunwar (EFM - calculating periods of residence)* [2019] UKUT 63 (IAC). Upper Tribunal Judge Grubb held, at para. 38ff:

> "38. …there is nothing in the passage relied upon in Longmore LJ's judgment to suggest that he was accepting that even a period before the residence card was issued could be taken into account towards the acquisition of a permanent right of residence. Secondly, the substance of Longmore LJ's reasoning runs counter to Mr Rashid's submission. The Court of Appeal repeatedly emphasised the distinction drawn in the Directive between the rights of residence conferred upon 'family members' and the (lesser) right to 'facilitate entry and residence' for, inter alia, those in a durable relationship (at [22]-[23]) together with the reinforcement of that distinction by the CJEU in *Rahman* [(Case C-83/11)] (at [24]). Further, Longmore LJ cited with approval at [24] what was said by Richards LJ in the case of [*Aladeselu v SSHD* [2013] EWCA Civ 144] (at [65]) that:
>
> > 'It should be emphasised that a finding that an applicant comes within Reg 8 does not confer on him any substantive right to residence in the UK'.
>
> 39. In my judgment, the Court of Appeal's decision in *Macastena* confirms, and applies, the scheme of the 2006 Regulations and Directive which I have set out above, drawing the distinction between

> the right of residence of a 'family member' and the absence of any right of residence for an 'extended family member' until a residence card is issued by the Secretary of State under reg 17(4) of the 2006 Regulations. Only from that point in time do the 2006 Regulations confer upon the 'extended family member', a right of residence because from that point in time they are treated as a 'family member' and may, if appropriate, rely upon the rights of residence recognised in reg 13(2) and 14(2). Then, and only then, does the individual begin to acquire a period of lawful residence under the 2006 Regulations which can count towards establishing a 'permanent right of residence' on the basis of residing in the UK in accordance with the 2006 Regulations for a continuous period of five years under reg 15(1)(b)."

36. The above passage was cited with approval by the Court of Appeal in *Aibangbee* by Sir Stephen Richards at para. 38 as a "neat encapsulation of the effect of the relevant provisions, giving proper effect to the judgment in *Macastena*."

37. Mr Paraskos did not take me to any features of the 2016 Regulations which call for a different approach.

38. The following conclusions may be drawn from the above authorities when applied to the 2016 Regulations:

    a. There was nothing in Longmore LJ's judgment in *Macastena* which suggested that a residence card issued to a durable partner has retrospective effect;

    b. The submission that a residence card has retrospective effect is contrary to the thrust of Longmore LJ's judgment;

    c. The Court of Appeal has repeatedly drawn a distinction between rights of residence enjoyed by family members and the lesser (facilitation) rights enjoyed by extended family members, including those in a durable relationship;

    d. A finding that person falls within regulation 8 of the 2006 – or 2016 Regulations (see Schedule 1(1)(a) of the 2016 Regulations) – confers no substantive entitlement on that person;

    e. It is only from the point that a residence card is issued that the bearer begins to accrue substantive rights under the 2016 Regulations, including residence counting towards the right of permanent residence.

39. For the reasons identified by Judge Grubb, the regime established by the 2016 Regulations does not permit pre-recognition periods of residence as a claimed durable partner to count towards the acquisition of the right of permanent residence. Nothing in the 2016 Regulations merits that conclusion, and the authorities concerning the equivalent provisions in the 2006 Regulations confirm that approach. Nothing in *Macastena* undermines that conclusion; Mr Paraskos' submissions concerning para. 15 of Longmore LJ's judgment are a misreading of that judgment, and are contrary to later Court of Appeal authority expressly addressing the issue, namely *Aibangbee*.

40. It follows that the judge was right to conclude that the pre-recognition periods for which the appellant claimed to have been in a durable relationship with MH

were incapable of counting towards the acquisition of the right of permanent residence. The period for which the appellant was recognised as a durable partner was less than five years and, accordingly, meant that he did not accrue the right of permanent residence. It was not an error for the judge not expressly to address whether the appellant had accrued the right of permanent residence because, on the chronology of his case, it was impossible for him to have done so.

Issue (2): not irrational for the judge to make findings on the quality of the pre-recognition relationship

41. On one view, I accept that the judge's findings of fact concerning the appellant's pre-recognition relationship with MH were otiose and need not have been included. On the basis of her analysis of *Aibangbee* at paras 41 and 42, such residence was irrelevant, and, at its highest, could not have counted towards the acquisition of the right of permanent residence, regardless of the validity of the relationship at that time.

42. However, the judge was plainly invited by Mr Paraskos to consider the evidence upon which she based these findings, and, on the basis of the way Mr Paraskos advanced his case below, and before this tribunal, such findings of fact lay squarely within the issues that were identified for the judge to resolve. Since it was the appellant's case that his pre-recognition residence as a claimed durable partner counted towards the acquisition of permanent residence (notwithstanding the multiple rejections by the Secretary of State of his earlier, pre-recognition applications) it is hardly surprising that she reached findings on that issue. Mr Paraskos has not submitted that the hearing before the judge was itself unfair, or that the appellant was not expecting to give evidence on that basis. On the contrary, paras 3 and 4 of the appellant's skeleton argument before the First-tier Tribunal summarised this aspect of the appellant's case, and the appellant's witness statements projected an image of a relationship that was genuine and subsisting until it broke down.

43. I respectfully consider that Mr Paraksos' submissions concerning this issue to be inconsistent. On the one hand, Mr Paraskos invited the judge to find that the appellant and MH had been in a durable relationship *before* the period from which the Secretary of State recognised the relationship as durable. On the other hand, the judge having reached findings addressing precisely that issue, Mr Paraskos now submits that it was perverse for the judge to reach such findings.

44. The judge plainly reached findings of fact on a "belt and braces" basis. While her essential legal analysis was, at its core, correct, the findings of fact she reached about the validity of the appellant's claimed durable partnership with MH were such that, if she was wrong about the impossibility of the appellant's pre-recognition claimed durable relationship counting towards the acquisition of permanent residence, she found as a matter of fact that the relationship was not durable at that time (or later), and so would not count towards it in any event.

45. The reality was that the appellant had made four unsuccessful residence card applications between January 2016 and December 2017 in respect of his claimed relationship with MH. Each of those refusal decisions carried a right of appeal. On the materials before me, the appellant did not exercise the rights of appeal he enjoyed against those decisions. He attempted retrospectively to challenge those refusal decisions before the First-tier Tribunal within the confines of these proceedings. I heard no submissions about whether that was an abuse of process, so I do not offer a view on that issue. However, it was not irrational for

the judge to reach findings of fact on the evidence she heard, having been invited to do so by the appellant, on the basis that his pre-recognition relationship with MH lay at the heart of his case. The fact is that the appellant disagrees with those findings. Other than Mr Paraskos's submission, which I have respectfully rejected, that it was irrational for the judge even to consider reaching findings of fact on that issue, the appellant has not sought to challenge the findings reached by the judge on the basis of any of the established legal principles for challenging findings of fact reached by first instance judges.

46. In conclusion on this issue, I find that the judge did not *need* to reach findings of fact concerning the status of the appellant's pre-recognition relationship with MH, but not for the reasons Mr Paraskos submitted. She did not need to reach those findings because, on any view, the appellant's pre-recognition residence was incapable of contributing towards his continuity of residence under the 2016 Regulations. However, it was essentially a matter of judicial discretion for the judge to do so; she was entitled to record that the appellant's pre-recognition relationship with MH was not genuine and subsisting in light of the fact she was being invited to impute precisely that period of residence to the appellant's acquisition of the right of permanent residence. The structure and content of a judgment, when addressing the agreed issues identified by the parties, is a matter of judicial discretion, and not something with which this tribunal will interfere without a compelling reason.

47. This ground is therefore not a basis upon which to set the decision of the judge aside.

Conclusion

48. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Chana did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 December 2023