



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/13657/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 22nd December 2020

Decision & Reasons Promulgated
On 13th January 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MRS LARISSA DIANE ZANZALA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Larissa Zanzala, in person
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Congo. She appeals the respondent's decision of 16th November 2016 to refuse to issue an EEA Residence Card as the family member of an EEA national exercising treaty rights in the UK in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. On 21st December 2013, the appellant was married to Mr Serge Aran Zanzala, an Austrian national, who claimed to be exercising free movement rights in accordance with the 2006 Regulations. However, evidence provided in support of the application establishes that Mr Serge Zanzala was married to Pascale Edith Mamnouo-Derikissa on 22nd June 1992 and they did not divorce until 8th April 2015. The respondent concluded that in the circumstances, Mr Zanzala was not free to marry the appellant on 21st December 2013 and therefore the appellant is not a 'family member' as defined in Regulation 7 of the 2006 Regulations. Furthermore the respondent did not accept that the appellant had provided sufficient evidence to establish that she is the partner of, and in a durable relationship with an EEA national such as to qualify as an 'extended family member' as defined in Regulation 8 of the 2006 Regulations. Finally, the respondent was not satisfied that the EEA sponsor is currently exercising his treaty rights in the United Kingdom.
3. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Ripley for reasons set out in a decision promulgated on 8th March 2017. Judge Ripley found that EEA sponsor ("Mr Zanzala") is a 'qualified person' within the meaning set out in Regulation 6(1) of the 2006 Regulations. She was satisfied the appellant has produced sufficient evidence to establish that Mr Zanzala is employed as a Warehouse Assistant by DFS. Judge Ripley considered the explanation provided by the appellant that at the time of their marriage, Mr Zanzala understood his divorce nisi to be the final divorce document and had not understood, until two years later, that the divorce had not been finalised until the grant of a decree absolute. Judge Ripley found that the appellant has not established that her marriage would be recognised in Austrian or indeed UK law, and she was not therefore satisfied that the appellant is a spouse or civil partner of the EEA sponsor within the meaning of Regulation 7. Judge Ripley did not go on to consider whether the appellant is an 'Extended family member' as defined in Regulation 8 because she considered she did not have jurisdiction to do so.
4. The appellant was granted permission to appeal the decision of Judge Ripley by Upper Tribunal Judge Grubb on 14th January 2019. I set aside the decision of First-

tier Tribunal Judge Ripley for reasons set out in my 'error of law' decision dated 27th January 2020. Given the limited issue that remained between the parties, I directed that the decision would be remade in the Upper Tribunal. I directed that the appellant shall file and serve any further evidence that she seeks to rely upon, within 14 days of my decision being sent to the appellant.

5. The matter was listed for a resumed hearing on 30th March 2020, but that hearing was vacated because of the need to take precautions against the spread of Covid-19. The matter was relisted for hearing before me on 22nd December 2020. The appellant appeared before me unrepresented and was accompanied by her partner. The appellant and her partner were assisted throughout the hearing before me by an interpreter arranged by the Tribunal. I was satisfied that the appellant, her partner and the interpreter were able to communicate with each other and that the appellant and her partner were able to fully participate in the hearing without any difficulty.
6. At the outset of the hearing before me, I was informed by the appellant that in response to the direction previously made by me in January 2020, the appellant's partner had sent a letter dated 31st January 2020 to the Tribunal and to the respondent setting out the matters relied upon, and to which various documents were attached. A copy could not be found on the Tribunal file, but during the course of the hearing, Mr Bates was able to find the copy received by the respondent. I was provided with a copy.

The issues

7. At the outset of the hearing before me, with the assistance of Mr Bates, I identified and explained to the appellant the issues that I am required to consider. Judge Ripley had previously found, in March 2017, that Mr Zanzala is a 'qualified person' within the meaning set out in Regulation 6(1) of the 2006 Regulations. Mr Bates submitted that given the passage of time and the declaratory nature of the decision, it is for the appellant to establish and satisfy the Tribunal that Mr Zanzala remains a

'qualified person' within the meaning set out in Regulation 6(1) of the 2006 Regulations.

8. Judge Ripley found that the appellant is not a spouse or civil partner of the EEA sponsor within the meaning of Regulation 7 and cannot therefore qualify as a 'family member' under the 2006 Regulations. There is nothing to undermine that finding and the appellant confirmed before me that she has not since entered into a valid marriage that is recognised in law. The remaining issue is whether the appellant is the partner of, and in a durable relationship with Mr Zanzala so that she is an 'extended family member' within the meaning set out in Regulation 8.

The evidence

9. I heard oral evidence from the appellant and her partner, Mr Serge Zanzala. A full account of the evidence and the submissions made before me is set out in the record of proceedings. In reaching my decision I have fully considered all the evidence that was before the Tribunal, whether it is expressly referred to in this decision or not.
10. In the absence of a witness statement from the appellant, I invited the appellant to set out in her oral evidence the evidence she relies upon to support the claim that she is the partner of, and in a durable relationship with Mr Serge Zanzala. She maintained they are in a durable relationship. She said there are three children of the relationship. She said that she met Mr Zanzala in or about August 2008 in Congo. Mr Zanzala was living in the UK at the time and she was living in Congo. His father passed away in Congo and they met when Mr Zanzala returned to Congo to deal with the burial of his father. Mr Zanzala had remained in Congo for about a month before he returned to the UK. They then kept in touch by telephone. Although Mr Zanzala was married, she was aware that his marriage was in difficulty. In 2009 Mr Zanzala returned to Congo and by that time, she understood that his ex-partner had filed for divorce. They became closer and eventually became engaged at a ceremony attended by their families. Their first daughter, who I shall refer to as JVZ, was born on 22nd March 2010. A photograph of the

'blessing' of their first daughter was included with the documents sent to the respondent and Tribunal under cover of the letter dated 31st January 2020.

11. The appellant explained that Mr Zanzala remained in Congo and they continued to live together at the same address in Congo with their daughter. On 21st June 2013, their second daughter, who I shall refer to as NCZ, was born. The appellant said that after the birth of their second daughter, Mr Zanzala was told by his ex-partner that they were now divorced, and both the appellant and Mr Zanzala believed they were free to marry. They decided to marry in Congo, and they were married on 21st December 2013 in Brazzaville. They had been living together for about 3 years prior to the marriage and after the marriage, they continued to live together in Brazzaville.
12. The appellant said that in January 2014, Mr Zanzala decided to return to Europe because he was a European national. He settled in the UK and then made an application for family reunion so that the appellant and their two daughters could join him. They arrived in the UK in January 2016, with the benefit of a 6-month family reunion visa. They lived together at an address in Eskdale Drive, Beeston, Nottingham and the appellant became pregnant. Their third daughter, who I shall refer to as BDZ, was born on 17th October 2016. They continued to live at the same address until about March 2017, when they had to move into emergency accommodation that was arranged by the local authority. In about July 2017 they moved into other Council accommodation in Beeston, Nottingham and they have continued to live together at the same address since. The appellant has provided a copy of a letter dated 4th July 2018 from HMRC addressed to the appellant and her partner at that address, regarding tax credit awards for the period 6th April 2018 to 5th April 2019. She has also provided a letter addressed to her at her current address from Severn Trent Water.
13. The appellant said that Mr Zanzala had previously worked for DFS and he left that employment about a year ago. He has been working for 'The Very Group' in a warehouse for about a year and is paid about £1300 per month.

14. In cross-examination, the appellant confirmed that her three daughters all attend Beeston Field Primary School. Mr Zanzala sometimes takes the children to school. When asked about the family home, the appellant said that the house that they live in has three bedrooms, one living room, a kitchen, a bathroom on the ground floor, and a toilet upstairs. The property has two toilets altogether, one in the downstairs bathroom and a separate toilet upstairs. The appellant was asked about the sleeping arrangements and confirmed that she and Mr Zanzala have a bedroom. Mr Zanzala's son from a previous relationship occupies one of the bedrooms and their three daughters occupy the remaining room which has a bunkbed. Two of the girls sleep on the bottom bunk which is like a double bed and one sleeps on the bunk above.
15. Mr Zanzala was called to give evidence. He said that the appellant is his wife, and they have three children together. Two of their daughters were born whilst they lived together in Congo and their third daughter was born in the UK. He said that they have in the past, and now continue to live together in the same house. He said that they met in Congo in 2006 when his father passed away and he had returned to attend the burial. The appellant had attended the burial. They had lived in the same village and their families had previously known each other.
16. Mr Zanzala said that he had remained in Congo for about a month after the burial of his father. When he returned to the UK, he said that he did not have any contact with the appellant. His evidence was that he had established contact with the appellant again when he returned to Congo following difficulties in his relationship with his wife in the UK. He returned to Congo in about March 2009 and at first lived in a hostel. When he started to run out of money to pay for the hostel, he started to look for someone who could assist him and the appellant had offered to assist and allowed him to stay where she was living. He said that initially the appellant had offered him a bed and she slept on the sofa. However, he began to open up to her and told her about the difficulties he had experienced with his wife in the UK. That drew them closer and their relationship then developed. They have continued living together since. In 2014, he decided to return to the UK because he

has children living in the UK from a previous relationship. When he arrived in the UK in 2014, he lived with his son for a few months. Mr Zanzala said that he lived at the address in Esdala Drive, Nottingham for about three years until about March 2017. He was joined by the appellant and their daughters in 2016. He said that in March 2017 they had moved into emergency accommodation in Nottingham, that was arranged by the council and they had lived in that accommodation for about three months. They then moved into accommodation provided by the local authority in or about June 2017, and they have been living together as a family at their current address since that time.

17. Mr Zanzala said that he had started working for DFS in October 2014. He worked there until July/August 2019 and left that employment because he was advised by his GP that the work was too physical and kidney stones had developed in his kidneys. He said that he then worked as a delivery driver for a newspaper for about three months earning approximately £300 per week. He said that he finished working as a delivery driver in March 2020 and since then, he has been working for the 'Very Group', as a packer/warehouse assistant. He said that he earns about £1300 each month. He confirmed that he has a contract of employment, but he was not aware that he had to produce that or other evidence of his income or employment.
18. In cross-examination, Mr Zanzala was also asked about the property at which the family live. He said that the property has three bedrooms. He and his partner have a bedroom in which the youngest of their daughters also sometimes sleeps. The girls share a bedroom, and the third bedroom is occupied by his son. He said that the property has two toilets, one downstairs in the bathroom, and a separate toilet upstairs. Mr Zanzala confirmed that his three daughters all attend Beeston Field Nursery and Primary School.
19. Mr Bates asked Mr Zanzala about his employment. He confirmed that the warehouse at which he works is on the border of Derby, Nottingham and Leicester

and that he works twelve-hour shifts working four days and then having four days off.

Submissions

20. I heard submissions from Mr Bates. He quite properly acknowledged that the evidence of the appellant and Mr Zanzala regarding their relationship is broadly consistent and on balance, there appears to be a genuine and durable relationship. Mr Bates submitted that although the appellant has failed to produce any evidence to support the claim that Mr Zanzala remains in employment, it is right to acknowledge that both the appellant and Mr Zanzala again gave consistent evidence regarding his current employment and income.
21. The appellant had nothing to add.

Findings and conclusions

22. It is for the appellant to establish, on a balance of probabilities, her entitlement to an EEA Residence Card in accordance with The Immigration (European Economic Area) Regulations. The 2006 Regulations now been replaced by the 2016 Regulations but insofar as this appeal is concerned, the relevant regulations are, for all intents and purposes, the same.
23. In reaching my decision I have considered all the evidence and material before the Tribunal and the submissions made by Mr Bates. I have had the opportunity of hearing the appellant and her partner give evidence, and seeing their evidence tested in cross-examination. Matters of credibility are never easy to determine, particularly, as here, where the evidence is received through an interpreter. I acknowledge that there may be a danger of misinterpretation, and I have also borne in mind the fact that events that may have occurred some time ago, can impact on an individual's ability to recall exact circumstances. I have considered the appellant's evidence and the story as a whole, against the available material and

other familiar factors, such as consistency with what the appellant has said before, the evidence of her partner, and the documents relied upon, albeit limited.

24. I found the appellant and her partner to be credible witnesses. They were unrepresented and plainly failed to appreciate the need to provide evidence to support the claims being made, particularly insofar as the employment of Mr Zanzala is concerned. It was apparent to me that neither the appellant nor Mr Zanzala had appreciated that they may face questions regarding their current living arrangements and the employment and income of Mr Zanzala. Nevertheless, they answered questions put to them in cross-examination without any hesitation and their evidence was broadly consistent in material respects. There were two inconsistencies in the evidence. The first was in relation to the year that they first met and the second was in relation to the current sleeping arrangements in the family home.
25. In her evidence, the appellant claimed that they first met in August 2008 when Mr Zanzala travelled to Congo. Mr Zanzala said in his evidence that his father passed away in 2006 and they first met in 2006. However, they were both consistent in their claim that they first met when Mr Zanzala had returned to Congo to attend the burial of his father, and that he had remained in Congo for about a month following the burial, before he returned to the UK. In my judgement the inconsistency between the evidence as to the year in which Mr Zanzala's father passed away is likely to be explained by the passage of time since that event. Insofar as it is necessary, I prefer the evidence of Mr Zanzala and find that his father passed away in 2006. I find the appellant and Mr Zanzala were previously known to each other because they lived in the same village and their families were acquainted. I find that they met briefly in 2006, but it was not until Mr Zanzala returned to Congo in 2009 that their relationship began.
26. The only other inconsistency in the evidence was regarding the current sleeping arrangements in the family home. The evidence of the appellant was that their three daughters share a bedroom. The evidence of Mr Zanzala was that the

youngest child usually sleeps in her parent's bedroom. That is in my judgement a minor inconsistency that does not, as Mr Bates properly acknowledged, undermine the claim that the appellant and Mr Zanzala are in a genuine and durable relationship. When the evidence is considered as a whole, and in particular, when one has regard to the other evidence received by the Tribunal regarding the addresses at which the family have lived at various times, and the general living arrangements, I am satisfied that the appellant and Mr Zanzala gave evidence that was entirely consistent in material respects and have given a truthful account of their relationship.

27. I first consider whether Mr Zanzala is a 'qualified person'. It is uncontroversial that he is an Austrian national in the United Kingdom. Judge Ripley had previously found, in March 2017, that Mr Zanzala is a 'qualified person' within the meaning set out in Regulation 6(1) of the 2006 Regulations. She accepted the evidence before the Tribunal of his employment with DFS. I accept the oral evidence of Mr Zanzala that he worked for DFS until July/August 2019 and left that employment because he was advised it was having an impact upon his health. I accept his oral evidence that he then worked as a delivery driver for a newspaper and that since March 2020 he has been working for the 'Very Group', as a packer/warehouse assistant earning approximately £1300 per month. Although there was no documentary evidence to corroborate his claim to be employed, I am satisfied that he had simply failed to appreciate the need to provide evidence in support. I accept the oral evidence because both the appellant and Mr Zanzala were asked separately in cross-examination about Mr Zanzala's employment and earnings and their evidence was entirely consistent.

28. Finally, I must consider whether the appellant is an 'extended family member' as defined in Regulation 8. Neither Council Directive 2004/38/EC nor the 2006 or 2016 Regulations provide a definition of 'durable relationship'. Insofar as is relevant, the respondent's guidance; Free Movement Rights: extended family members of EEA nationals, Version 7.0 published on 27th March 2019 states:

Evidence required for durable partners

A durable relationship is an unmarried partnership which has normally continued for 2 years or more. The evidence the applicant can provide may include:

- proof that any previous relationship has permanently broken down, for example a: decree absolute for marriages
- ...
- evidence of cohabitation for 2 years, for example:
 - bank statements or utility bills in joint names at the same address
 - rent agreements
 - mortgage payments
 - official correspondence which links them at the same address
- evidence of joint finances, joint business ventures and joint commitments, for example:
 - tax returns
 - business contracts
 - investments
- evidence of joint responsibility for children such as:
 - a birth certificate or custody agreement showing they are cohabiting and sharing responsibility for children
- photographs of the couple
- other evidence demonstrating their commitment and relationship

You must always consider the individual circumstances of the application. For example, there may be instances when the couple have not been in a relationship for 2 years or more, but you are still satisfied that the relationship is subsisting and durable. This may be, for example, where the couple have a child together and a birth certificate showing shared parentage has been provided with evidence of living together.

29. I accept the evidence given by the appellant and Mr Zanzala regarding their relationship. The appellant and Mr Zanzala lived together for a number of years in Congo and I find, they have lived together since the appellant's arrival in the UK in 2016. There are three children of the relationship. A copy of the birth certificates for each of the children has been provided to the respondent and the Tribunal. The appellant has also demonstrated her commitment to the relationship by the assistance and care she provides to Mr Zanzala's son from a previous relationship, who continues to live in the family home. Having carefully considered the evidence before me, I find the appellant is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national and it follows that she is, in my judgment, an 'extended family member' as defined in Regulation 8.

30. In my judgement the appellant has established an entitlement to a Residence Card, and I allow the appeal.

Decision:

31. The appeal is allowed under the Immigration (European Economic Area) Regulations.

Signed *V. Mandalia*

Date 29th December 2020

Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

Although I have allowed the appeal, I have done so having had the opportunity of considering the evidence provided by the appellant and with the benefit of hearing the oral evidence of the appellant and her partner, much of which was not before the respondent at the time of the respondent's decision. In all the circumstances, I decline to make a fee award.

Signed *V. Mandalia*

Date 29th December 2020

Upper Tribunal Judge Mandalia