Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/12152/2013
IA/12153/2013
IA/12154/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23 January 2014
Prepared 24 January 2014

Determination Promulgated
On 31 March 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY
DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

WISAM TAHA
JASMINE TAHA
JUDIT TAHANE SZABO

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R de Mello, Counsel, instructed by J M Wilson
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Hungary, the first appellant ("the appellant") being the husband of the third appellant and the second appellant being their daughter, who was born in 2004. They applied in September 2012 for documentation to certify their permanent residence in Britain pursuant to Regulation 15 of the Immigration (EEA) Regulations 2006.

2. Their applications were refused on 19 February 2013. The appellants appealed. Their appeals were heard by Judge of the First-tier Tribunal Taylor on 9 August 2013 and dismissed. They then appealed, with permission, to the Upper Tribunal and in a decision promulgated on 20 November 2013 Deputy Upper Tribunal Judge Hall set aside the decision. In these circumstances the appeal came before us for a hearing afresh.

3. The notice of refusal dated 19 February 2013 addressed to the appellant stated:

> "You have applied for Permanent Residence on the basis that you are an EEA national who has resided in the UK in accordance with Immigration (European Economic Area) Regulations 2006, Regulation 15(1)(a) with reference to 2(4) and 5(6) of the Accession (Immigration and Worker Registrations) Regulations 2004 for a continuous period of five years. However you have not provided evidence that you have resided in the United Kingdom in accordance with Immigration (European Economic Area) Regulations 2006, Regulation 15(1)(a) with reference to 2(4) and 5 (6) of the Accession (Immigration Worker Registration) Regulations 2004 for a continuous period of five years."

4. The reasons for refusal letter stated as follows:-

> "Under Regulation 15(1)(a) of the European Regulations 2006 an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years will be issued with a document certifying their permanent residence.
> With further reference to Regulations 2(4) and 5(6) of the Accession (Immigration and Worker Registration) Regulations 2004, an EEA national from Hungary wishing to exercise Treaty rights in the United Kingdom as a worker was, until 30 April 2011, required to first register under the Worker Registration Scheme (WRS) his/her employment with an employer be issued *[sic]* with a WRS certificate and accrue twelve months' continuous legal employment with that employer or should they change employers inform the WRS and acquire a new certificate within one month of the start of that new employment for it to count towards the required twelve months' continuous legal employment stated. That twelve months acts then as a starting point for any claimed five years continuous residence in accordance with the regulations referred to in Regulation 15 as stated. It should be noted that any lawful employment starts from the date of issue of the WRS certificate for each employer rather than the actual date employment commenced.
>
> Our records indicate that you registered with the Worker Registration Scheme (WRS) Registrations on 29 June 2007. The first employer you registered was NES Health Care (UK). However you have provided a P45 showing the termination of your employment with this company ending 27 July 2007. As our records show that you did not register any further employment on the WRS, you have failed to complete the initial twelve months' qualifying period to make you eligible for permanent residence.

> Therefore you will not be eligible for permanent residence until you have completed twelve months' continuous employment on the WRS in accordance with the Accession (Immigration and Worker Registration) Regulations 2004.
>
> On the basis that you are not able to provide evidence you have yet to reside in the United Kingdom in accordance with these Regulations for a continuous period of five years your application is refused under Regulation 15(1)(a) of the European Regulations 2006 of the Immigration (EEA) Regulations 2006 *[sic]* with further reference to Regulations 2(4), (5) and (6) of the Accession (Immigration Worker Registration) Regulations 2004.
>
> As your application for permanent residence has been unsuccessful, this also means that as a sponsor, family members linked to your application will also be ineligible for permanent residence."

5. The appellant's evidence, which was not disputed, was that he had come to Britain with his wife and child in November 2006 as an EU citizen. He sought work until March the following year when he took his first job in the private sector, being employed by NES (Health Care) for four months. That company enrolled the appellant in the Workers Registration Scheme. The appellant had not known that he was required to be part of that scheme. He had believed that as an EU national he had freedom of movement as long as he was exercising Treaty rights.

6. In August 2007 he started work as a clinical fellow in vascular surgery at University Hospital Birmingham NHS Foundation Trust. That job lasted until 30 October 2008 and thereafter the appellant worked as a surgeon in a large number of hospitals more or less continuously until 3 June 2011. Thereafter, he stated, he had worked in 39 jobs at various hospitals until April 2012 before starting work at a hospital in Wales.

7. Hungary became a member of the European Union on 1 May 2004. There was then a transition period until 1 May 2011 during which there were restrictions on the freedom to work here of Hungarians and nationals of other countries which had acceded to the EU at the same time (their citizens being known as the A8 nationals). Those restrictions ended at the end of the accession period on 30 April 2011.

8. Mr Tarlow accepted that the writer of the letter of refusal had been wrong when he had indicated that the appellant would not be eligible for permanent residence until he had completed twelve months' continuous employment on the WRS in accordance with the Accession (Immigration and Worker Registration) Regulations 2004. Rather the appellant, if he continued in work, would be entitled to permanent residence on 1 May 2016.

9. Mr de Mello argued that the starting point for any consideration of the appellant's position was Directive 2004/38 EC. He referred to the recitals to that Directive and Articles 1, 2, 3, 7 and 16. Those Articles read as follows:

" Article 1
Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2
Definitions

For the purposes of this Directive:
(1) 'Union Citizen' means any person having th nationality of a Memebr State:
(2) 'Family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3
Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union Citizen who satisfied the conditions referred to in points (a), (b) or (c)

Article 16
General rule for Union citizens and their Family Members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired the right of permanent residence shall be lost only through absence from the host member state for a period exceeding two consecutive years.

10. Mr de Mello stated therefore that it was evident that workers exercising Community rights who resided in the home state for a period of five years were entitled to permanent residence. He stated that the relevant question was whether or not that period must comply with the Accession Regulations as contended by the respondent or simply to the Union citizen having resided in the home country in accordance with Article 7(1)(a).

11. Having referred to the provisions of in Article 16 (1) which would lead to rights of permanent residence he argued that any breach of the Accession Regulations which had occurred during the period of residence should be disregarded. He argued that it was only in certain circumstances such as those set out in Article 16(3) that continuity might be interrupted. Moreover legal residence was an autonomous concept which had had to have the same meaning in Poland, Bulgaria, Romania and Britain.

12. He referred to the Accession Treaty which gave freedom of movement rights to the nationals of EU states such as Hungary which had joined in 2004. He accepted, however, that domestic legislation gave the Secretary of State the ability to make regulations which controlled the movement of workers of Accession countries.

13. Having pointed out that there was no relevant case law on the issue of the rights of those such as the appellant who had not complied with the regulations in force regarding the registration of A8 workers, he referred to the argument in his outline submissions that it would be appropriate to refer the issue to the European Court of Justice. We stated that we did not consider that that would be appropriate and that we would endeavour to determine the issue ourselves.

14. Mr de Mello then referred to case law which he argued supported his position. He first referred to the judgment in the case of **MG** (C-4000/12) which dealt with the entitlement to residence of a Portuguese national who, although she had entered Britain as a worker in 1998, had given up work to have her first child in 1999 and thereafter had been supported by her husband until they had separated in December 2006. She had remained married to her husband. In April 2008 her children had been placed in foster care following a report that injuries to one of the children was non-accidental and in 2009 she had been convicted of criminal offences relating to the child and had been sentenced to 21 months' imprisonment. Her husband had been awarded custody of the children. In May 2010 she had applied for permanent residence in the United Kingdom. That application had been refused and the First-tier Tribunal (IAC) had found, on appeal, that she had not acquired the right of permanent residence for the purposes of Directive 2004/38. The Upper Tribunal referred that issue to the ECJ. The issue of M G's entitlement to residence was considered, and in particular whether or not the requisite period of ten years should count back from the date of the decision to expel or forward from the date of the appellant's residence in Britain. In paragraph 24 of the judgment the court stated that:-

> "24. ... Unlike the requisite period for acquiring a right of permanent residence, which begins when the person concerned commences lawful residence in the host member state, the ten year period of residence necessary for the grant of enhanced protection provided for under Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of decision ordering that person's expulsion."

Mr de Mello stated that on the basis of that authority the date from which this appellant had resided legally must have started in March 2007.

15. He stated that the respondent was wrong to conclude that the period between July 2007 and 30 April 2011 should be disregarded because the appellant was not registered under the Worker's Registration Scheme and therefore that that period was not lawful and the appellant should not be treated as a worker as he was only entitled to reside in the home state in compliance with the WRS: the decision was not in accordance with the Directive. Paragraph 24 of **MG** was authority for the argument that the period for acquiring a right of permanent residence began when the person concerned commenced lawful residence in the host Member State. He accepted that the position of this appellant was of course entirely different from that of a person sentenced to imprisonment as during imprisonment the person imprisoned is not exercising Community rights and was clearly not indicating that they were integrated into society.

16. He argued that legal residence for the purpose of Article 16.1 was determined by reference to compliance with the terms of the Directive and not the Accession Treaty and that the Union citizen had to show that he had resided in the host Member State in accordance with Article 7.1 and not simply in accordance with the Accession Regulations. He stated that that followed from the decision of the ECJ in the case of **Ziolkowski** Case C-424/10. Ziolkowski was a Polish citizen who entered Germany in September 1989, obtaining a residence permit on humanitarian grounds. Although Ziolkowski and his wife had not worked in Germany for the requisite period, the issue was whether or not they had resided legally.

17. In paragraphs 46 and 47 of the judgment it was stated that:

> "46. ... the concept of legal residence implied by the terms 'have resided legally' in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the Directive, in particular those set out in Article 7(1).
>
> 47. Consequently a period of residence which complies with the law of the a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1)."

He stated that the judgment in Ziolkowski indicated that once the EEA national had complied with the initial provisions no further additional conditions could be provided. The appellant had been legally working and should be treated as a worker who had worked for the requisite period to be granted permanent residence.

18. He argued that there was no reason to disregard the period of stay prior to 2011 because it fell foul of any national measures.

19. Mr de Mello also claimed that Regulation 7A(2) and Regulation 7A(5) of the Immigration (EEA) Regulations 2006 discriminated against the appellant as they prevented the appellant from acquiring permanent residence because, after May 2011 when the transitional period came to an end he would be required to demonstrate he had complied with the Accession Regulations during the transitional period. This, he argued, was discriminatory in that it applied only to A8 nationals, moreover it applied to them in practice beyond 1 May 2011 and had placed that group at a disadvantage when compared with other EU nationals who had resided in Britain during the same period and had not been required to register, who would meet the five year legal requirements.

20. Britain's continued derogation after 1 May 2011 regulating access to permanent residence was, he argued, impermissible, discriminatory and contrary to EU law. He stated that this was unequal treatment based on the appellant's nationality contrary to the Article 8 of the Treaty of the European Union. He emphasised that non-discrimination was a fundamental aspect of the Charter of Fundamental Rights of the European Union.

21. Before Mr Tarlow's submissions we asked him to confirm that he accepted that the appellant was a worker who had worked legally since 2007. He initially stated that he accepted that propositions but then resiled from that position, stating that the appellant had not worked in accordance with the Accession Regulations and therefore it could not be said that he had worked legally in Britain. He argued that the accession arrangements were lawful and had taken effect under the Workers Registration Scheme. The appellant had not complied with that scheme and the effect was that he was not entitled to permanent residence as he had not complied with the requirements of the Workers Registration Scheme. As he was not complying with the scheme then he could not be said to be working in Britain legally.

Discussion.

22. We note from the debate in Hansard on 28 April 2004 that when the Minister of State, Baroness Scotland of Asthal moved the Regulations and the Accession (Immigration Worker Registration) Regulations 2004 she stated:-

> "In summary, the Worker Registration Scheme has been designed to reflect and not to hinder the flexibility and creativity of our labour markets. I must stress that we do not seek to prevent people from the Accession countries from working, providing that they comply with the registration scheme. But it is important to monitor that activity and to ensure that if they are not working they do not have access to our social security system."

23. We note moreover the reply of Baroness Anelay of St John's who stated:-

> "I looked at the IND website today, where confusion abounds. If I were trying to find out what on earth will be going on next week either as an employer or as a prospective employee, my heart would sink. On 23 February we also welcomed the essential part

of the package outlined by the minister; that is, those who are required to register for work should not be able immediately to claim social security, child benefit and work related benefits. Their access to social housing should be restricted. In her opening remarks, the minster was right to refer to those orders."

24. It is clear from that exchange that the purpose of the Accession (Immigration and Worker Registration) Regulations 2004 was to regulate the flow of workers from A8 countries to Britain so as not to place an undue burden on social benefits here: that was a valid objective which in itself was certainly not unlawful. We note the terms of Regulations 4 through 7 which state as follows(the words in square brackets substituted from 30 April 2006) :

"Right of residence of work seekers and workers from relevant acceding States during the accession period

4. (1) This regulation derogates during the accession period from Article 39 of the Treaty establishing the European Community, Articles 1 to 6 of Regulation (EEC) No. 1612/68(**1**) on freedom of movement for workers within the Community and [Council Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, insofar as it takes over provisions of] Council Directive (EEC) No. 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

(2) A national of a relevant accession State shall not be entitled to reside in the United Kingdom for the purpose of seeking work by virtue of his status as a work seeker if he would be an accession State worker requiring registration if he began working in the United Kingdom.

(3) Paragraph (2) is without prejudice to the right of a national of a relevant accession State to reside in the United Kingdom under the [2006 Regulations] as a self-sufficient person whilst seeking work in the United Kingdom.

(4) An accession State worker requiring registration shall only be entitled to reside in the United Kingdom in accordance with the 2000 Regulations as modified by regulation 5.

Application of 2006 Regulations in relation to an accession State worker requiring registration

5. (1) The 2006 Regulations shall apply in relation to an accession State worker requiring registration subject to the modifications set out in this regulation.

(2) A national of a relevant accession State who is seeking employment in the Unite Kingdom shall not be treated as a job seeker for the purpose of the definition of

"qualified person" in regulation 6(1) of the 2006 Regulations and an Accession State worker requiring registrations shall be treated as worker for the purpose of that definition only during a period in which he is working in the United Kingdom for an authorised employer.

(3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.

(4) Where an accession State worker requiring registration ceases working for that employer in the circumstances mentioned in regulation 6(2) of the 2006 Regulations during the one month period beginning on the date on which the work begins, that regulation shall apply to that worker during the remainder of that one month period.

(5) An accession State worker requiring registration shall not be treated as a qualified person for the purpose of regulation 15 of the 2000 Regulations (issue of residence permits and residence documents).

25. We note that the Accession (Immigration and Worker Registration) Regulations 2004 Order were revoked with effect from 1 May 2011 under the Accession (Immigration Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011.

26. Regulation 7A of the Immigration (EEA) regulations 2006 states as follows:-

"**7A.— Application of the Accession Regulations**

(1) This regulation applies to an EEA national who was an accession State worker requiring registration on 30th April 2011 ('an accession worker').

(2) In this regulation—

"*accession State worker requiring registration"*has the same meaning as in Regulation 1(2)(d) of the Accession Regulations;

"*legally working"* has the same meaning as in Regulation 2(7) of the Accession Regulations.

(3) In Regulation 5(7)(c), where the worker is an accession worker, periods of involuntary unemployment duly recorded by the relevant employment office shall be treated only as periods of activity as a worker—

(a) during any period in which Regulation 5(4) of the Accession Regulations applied to that person; or

(b) when the unemployment began on or after 1st May 2011.

(4) Regulation 6(2) applies to an accession worker where he—

(a) was a person to whom Regulation 5(4) of the Accession Regulations applied on 30th April 2011; or

(b) became unable to work, became unemployed or ceased to work, as the case maybe, on or after 1st May 2011.

(5) For the purposes of Regulation 15, an accession worker shall be treated as having resided in accordance with these Regulations during any period before 1st May 2011 in which the accession worker—

(a) was legally working in the United Kingdom; or

(b) was a person to whom Regulation 5(4) of the Accession Regulations applied.

(6) Subject to paragraph (7), a registration certificate issued to an accession worker under Regulation 8 of the Accession Regulations shall, from 1st May 2011, be treated as if it was a registration certificate issued under these Regulations where the accession worker was legally working in the United Kingdom for the employer specified in that certificate on—

(a) 30th April 2011; or

(b) the date on which the certificate is issued where it is issued after 30th April 2011.

(7) Paragraph (6) does not apply—

(a) if the Secretary of State issues a registration certificate in accordance with Regulation 16 to an accession worker on or after 1st May 2011; and

(b) from the date of registration stated on that certificate."

27. We agree with Mr de Mello that there is no case law before us which assists us in determining this appeal save that it is clear from the judgment in MG that when considering a period of entitlement to permanent residence it is necessary to count back from the date of the decision.

28. In effect Mr de Mello is asking us to find that the Worker Accession Regulations and also Regulation 7A of the Immigration (EEA) Regulations are ultra vires as they are not in accordance with the Directive. We do not agree. The Worker Accession Regulations, for proper reasons as is shown by the exchange in Parliament set out above, regulated the rights of workers from the A8 countries to work in Britain: those registered under the scheme were entitled to certain privileges and those who

were not registered were not. The Regulations stem from the terms of the Accession Treaties. Those Treaties were entered into under the auspices of the EU and were valid and accepted as binding under EU law. We cannot accept that Britain was not entitled to regulate the flow of workers from the A8 countries to Britain.

29. It follows therefore that Britain was entitled to decide who was or was not working legally here. As the appellant was not registered he was not working legally. We consider that it therefore follows that as he was not working legally in Britain he could not have accrued the five years required to entitle him to permanent residence.

30. Mr de Mello's further argument was that the fact that the appellant was working lawfully on the date of the application means that the five year period should be counted back from that date and that, in effect, the five year period does not mean five years lawful residence but rather five years working here. We cannot agree. To follow that argument it would be necessary to conclude that the fact that the worker had worked her unlawfully should be ignored. We consider that the five year period must be lawful residence, nor mere residence in the host country.

31. Mr de Mello also argued that the decision under appeal, which was made after Hungary became a full member of the EU, when there was freedom of movement without restriction for Hungarian nationals to work in Britain, unlawfully discriminated between Hungarians and nationals of other A8 countries and other EU nationals who had not been subject to the restrictions set out in the Accession regulations. That, however, is incorrect. The reality is that nationals of the A8 countries were treated differently during the accession period, and Britain is entitled to distinguish between a national of an A8 country who was working in Britain during the accession period and had to comply with certain conditions and the national of an EEA state whose nationals did not have to comply with these conditions. Britain is also entitled to distinguish between the A8 national who was working here legally, that is, in accordance with the Regulations and one who was not.

33. Although Mr de Mello made much of the claim that the Accession Treaties should be interpreted in the same way in each EU state the reality is that there was nothing before us to indicate that other EU countries treated the nationals of A8 countries in a way that was different from Britain's treatment of such nationals.

34. We have therefore concluded that although the decision of the First-tier Judge has been set aside it is appropriate to remake the decision and to dismiss the appeal.

Decision
This immigration appeal is dismissed.

Signed Date
Upper Tribunal Judge McGeachy