



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/36249/2014
IA/36251/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 2 June 2016

Decision & Reasons Promulgated
On 18 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

Mrs MARIE CLAIRE REGINA ZEFACK (1)
Mr JEAN PAUL VOUA (2)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs A Imamovic, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Previous Hearings

1. In this matter the Appellants had been granted permission to appeal following a hearing on 16th October 2015 before Deputy Upper Tribunal Judge Davey. The hearing before me was a resumed hearing.
2. Judge Davey had set out in his decision that Mrs Zefack is a national of France and Mr Voua a national of the Ivory Coast. The original appeal was against the Secretary of State's decision to refuse permanent resident pursuant to the provisions of Regulation 15 of the Immigration (European Economic Area) Regulations 2006. Namely that in respect of Regulation 15(1)(a) the Respondent was not satisfied that Mrs Zefack had resided in the United Kingdom in accordance with the Regulations for a continuous period of 5 years. Thereby Mr Voua, himself not an EEA national, had thereby not resided in the United Kingdom for a continuous period of 5 years in accordance with the Regulations either.
3. Judge Davey also noted that the Mrs Zefack had contended that she had been employed in the United Kingdom since 12 February 2006 to 15 January 2012. She was a student thereafter and work had continued through to the hearing before the First-tier Tribunal Judge in December 2014.
4. Judge Davey found that there was a material error of law and that the First-tier Tribunal Judge's decision could not stand because there had been an error in respect of when the period of continuous employment needed to be commenced from. There was therefore to be a re-hearing in respect of the EEA Regulations. Finally Judge Davey noted that Article 8 had not been pursued. Indeed Article 8 was not pursued before me either.

The Hearing

5. At the hearing before me that the Appellants' bundle for the hearing had not been sent to the Home Office as ordered by Judge Davey. Therefore he had not had a chance to read the bundle and to take a view about the case. He said that he had discussed the matter with Mrs Imamovic and that the plan was for Mrs Zefack to give evidence so he could follow what was being contended in the evidence and in the large bundle of documents from the Appellants (comprising 167 pages with numerous documents). He would take a view after hearing the evidence. There was also a skeleton argument on behalf of the Appellants dated 2nd June 2016 from Mrs Imamovic, along with previous skeleton arguments in the bundle.
6. Mrs Imamovic agreed this would be a good way of dealing with matters and proceeded to call Mrs Zefack to give evidence.
7. Mrs Zefack adopted her witness statement at pages 17 to 18. She then gave evidence and was cross referred to various documents in the bundle. I shall refer to her

evidence as appears most relevant during the findings I have made in this case. Of note though after having heard the evidence, Mr Mills was of the view that he was unable to make any concessions about the evidence.

8. Thereafter, Mr Voua gave evidence. He adopted his witness statement. There were no further questions put to him.

The EEA Regulations

9. Regulation 15 of the Immigration (European Economic Area) Regulations 2006 provides as follows,

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

- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
- (b) a family member of an EEA national who is not himself 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;
- (c) a worker or self-employed person who has ceased activity;
- (d) the family member of a worker or self-employed person who has ceased activity;
- (e) a person who was the family member of a worker or self-employed person where —
 - (i) the worker or self-employed person has died;
 - (ii) the family member resided with him immediately before his death; and
 - (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;
- (f) a person who —
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) But this regulation is subject to regulation 19(3)(b)."

Submissions Summarised

10. I heard submissions from both parties, it having been agreed that Mrs Imamovic would go first with her submissions. It was said that there was a right of residence from 2005 to 2010. In 2008/2009 there was intermittent working. Therefore Mrs Zefack had already obtained a right to residence. From 2006 to she had continued to study and to work. The gaps, i.e. the Jobseekers Allowance, was for a short period of time. Mrs Imamovic said that if I was against her in respect of those matters, then as set out in her skeleton argument, Extended Rights of Residence becomes appropriate. There it could be seen that there is reliance on the case of **Samsam (EEA: revocation and retained rights)** [2011] UKUT 165 and **MDB and others (Article 12, 1612/68) Italy** [2010] UKUT 161 (IAC).
11. Mr Mills in his submissions said that it was clear NHS medical treatment was not comprehensive medical insurance. The document provided to me today shows that there was no such insurance obtained by the Appellants until March 2016. Therefore it was submitted that studying until recently was irrelevant. Mr Mills said that the real question was whether Mrs Zefack was a worker. The Regulations do not require permanent working. For example Regulation 5 says they do not cease to be a worker if they are temporarily unemployed. It was said that paragraph 8 of the Appellant's skeleton argument which had contended that a woman does not lose her status as a worker/exercising treaty rights by being on maternity leave was indeed correct.
12. Mr Mills said that the issue in the case though was the gaps in the documents and therefore the dates. The burden of proof was on the Appellants. The oral evidence was vague. It was not a criticism but it was vague. Perhaps most people would be. The problem was that there were just not the sufficient documents to show the required proof. For example there was a gap well in excess of 6 months after the work at Good Hope in September 2009. That very clearly interrupted the exercising of treaty rights. When a student, she was not exercising treaty rights. There was no documentary evidence to say otherwise. The letter from Best Connection at page 29 is remarkably vague and was of poor quality. The gap prior to 2009 remains even with the payslips from September 2009 to 2012. There are then missing payslips thereafter. There is no evidence of work in the second half of 2012. As for the National Insurance payments, that is a schedule. It is not what was paid at page 67. Therefore it must have been sparse employment. Page 27 appeared to be part of the same letter. Marginal or ancillary economic activity does not qualify her as a worker. There was just a £24 National Insurance payment in 2005/2006. It needs to be more than that. There are also the gaps in 2008/2009 and in 2012/2013. There is no 5 year period.

13. Mr Mills said that the alternative argument on behalf of the Appellants does not relate to Permanent Residence. The Respondent's decision only relates to Permanent Residence. If they sought an Extended Right of Residence then the application ought to be made.
14. I gave Mrs Imamovic the last word and she responded to some of Mr Mills' submissions. There had been a clear explanation as to why some of the documents could not be provided by the Appellants. In relation to the Extended Rights of Residence, there was reference to the case of **MDB**.
15. Mr Mills said that having seen the case of **MBD** it was conceded that Mrs Zafeck was therefore now a qualified person for the purposes of Regulation 6 today. It was a case in which it was being conceded that I could allow outright that Mrs Zafeck as a French national wife is qualified under Regulation 6 of the 2006 Regulations and therefore her husband Mr Voua is entitled to an Extended Right of Residence under Regulation 14(2) and therefore he is entitled to a Residence Card under Regulation 17(2).

Findings

16. In so far as the oral evidence is concerned, I accept that Mrs Zafeck was not attempting to lie or to deceive me during her oral evidence, but it was indeed an obvious feature of the case that she struggled significantly to deal with dates and questions about when and where she was working at any particular time. I accept that her former employers and others have not been the most helpful in wishing to provide her with accurate documents of what happened, but Mr Mills is entirely right that ultimately the burden of proof remains on the Appellants. I cannot ignore the gaps in the evidence just because I might be sympathetic to the situation that the Appellants find themselves in. I have taken into account the short witness statement by Mr Voua at pages 19 to 20 but that was the same witness statement before the First-tier Tribunal and does not really engage with the issues before me. Nor had Mr Voua said any more in his oral evidence other than to adopt that witness statement.
17. Therefore although I do not find that Mrs Zafeck has been deliberately obstructive or the like in her evidence, I do find that she has unable to satisfy me to the required balance of probabilities standard that she is entitled to a Permanent Right of Residence.
18. The reasons that I come to this view are because of the difficulties she experienced in seeking to fill in the gaps in her evidence and indeed in respect of her "CV" that she had provided. It is regrettable that the very short written statement that her solicitors had provided in the bundle did not deal with the obvious requirements. Mrs Imamovic sought to assist as best she could during the hearing and during the oral evidence but regrettably the gaps remained.

19. There is no continuity in respect of any period of 5 years when one looks to the actual detail of the documents provided.
20. First, there is the deficiency in the evidence in respect of the two claimed agencies that Mrs Zafeck claimed to work for. Mrs Zafeck told me she was unable to get confirmation from the agency because the records were discarded. Because she was not able to give me accurate and detailed information I am not satisfied that she is correct in her memory. The payslips and other documents are not sufficient because they do not fill in the gaps for the many months and years for which there remain uncertainties.
21. Second, there is then the document at page 123 of the Appellant's bundle. Mrs Zefack said in her evidence that "this document is a bit wrong". That was because she had claimed Jobseekers Allowance for just two months. This seems to conflict with the document at page 130 of the bundle which a letter from the Jobseekers Allowance is showing a payment of £64.90. It is not easy to reconcile the two documents and I have not been able to resolve which is correct. It leaves the matter, at best, uncertain.
22. Third, it was accepted by Mrs Zafeck that she did not have private health insurance until earlier this year. She accepted that during her periods of studying she had relied on the NHS. She now (since March 2016) has private health insurance but did not previously.
23. Fourth, I regret to say that there was utter confusion during Mrs Zafeck's oral evidence during cross examination. I make every allowance for how difficult witnesses find giving evidence and how in this case there is much reliance on memory, but I have not been able to reconcile the evidence in Mrs Zafeck's favour. By way of example, during the start of cross examination Mrs Zafeck said she had commenced working for Good Hope Hospital via the Best Connection agency from 2009 to 2012. She was asked to look at page 27 of the Respondent's bundle where she had previously said she had worked at Good Hope Hospital in 2010 and not 2009.
24. Mrs Zafeck said she made a mistake and that it was from 2010 that she had started working at Good Hope hospital. The problem remained that there was the gap for 2009. She said if she was at university then she must have worked for just one year and not two.
25. Fifthly, as for the time period January 2012 to August 2013 Mrs Zafeck said she could not really remember where she had worked. She said the payslips may deal with this, but she agreed that there were no or no sufficient payslips for 2014. She said that the Judge had asked her to get payslips but she could not get them. That was because her agency/employers could not provide them. She said it was not clear why the employer had said what was said at page 29 of the Appellant's bundle, namely that she had worked from May 2012 to June 2012 and then in 2014 for 7 weeks and during intervals in 2010. She accepted this was inconsistent with her own evidence. She insisted she had worked for Best Connection in 2013 too. She said even

though she was relying on her employer's letter at page 29 it did not give the true facts.

- 26 Sixthly, she accepted that although she had been referring to bank statements, in fact the letters were in respect of overdraft fees and not bank statements which, for example, showed her earnings for the most part. There were many missing in any event.
27. Finally, the National Insurance contributions noted at page 64 of the Appellant's bundle merely shows what was needed to be paid and in any event for 2012-2013 there was just £26.50 apparently to be paid. If that is to mean that the National Insurance contributions for that year from employment was just £26.50 (I did not get a proper explanation from the Appellant what the document actually meant) then it hardly shows much in the way of employment.
28. It is quite clear to me that Mrs Zafeck has worked, studied, has sought Jobseeker's Allowance and has been on maternity time, but in the end there are significant gaps in any period of time that I have sought to use and which was relied upon. My task was not made easy by the failure of there being a proper witness statement. Ms Imamovic said and did all she could, but regrettably the evidence is simply lacking and vague. There are obvious breaks in the continuity and there is no 5 year period which can be shown for the purposes of the claim relating to Permanent Rights of Residence.
29. I therefore conclude that the Appellant's appeal in respect of the claim to a Permanent Right of Residence has to fail.
30. In view of Mr Mills' concession though in respect of the Extended Right of Residence pursuant to Regulation 14 of the EEA Regulations, and because Mr Mills said that the matter would not need to return to the Secretary of State to decide that issue, I allow the appeal on that basis.

Notice of Decision

The First-tier Tribunal's decision contained a material error of law and is set aside. I remake the decision.

The appeal in respect of Permanent Rights of Residence is dismissed.

The appeal is allowed in respect of Regulation 14 of the Immigration (EEA) Regulations 2006 relating to Extended Rights of Residence in respect of both Appellants. Mr Zafeck with reference to Regulation 14(1) and Mr Voua in respect of Regulation 17.

No anonymity order is made.

I make no order for costs in the Appellants' favour. The Appellants' documents in this case remain inconsistent and difficult to follow which has caused a disproportionate amount of time to be spent by the Tribunal on the case.

Signed

Date 16 June 2016

Deputy Upper Tribunal Judge Mahmood