Neutral Citation Number: [2018] EWCA Civ 1558

Case No: C9/2016/2189

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE KING DBE
and
THE RIGHT HONOURABLE LORD JUSTICE COULSON

- -

Between:

SELIM MACASTENA	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr David Blundell (instructed by **Government Legal Department**) for the **Appellant**
Mr Manjit Gill QC (instructed by **Bankfield Heath Solicitors**) for the **Respondent**

Hearing dates: 19th June 2018

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. This appeal raises the question whether time spent by a man in a durable relationship with a woman who is an EEA national with a permanent right of residence in the United Kingdom can be added to subsequent time as a spouse to meet the requirement of 5 years continuous lawful residence before the man can himself acquire a permanent right of residence. The answer is that time so spent cannot be added unless the Secretary of State for the Home Department has (or perhaps ought to have) issued the man with a residence card as an "extended family member", pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The answer to this question is important for foreign criminals with ordinary rights of residence who can only be deported "on grounds of public policy or security"; if, however, they have a permanent right of residence they can only be deported on "serious grounds of public policy or security".

Facts

2. Mr Macastena is a Kosovan national who entered the United Kingdom unlawfully on 3rd July 2005 and subsequently formed a relationship, including cohabitation, with Ms L a Polish national living and working lawfully in the United Kingdom. They became engaged in December 2007 and went to Kosovo where they married on 6th August 2008. On 22nd August 2008 he was granted an EEA family permit as the spouse of Ms L by an Entry Clearance Officer and, after re-entry on 5th September 2008, he was issued with a 5 year residence card on 23rd September 2009 as a family member under the 2006 regulations. On 30th July 2013, after he and Mrs L had divorced and after he had received a new residence card as an individual who retained a right of residence, he was convicted of unlawful wounding contrary to section 20 of the Offences Against the Person Act. He and his brother had attacked a fellow motorist (Mr Prater) at 10.00 p.m. at night. Mr Macastena, driving with his brother, had cut across Mr Prater's path and became cross when Mr Prater hooted his horn. He braked sharply, put his car into reverse and drove backwards forcing Mr Prater to stop. He then attacked Mr Prater with a saw while his brother used a hammer. On 30th August 2013 Mr Macastena was sentenced to 24 months' imprisonment.

3. The Secretary of State decided that it was appropriate to deport Mr Macastena, served notice of intention to deport on 24th October 2013 and signed a deportation order on 13th August 2014. On 15th August 2014 Mr Macastena lodged notice of appeal to the First Tier Tribunal; the hearing took place on 19th May 2015 and on 18th June 2015 FTT Judge S. J. Clark allowed his appeal. The Secretary of State appealed to the Upper Tribunal which dismissed her appeal. There is now an appeal to this court.

4. As noted in para 1 above, a foreign criminal who has acquired a right of residence under the 2006 Regulations can only be deported if the Secretary of State decides that his removal is "justified on grounds of public policy or public security …" pursuant to regulation 19(3). In respect of a person with a permanent right of residence there is a more stringent test. A decision to deport may not be made "… except on serious grounds of public policy or public security" (regulation 21(3)).

5. The question therefore is whether Mr Macastena had acquired such permanent right of residence at the time of the decision to deport him. If not, he will fall to be deported on grounds of public policy. If he had acquired such a right, he can only be deported on "serious grounds of public policy".

6. Permanent right of residence is dealt with in regulation 15 (1) which provides that both an EEA national who has resided in the United Kingdom for a continuous period of 5 years, and a family member of a EEA national who has resided with that EEA national for a continuous period of 5 years, acquire a permanent right of residence in the United Kingdom. A sentence of imprisonment interrupts any period of residence which is no longer "continuous". Mr Macastena became a family member of an EEA national when he married Ms L on 6th August 2008 but he did not start residing lawfully with her in the United Kingdom until 5th September 2008. Since he began his sentence on 30th August 2013, he misses 5 years' continuous residence by the small margin of 5 days.

7. He maintains, however, that before he married Ms L, he was an "extended family member" because he was in a durable relationship with Ms L in accordance with the definition of extended family member in regulation 8(5) of the 2006 Regulations and that, on that basis, he had (or ought to be treated as if he had) a permanent right of residence for 5 years. Regulation 8(1) defines "extended family member" to include a person who satisfies the conditions in para (5) which specifies satisfaction of the condition:-

> "if a person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

Mr Macastena therefore contends that he can only be deported or removed on serious grounds of policy which, he says, do not exist.

Decisions below

8. The Secretary of State in her decision letter of 11th August 2014 said that, although Mr Macastena had a right of residence, he fell short of acquiring a right of permanent residence since he had not been continuously resident with his EEA national wife (or as an individual who had retained a right of residence after his divorce) for 5 years. It was sufficient therefore to apply the lower standard of grounds for deportation (namely "grounds of public policy" rather than "serious grounds of public policy") (see paras 17-18). She applied that lower standard and decided that public policy required his deportation. That was a proportionate decision when balanced against the continuing risk Mr Macastena posed to the public. There would moreover be no breach of Mr Macastena's Article 8 rights under the Immigrations Rules if he was deported.

9. FTT Judge S. J. Clark, however, accepted that Mr Macastena had acquired a permanent right to reside in the United Kingdom because he was satisfied that Mr M had been in a durable relationship with Ms L before their marriage (para 13). The right question therefore was whether there were "serious" grounds of public policy which necessitated his deportation. He held that there were no such serious grounds,

particularly in the light of the fact that Mr Macastena was now settled in the plumbing business at which he worked and of which he owned half.

10. The Secretary of State obtained permission to appeal to the Upper Tribunal which promulgated its decision on 20th January 2016. The Secretary of State accepted that, pursuant to regulation 17(1)-(3), she was obliged to issue a residence card to any family member of an EEA national who herself had a permanent right of residence and thus to treat such family member as himself having a permanent right of residence but submitted that that obligation only applied to family members (namely, for the purposes of this case, spouses) not persons in a durable relationship who were in the words of the regulation "extended family members". They were catered for by regulation 17(4) and (5) which provided:-

> "(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 relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
>
> b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
>
> (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security."

11. In the light of these regulations, the Secretary of State contended that, unlike full family members who had to be treated as having a right of permanent residence and had a right to receive a residence card, extended family members had no such right but only an entitlement to require the Secretary of State to exercise her discretion and, in so doing, the Secretary of State would have to "undertake an extensive examination of the personal circumstances of the applicant" before issuing such residence card.

12. Upper Tribunal Judge Coker decided that, if the Secretary of State had not exercised her discretion, the First Tier Tribunal could do so and that was effectively what the First Tier Tribunal had done. Alternatively, the Secretary of State could be treated as having exercised her discretion adversely to Mr Macastena because evidence of Mr Macastena's durable relationship was before the Secretary of State at the time he applied for a residence permit, but she had only considered whether he had lawful residence from 5th September 2008 when he re-entered the United Kingdom after his marriage. The First Tier Tribunal (and, indeed, the Upper Tribunal) could then decide whether her (implicit) adverse exercise of discretion had been exercised according to correct principles (paras 15-16).

13. The Upper Tribunal held that the First Tier Tribunal had been correct (effectively) to hold that Mr Macastena had been in a durable relationship before his marriage and that the Secretary of State could not, therefore, in her discretion decide that Mr Macastena was not entitled to a permanent right of residence (and, therefore, a

residence card). If followed that Mr Macastena could only be deported on "serious grounds of public policy".

Grounds of Appeal

14. The Secretary of State contends:-

1) his predecessor was correct to consider Mr Macastena's position only as from 5th September 2008 because it was only as from that date that Mr Macastena's lawful residence began as the spouse of Ms L. Before that date he was not lawfully resident in the United Kingdom because he was not a "family member"; his residence as an "extended family member" in a durable relationship with Ms L was not lawful residence, unless the Secretary of State had been asked to exercise her discretion to issue a residence card pursuant to regulation 17(4) and that discretion had been exercised in his favour; that had never happened. FTT Judge Clark was therefore wrong to hold that time spent in a durable relationship before marriage could, as a matter of law, be added to the time of Mr Macastena's marriage to achieve the 5 year requirement for a permanent right of residence;

2) moreover, even the Secretary of State could only determine any application while Mr Macastena was in a durable relationship, not at some later date;

3) UT Judge Coker was wrong to decide that the Secretary of State had implicitly exercised her discretion adversely to Mr Macastena, let alone to decide that she had exercised that discretion on wrong principles, let alone that the Upper Tribunal was entitled to exercise discretion itself in favour of Mr Macastena; similarly, if the right interpretation of the FTT judgment was that Judge Clark had exercised a discretion, the FTT was not entitled to do so; and

4) if the tribunal were entitled to exercise their own discretion, that discretion was wrongly exercised because neither tribunal "undertook an extensive examination of the personal circumstances of the applicant" as required by regulation 17(5).

Circumstances in which a durable relationship can be taken into account for purposes of acquiring a permanent right of residence

15. 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 2006 regulations 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. But Mr Macastena never made such an application. All that had happened before he left for Kosovo to get married to Ms L was that he had entered the United Kingdom unlawfully on 3rd July 2005 and he had unlawfully remained here. It is true that Mr Macastena's solicitors, in the light of his wish to marry Ms L in August 2008, on 29th July 2008 notified the Secretary of State of his unlawful presence in the United Kingdom and informed her that he had been living with Ms L since September 2007. They did not, however, ask for a residence card on that basis; they asked and were granted a Visa Disclaimer form so that Mr Macastena (with Ms L) could return to Kosovo and get married there. It was only after the marriage that Mr Macastena was issued first with an EEA Family Permit as Ms L's spouse (enabling him to re-enter on

5th September 2008) and in due course with a residence card as the spouse (family member as per the 2006 regulations) of an EEA national working in the United Kingdom.

16. Mr Macastena now argues that the Secretary of State knew of his durable relationship with Ms L and has never contested that it existed for some time before his marriage. That, it is said, is enough for that durable relationship to be added to his time as a spouse for the purpose of acquiring a permanent right of residence.

17. That cannot be right. An extended family member can only be issued with a residence card on the basis of his durable relationship with an EEA national if the Secretary of State has undertaken "an extensive examination of the personal circumstances of the applicant". That has never happened and can only happen after an application for a residence card is made. Merely notifying the Secretary of State that one is in a durable relationship is nowhere near enough either to constitute such extensive examination or to require such examination to be undertaken. FTT Judge Clark was with respect wrong to think that time spent in a durable relationship with Ms L could just be added to time spent as her spouse, provided that the First Tier Tribunal itself was satisfied that there had been a durable relationship before the marriage.

18. This is confirmed (if confirmation is needed) by the analogous case of CS (Brazil) v SSHD [2009] EWCA Civ 480; [2010] INLR 146 which considered regulations 8(5) and 17(4) of the 2006 regulations, along with the relevant provisions of the Citizens Directive, Directive 2004/38/EC pursuant to which the regulations were enacted. The applicant in that case was not a foreign criminal asserting a right of permanent residence but a Brazilian homosexual who had a durable relationship with an Italian man which had come to an end at the same time as CS's own three year leave to remain expired on 17th January 2007. He then applied for further leave to remain on the ground that, if he had applied for a residence card while the durable relationship existed, he would have obtained one which would have been valid for 5 years pursuant to regulation 17(6). His application was refused in July 2007. He submitted that, since he had had an available putative right before the end of his relationship, that right should have been a powerful factor for the Secretary of State to take into account when deciding in July 2007 whether to extend his leave to remain.

19. Laws LJ (with whom Hooper and Toulson LJJ agreed) held that CS's argument failed, saying (para 13):-

> "In July 2008 the appellant had no rights under the Directive nor under the Regulations. It is obvious, but important, that article 3(2)(b) [of the Directive] and reg 8(5) are both expressed in the present tense. By July 2007 the appellant clearly had no entitlement to be considered for residence as an extended family member as such, for at that time he did not possess that status. In my judgment, the Secretary of State was simply not required in July of that year to undertake the art 3(b) exercise … I do not accept that the appellant's potential or putative rights, that could have been made good during the durable relationship, give rise as a matter of law to a duty after that relationship was over upon the shoulders of the Secretary of

> State to address the historic fact of those putative rights in making her discretionary decision in July 2007…"

20. Likewise, in the present case there was, in my judgment, no duty on the Secretary of State to take into account, when considering whether Mr Macastena should be deported, the fact that he could have applied for a residence card pursuant to regulation 17(4) during his durable relationship with Ms L and would have been entitled to an extensive examination of his personal circumstances which might well have resulted in the issue of a residence card to him. Not only is the definition of extended family member in regulation 8(5) expressed in the present tense, so also is regulation 17(4).

21. Mr Manjit Gill QC for Mr Macastena submitted that this was a new argument taken by the Secretary of State who had cited CS Brazil to neither tribunal below and that he should not be permitted to make this argument now for the first time. But the argument is not truly a new argument, let alone a new ground of appeal. It was always the Secretary of State's argument that time spent in a durable relationship when no application had been made to the Secretary of State in respect of that durable relationship could not be added to time spent as a spouse so as to amount to the time required for the acquisition of a permanent right of residence. CS Brazil is no more than an authority which supports that argument and then only by analogy rather than directly. The case was moreover cited in the skeleton argument for the application for permission to appeal in the light of which permission was granted and it would not be right for us to exclude consideration of it.

22. Mr Gill's argument was that Article 3(2) of the Citizens Directive requires the host Member State, in accordance with its national legislation, to "facilitate entry and residence" for

> "a partner with whom the Union citizen has a durable relation, duly attested"

and that the Secretary of State did not facilitate such residence if he ignored the durable relationship which Mr Macastena had with Ms L.

23. Such facilitation, however, is a matter for national legislation; moreover, the host Member State is mandated by Article 3(2) itself to "undertake an extensive examination of [the applicant's] personal circumstances". Mr Gill did not contend that the UK's national legislation was incompatible or inconsistent with the Citizens Directive and, for that reason, I have referred only to the 2006 regulations.

24. Mr Gill also relied on the decision of the Court of Justice of the European Union in Rahman v SSHD [2013] QB 249 for the propositions (1) that (as per para 22) the Member States must make it possible for persons in a durable relationship to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons and (2) that (as per para 24) the Member State had to ensure that its legislation contained criteria which are consistent with the normal meaning of the word "facilitate" and which do not deprive Article 3(2) of its effectiveness. But Mr Gill could not point to criteria contained in the legislation which are inconsistent with the word "facilitate" or which deprived Article 3(2) of its effectiveness. In para 22 of its decision, the CJEU itself

envisaged that an application had to be made if Article 3(2) was to be invoked. That is confirmed as a matter of English and European law by Aladeselu v SSHD [2013] EWCA Civ 144; [2014] INLR 85 in which Richards LJ said (para 65):-

> "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. Whether to grant a residence card is a matter for decision by the Secretary of State in the exercise of a broad discretion under reg 17(4), subject to the procedural requirements in reg 17(5). All this is underlined by the observations of the court in Rahman as to the nature of the host Member State's obligations under Art 3(2) of the Directive (see para [29] above). In the present case, as the Upper Tribunal noted, the Secretary of State has yet to consider the applicants' cases pursuant to reg 17(4) and (5)."

Can the tribunal exercise a discretion when the Secretary of State has not?

25. In the light of the above consideration it is not, in my opinion, open to a tribunal to exercise the discretion conferred on the Secretary of State by regulation 17(4). No doubt if the Secretary of State exercises his discretion on a legally unsound basis, the tribunal can determine that there has been an error of law and remit for a decision to be taken on the legally correct basis. But there first has to be an exercise by the Secretary of State of his or her discretion. Nor can this requirement be avoided by the device of assuming that the Secretary of State has exercised a discretion and then deciding that it must have been exercised on a false basis. UTJ Coker thought that this course was open to her so that she could then decide the case according to her perception of its merits. But she was, with respect, wrong to do so.

26. I would therefore uphold the first three grounds of the Secretary of State's appeal. Even if I am wrong about that, I would also hold that neither tribunal in fact undertook the extensive examination of Mr Macastena's personal circumstances as required by regulation 17(5) and I would, if it were necessary, also uphold the fourth ground of appeal. But in the light of my earlier conclusions, it is unnecessary to say more.

Conclusion

27. I would therefore allow this appeal. It is common ground that the Upper Tribunal has not considered Mr Macastena's Article 8 rights outside the Immigration Rules or his argument that, since he missed 5 years' continuous residence by only 5 days, an application of the de minimis non curat lex principle should ensure that he qualified for the more stringent requirement of "serious grounds of public policy" before he can be deported. I would therefore remit the case to the Upper Tribunal to enable it now to consider those matters, but those matters only.

Lady Justice King:

28. I agree.

Lord Justice Coulson:

29. I also agree.