Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/07729/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral Determination given following hearing	**On 08 March 2019**
On 21 January 2019	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LULZIM RAMIQI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms J Rothwell, Counsel instructed by Bureau for Migrant Advice

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Morgan, in which the judge allowed the appellant's appeal against a decision of the respondent refusing to grant him a permanent residence card. Although technically the respondent is the appellant in this appeal, for ease of convenience I shall refer to the parties as they were before the First-tier Tribunal, that is to Mr Ramiqi as "the appellant" and to the Secretary of State as "the respondent".

2. The appellant in this case is a national of Kosovo who first arrived in this country in November 1998. He applied for asylum but that claim was

refused in 2000. He remained in this country without leave but in 2005 he met Ms Stefanikova with whom he lived for a number of years. They started living together in early 2005 and had a son born on 30 November 2007. I am told that the son is now a British citizen which although not directly relevant to this appeal is relevant as regards the appellant's status in this country, as will be apparent below. Very soon after the birth of their child the appellant applied for a residence card as the extended family member of Ms Stefanikova who was as a Slovakian national working in the UK an EEA national exercising treaty rights in this country. That application was successful and in 2009 the applicant was granted a residence card and that residence card was transferred into his passport, and a further residence card valid from February 2010 to February 2015 was granted. Unhappily, the couple's relationship (which no-one has suggested was anything other than genuine) did not survive and the couple separated in September 2010. The couple, however. had remained in contact (and I note that Ms Stefanikova appeared with the appellant before this Tribunal today) and the appellant has remained in regular contact with his son and the son lives with him on weekends. The appellant applied for a permanent residence card as confirmation of a permanent right to reside under the EEA Regulations on the basis that he had been exercising treaty rights in the UK for a continuous period of five years. The basis of this application was that he had been living with Ms Stefanikova from 2005 to 2010 and that the time spent living with her prior to 2009 was time which ought to be treated as counting towards that five year period.

3. The application was refused by the respondent because the respondent considered that on a correct construction of the Regulations although the appellant was an extended family member that did not of itself give him a right to reside in the country pursuant to the EEA Regulations unless and until he was granted a residence card pursuant to these Regulations. That would only happen after the respondent had been given an opportunity to investigate the application and reach a decision. The appellant appealed against this decision and his appeal was determined by First-tier Tribunal Judge Morgan following a hearing at Taylor House on 10 October 2018, at which regrettably the respondent was not represented. In a decision promulgated on 17 October 2018 Judge Morgan allowed the appeal. The respondent now appeals against that decision, leave having been granted on 16 November 2018 by First-tier Tribunal Judge O'Brien.

4. The sole issue before this Tribunal is whether or not a period of time spent with a partner prior to the grant of a residence permit counts as time spent pursuant to the EEA Regulations as is necessary for the grant of permanent residence. In order to qualify for such a grant an applicant is required to have been exercising treaty rights for a continuous period of five years.

5. As already indicated above, unfortunately the respondent was not represented and so the legal arguments were not fully canvassed before the judge. Appearing on behalf of the appellant before this Tribunal, Ms Rothwell, who appeared below, indicated that the judge did not wish her to

address him on case law and so she was unable to ensure that the Tribunal was in as full a position to understand the case law as would have been desirable. She appreciated, however, that there were difficulties within her defence of this decision for reasons which will appear below.

6. The difficulty which in the judgment of this Tribunal Ms Rothwell has in defending the decision made by the First-tier Tribunal is that this issue has been considered by the Court of Appeal in *Macastena v SSHD* [2018] EWCA Civ 1558, which has decided this point. Although Ms Rothwell has attempted to distinguish this decision on the basis that the facts were a little different, in reality the basic issue is indistinguishable. In that case the issue before the Court of Appeal was set out starkly at paragraph 1 of its decision:

> "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 five 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'".

7. Although obviously that was a case involving deportation, the issue is identical to the issue in this case, and the reasoning applied by the Court of Appeal is the same as would need to be applied in this case. In its decision the Court of Appeal deal with what amounts to a "permanent right of residence" which 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 five years, and a family member of an EEA national who has resided with that EEA national for a continuous period of five years, acquire a permanent right of residence in the United Kingdom".

In the particular case the Court of Appeal was considering in *Macastena* the period of time spent as the wife of the EEA national (that is when he became technically a "family member" of that national until when that period ended) was just under five years and so in order to have the status of a permanent resident he needed to have added the period when he was an "extended family member" because he was in a durable relationship with a lady who subsequently became his wife. The basis of the Court of Appeal's decision was that the extended family members did not have a

right of residence but only an entitlement to require the Secretary of State to exercise her discretion. Upper Tribunal Judge Coker in the Upper Tribunal had upheld a decision of the First-tier Tribunal to the effect that because the parties in that case had been in a durable relationship before they had married, the Secretary of State could not in her discretion have decided that that applicant was not entitled to a permanent right of residence and therefore he had to be treated as having exercised his EEA rights during that period. The Court of Appeal allowed the Secretary of State's appeal on the basis that a partner to a durable relationship will only be issued with a residence card once the Secretary of State has undertaken "an extensive examination of the personal circumstances of the applicant". This can only happen after an application for a residence card has been made. Accordingly, until at the very earliest an application for a residence card has been made, there is no right of residence and accordingly time spent in the UK is not spent in accordance with the EEA Regulations.

8. I have summarised the decision very briefly but essentially the reasons given by the Court of Appeal for allowing the Secretary of State's appeal against the Upper Tribunal's decision in *Macastena* apply equally in this case, and I am bound by that decision. Ms Rothwell has asked me to note in this decision that a Deputy Judge of this Tribunal allowed an appeal on similar grounds to those advanced in this case but that the Secretary of State has been granted permission to appeal that decision to the Court of Appeal and that appeal is to be heard shortly. In the event that that appeal was to succeed, she would wish to be able to rely on such subsequent judgment.

9. Be that as it may, as I have already indicated, I am bound by current jurisprudence and not by what an applicant hopes a Court of Appeal might decide in the future and it follows that this decision of the First-tier Tribunal must be set aside because it is wrong in law.

10. As this appellant's appeal cannot succeed on the basis of the law as it now is, I will re-make the decision dismissing the appeal.

11. I should, however, make one other point in passing in fairness to the appellant and it is this. This application is essentially an academic one because it seems that the appellant would be bound to succeed were he to make an application for leave to remain under Article 8 both under the Rules and also outside the Rules. He should succeed under the Rules because he has been residing in this country for over twenty years now and other than the fact that for part of that time he has been here without leave he has not been convicted of, nor has he committed any offence and there does not appear to be any reason why permission (albeit that the leave would not be indefinite leave) should not be granted. Further, he has a British citizen son who lives with his mother in this country and it would seem clearly to be the position that it would not be reasonable to expect that child to leave the UK, even were his father to leave, because the family would not leave together as the appellant and his former partner are no longer together. Accordingly, pursuant to Section 117B(6)

of the Nationality, Immigration and Asylum Act 2002 as inserted by the Immigration Act 2014, it is not in the public interest to require the appellant to leave. So, although I am bound by precedent to dismiss this appeal from the appellant, there is another basis upon which he should now be entitled to leave to remain. However, so far as the current appeal is concerned, it must be dismissed.

Decision

I set aside the decision of First-tier Tribunal Judge Morgan as containing a material error of law and re-make the decision as follows:

The appellant's appeal against the respondent's decision refusing to grant him a permanent residence card is dismissed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 27 February 2019