



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

Appeal Number: IA/09195/2014
IA/09196/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 29th October 2014**

**Determination
Promulgated
On 6th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**(1) MRS ROMUALOA AMAEFULE
(2) MR NAPOLEON AHAMAEFULE AMAEFULE**

(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Williams, Solicitor

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge Hillis who, in a determination promulgated on the 3rd July 2014, dismissed each of the appellants' appeals against the respondent's decision to (a) refuse their applications for an EEA Residence Card in recognition of their claimed right to reside permanently in the United Kingdom under European Union (EU) Treaties, and (b) revoke the EEA Residence Cards that had previously been issued to them.
2. The appellants are married to each other. The first appellant is a citizen of Poland, who was born on the 2nd May 1977, and the second appellant is a citizen of Nigeria, who was born on the 26th November 1980. They have two children. Their children were born, in the United Kingdom, on the 8th January 2010 and the 23rd March 2012, respectively.
3. The respondent refused to recognise that the appellants had acquired a permanent right of residence in the United Kingdom because they had failed to prove that the first appellant had been a 'qualified person' under Regulation 6 of the Immigration (European Economic Area) Regulations 2006 - that is to say, that she had been exercising EU Treaty rights in the United Kingdom - for a continuous period of at least five years. Moreover, as the evidence submitted with their applications revealed that the first appellant was not currently exercising her EU Treaty Rights, the respondent revoked the Residence Cards that had previously been issued to them.
4. The application for permission to appeal contained five grounds. These can however be distilled into three discrete arguments which, when placed in a logical order, are as follows -
 - (i) The judge erred in his analysis of what was required for the appellants to acquire a permanent right of residence. Upon a correct analysis of the law, their appeals against refusal to grant their applications for a Permanent Residence Card ought to have been allowed
 - (ii) The judge erred in failing to consider, either properly or at all, evidence that the first appellant was now working. Had this evidence been considered, the appeals against revocation of the appellants' existing Residence Cards would have been allowed.
 - (iii) The judge erred in his analysis of whether the appellants' removal from the United Kingdom would be incompatible with their right to respect for private and family life, with particular reference to the best interests of the children.
5. In dismissing the appeals against refusal to grant Permanent Residence Cards, the judge said this -
 13. I find on the evidence of the Appellants at the hearing that the first app has failed to show that she was a worker as defined in Regulation 6 of the EEA Regulations 2006 as she was unemployed by choice following her maternity leave in 2010 and her successful application to the Employment Appeal Tribunal for unfair dismissal. The Appellants made the conscious

decision for the first Appellant, the EEA national in these proceedings, to stay at home and care for her children who were not at that time in education as defined in the Regulations

14. The first Appellant chose to remain at home and care for her pre-school age children while her non-EEA national husband went to work when it was available. She was, therefore, not exercising her Treaty Rights and was, in my judgement, voluntarily unemployed for a period in excess of six months during the relevant five-year period from October, 2008 to October 2013 required for the grant of a Permanent Residence Permit.

6. Mr Williams renewed his argument - which he apparently also advanced before the First-tier Tribunal - that, by virtue of Article 16 of Directive 2004/58/EC, continuity of residence is unaffected by a single period of absence, not exceeding 12 consecutive months, for important reasons such as pregnancy. It therefore followed that the first appellant should have been treated as having exercised her EU Treaty rights until the 1st January 2011, notwithstanding the fact that her employment had ceased some 12 months earlier.
7. There are two problems with this argument. The first problem is that Article 16 of the Directive (which is transposed into UK law by Regulation 3) is concerned with continuity of residence in the host country rather than continuity of employment. The outcome of this appeal was not dependent upon calculating the first appellant's period of residence in the UK; rather, it was dependent upon calculating the period during which she had been exercising EU Treaty rights whilst she was residing in the UK. The second problem, as Mr Jarvis pointed out, is that even if the appellant was treated as having exercised her EU Treaty rights from the moment of her arrival in the UK until the 1st January 2011, as Mr Williams contended should be the case, she would still not have acquired a permanent right of residence. This is because she claims only to have arrived in the UK on the 26th October 2006, which is less than five years before the constructive period of her employment ended. It follows that the judge did not err in law in dismissing the appeals against refusal to grant the appellants' applications for Permanent Residence Cards. The decision of the First-tier Tribunal is thus preserved to that extent.
8. There is evidence on the file that Mr Williams faxed documentary proof of the first appellant's current employment in the United Kingdom to the First-tier Tribunal in advance of the hearing. Moreover, Mr Williams says that he drew the judge's attention to that evidence. The judge nevertheless does not make any mention of it in his determination. This is probably because he concluded (rightly) that the evidence could not have affected the outcome of the appeal against refusal to grant the appellants' applications for Permanent Residence Cards (see above). The evidence was however potentially relevant to the appeal against the respondent's decision to revoke the appellants' existing Residence Cards. The judge does not appear to have appreciated that he was also seized of an appeal against this discrete Immigration Decision, for he makes no mention of it. This was

obviously an error of law. Moreover, that error was material to the outcome of the appeal for the following reasons.

9. By virtue of Section 85 of the Nationality, Immigration and Asylum Act 2002, the Tribunal is empowered in an in-country appeal to consider evidence of circumstances that have arisen after the date of the Immigration Decision. It was clearly right to consider such evidence in this appeal. This is because the Notice of Immigration Decision specifically gave the appellants the option of either appealing to the Tribunal or making a fresh application in the event that they considered that they had, "a right to reside in the United Kingdom as a matter of European law, and are in a position to submit the necessary information to support [the] application for a residence card". The Notice thus clearly contemplated the possibility of a change in the first appellant's circumstances following the decision to revoke the appellants' existing Residence Cards. I therefore stood the matter down so as to enable Mr Jarvis to make appropriate enquiries concerning the documentary evidence that had been submitted in respect of the first appellant's current employment. As a result of this, Mr Jarvis was able to tell me that HMRC had confirmed that the employment in question was registered with them for tax purposes. I therefore remake the First-tier Tribunal's decision, by allowing the appeals to the extent and on the ground that the revocation of the appellants' existing Residence Cards is contrary to their EU Treaty rights.
10. As I have decided to allow the appeals against revocation, it follows that the threat of removal from the United Kingdom and consequent potential engagement of the operation of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms have ceased to exist. It is thus no longer relevant to consider whether the judge's Article-8 analysis was flawed.

Notice of Decision

11. The decision of the First-tier Tribunal to dismiss the appeals against the respondent's refusal to grant the appellants' applications for a Permanent Residence Card is preserved.
12. To the extent that the First-tier Tribunal dismissed the appeals against the respondent's decision to revoke the appellants' existing Residence Cards, its decision is set aside and is substituted by a decision to allow those appeals on the ground that the revocation decision is contrary to the appellants' EU Treaty rights.

Anonymity is not directed.

Signed

Date

Deputy Judge of the Upper Tribunal

5th November 2014