Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05874/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 June 2019	**On 26 June 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MOHAMMAD IRFAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr W Rees, Counsel, instructed by Marks & Marks Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 16th August 2018 to refuse his application for a permanent residence card under Regulation 15 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations). First-tier Tribunal Judge Aujla dismissed the appeal in a decision promulgated on 21st March 2019. The Appellant now appeals against that decision with permission granted by First-tier Tribunal Judge O'Brien on 3rd May 2019.

2. The background to this appeal is that the Appellant claimed that he entered the UK in 2004 on a visitor's visa. On 6th December 2012 he was issued with a residence card as the unmarried partner of an EEA national, [MK]. On 5th December 2017 the Appellant applied for a permanent residence card under Regulation 15 of the 2016 Regulations. He indicated on the application form that he was unable to contact the EEA Sponsor but the basis of the application was that he had established a period of five years residence in accordance with the 2016 Regulations.

3. The Secretary of State refused that application. The reasons given for refusal were that on 27th September 2017 the Appellant arrived at Heathrow on a flight from Islamabad and was interviewed by an Immigration Officer and during the course of his interview he said that he had gone to Pakistan on 14th August 2017 to visit his wife and children. He told the Immigration Officer that he had got married in Pakistan in 1987 and that he had come to the UK in 2004 on a visit visa. The Secretary of State noted that in the application for a permanent residence card the Appellant had not provided any details of his marriage in Pakistan nor had he provided a divorce certificate. It was noted that the Home Office expected to see proof that any previous relationship had permanently broken down and that no such evidence had been provided in this case. The Secretary of State further noted that the Appellant had not provided a copy of the Sponsor's passport as the relationship had broken down and that he was not willing to provide any financial documents. The Secretary of State noted that the bank statements submitted for the Appellant and the Sponsor were in individual names, the council tax statements and tenancy agreements had another name also listed on them and there was no substantial evidence of joint financial commitments. The Secretary of State refused the application for permanent residence as the unmarried partner of an EEA national saying that there was insufficient evidence of a subsisting relationship for the required five year period.

4. At the hearing in the First-tier Tribunal the judge identified that there were two main issues in the appeal [9]. The first issue identified was whether the Appellant had completed five years' residence in the UK in accordance with the Regulations before the relationship between him and the Sponsor broke down. The judge noted that, as the Appellant was not the spouse of the Sponsor he could not rely on retained rights. The second issue was identified as being the Appellant's marriage in Pakistan. At paragraph 10 the judge noted that the case was put on the Appellant's behalf that he had resided with the Sponsor since 2010 and had therefore resided with her for two years before he made the application for a residence card in 2012. The judge appears to have accepted the submission that, as the Sponsor left the Appellant in November 2017 and the relationship finally ended in April 2018, he had therefore completed five years' residence before the relationship ended. At paragraph 22 the judge identified that the issue to be determined as whether or not he found that the Appellant was free to enter into a relationship with the Sponsor when he commenced the relationship in 2010. The judge went on to find that the Appellant's account was not credible, that he did not find it plausible that the

Appellant would divorce his wife of seventeen years with whom he had four children, in the circumstances described in his oral evidence, shortly before he came to the UK in 2004 [27]. The judge noted that the Appellant had not provided any evidence of his divorce, finding that, if he had genuinely divorced his wife as claimed, there would be some evidence of that. The judge rejected the Appellant's account that he had legally divorced his wife before he entered into a relationship with the Sponsor or at any time during his relationship with her. The judge went on to find at paragraph 29:

> "The Appellant was therefore not free to enter into a relationship with the sponsor as her unmarried partner and therefore his relationship with her, regardless of its genuineness, did not qualify him to be granted a residence card as a result."

The judge found that the Appellant was not a credible witness, that he was married to his wife when he entered into the relationship with the Sponsor and continued to be married to her during his relationship with the Sponsor and that there was no evidence of a legal divorce. In those circumstances the judge found that the Appellant had not established that he had continually resided in the UK in accordance with the Regulations for a period of at least five years as required by Regulation 15(1)(b) and dismissed the appeal.

The grounds of appeal

5. It is contended in the grounds that the judge made an error of law at paragraph 22 of the decision where he said:

> "There was no dispute between the representatives that the Appellant would not be free to enter into a relationship with another woman leading to a grant of residence card if he was already married and that marriage had not been legally terminated before he entered into the relationship."

Reliance was placed on Regulation 8(5) of the 2016 Regulations contending that the test under the Rules is whether the relationship is durable and this does not depend on the Appellant proving that he is legally divorced from any previous relationship or whether any other relationship has broken down. It is further contended that the judge erred in his approach to the determination of Judge Callender Smith promulgated on 11th March 2015 in relation to the Appellant's son. Judge Callender Smith found that the Appellant's son had been living with the Appellant and the EEA Sponsor since shortly after he arrived in the UK in June 2012 and that he had been financially and emotionally dependent upon the Appellant and his EEA partner while in Pakistan and therefore allowed the Appellant's son's appeal under Regulation 7 of the 2016 Regulations. It is contended in the grounds of appeal that the judge failed to give appropriate weight to this decision. It is further contended that the judge failed to have regard to the report from the Immigration Officer at page 71 of the Respondent's bundle which shows that the Appellant was in fact released from detention at port following confirmation from his EEA

partner that they were partners. The grounds further contend that the judge's reasoning at paragraph 22 is irrational. At paragraph 22 the judge found that, if the Appellant's relationship with the Sponsor was sanctioned by the UK authorities by granting him a residence card whilst he was still married to his wife in Pakistan regardless of his separation from her, "the UK authorities would in effect be approving a polygamous situation which is not possible or allowed under UK law". It is contended that this is flawed in that the Appellant's marriage in Pakistan is not a valid marriage in the UK and, in any event, he is not married to his UK Sponsor and the issue of polygamy cannot therefore arise.

6. It is contended in the grounds of appeal that the judge took a flawed approach in that the starting point should have been Regulation 7(3) and that the judge was required to assess how long the couple remained in a durable relationship and made no finding on this point. The judge was required, it is contended, to assess whether the Appellant had established the Sponsor's exercise of Treaty rights for five consecutive years and no findings on this issue were made. It is contended that the judge's focus on whether the Appellant was divorced from his first wife was a focus on an irrelevant matter.

7. Permission to appeal was granted by First-tier Tribunal Judge O'Brien who considered it arguable that the judge erred in focusing on whether the couple are divorced rather than on whether the marriage subsists and considered all grounds were arguable.

8. The Secretary of State submitted a Rule 24 response dated 10th June 2019 arguing that the grounds of appeal have no merit. It is submitted that the judge has addressed the issues raised in the refusal notice having canvassed the representatives as to the issues and as to what needed to be decided. It is contended that the issue to be decided was not whether the Appellant had committed bigamy and was in a polygamous relationship, as suggested in the grant of permission, instead it was the issue raised in the refusal notice that no evidence had been provided of the previous marriage or divorce certificate. It is contended that the judge considered this core issue and found that the Appellant had not been truthful or provided credible evidence that he was divorced or that the relationship had broken down. It is submitted therefore that the First-tier Tribunal Judge addressed the issues before him and reached conclusions open to him on the evidence.

The hearing

9. At the hearing Mr Rees submitted on behalf of the Appellant that the judge failed to fully consider the issue in the appeal which is whether the Appellant meets the requirements of Regulation 8(5) of the 2016 Regulations. He submitted that the Appellant has established that he was in a durable relationship with an EEA national from 2010 until April 2018. In his submission there was a partial split in November 2017 but the relationship broke down in April 2018. In his submission the First-tier

Tribunal Judge erred in alighting on the issue of whether the Appellant had a divorce from his Pakistani wife but failed to address the more fundamental issue which is whether a religious marriage in Pakistan would have been recognised as a marriage in the UK and should have focused on the durability of the relationship with the EEA national under Regulation 8(5). In his submission the 2012 residence card was issued on the basis of the relationship and this issue was not raised then. Mr Rees accepted that the five year qualifying period began when the residence permit was granted. In his submission the EEA Sponsor was exercising Treaty rights until April 2018. In his submission the judge made a material error in focusing on the issue of the Appellant's marriage in Pakistan and in his assertion in relation to the polygamous situation in light of the fact that he was never married to the EEA national and his previous marriage would not be recognised under UK law. He further submitted that the judge erred in failing to make findings that the Sponsor's exercise of treaty rights had been for a period of five years up until 6th December 2017. Mr Rees accepted that the Appellant could not claim for any period of residence prior to the issue of the residence card on 6th December 2012 and submitted that the five year qualification period ended on 6th December 2017. He submitted that the judge failed to take account of the decision of First-tier Tribunal Judge Callender Smith who, he submitted, could not have allowed the son's appeal if he was not satisfied that the Appellant and the EEA national were not in a durable relationship at that time.

10. In response Mr Melvin submitted that the issue of the durability of the Appellant's relationship was not argued in the son's appeal therefore there was no misapplication of the principles in **Devaseelan [2002] UKIAT 00702** which, in any event, was not argued before Judge Callender Smith. In his submission there was no evidence that the Appellant's application in 2012 referred to his wife and children in Pakistan. He submitted that the point taken by the judge about polygamy was not that there were two marriages but that there were two relationships. In his submission the conclusions made by the judge were open to him on the basis of the evidence and the finding as to Appellant's lack of credibility. He further submitted that the Appellant's relationship with the EEA national appears to have ended in November 2017 which is short of the required five year qualification period. He submitted that the focus of the reasons for refusal letter was the lack of evidence as to the breakup of the relationship in Pakistan. There was nothing from the ex-wife in Pakistan by way of evidence on this issue. He further pointed out that there was nothing in the Appellant's application form for permanent residence about his previous marriage.

11. Mr Rees responded by highlighting paragraph 11 of the Appellant's witness statement which he said indicated that the relationship was ongoing until April 2018.

12. We reserved our decision in relation to the error of law and heard submissions from both representatives in relation to remaking the decision

should we find an error of law in the decision. Mr Melvin submitted that the relationship between the Appellant and the EEA national broke down in November 2017. He submitted that there was no evidence from HMRC or any other source to show that the Appellant's partner was exercising Treaty rights under the Regulations between 2012 and 2017. He submitted that the Appellant had not provided evidence of the marriage and claimed divorce in Pakistan.

13. Mr Rees submitted that there was extensive evidence in the Appellant's bundle. There were bank statements in the Sponsor's name and sufficient evidence of her exercise of Treaty rights. In his submission the relationship did not finally break down until April 2018 as the couple tried to reconcile between March and April 2018. He submitted that the EEA Sponsor has been working in the UK since 1999 and throughout all of the relevant period. In his submission there is sufficient evidence in the Appellant's bundle that the EEA Sponsor was exercising Treaty rights and that the relationship did not end until April 2018. In his submission this means that the requirements of the 2016 Regulations were met between 6th December 2012 and 6th December 2017.

Discussion and Conclusions

14. The relevant provisions of the 2016 Regulations are as follows:

'**Regulation 2(1)**

…

"durable partner" does not include—

(a) a party to a durable partnership of convenience; or

(b) the durable partner ("D") of a person ("P") where a spouse, civil partner or durable partner of D or P is already present in the United Kingdom and where that marriage, civil partnership or durable partnership is subsisting;

"Family member"

7. - …

(3) A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—

(a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and

(b) the EEA family permit, registration certificate or residence card remains in force.

"Extended family member"

8. - (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1) (a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).

…

(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, and is able to prove this to the decision maker.

Right of permanent residence

15. - (1) The following persons acquire the right to reside in the United Kingdom permanently—

…

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

…'

15. It is clear from the reasons for refusal letter that the focus of the Secretary of State's decision to refuse was the conclusion that there is insufficient evidence of a subsisting relationship for the required five year period under Regulation 15(1)(b). In that context the Secretary of State raised the issue of the Appellant's previous relationship in Pakistan and the lack of evidence that the Appellant and the Sponsor had a subsisting relationship.

16. The starting point is Regulation 8(5). It is not in dispute that the Appellant was granted a residence card under Regulation 8(5) on 6th December 2012 as the unmarried partner of an EEA national on the basis that it was accepted that the Appellant was the partner of and in a durable relationship with an EEA national. Accordingly, in accordance with regulation 7(3), from that date the Appellant was treated as a family member.

17. As accepted by Mr Rees at the hearing, the case of **Kunwar (EFM – calculating periods of residence) [2019] UKUT 00063 (IAC)**, clarifies that an extended family member does not have a right of residence until a residence card is issued by the Secretary of State at which stage s/he is treated as a family member and may only at that point begin to acquire a period of lawful residence which can count towards establishing a permanent right of residence [39]. Accordingly the judge's acceptance of the submission recorded at paragraph 10 that the five year residence period began in 2010 was wrong in law.

18. The grounds deal with this at paragraph 5 which contends that, despite noting that there was no dispute on this issue between the parties at the hearing at paragraph 22, the judge erred in failing to apply Regulation 8(5). Whilst the grounds do not specifically refer to paragraph 10 and the submission made there, in our view it is clear that the judge took an erroneous approach to the submissions by the parties and the attempt to narrow the issues as contended in the grounds of appeal. This led the

judge to concentrate on the issue of the Appellant's marriage and divorce in Pakistan and the apparent issue as to whether he was free to enter into a relationship in the UK. Instead, the judge should have considered whether the Appellant established that he was a family member of an EEA national who had resided in the UK with the EEA national in accordance with the Regulations for a continuous period of five years (regulation 15(1)(b)).

19. The starting date for the assessment of this five year period, as confirmed in **Kunwar**, is the date on which the Appellant was issued with a residence card. It is not in dispute that the Appellant's residence card was granted on 6 December 2012 and was valid until 6 December 2017. Accordingly the period of residence for the purposes of Regulation 15 began to run on 6 December 2012. This was accepted by Mr Rees at the hearing. However Mr Rees submitted that the relationship ended in April 2018 and that the Appellant had therefore established five years residence in accordance with the Regulations. If this was established then any error at paragraph 10 would not be material.

20. It is contended in the grounds of appeal that the judge erred in his approach to the decision of Immigration Judge Callender Smith promulgated on 11th March 2015 in relation to the Appellant's son. That application was based on the claim that the Appellant's son had been supported financially by his father in Pakistan and that after arriving in the UK in June 2012 he resided with the Appellant and his partner. At that hearing Judge Callender Smith heard oral evidence from the Appellant's son, the EEA Sponsor and the Appellant. We note that at paragraph 27 Judge Callender Smith accepted that the EEA national demonstrated that she was working on a self-employed basis and that the Appellant was working. It was also accepted that the Appellant's son was a named tenant on the tenancy agreement and the judge found that the oral and documentary evidence presented in the appeal was both cogent and credible and found that the Appellant's son had been living as a dependant with the EEA Sponsor and the Appellant in this case since shortly after he arrived in the UK in June 2012 and allowed the appeal under Regulation 7. We take into account this decision in accordance with **Devaseelan**, we accept that it is implicit that Judge Callender Smith accepted that the EEA Sponsor and the Appellant were in a relationship at that time. However the judge made no specific findings on that issue. In any event that decision was made in March 2015 and may stand as an assessment of the situation at that time. However in this appeal it is necessary to take into account all of the evidence relating to the entire five year period. That decision is not determinative of the issues to be decided in this appeal accordingly Judge Aujla made no material error in his approach to the decision.

21. We have considered the record of the Appellant's interview at Heathrow Airport. Whilst it is stated in the reasons for refusal letter that this took place on the Appellant's return from Islamabad to Heathrow on 27th September 2017 we note the document at page 71 of the Respondent's

bundle is dated 1st July 2018. In any event it states that the Appellant left the UK on 14th August 2017, went to visit his wife and children, he said that he got married in Pakistan in 1987 and he came to the UK on a visit visa but that he was living with his Polish partner since 2007 at 196 [~]. The report states that the passenger's partner was contacted and confirmed that she was a Polish national and that the passenger was her partner and that she met him seven years ago at 196 [~]. There is some conflict between this document and evidence elsewhere. There is no evidence that, prior to this, the Appellant informed the Home Office that he was married in Pakistan. It is not mentioned in his application for a permanent residence card. Further, he told the Immigration Officer that he had been living with his partner since 2007. However it does appear that the Appellant's account was accepted at that stage and he was granted leave to enter. The First-tier Tribunal Judge considered that this issue was significant in the determination of the issues in this appeal. This was clearly an erroneous approach. As set out above, the issue is whether, to meet the requirements of regulation 15, the Appellant had demonstrated that he had resided with the EEA Sponsor in accordance with the 2016 for a continuous period of five years from the date on which he was granted a residence card under regulation 8.

22. We have considered the evidence before the First-tier Tribunal as to the Appellant's residence with the EEA Sponsor during the relevant period.

23. We note the four tenancy agreements provided in the Appellant's bundle. The first is for a period of twelve months from December 2012. The second is for a period of twelve months at a different address from 10th December 2013. The third is in respect of the same address for a period of twelve months from December 2014. The fourth is in respect of the same address for a period of twelve months from 10th December 2015. The Respondent's bundle contains a further tenancy agreement for a period of twelve months from 10th December 2016 in the name of the Appellant and his son. The first agreement was in relation to the Appellant and the EEA Sponsor, the other agreements were in the name of the Appellant, the EEA Sponsor and his son but the agreement dated 10th December 2016 named the tenants as the Appellant and his son. Accordingly the tenancy agreements do not provide evidence that the Appellant and the EEA Sponsor resided together beyond 2015/2016.

24. We also take into account further documents in the Appellant's bundle including council tax bills in the name of the Appellant and the EEA national from 2010/12 until 2017/18 in relation to first and second floors 196 [~], London. We take into account HMRC payment records in relation to the EEA national but note that the reasons for refusal letter does not dispute that the EEA national was a qualified person throughout the relevant period. However we acknowledge that the self-assessment statements produced give her address as 196 [~]. The latest HMRC document before us is a self-assessment calculation for 2015/16. We note also that the national insurance contribution records dated March and October 2013 give her address as 196 [~]. We take into account HSBC

bank statements in the name of the EEA national. These cover the period from 27th January 2014 to 26th December 2016.

25. Accordingly the only documentary evidence of the EEA national's residence at the same address of the Appellant beyond 2016 is the council tax bills issued on 11th March 2016 and 10th March 2017 in both names. We have taken account of the documents in the Respondent's bundle showing the Appellant's residence including a bank statement from March to June 2017 from NatWest, and Thames Water bills naming the Appellant and the EEA national. In our view, whilst there is some documentary evidence covering some of the time during which the Appellant has claimed to reside with the EEA national, there is insufficient documentary evidence of their residence together after 2016.

26. In his witness statement dated 18 March 2019 the Appellant said that he met his partner in 2006 and they lived together until November 2017 when she moved out of the address (paragraph 4). He said that he attempted to reconcile after she moved out but the relationship permanently broke down in the summer of 2018 when she confirmed that she no longer wanted to be in a relationship with him (paragraph 4). The Appellant says that he was stopped by an Immigration Officer when he returned from Pakistan on 27 September 2017. He said that he went to visit his daughters and that he saw his children's mother while he was there. He denied that he had referred to her as his wife. He said that after this incident his relationship with his EEA partner got into difficulty because of his visits to Pakistan and the fact that he was supporting his daughters. He said that his partner left the house in November 2017 and that he did not at that point have any contact with his partner and could not provide her ID card or other supporting documents (paragraph 10). He went on to say that he bumped into her in a chance encounter in March 2018 in his local high street and she gave him her new telephone number and told him where she had moved to, they remained in contact after this and he attempted to reconcile with her but it was clear that she did not want to continue with the relationship some time in April 2018. He said that in July 2018 the Home Office requested further documents relating to his ex-partner, she provided him with her original ID card but said that she would not give any further documents including anything in relation to her self-employment in the UK and that he has not spoken to her since then (paragraph 11).

27. The Appellant's son submitted a witness statement in which he too said that his father's partner left the family home in November 2017 two months after his father had returned from Pakistan and that prior to this they had lived together as a couple.

28. It is clear from both of these witness statements that the EEA national left the couple's home in November 2017. We reject the evidence that the relationship continued beyond that. This assertion is based on a chance encounter in March 2018 and the fact that, according to the Appellant's witness statement, they "remained in some contact after this" and that he

attempted to reconcile with her but that she made it clear that she did not want to continue in the relationship in April 2018. In our view this sporadic or infrequent contact cannot amount to a continuation of a durable relationship beyond November 2017 when the couple were no longer cohabiting and at a stage when the Appellant did not have contact with her.

29. Accordingly, in our view, having considered all of the evidence, the judge made a material error at paragraph 10 in accepting the submission that the Appellant had completed five years residence in the UK in accordance with the Regulations before the durable relationship ended. The judge made a material error in going on to focus on the issue of the Appellant's marriage in Pakistan and failing to determine all of the matters in issue under the 2016 Regulations. In these circumstances we set the decision of the First-tier Tribunal aside.

30. Having considered all of this evidence we find that there is insufficient evidence to demonstrate that the Appellant was in a durable relationship with the EEA national for a continuous period of five years from the granting of the residence card on 6th December 2012. There is inadequate documentary evidence of the couple residing together throughout the period and in particular after 2016. In any event it is the evidence of the Appellant and his son that the EEA national left their residence in November 2017 after a period of discord. We do not accept on the evidence before us that the relationship remained durable after November 2017. The Appellant has not demonstrated that he meets the requirements of regulation 15 (1) (a). We remake the decision by dismissing the appeal under the 2016 Regulations.

Notice of Decision

31. The decision of the First-tier Tribunal contains a material error of law.

32. We set it aside. We remake it by dismissing the appeal under the 2016 Regulations.

33. No anonymity direction is made.

Signed Date: 24th June 2019

A Grimes
Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed therefore there can be no fee award.

Signed Date: 24th June 2019

A Grimes
Deputy Upper Tribunal Judge Grimes