Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01648/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 19th January 2016	**On 20th January 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SELIM MACASTENA

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr M Gill QC and Mr N Ahluwalia, counsel, instructed by Bankfield Heath solicitors

DETERMINATION AND REASONS

1. First Tier Tribunal (FtT) judge S J Clarke allowed Mr Macastena's appeal under regulation 26 Immigration (European Economic Area) Regulations 2006 ("EEA Regulations") against a deportation order made pursuant to regulation 19(3)(b)of the EEA Regulations. Judge Clarke found that Mr Macastena had acquired permanent residency and was thus entitled to the higher level of protection afforded by regulation 21(3) of the EEA Regulations namely whether there are serious grounds of public policy or public security which necessitate his deportation. Judge Clarke then proceeded to consider the facts of the offence and

whether there was a genuine and present threat to members of the public from Mr Macastena.

2. Mr Macastena was convicted on 30th August 2013 of wounding/inflicting grievous bodily harm, s20 Offences against the Person Act 1861 on a plea of not guilty. He was sentenced to 2 years imprisonment. He did not appeal against conviction or sentence. He had no prior convictions and had no convictions since that conviction.

3. The SSHD was granted permission to appeal on the basis that it was arguable that Judge Clarke had failed to give adequate reasons for finding that Mr Macastena had acquired a permanent right of residence; as to the nature of his claimed relationships and the impact of his period of imprisonment on the period of lawful residence. The SSHD also relied upon, and was granted permission upon, a second ground namely that the judge had erred in the assessment of public policy which itself was infected by the finding of the judge that he was entitled to the higher level of protection.

4. Mr Macastena, a Kosovan national date of birth 22nd June 1982 arrived unlawfully in the UK in 2005. He did not seek to regularise his stay and subsequently left the UK on 4th August 2008.

5. On 30th July 2008 he signed a disclaimer in the case of Voluntary Departure having been notified that he was liable to be removed from the UK under Immigration Powers. By letter dated 29th July 2008, through his then solicitors, he notified UK Immigration Service that he wished to return to Kosovo on 4th August 2008 "and make an application for entry Clearance to the UK to join his partner, Emilia Aniela Leszczynska, a Polish National exercising treaty Rights". He duly left the UK. On 6th August 2008 he married Ms Leszczynska. He applied for entry clearance; in the application for entry clearance he stated, *inter alia,* that he had met Ms Leszczynska on 10th July 2007, that their relationship commenced three days later; that their marriage was due to take place on 6th August 2008 and that they had been living together since 14th September 2007. In a covering letter dated 11th August 2008 from his then solicitors, Mr Macastena said, he would be making an application "for an entry Clearance (otherwise known as EEA Family Permit) as a Family Member of an EEA national who is exercising Treaty Right". That covering letter also refers to the information set out in the application form as regards when they met and when they started living together and when they were intending to marry. The covering letter from the solicitors' states that Mr Macastena and Ms Leszczynska meet the requirements of paragraph 281 and therefore he "MUST be granted an EEA Family permit".

6. Mr Macastena was issued with an EEA Family Permit as a family member of an EEA national valid for 6 months and on 5th September 2008 he entered the UK. On 20th or 24th February 2009 he applied for a Residence Card. That application was acknowledged by the UKBA by letter dated 21st April 2009. On 23rd September 2009 he was issued with a Residence Card valid until 23rd September 2014. On 1st August 2012 he applied for a new Residence Card on the grounds that he was divorced from his EEA spouse. He was issued with a new Residence Card on 3rd May 2013 as a person who had retained a right of residence under the EEA Regulations valid until 3rd May 2018.

7. On 24th October 2013 Mr Macastena was notified of his liability to deportation. He was sent an EEA questionnaire which was replied to in the form of a letter from his then solicitors (different to those which he had instructed earlier but not his current solicitors) dated 11th November 2013. In that he stated, *inter alia*,

> "…he came to the UK in September 2008 and has been exercising EU Treaty rights in the United Kingdom since then….
> …it should be noted that Mr Macastena came to the United Kingdom in 2008 as a family member of a EEA citizen. He has remained in the United Kingdom for the last five years. Mr Macastena' offence was serious but he himself he was not involved in physical injury to others. Mr Macastena has been in the United Kingdom for over five years and enjoys a "permanent right of residence" in the United Kingdom…"

8. In a witness statement dated 13th July 2014 and submitted to the UKBA by his current solicitors, Mr Macastena stated

> "2 …I met my wife 2007 shortly after and started a relationship. My wife is a Polish national and was living and working in the UK. I sought legal advice on our position and we were advised that I was entitled to remain in the UK as her unmarried partner as long as she was exercising Treaty Rights. We decided that we wanted to marry however and so we returned together to Kosovo together and married on August 2008.
> 3.. I returned to the UK on 5/9/2008 on an EEA family permit…..
> 4. In around 2011, my wife and I separated. We were not getting on particularly well anymore and we decided to make our separation permanent. We divorced in 2012. At the time of our separation I met my current girlfriend…
> ….
> 6….Since I separated from my wife, I obtained permission to remain in the UK under the EEA Regulations as I had been married for over three years and resided with my wife in the UK throughout our relationship. Due to the length of time I have spent in the UK under the EEA regulations, I have acquired a permanent right of residence here.
> …."

9. In the reasons for deportation letter dated 11th August 2014 the UKBA acknowledges receipt of the letter and enclosures from the solicitors dated 11 November 2013, 16th July 2014 and 17th July 2014; considers Regulation 15 of the EEA Regulations; states that residence in the context of the EEA Regulations means "lawful residence within the community. It is not considered that time spent in prison constitutes residence for the purpose of the EEA Regulations". In the reasons for deportation letter the UKBA states

> "17. Although you claim to have first arrived in the UK in 2005, you have provided no evidence to substantiate your claims. Furthermore, as you claim to have entered the UK as a family member of a European Citizen on 5th September 2008, it is only your period of residence from that date that can be assessed for the purpose of the 2006 EEA Regulations. You stated that you have acquired a permanent right to reside in the UK due to the length of time you spent in the UK under the EEA Regulations. A point your previous representatives reiterated in their letter of 11th November 2013. It is noted that you have been incarcerated since 30th August 2013 when you were sentenced for your current offence. Time spent in custody is not considered as lawful residence within the community for the purpose of the EEA Regulations. Your residence here initially as the family member of an EEA national and subsequently as an individual who had retained a right of residence under the 2006 EEA regulations falls short of the pre-requisite 5 years. Therefore it is not accepted that you have resided in the UK for a continuous period of 5 years in accordance with the EEA Regulations.
> 18. In light of the information available, it is considered that you have not acquired the right of permanent residence in the United Kingdom. An EEA national or a family member

> of n EEA national who has not acquired permanent residence in the UK may be deported on grounds of public policy or public security…."

10. Before the FtT Mr Macastena submitted that he was, on any reasonable view given the evidence, in a durable relationship with Ms Leszczynska prior to his departure to Kosovo and at least from the point of his departure to Kosovo with the express intention of marrying there. It was submitted that the UKBA decision the subject of the appeal before the FtT was flawed for its failure to give consideration to whether Mr Macastena was in fact in a durable relationship with Ms Leszczynska prior to his marriage. It was acknowledged by his representatives that in such circumstances the SSHD would be required to exercise her discretion under regulation 17(4) of the EEA Regulations but the fact that such discretion was not, in the circumstances of this case, exercised does not preclude the FtT from doing so: *YB (EEA reg 17(4) – proper approach) Ivory Coast* [2008] UKAIT 00062.

11. FtT Judge Clarke concluded:

> "9. It was submitted by Mr Gill QC that the Appellant has acquired a permanent right of residence and I accept the Appellant has provided evidence to substantiate this claim. I accept the Appellant has shown that he was in a durable relationship with his Polish Spouse prior to his marriage to her. In the supplementary Appellant's Bundle 2 at page 1 there is a letter from his former representatives dated 29 July 2008 to UK Immigration Service London Stansted Airport which states that the Appellant entered the UK illegally on 3 July 2005 and remained in the UK illegally. He wishes to return voluntarily back to Kosovo on 4 August 2008 and make an application for entry clearance to the UK to join his then partner Emilia Aniela Leszczynska a Polish National exercising treaty rights in the UK.
> 10. On page 3 of the same bundle is a letter from the same former representatives dated 11 August 2008 to the British Embassy in Skopje regarding his application for an EEA residence card. It records how the EEA national entered the UK in May 2006, the parties met on 10 July 2007 and commenced a relationship shortly after that, and 14 September 2007 the couple commenced living together. The couple were engaged on 25 December 2007. They were married on 6 August 2008.
> 11. The writer of the letters state that their relationship is evidenced by way of photographic evidence together in the UK prior to their wedding, a tenancy agreement in joint names, a council tax bill in joint names and utility bills in joint names, and the marriage certificate. The application form dated 30 July 2008 was provided which confirms these dates.
> 12. I was provided with registration certificate for the EEA national, the tenancy agreement, various utility bills, the tenancy agreement showing both their names and the bank statements of the EEA national all showing the address of 73 Beechwood Rise. The bank statements also show payments into her account from PMP recruitment and I accept that she was exercising treaty rights as claimed.
> 13. Therefore the Appellant has shown that he acquired permanent residence…."

12. The SSHD's grounds assert that the FtT judge failed to make reasoned findings on when Mr Macastena last entered the UK and that having entered the UK illegally previously and been convicted of a serious offence such lack of reasoned finding amounts to inadequate reasoning. Mr Bramble did not actively pursue this line of argument. It is plain from the reasons for the deportation letter that Mr Macastena's last date of entry is not in dispute; nor can it be legitimately disputed that he was in the UK at the end of July 2008 when he was in direct contact with UKBA. Nor was any point taken by the SSHD with regard to the claimed prior relationship between Mr Macastena and Ms Leszczynska – had there been any

challenge to their account it is inconceivable that he would have been issued with a family permit so soon after his marriage.

13. Mr Gill accepted that counting from the last date of entry (5th September 2008) the applicant did not have five years continuous residence (the *de minimis* submission made to the FtT was not made to me) prior to his incarceration. In so far as the SSHD asserts that the FtT judge did not have regard to the incarceration in calculating the period of lawful residence, this again was not actively pursued by Mr Bramble – quite properly because nothing turned on that and Mr Macastena had not been arguing that it did.

14. The significant ground relied upon by the SSHD is that set out in paragraph 8 of the grounds which is that the judge does not explain or make a clear finding on what basis he could have acquired 5 years lawful residence; that it was not clear whether Mr Macastena was in a durable relationship and that the decision was inadequately reasoned. This paragraph of the grounds is rather confused when read as a challenge to the findings of the judge in paragraphs 9 to 12 of his determination as set out above. The judge plainly looked at the evidence before him – the veracity and legitimacy of which was not challenged by the SSHD and reached the clear conclusion that the couple had been in a durable relationship prior to their marriage. Although the judge does not give an actual date it is inconceivable that he could not have considered them to be in a durable relationship since the date they started living together – a finding that was open to him on the evidence before him: a matter (and evidence of which) had been before the SSHD since 2008 when Mr Macastena applied for an EEA family permit and again in 2012 when he applied for retained rights of residence and again in response to a letter from the SSHD requesting reasons why he should not be deported. Even if that date is not accepted or correct it is inconceivable that the couple could not have been in a durable relationship on 4th August 2008, given they married two days later and he was issued with a residence permit shortly thereafter.

15. It is *Acte Clair* that a residence permit/card is not required to enable a person to remain in the UK on the basis of EEA rights. The issue of such a permit/card is declaratory of such rights. Although Mr Macastena entered the UK unlawfully and remained unlawfully, when he entered into a durable relationship with Ms Leszczynska he ceased to be unlawfully in the UK.

16. There does remain the issue of whether, in the purported absence of the exercise of discretion by the SSHD Mr Macastena could be considered to be in a durable relationship such that he was no longer unlawfully in the UK and was thus accruing lawful residence for the purposes of the EEA Regulations. It is plain that the claim by Mr Macastena that he had been in a durable relationship with Ms Leszczynska prior to leaving the UK on 4th August 2008 was before the SSHD both at the time the application for a residence permit was made following the couple's marriage and subsequently. In her reasons for deportation letter dated 11th August 2014 the SSHD implicitly refers to his unlawful residence in the UK, considers what is implicitly accepted as his lawful residence in the UK (paragraph 17) but fails to provide reasons why his previous unlawful entry to the UK should result in the implicit refusal of recognition of his entitlement to be in the UK as a result of his durable relationship. Although there has been no express

consideration by the SSHD of her exercise of discretion under regulation 17(4) it is plain that she could not have reached her decision as to whether Mr Macastena had acquired permanent residence upon his incarceration without having considered the evidence before her as to his acquisition of residence permits/cards. That she did not exercise her discretion in his favour is implicit in the decision to consider he had lawful residence in accordance with the EEA Regulations only from 5th September 2008. As is made clear in [38] of *YB* the Tribunal is entitled and required to consider for itself the lawfulness of the exercise of discretion.

17. Judge Clarke plainly had evidence before him which supported and justified the account given by Mr Macastena that he was in a durable relationship with Ms Leszczynska prior to their marriage. Absence from the UK for a month does not break that required continuity – see regulation 3 of the EEA Regulations. Although the decision of Judge Clarke could perhaps have referred more specifically to the EEA Regulations and to *YB* when reaching his decision, and to the reasons for deportation letter of the SSHD, it is plain from a proper reading of the decision that he properly considered the evidence before him and reached conclusions that were reasonable and sustainably and lawfully open to him.

18. There is no error of law in the finding by the FtT judge that Mr Macastena was in a durable relationship prior to his entry on 4th September 2008 and it is inconceivable that that relationship could not have been durable prior to their marriage on 6th August 2008. Accordingly Mr Macastena has acquired a permanent right of residence and is entitled to the higher level of protection as found by Judge Clarke.

19. In so far as the second ground upon which the SSHD was granted permission the assertion that the decision was infected by the finding as to permanent residence falls away. The remaining ground relies upon an asserted failure on the part of the FtT judge to factor in and take account of the fact that Mr Macastena was tried as a co-defendant; that he appears to have brothers in the UK and there was no assessment of his contact with those individuals, that although he may have a low risk of re-offending there is an elevated risk of him causing serious harm if he does so offend; that current good behaviour had been achieved whilst on licence; he had been unlawfully in the UK between 2005 and 2008 and thus this should have been considered and that his stable family and employment circumstances were the same factors in place at the time of the instigation of the offence.

20. Although permission was granted on this ground, it is in fact little more than a disagreement with the findings of the judge. The ground fails to consider the appropriate test under the EEA Regulations, a test which the FtT judge considered and applied to the evidence before him taking fully into account *inter alia,* the seriousness of the offence, the judge's sentencing remarks, the social worker and probation officer reports, the OASys report, the sentencing plan, compliance and letters from prison officers. The judge properly directed himself to the relevant test of whether Mr Macastena was a genuine and present threat to the public. Although there is no specific consideration of Mr Macastena's contact with his brother or other individuals or that his current good behaviour has been whilst he is on licence or that he was in a stable family and employment environment at the date of the commission of the offence, the judge considered

appropriately whether there was a *genuine and present threat.* There is no requirement to set out each and every piece of evidence or submission to which he was referred. The judge has illustrated in his decision that he has fully considered the whole of the evidence and the account in reaching his decision. The judge's findings and conclusion were open to him on the evidence before him. There is no error of law.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision of the FtT; the decision stands namely the appeal against the decision to deport him under the EEA Regulations is allowed.

Date 20th January 2016

Upper Tribunal Judge Coker