



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

Appeal Number: IA/29456/2014

THE IMMIGRATION ACTS

Heard at Bradford

On 5th February 2015

**Decision & Reasons
Promulgated**

On 25th February 2015

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE

and

**SUHAYB AHMED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer

For the Respondent: Mr N Vaughan instructed by NBS Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Dickson made following a hearing at Bradford on 1st October 2014.

Background

2. The claimant is a citizen of Bangladesh born on 31st December 1973. On 9th February 2007 he married a citizen of the Netherlands and came to the UK. He was subsequently granted a residence card as a family member of an EEA citizen valid from 3rd July 2008 to 3rd July 2013.

3. On 8th May 2013 he applied for a permanent right of residence under Regulation 5 of the Immigration (EEA Regulations) 2006.
4. The facts of this case are not in dispute. The claimant is the husband and main carer of the sponsor who has had a long history of mental health problems and suffers from a psychotic illness. She has not worked at least from the time when she entered the UK, following a personal injury while she was living in the Netherlands, and from that time she has been physically and mentally unfit.
5. The couple have a 6 year old son. The claimant works as a tandoori chef, part-time, 24 hours a week.
6. The judge wrote as follows:

“The Sponsor and the Appellant have both been granted residence cards. At the time the Sponsor would have established that she was a qualified person under regulation 6. She was not a jobseeker, a worker, a self-employed person or a student. She must therefore have been a self-sufficient person under Regulation 1(i)(d). Her brother and his family were living in the UK when the Sponsor joined them after her marriage broke down in the Netherlands. It is not realistic to expect the Sponsor and her family to return to the Netherlands.

The Sponsor is in my view still a self-sufficient person as her brother continues to live here and furthermore the Sponsor now works as a tandoori chef in a restaurant. The Appellant is therefore a family member of an EEA national and has resided in the UK with an EEA national in accordance with the Regulations for a continuous period of five years (Regulation 15(i)(c). It follows in my view that the Appellant is entitled to a residence card.”

The Grounds of Application

7. The Secretary of State sought permission to appeal on the grounds that the EEA spouse had failed to demonstrate that she had been a qualified person as defined in Regulation 6 for a continuous five year period or a worker or self-employed person who has ceased activity as per Regulation 5. Since she has not worked since arriving in the UK she has never qualified as a worker, jobseeker, self-employed person or student.
8. So far as self-sufficiency is concerned, no up-to-date documentation showing the EEA Sponsor’s continuous self-sufficiency for the last five years has been produced. Neither has it been shown that the sponsor has comprehensive sickness cover as required under Regulation 5C(2).
9. Permission to appeal was granted by Judge Pooler for the reasons stated in the grounds on 27th November 2014.

Submissions

10. Mr Diwnycz relied on his grounds.
11. Mr Vaughan accepted that the claimant did not have comprehensive sickness cover. However he said that as a matter of fact the couple were

self-sufficient because they relied on his earnings as a tandoori chef and support from the wider family.

12. He relied on The National Health Service (Charges to Overseas Visitors) Regulations 2011 exemption which states -

“9. No charge may be made or recovered in respect of any relevant services provided to an overseas visitor who has entitlement to the provision of the services in question under or by virtue of any of the following -

- (a) Regulations made under Article 48 of the Treaty on the Functioning of the European Union;
- (b) An agreement entered into between the European Union and any other country;
- (c) Any other enforceable EU right.”

13. He said that the couple had been allowed to live in the UK for five years which ought to count for something and there was an element of fairness if they were denied the right to remain in the UK.

Findings and Conclusions

14. Regulation 4(1)(c) of the 2006 Regulations states -

“(c) Self-sufficient person means a person who has -

- (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
- (ii) comprehensive sickness insurance cover in the United Kingdom.”

15. Regulation 4(2) provides -

“For the purposes of paragraph (1)(c), where the family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their family members of that person -

- (a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and his family members becoming such a burden;
- (b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.”

16. The issue relating to sickness insurance cover has recently been considered by the Court of Appeal in Ahmed v SSHD [2014] EWCA Civ 988.

17. The Court of Appeal rejected the argument that the condition was satisfied because of an entitlement to use the national health service and there was no need to have private insurance cover. In a comprehensive judgment

the Court of Appeal concluded that there was clear and consistent case law from the CJEU, and specifically did not accept the present argument that an entitlement to free NHS treatment satisfied the requirements under the Regulations to have comprehensive sickness insurance cover.

18. That is determinative of this appeal. The claimant does not have such cover and therefore cannot establish that the EEA family member was exercising treaty rights for a continuous period of five years in the UK as a self-sufficient person. Accordingly he does not qualify for a permanent residence card.
19. So far as Article 8 is concerned, the refusal letter states that the claimant should make arrangements to leave which is the consequence of the decision to refuse a residence card. The Secretary of State's position seems to be that Article 8 does not fall to be considered because the claimant has not made a separate application under the Immigration Rules in reliance on family and private life established in the UK.
20. Whether or not that is the Respondent's position, it does not fetter the Tribunal's obligations to consider whether the claimant's removal from the UK would breach Article 8 of the ECHR.
21. However in this case there can be no such breach. The EEA national has not established that she has been exercising treaty rights for a continuous period of five years but that does not in itself demonstrate that she has no right to reside here under the Regulations.
22. If she does not a removal decision may be taken that she return to the Netherlands where the claimant could join her. They have a 6 year old child but he would not be required to leave the EEA and no evidence has been put forward to establish that it would be unreasonable to expect him to return with his parents to the Netherlands should it not be possible for his mother to establish a right to reside here under the Regulations.

Notice of Decision

23. The judge erred in law. This decision is set aside and re-made. The claimant's appeal is dismissed.

No anonymity direction is made.

Signed

Date **5th February 2015**

Upper Tribunal Judge Taylor