



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/17790/2013
IA/17791/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2014
Determination Prepared 2 July 2014

Determination Promulgated
On 11 July 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MOSHOOD KARATU (FIRST APPELLANT)
TOYIN KARATU (SECOND APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Jafferji, of Counsel instructed by Fitzpatrick ad Co.
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The first appellant is a citizen of Germany born on 6 March 1967. The second appellant is his wife, a citizen of Nigeria born on 6 April 1979. They appeal against a decision of Judge of the First-tier Tribunal Nightingale who in a determination dated

24 February 2014 dismissed their appeals against a decision of the Secretary of State to refuse to issue them with a permanent registration certificate and permanent residence card respectively as persons who had resided in the United Kingdom in accordance with the Immigration (EEA) Regulations 2006 for a continuous period of five years.

2. The first appellant had claimed that he had entered Britain in 2007 and had sought work here until 2009 when he became a student between 2009 and 2011, and that thereafter he had entered self-employment.
3. The judge considered the evidence and the submissions and, having set out the applicable law in paragraph 19 gave her findings and reasons in paragraph 20 onwards of the determination. She found that given that the appellant had been paid jobseeker's allowance rather than income support she was prepared to accept that he might have been in employment for a short period of time in Britain and concluded that it was therefore not the case that he had entered Britain in order to seek employment as his evidence had been that he had come to take up employment. However, no evidence of the employment had been produced and "since the appellant was not entirely clear how long, exactly, he had worked for," the judge said that she could not find that the period in question had been established on balance to be a period during which he had exercised Treaty rights as a worker. She said that taken at its highest the appellant might have worked in the United Kingdom and exercised Treaty rights as a worker but he had not established on the evidence before her on balance that he had done so.
4. In paragraph 21 she went on to write:-

"However, if I am to accept that the appellant went from employment to involuntary unemployment in 2009, he is not, in the definitions found within the Regulations, to be regarded as a jobseeker during this period of time, but must make out the requirements of Regulation 6(2). I accept that the first appellant was in duly recorded involuntary unemployment for a two year period and, indeed, that he had registered as a jobseeker with the relevant employment office. However, he has not established that he was employed for one year or more before becoming unemployed. Also, it appears that he was unemployed for more than six months since his claim, in fact, relates to a two year period. There is no evidence that during this period of unemployment he had a genuine chance of being engaged. Given that he was unemployed for two years and then, subsequently, entered education for two years realising that he needed further qualifications in order to secure some kind of employment, the evidence points in the other direction. Even if this period should, in fact, be treated as a period during which he was a jobseeker, I cannot find that the definition of a qualified person found at Regulation 6(4) is made out on the evidence before me. Even following two years unemployment, and two year back at college, it appears that he was not able to secure employment and, in fact, had to start his own business in order to try and earn some income. I cannot, therefore, find that the two years that the appellant spent as a Jobseeker's Allowance claimant amounts to qualifying activity under Regulation 6(2)(b) or 6(4). I therefore find that the first period

for which qualifying residence has been established is, in fact, his time at the University of Greenwich which, I accept, does amount to a period of study."

Turning to the period between 2009 and 2011 the judge stated that she did not find on balance that the lack of private arrangements for sickness cover rendered the appellant's period of residence between 2009 and 2011, not in accordance with the Regulations and she accepted that the appellant had been a student in accordance with the Regulations during that period.

5. The judge then turned to the appellant's claim that he had set up his own business some time around August or September 2011 but had not started trading until the end of December 2011. She stated there was no indication of what he had been doing between July and December 2011 other than taking steps to register a business by way of economic activity or any other qualifying activity. She stated that there appeared to be a period of around five months when the first appellant was not exercising any kind of Treaty rights at all.
6. The judge then considered the evidence that had been produced with regard to the self-employment. She noted that two tax returns had been made but stated:-

"There is not one invoice, letter, bank statement, or indeed, anything else which established that his business is genuinely trading. There are no letters from his clients or, indeed, anything other than the mere fact of his NI registration and the two tax returns. There is nothing shown in the bank statements of the first appellant referred to as being a result of business income. The majority of the payments into the bank account appear to emanate, in fact, from the second appellant. There are other, unspecified, payments into his bank account, but there is nothing to link these with business activity."

7. At paragraphs 25 onwards the judge set out her conclusions as follows:-

"25. I therefore considered the evidence before me in the round. The first appellant is registered as self-employed, and has made two tax returns in the sum of around £3,000 per year. He has made, and continues to make, national insurance contributions as a self-employed person. Taking the evidence before me at the highest, I find it had been established that the first appellant might be doing some self-employed work, but it has not been established on the balance of probabilities that he is, in fact, self-employed for the purposes of Regulation 6 of the 2006 Regulations. Consequently, I do not find that it has been established on balance that he has completed two years' residence in accordance with the EEA Regulations 2006 as a self-employed individual.

26. I find that it has not been established on balance that the appellants have resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. The appeals must, therefore, fail on this basis. It is, of course, open to the appellants to make a fresh application with the appropriate documentary evidence to establish their claimed rights. However, on the evidence which is before me they have not discharged the burden of proof and, consequently, these appeals must fail.

27. These appeals are against the decision of the respondent to refuse to issue permanent residence cards to the appellants. There is no removal decision and, also, no Section 120 notice has been served. (Schedule 1, regulation 20(4)(8) applies to the issuing of section 120 notice in an EEA appeal.) There is presently no requirement for the appellants to depart the United Kingdom as a result of the refusal to issue them with permanent residence cards. Following the decision of the Court of Appeal in Lamichhane, only the subject matter of the decision appealed is, therefore justiciable in the absence of a Section 120 notice. Article 8 is not, therefore, considered."
8. The Appellant appealed arguing that the judge had failed to deal with a ground of appeal which argued that even if the appellants did not qualify for permanent residence they ought to be granted a further five years residence card. The grounds asserted that in paragraph 25 the judge had accepted that the first appellant had been exercising Treaty rights as a self-employed person from 2011 to date. They also argued that the judge had erred in her consideration of whether or not the appellant was a jobseeker and saying that there was lack of sufficient credibility findings in respect of the oral testimony. Proper reasons had not been given. The third ground of appeal argued that the five year period ought to have been considered from the date of the appeal hearing, that is from 2014 back to 2009.
9. Although permission to appeal was refused on those grounds asserting that the judge should have considered the five years back from the date of hearing under the provisions of Section 85(4) of the 2002 Act Upper Tribunal Judge Taylor stated that there was merit in the argument the judge had erred in failing to determine a ground of appeal (I consider that she was referring to the First-tier Judge who had refused permission) and stated that all grounds could be argued.
10. At the hearing of the appeal before me Mr Jaffarji argued that the primary ground on which he wished to rely was that the judge had not determined the issue of whether or not the first appellant was entitled to residence in any event even if he did not qualify for permanent residence. While he accepted that that application had not been made he stated that it was for the judge to have determined whether or not the first appellant was self-employed but in any event as his children were EU nationals he and his wife would have a right of residence in any event. In support of that argument he referred to the determination of the Tribunal in MDB & Others (Article 12, 16 12/68) Italy [2010] UKUT 161 (IAC) although he did not put the determination before me. He stated that that determination meant that any rights of the appellant should be considered when leave was refused and he referred to Section 109(iii) of the Nationality, Immigration and Asylum Act 2002 which stated that the Regulations could make provision for an appeal against an immigration decision taken in respect of a person who has or claims to have a right under any of the Community treaties and that immigration decision was defined as a person's entitlement to enter or remain in the United Kingdom or their removal from the United Kingdom.

11. Mr Jaffarji went on to state that the judge had erred in not accepting that the appellant had exercised Treaty rights for five years. Moreover he stated that as the appellants had children here who were in education they were on that basis alone entitled to remain.
12. In reply Mr Melvin pointed out that he had not been served with a copy of **MDB** and so therefore could not comment thereon but in any event he asked me to accept there was no material error of law in the determination. The judge had been entitled to find that the appellant had not been exercising Treaty rights here at any time and therefore the other points fell away. The judge was correct not to be satisfied that the appellant had worked in 2007 and there was nothing in the appellant's evidence to show that he had ever been self-sufficient or that he had started a business which was genuinely trading.
13. He emphasised that it had never been argued that because the appellant had children in education here the appellants were entitled to right to remain.
14. In reply Mr Jaffarji stated that it was evident from paragraph 25 of the determination the judge had accepted that when the first appellant had entered Britain he had entered as a worker and that this would impact on the rights of the appellants to remain as the parents of children in education. They had a right to remain as long as the children attended school. Moreover he emphasised that there was an error in regard to the extended right of residence.

Discussion

15. The appellants applied for documentation to show that they were entitled to permanent residence here. The decision was made to refuse that and the grounds of appeal before the Judge of the First-tier Tribunal dealt solely with that point. The grounds merely assert that the appellant was a jobseeker between 2007 and 2009, a student for the following two years and a self-employed person thereafter.
16. That was the issue that was considered by the Judge.
17. Although I consider that the judge's conclusions in paragraph 25 were somewhat unclear regarding whether or not the appellant had been exercising Treaty rights until 2007 as a jobseeker it appears to be the case that the judge found that the appellant was not. Moreover although the judge accepted that the first appellant had exercised Treaty rights as a student between 2009 and 2011 the judge did not accept that the first appellant was exercising Treaty rights thereafter.
18. The judge's findings of fact on those issues were unequivocal. In effect the judge found that the first appellant had not been exercising Treaty rights since the end of his studies in 2011. That being the case the judge was entitled to find that the first appellant was not entitled to permanent residence in Britain nor the second appellant entitled to the appropriate residence card.

19. The grounds of appeal raised a matter not before the judge in the First-tier – and therefore it is arguable that it was not an error of law for the judge not to have dealt with it but that issue was whether or not the appellant was entitled to a right of residence in any event. Given the judge’s findings of fact that the appellant was not exercising Treaty rights because he was not working as a self-employed person in the period after his studies here the judge could not have found that the appellant was therefore entitled to a residence card. The reality is that the first appellant did not, at the date of hearing nor indeed at the date of application nor date of decision qualify for a residence card as it had not been accepted that he was exercising Treaty rights in Britain. Therefore although that might well have been an issue on which the judge should have adjudicated the only conclusion could have been that the appellants were not so entitled.
20. Similarly with regard to the position of the appellants as the parents of EU nationals who were studying here the reality is that there was no evidence placed before the judge or indeed before me that when the appellant’s children were in education here the first appellant was exercising Treaty rights.
21. For these reasons I consider that the decision of the judge to dismiss this appeal on immigration grounds shall stand and the appellants’ appeals are hereby dismissed.

Signed

Date

Upper Tribunal Judge McGeachy