Subject-matter concerned	☐ **1) non-discrimination on grounds of nationality** ☒ **2) freedom of movement and residence** - **linked to which article of the Directive 2004/38 – Article 7** ☐ **3) voting rights** ☐ **4) diplomatic protection** ☐ **5) the right to petition**
Full reference	***Weldemichael v Secretary of State for the Home Department***, Upper Tribunal (Immigration and Asylum Chamber), 23 September 2015, [2015] UKUT 540 (IAC), available at: www.bailii.org/uk/cases/UKUT/IAC/2015/540.html.
Decision date	23 September 2015
Deciding body (in original language)	Upper Tribunal (Immigration and Asylum Chamber)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2015] UKUT 540 (IAC)
Parties	Weldemichael and Obulor v Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/uk/cases/UKUT/IAC/2015/540.html
Legal basis in national law of the rights under dispute	Regulations 6 and 15 Immigration (European Economic Area) Regulations 2006

Key facts of the case (max. 500 chars)	The appellants, Ms Weldemichael, a Dutch national, and Mr Obulor, a Nigerian citizen who was married to Lithuanian national, both appealed against decisions upholding the Secretary of State's refusal of their applications for permanent residence as they had failed to meet the requirement of Regulation 15 of the EEA Regulations due to periods of absence from working or job-seeking due to pregnancy and childbirth. The parties accepted that, in light of the CJEU's judgement in *Saint Prix v Secretary of State for Work and Pensions*, a woman who gave up work or job-seeking because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retained the status of "worker" within the meaning of Article 45, provided she returned to work or found another job within a reasonable period after the birth of the child. However, they disagreed on whether lawful residence accrued during the period of not working or job-seeking was to be taken into account in the acquisition of permanent residence, as well as on the requirements that had to be met at the end of the period, and the duration of the "*Saint Prix* extension period" (PSE).
Main reasoning / argumentation (max. 500 chars)	The tribunal interpreted *Saint Prix* and held the following: 1. Period prior to birth: the tribunal stated that it was common ground that from 11 weeks before the "expected date of confinement" (EDC) a woman could not be expected to work. The period of 11 weeks was established by domestic law in order to give effect to Directive 92/85/EC. 2. Period post birth: The tribunal held that, as the purpose of the maternity leave period was to provide protection to women, it would be unreasonable to expect a woman to have returned to work before the end of the relevant maternity leave. 3. Length of *Saint Prix* extension period (PSE): The Tribunal considered that this required an individual consideration of a woman's circumstances, taking into account additional factors which may render a longer period between the date of birth and the commencement of work reasonable. It again concluded that a reasonable period could not be less than that laid down by domestic law in conformity with Directive 92/85/EC. 4. Status during SPE: The tribunal held that if a woman ceased work or ceased looking for work owing to the physical constraints of the late stage of pregnancy, being 11 weeks or less before the EDC, then there was a presumption that she had not left the employment market. That presumption could be rebutted by clear evidence of an intention not to return. If there is no return to work within the year starting 11 weeks before EDC, that is likely to be an indication that there had been no intention to return although account would need to be taken to evaluate attempts to find work in that period. With regard to the facts of the case, the tribunal considered that Ms Weldemichael had returned to work more than a year after the birth of her child and concluded that this was not a reasonable period. **The wife of Mr Obulor had stopped working more than 20 weeks before the birth of her child and the tribunal concluded that this fell outside of the scope of the ruling in *Saint Prix***.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The tribunal interpreted *Saint Prix* and set out the requirements to be met in order for an EEA national to retain continuity of residence for the purposes of Regulation 15 of the EEA Regulations during a period when she gave up working or job-seeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The appeals were dismissed.
Key quotations in original language and translated into English with reference details (max. 500 chars)	*An EEA national woman will retain continuity of residence for the purposes of the Immigration (European Economic Area) Regulations 2006 (the 2006 EEA Regulations) for a period in which she was absent from working or job-seeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth if, in line with the decision of the CJEU in **Jessy St Prix**:* *(a) at the beginning of the relevant period she was either a worker or seeking employment;* *(b) the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work);* *(c) the relevant period did not extend beyond 52 weeks; and,* *(d) she returned to work.* *So long as these requirements are met, there will be no breach of the continuity of residence for the purposes of regulation 15. Time spent in the United Kingdom during such periods counts for the purposes of acquiring permanent residence.* [before Para. 1] "It is sensible to analyse first what period of absence from employment or seeking employment prior to the expected date of confinement ("EDC") is permissible. It was not submitted that in any individual case, a woman need prove that she gave up work due to the physical constraints of the late stages of childbirth. It was common ground that from 11 weeks before "EDC a woman cannot be expected to work, that timing being fixed, in order, as a matter of policy to protect pregnant women." The period of 11 weeks is established by domestic law in order to give effect to " Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding" ("Directive 92/85/EC"). In any event it is not clear that it was part of the remit of the CJEU in **St Prix** to give guidance as to how a pre-childbirth

	absence from work was to be assessed". [Para. 22] "We do not rule out that the physical constraints of pregnancy may require ceasing work or seeking employment before 11 weeks if, for example, it was a multiple pregnancy or there were particular requirements of the work in question. That would, however need to be proved by cogent evidence". [Para. 23] "It is apparent from this that the underlying issue identified by the CJEU was whether a woman has left the employment market, an issue which would appear primarily to be evidential. They considered that if she has not, then her continuity of status as a worker has not been broken. The questions that the CJEU considers the national court concerned should consider [42] must be viewed in that context. The exercise to be undertaken is thus, as the court considered, an evaluative process, albeit one which is relatively closely circumscribed given the reference to "physical constraints of the late stages of pregnancy", the "aftermath of childbirth" and the proviso of a return to work. It is a narrower exercise than assessing job-seeking although there is, we consider, no reason in principle why the approach in assessing the reasonableness of an SPE should not be analogous to or analysed in the same way in which job-seeking is assessed; finding a job is indicative that prior to that point, an individual seeking work had a genuine chance of being engaged but it is not determinative". [Para. 41] "That observation is subject to this important caveat: given that the purpose of the maternity leave period is to provide protection to women, it is difficult (absent evidence of a clear intention of the part of the woman not return to work) to envisage that it would be reasonable to expect a woman to have returned to work before the end of the relevant maternity leave". [Para. 42] "Subject to that general observation, we consider that what is "reasonable" requires an individual consideration of a woman's circumstances, taking into account additional factors which may render a longer period between the date of birth and the commencement of work reasonable. The CJEU did not indicate that any of the factors they identified should be determinative, or of necessarily holding more weight. That said, the protection of women workers is a thread of concern running through the decision of the CJEU, and it is thus difficult to hold that any reasonable period could be less than that laid down by domestic law in conformity with Directive 92/85/EC". [Par. 49]

	"We do note, in reaching this conclusion, that Mr Berry submitted that there is no bright line identified by the CJEU. While we have some sympathy with that submission, we consider that the scope for variance in assessing what is reasonable is constrained significantly by the reference to Directive 92/85/EC and the consequent minimum length thereby indicated. There is also the express reference to finding work". [Para. 50] "We consider that it must not be forgotten that although pregnancy is not an illness, illness during pregnancy or afterwards which prevents a woman from working, or job-seeking, may engage regulation 6 (2) of the EEA Regulations in any event". [para. 51] "Drawing these strands together, we consider that if an evaluation of a woman's status is to be carried out at a point during a potential SPE, so long as it is shown that she ceased work or looking for work owing to the physical constraints of the late stage of pregnancy, in effect, 11 weeks or less before the EDC, then there is a presumption that she has not left the employment market. That presumption could be rebutted by clear evidence of an intention not to return. If there is no return to work within the year starting 11 weeks before EDC, that is likely to be an indication that there had been no intention to return although account would need to be taken to evaluate attempts to find work in that period. Further, a woman may well have intended to return to work, but due to a supervening event such as serious illness or an accident, have been unable to do so. While it may well be that she has left the employment market as a result, it does not mean that she did so, and her continuity of residence ceased at the moment she ceased work or looking for work; her intentions may have changed much later, and in such circumstances, a careful fact-sensitive analysis is required". [Para. 56] "Ms Smyth submitted that only time accrued under article 7 of the Citizenship Directive could be counted when assessing whether permanent residence has been acquired and that thus time spent during an SPE could not be taken into account". [Para. 57] "We do not consider that time spent by a woman during a SPE period can be discounted in assessing continuity of residence. We note that there is no indication that other, temporary absences from work as identified in regulations 6 to 7 (and indeed by article 7) interrupt continuity of working; such a restriction could only apply to women and would thus be inherently discriminatory. Further, it presupposes that article 7 contains a closed list which at [31]-[33] of the judgment of the Court in **St Prix** indicates it is not". [Para. 58]

	"Drawing these conclusions together, we consider that the questions we posed at the outset can be answered as follows:- A woman will retain continuity of residence for the purposes of the 2006 EEA Regulations for a period in which she was absent from working or job-seeking if, in line with the decision of the CJEU in **Jessy St Prix**: (a) at the beginning of the relevant period she was either a worker or seeking employment; (b) the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work); (c) the relevant period did not extend beyond 52 weeks; and, (d) she returned to work," [Para. 59] "On the facts of Ms Weldemichael's case, as set out above, she did not return to work until well over a year after the birth of a child. Even assuming that the relevant maternity period is 12 months (including the 11 weeks before EDC), we are not satisfied that this could be seen as a reasonable period. Assuming the start of an SPE to be 11 weeks before 20 November 2009, then the appellant would require an SPE nearly 2 years to be accepted in order to show a continuity of residence. While we note the submissions made on her behalf, we are not persuaded that there are reasons of substance sufficient to explain why such long period before returning to work should be accepted". [Para. 65] "As it is not in dispute that Ms Jociute had not returned to work, even on the basis of the concession made, her continuity of lawful residence ceased in November 2008, and she was not able to benefit from the decision in **St Prix**. Even if she were, there is still a substantial gap between her seeking work in November 2008 and the beginning of any applicable SPE. She ceased working almost 9 weeks before the date (11 weeks before the EDC) from which she would be entitled to maternity leave. Such a substantial extension to the period falls clearly outside what could be considered reasonable in the terms of the decision of the CJEU in **St Prix"**. [Para. 75]
Has the deciding body referred to the Charter of Fundamental Rights. If yes, to which specific Article.	No, only as part of the recitals to the Directive (see Para. 3).