



**Upper Tribunal
(Immigration and Asylum Chamber)**

**Appeal Number: EA/01593/2020
HU/18626/2019**

THE IMMIGRATION ACTS

Heard at Bradford (via Microsoft Teams)

**Decision & Reasons
Promulgated**

On the 13 October 2021

On the 17 November 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MD OBIDUR RAHMAN
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik QC instructed by Chancery Solicitors.

For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

DECISION AND REASONS

Discussion

- 1.** This is a Resumed hearing following the Upper Tribunal finding error of law in the decision of the First-tier Tribunal in this appeal as set out in the Decision and Reasons dated 18 August 2021.
- 2.** The appellant has two appeals, the first being against the refusal of an application for a Residence Card in recognition of his right to reside in

the United Kingdom as an Extended Family Member of an EEA national exercising treaty rights in the UK.

- 3.** The reasons for that application being refused are said to be because the decision-maker claimed the appellant had provided no evidence of his relationship with the EEA national and had failed to provide evidence that he was dependent upon him prior to and after arriving in the United Kingdom to date.
- 4.** In a further bundle of evidence provided pursuant to directions that evidence, which was not provided initially to the decision maker, has now been made available. This is in the form of witness statements from the appellant and from EEA national.
- 5.** Mr Diwnycz had no cross examination of the appellant or EEA national, both of whom were present remotely. It was accepted the evidence now available showed that the decision to refuse the residence card was wrong as evidence of the relationship and required element of dependency had been provided.
- 6.** I am satisfied on the evidence, and in light of Mr Diwnycz' submissions that the appellant has discharged the burden upon him to show he is entitled to the grant of a residence card as an extended family member of an EEA national and allow that appear on the basis that the Secretary of State's decision is not in accordance with Community law.
- 7.** Mr Malik QC also submitted that the appeal should be allowed on human rights grounds too, especially in light of the current position of the Secretary of State, following Brexit and the departure of the United Kingdom from the European Union, that there was no longer any mechanism for a Residence Card to be issued in the UK. It was submitted this would leave the appellant in the position of an individual who has succeeded under the EEA Regulations but who would be unable to obtain any documentary proof of his right to remain in the United Kingdom under those provisions.
- 8.** There has also been a long delay in relation to this matter as the original refusal of the residence card, dated 10 July 2017, stated the appellant had no right of appeal, which was found to be a position that was wrong in law, as set out in the error of law finding. The appellant's position is that had he been given a right of appeal he would have succeeded, and therefore been able to demonstrate the requisite period of ten years continuous lawful residence in the United Kingdom, enabling him to succeed in his application for indefinite leave to remain made on that basis.
- 9.** Even with the EEA appeal being allowed the appellant does not have the requisite ten years lawful residence as the EEA application did not confer section 3C leave upon him, as set out in the error of law finding. Mr Malik QC's submission that notwithstanding this fact the appellant should be treated in the same way was also rejected in that earlier document.
- 10.** It is, however, the combination of factors in this appeal that make it somewhat unusual. The appellant made a valid application which was refused, and he was denied a right of appeal. There has been delay in resolving the status of that appeal, but that was not as a result of any fault by the appellant. The appellant has been in the United Kingdom

for a number of years and has established a private life here. The quality of that private life has to be taken into account. The appellant is unlikely to be able to secure a Residence Card in light of the developments referred to above, and it is not known how the appellant would be able to secure the right to which is been found he is entitled in law, in light of the current position relating to grants of Residence Cards adopted by the Secretary of State. In all the circumstances I find that the public interest in removing the appellant is considerably weakened in this appeal. It cannot be proportionate to remove a person from the United Kingdom who otherwise has a right to remain here and that he would have been able to enjoy and enforce but for the mistake by the decision-maker in relation to his right of appeal.

- 11.** It is also unusual for a Tribunal to have before it both an appeal against the refusal of a Residence Card and an appeal on human rights grounds. In the unique circumstances I find it appropriate in this case to find that the Secretary of State has failed to discharge the burden of proof upon her to the required standard to show that the appellant's removal from the United Kingdom is proportionate all the circumstances.

Decision

- 12. I allow both appeals.**

Anonymity.

- 13.** The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated 15 October 2021