Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00742/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2018	**On 29 March 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ABDOU GAMIL MAHMOUD MEGAHED ELAMELI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Al-Rashid, Counsel, instructed by Carlton Law Chambers
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Davey (the judge), promulgated on 7 March 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 5 January 2016 refusing to issue him a permanent residence card under the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

Factual Background

2. The appellant is a national of Egypt, date of birth 7 January 1976. According to his witness statement dated 1 February 2017 he entered the UK as a visitor on 8 August 2001. He met Daiva Dzidolikaite, a Lithuanian national, in the summer of 2004. They moved in together in August 2005 and underwent an Islamic marriage ceremony on 10 September 2006. They did not undertake a legal marriage recognised in the UK. Their child was born on 25 November 2006. On 25 January 2008 the appellant applied for a residence card on the basis of his relationship with Daiva. On 14 July 2010 he was issued with a residence card under the provisions of the 2006 Regulations as an extended family member as a person in a durable relationship with an EEA national exercising Treaty rights in the UK. This was valid for 5 years, until 7 July 2015.

3. On 3 July 2015 the appellant applied for a permanent residence card. The respondent refused to issue the permanent residence card under regulation 15(1)(b) of the 2006 Regulations. The respondent was not satisfied the EEA national had resided in accordance with the 2006 Regulations during the required 5-year period. The respondent considered the application on the basis that the appellant was an extended family member under regulation 8 of the 2006 Regulations but was not satisfied that the appellant was still in a durable relationship (regulation 8(5)) as he and Daiva had not resided together full time since 2012. Having concluded that the relationship was no longer subsisting the respondent refused to issue a permanent residence card.

The decision of the First-tier Tribunal

4. On appeal the judge found that Daiva had, at all material times, been a qualified person. The judge found that in 2012 the appellant and Daiva experienced difficulty in their relationship and that he moved out and rented a room in another property. He continued their friendship and maintained an equable relationship in order to care jointly for their child. The judge found, based on the evidence before him, that the appellant and Daiva were essentially separated parents caring for their child and sharing that responsibility. The judge accepted that the appellant regularly stayed at Davia's flat for days at a time but they did not have a sexual relationship but "… effectively a friendship which is solidified by their joint interest in the daughter."

5. At [14] the judge noted that there was no definition of the term 'durable relationship' in the 2006 Regulations and that there were no time limits on what could constitute a durable relationship, but observed that a durable relationship was probably intended to be a relationship akin to marriage. At [15] the judge found that the appellant and Daiva had not ultimately resolved their differences and did not wish to be in a permanent relationship. At [16] the judge found that the appellant and Daiva were "simply different and best friends" and that they did not "… in its true sense live together or have a romantic relationship." The judge found that their relationship

was one of friendship. As to whether or not they had plans to live together, it was a possibility but no more than that and a possibility because of their child. At [18] the judge found that the relationship between the appellant and Daiva was a unity as joint carers of their daughter and, at [19] concluded that the relationship was an enduring friendship and not one of companionship, noting that they did not, "in its true sense", cohabit and that they had no wish to do so.

6. Having concluded that the appellant and Daiva had not been in a durable relationship since 2012, the judge dismissed the appeal.

The grounds of appeal and the error of law hearing

7. The 1st ground contends that the starting point in assessing whether the 5 years required for permanent residence should be calculated by reference to the date that the durable relationship commenced. As the appellant and Daiva had been in a durable relationship since around August 2005, and the durable relationship has lasted for 12 years by mid-2012, regulation 15(1)(b) was therefore satisfied. Reliance was placed on the decision of Idezuna (EEA - permanent residence) Nigeria [2011] UKUT 00474 (IAC).

8. The 2nd ground contends that the judge was not lawfully entitled to find, on the evidence before him, that the appellant and Daiva were no longer in a durable relationship. The appellant spent 3 to 4 days a week at Daiva's flat, he provided regular and extensive financial support, was a joint carer with their daughter with whom he had a very close relationship, and there was a prospect of resuming permanent cohabitation. It was submitted that there was a durable relationship despite the absence of sexual intimacy.

9. Mr Al-Rashid adopted and expanded upon both grounds in his oral submissions. He submitted that the durable relationship continued at the very least until mid-2012, over 5 years. The judge erred in concluding that the relationship ended in 2012. There was said to be a limited falling out in 2012 and that the appellant vacated the family home, but that he still spent half the week at Daiva's flat. It was submitted that the only material change post 2012 was that the appellant lived in a separate address. Every relationship fluctuated and there was no requirement that the quality of the relationship had to be maintained throughout its existence. The judge, it was submitted, unlawfully focused on the end of the period of permanent cohabitation, that this was determinative in his decision, and that it was an error of law because there was no requirement for cohabitation for a durable relationship to exist.

Discussion

10. Regulation 8(5) indicates that the partner of an EEA national with whom he is in a durable relationship is an extended family member. A person who meets the definition of extended family member may be granted an EEA residence card, after an extensive examination of

their personal circumstances (regulations 17(4) and (5)). Under regulation 7(3), a person who is an extended family member and has been issued with an EEA 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, *inter alia*, regulation 8(5) in relation to the EEA national, and the residence card has not ceased to be valid or been revoked.

11. It is readily apparent from the forgoing that an extended family member of a relevant EEA national will only be considered as a family member after the issuance of a residence card (regulation 7(3)). Unless and until a residence card is issued the extended family member cannot be treated as a family member.

12. The appellant applied for a permanent residence card. A person acquires a permanent right of evidence if, *inter alia*, they are a family member of an EEA national who is not himself an EEA national but who has resided in the UK with the EEA national in accordance with the 2006 regulations for a continuous period of 5 years. The appellant could only be treated as a family member after the issuance of his residence card. He was issued with the residence card on 14 July 2010. Contrary to the first ground, he could not therefore have acquired a permanent right of residence by mid-2012. The earliest possible date for calculating the appellant's residence as a family member is 14 July 2010. Although he may well have been an extended family member since August 2005, he cannot, for the purposes of establishing a permanent right of residence, have been treated as a family member until 14 July 2010.

13. The grounds refer to Idezuna (EEA - permanent residence) Nigeria but this case did not concern an extended family member. The applicant in Idezuna was legally married to his partner, an EEA national exercising treaty rights, and therefore had a right of residence based on his status as a family member. The appellant in the present appeal could not be treated as a family member until his residence card was issued. I consequently find that the 1st ground is not made out.

14. There is no definition of 'durable relationship' in the 2006 regulations. In Rose (Automatic deportation - Exception 3) Jamaica [2011] UKUT 276 (IAC) the Upper Tribunal commented, at [24],

> "There is little case law on the meaning of "durable relationship", although we have derived help from the case of YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062. It is clear to us that the concept is not co-terminous with "family life" within the meaning of Article 8. "Family life" may exist even if only for a short period. So the fact that the FTT accepted that the appellant had a family life relationship or family life relationships does not necessarily show that that with his partner was "durable"."

15. Being in a durable relationship does not necessarily entail cohabitation: see YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 and Rose (Automatic deportation - Exception 3)

Jamaica [2011] UKUT 276 (IAC) (at para 24), and Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 00079 (IAC) (at paragraph 19). Nor does the concept of durable relationship impose a fixed time limit (YB).

16. Ultimately the question whether a person enjoys a durable relationship with his or her partner is a question of fact, having regard to the natural meaning of the words and considered in the context of the purpose of the regulations. While the regulations, reflecting the Directive 2004/38/EC, distinguish between formalised relationships such as marriage and civil partnerships on the one hand, and non-formalised relationships on the other, there must be some equivalence between the concept of marriage and that of being a partner in a durable relationship. I note that the respondent refers to durable relationships as being 'akin to marriage' in her guidance 'Free Movement Rights: extended family members of EEA nationals.' I find that the judge was consequently entitled to approach the definition of 'durable relationship' as being one that is akin to marriage.

17. There is nothing in his decision to suggest that the judge required sexual intimacy as a pre-condition to the existence of a durable relationship, or that the judge considered that a durable relationship could only be established by cohabitation. My summary at paragraphs 4 and 5 of this decision of the judge's assessment of the relationship between Daiva and the appellant demonstrates that he gave detailed and careful consideration to the nature and quality of the relationship. Contrary to Mr Al-Rashid's submissions, the judge did not treat the appellant's decision to live at a different address in mid-2012 as the determinative factor in determining whether a durable relationship continued. While accepting that the appellant regularly stayed at Daiva's flat and that he and Daiva were 'best friends', the judge was rationally entitled to conclude that their relationship was essentially one of friendship and not companionship, designed to ensure they are both able to care for their daughter. This was a conclusion rationally open to the judge on the evidence before him and for the reasons he gave.

18. I consequently find that the 2nd ground has not been made out. The appeal is therefore dismissed.

Notice of Decision

The judge did not make a material error of law. The appeal is dismissed.

Signed

27 March 2018
Date

Upper Tribunal Judge Blum