Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34982/2015

THE IMMIGRATION ACTS

Heard at Bradford **Decision & Reasons Promulgated**
On 12 April 2017 **On 26 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

TAWKAL ZADRAN
(ANONYMITY ORDER NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Salam, Solicitor, Salam & Co Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

1. The First-tier Tribunal did not make an anonymity order. I have not been asked to make an order and see no reason to warrant an order being made.

Background

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Graham (hereafter "the Judge") allowing his appeal pursuant to the Immigration (European Area) Regulations 2006 ("the 2006 EEA Regulations") against a decision of the Secretary of State

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refusing his application for a Residence Card pursuant to Regulation 10 of the 2006 Regulations.

3. The Appellant is a citizen of Afghanistan. He is married to Anna Nikoniuk who is an EEA national. The couple met in 2010 and began a relationship. They married according to Islamic law in March 2011. The couples' son was born on 18 October 2011. On 9 October 2012, the Appellant was issued a Residence Card as an extended family member until October 2017. The couple separated in 2014 and an Islamic divorce took place on 10 January 2015. On 26 November 2015, the Appellant's Residence Card was revoked as he was no longer in a durable relationship with Ms Nikoniuk. On 12 January 2015, the Appellant applied for a Residence Card on the basis that he had retained a right of residence pursuant to Regulation 10 of the 2006 Regulations. The Secretary of State refused that application on 27 November 2015. It is that decision which was the subject of appeal before the First-tier Tribunal. By the time the appeal came before the Judge on 9 September 2016, the Appellant's circumstances had changed. He had reconciled with Ms Nikoniuk and married in a civil ceremony conducted on 17 May 2016.

4. Before the Judge, the Appellant argued that he had retained a right of residence pursuant to Regulation 10. The basis upon which the Appellant put his case is not fully set out by the Judge in her decision, but the Grounds of Appeal to the First-tier Tribunal can be distilled into three essential heads and summarised as follows:

   (i) An extended family member is to be treated as a family member pursuant to Regulation 7(3);

   (ii) The Appellant was entitled to a retained right of residence under Regulation 10 (5)(a) on the breakdown of his relationship;

   (iii) The Appellant retained a right of residence on divorce as he was a parent with actual custody of a child or a parent who had access rights to a child 10(4) & 10(5)(d)(iii).

5. The Judge considered these arguments. At [17] the Judge stated, *"Since the revocation of the Appellant's residence card in November 2015, the Appellant is no longer entitled to be treated as a family member of an EEA national. He reverts to an extended family member of an EEA national."*

6. While this reasoning is plainly wrong (he did not revert to being an extended family member) the Judge found the Appellant could not meet Regulation 10(5) because (i) his Islamic marriage and divorce was not recognised under UK law, and (ii) the 2006 Regulations made no provision for an extended family member to retain a right of residence. Accordingly, the Judge was satisfied that the Appellant's Residence Card was properly revoked as he was no longer in a relationship with Ms

Nikoniuk at the time of revocation, and thus could not continue to satisfy the requirements of Regulation 8(5).

7. Nevertheless, the Judge accepted the evidence of the relationship and marriage and thus found the Appellant was entitled to a Residence Card as the family member of a qualified person under Regulation 7. The Judge accordingly allowed the appeal.

8. The Appellant sought permission to appeal to the Upper Tribunal on the grounds that the Judge had erred for the following reasons:

   (i) In finding that the Appellant had not retained a right of residence when his relationship terminated as he had secured access rights to his child;

   (ii) In concluding that the marriage and its termination was not recognised;

   (iii) The Respondent’s guidance recognised that the relationship of an extended family member does constitute “termination” once the relationship ends;

   (iv) In drawing a distinction between the termination of a marriage and the termination of a relationship of a durable partner;

   (v) In stating that the Appellant’s status reverted to that of an extended family member on termination of the relationship;

   (vi) In finding that unmarried partners cannot be classified as a ‘former spouse’ on termination of the relationship, thus excluding the appellant from retaining a right of residence on the basis of having access rights to a child.

9. First-tier Tribunal Judge Shimmin granted permission on 11 January 2017 on the basis that the grounds disclosed material errors of law.

Discussion

10. The circumstances surrounding this appeal are somewhat unusual. At the hearing, I raised the following matters with the representatives. First, it did not appear to me that the appellant was seeking to reverse the decision of the Judge allowing the appeal and I indicated to Mr Salam that the appeal, putting aside the merits, appeared to be an academic exercise given that the appellant had been issued with a Residence Card. I was told that the significance of the appeal was that if the Appellant had retained a right of residence that he would be entitled to permanent residence. Second, I reminded the representatives of the decision in **AN (Only loser can appeal) Afghanistan [2005] UKIAT 00097**. Mr Salam did not appear to be familiar with this decision and while Mrs Pettersen indicated that she had given some thought to its application prior to the hearing, she indicated that she was not raising

this as an issue and was content to proceed. Given the Respondent's position before me and the change to the statutory scheme underpinning appeals since **AN** was decided and, given my ultimate conclusions in this case, I have not asked the parties for their views on that decision.

11. At the hearing both representatives made brief submissions; Mrs Pettersen amplified the Respondent's Rule 24 Response and Mr Salam essentially repeated the grounds the particulars of which I have set out above. Neither party relied on any authorities. I reserved my Decision which I now give with reasons.

12. There is no challenge to the Judge's finding that the appellant is entitled to a Residence Card as a family member under Regulation 7.

13. The appellant's challenge relates to the Judge's treatment of his claim that he was on a proper reading of the 2006 Regulations and the Directive entitled to retain a right of residence under Regulation 10 on the breakdown of his relationship.

14. The Judge concluded that a right of residence could not be retained for the reasons that she gave at [16] & [17], which I referred to above. While the route by which she reached that conclusion is flawed at [17], I am satisfied that the error is not material. Her conclusion that Regulation 10 could not be satisfied was I find ultimately correct.

15. Article 2.2. of the Citizens' Directive 2004/58/EC defines a 'family member' as:

"(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);"

16. The beneficiaries of the Directive are set out in Article 3.2. and provides:

"Without prejudice to any right to free movement and residence the persons concerned may have, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

....

(b) the partner with whom the Union citizen has a durable relationship, duly attested."

17. The distinction made by the Directive between spouses and durable partners is laid bare by these provisions. The former provides automatic rights of residence for spouses and registered partners, and the latter only requires Member States to make domestic provision to facilitate entry and residence of durable partners among other classes not relevant here.

18. The rights of family members as defined by Article 2.2 namely, spouses and registered partners, are protected on termination or annulment by Article 13 of the Directive which provides for the *"Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership".* Regulation 10, upon which reliance was placed by the appellant, transposes Article 13 of the Citizens' Directive. It is thus clear that these provisions of the Directive and the Regulations transposing them are not applicable where there has been no marriage or civil partnership.

19. The Judge was thus correct to find at [16] that the appellant could not benefit from the provisions of Regulation 10 as his Islamic marriage was not recognised under UK law.

20. The appellant seeks to rely on the respondent's guidance on extended family members and Regulation 7(3) of the 2006 Regulations. As for the former, I was not provided with a copy of the guidance, but there is no dispute that the grounds correctly set out the terms of the guidance as follows: *"If the relationship is <u>terminated</u> at any point during the five years immediately before permanent residence, then the durable partner no longer has a right of residence."* [My undermining]. Reliance is placed on the verb "termination" in support of an argument that there is no distinction between the termination of a marriage between registered spouses or partner and the termination of a relationship of a durable partner. I fail to see how this can bring the Appellant within the terms of Regulation 10. Tellingly, there is no mention in the guidance of a possibility of retaining a right of residence. The guidance notes nothing more than on the termination of the relationship the durable partner ceases to have a right of residence. The guidance does not assist the appellant's case.

21. As for the latter, Regulation 7(3) does not assist the appellant either. Regulation 7(3) provides *".... a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked",* there is no dispute that he fell as a consequence to be treated as a family member. However, it is plain, in my judgement, on any reading of Regulation 7(3) that following the breakdown of the

relationship the appellant ceased to be a durable partner under Regulation 8(5) and, in turn, could no longer be treated as a family member under Regulation 7(3).

22. Insofar as I have understood the appellant's arguments as set out above, I find that they are without merit. For the reasons given above, I do not set aside the decision of the First-tier Tribunal as the Judge did not materially err in law.

Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law. The decision of the First-tier Tribunal stands.

Signed Date: 20 June 2017
Deputy Upper Tribunal Judge Bagral