Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/12478/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Promulgated on**
On 7 March 2014	**On 3 September 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLEKSANANDR NOVIKOV

Respondent

Representation:

For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer
For the Respondent: Mr Nazir, instructed by Copland Immigration Services

DETERMINATION AND REASONS

1. The respondent (whom we shall call 'the claimant') is a national of Ukraine. He is married to a French national working in the United Kingdom. He entered the United Kingdom on 1 May 2006 with his wife and on application was granted a residence card valid until 29 May 2012. He now claims that he is entitled to permanent residence, on the basis of his having been here for more than five years as the spouse of a national of a Member State who is herself exercising treaty rights. He has made two

applications. It is the refusal of the second, on 27 March 2013, that gives rise to the present proceedings.

2. The claimant appealed against that refusal to the First-tier Tribunal, where Judge Quigley allowed his appeal. The Secretary of State now appeals, with permission, to this Tribunal.

3. The problem is this. The claimant's right to permanent residence in the United Kingdom arises, if at all, from the Citizens Directive 2004/38/EC as implemented in the United Kingdom by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (as amended). Regulation 6 defines a 'qualified person'. A qualified person is necessarily an EEA national. Regulation 7 defines 'family member': as her spouse, the claimant is a family member of his wife. As such, he is entitled to reside in the United Kingdom under reg 14(2), "for so long as he remains the family member of the qualified person". His permanent right of residence, if any, would be on the basis that, in the words of reg 15(1)(b), he is:

> "A family member of an EEA national who is not himself and EEA national but who has resided in the United Kingdom with the EEA national in accordance with these regulations for a continuous period of five years."

4. Looking now at the same regulations in reverse order, it is clear that in order to acquire the permanent right of residence, the claimant would have to have resided in the United Kingdom for five years "in accordance with these regulations", which means that for those five years his residence must have been residence permitted by reg 14(2). That in turn requires the resident for that period to have been as the family member of a 'qualified person'. The question therefore is whether, for the period of five years in question, the claimant's wife was a 'qualified person'. For present purposes it is sufficient to say that the definition of 'qualified person' includes both a worker and a student. Both of those terms are defined in reg 4. We do not need to set out the definition of a 'worker', but, by reg 4(1)(d):

> "(d) 'student' means a person who –
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> (i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is –
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> (aa) financed from public funds; or
>
> (bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;
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> (ii) has comprehensive sickness insurance cover in the United Kingdom; and
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> (iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient

resources not to become a burden on the social assistance system of the Untied Kingdom during his period of residence."

5. Paragraphs (3) and (4) of the same regulation make further provision in relation to the assurance required by reg 4(1)(d)(iii).

6. The claimant's wife has been at various times during the period in question a worker. She has also been a full-time student at the University of Glasgow. At the hearing before Judge Quigley the Secretary of State pointed out that time in the United Kingdom spent as a student could count as residence in accordance with the EEA Regulations. It is not clear whether the Presenting Officer drew the judge's attention to the requirements of reg 4. The judge found that the claimant's wife was a full-time student from September 2008 until July 2012. During that period she had sometimes undertaken part-time and vocation work. There were however, two periods when she was not employed, that is to say from September 2010 until May 2011, and from September 2011 until January 2012. The judge allowed the appeal because she thought that the Secretary of State had failed to appreciate that the period of time during which the claimant's wife was a full-time student counted towards her residence as a qualified person. When she was not working, she was nevertheless a student.

7. That, however, as is clear from the regulations we have set out, was not sufficient. Whilst the claimant's wife was a worker (presumably including periods of part-time work), as indeed evidenced by her National Insurance contribution record, she was a qualified person under the category of 'worker'. When she was not working however, the only basis upon which the claimant claims that she was a qualified person is that she was a 'student'. But there is no evidential basis upon which the judge could have found that she had Comprehensive Sickness Insurance Cover during those periods. It thus appears clear that, in the periods when the claimant's wife was not working, she was not a qualified person, and it follows from that that during those periods, the claimant's residence with her was not as the family member of a person who was residing "in accordance with these regulations".

8. It thus appears that, so far as the decision under the regulations was concerned, the Secretary of State was correct, and the First-tier Tribunal Judge was wrong. She erred in law by failing to appreciate the full definition of 'student' in reg 4 and as a result treated the claimant's wife as a qualified person at times when she clearly was not.

9. We had reached that view on the basis of the regulations themselves: neither party referred us to any authority. Following the hearing we became aware that the Court of Appeal was shortly to consider a similar issue. The hearing of Ahmad v SSHD was on 2 April 2014. The leading judgement of the Court of Appeal [2014] EWCA Civ 988 is given by Arden

LJ, with whom Beatson LJ and Sharp LJ agreed. Arden LJ sets out in her judgement not merely the provisions of the law but the reasons for them, and makes copious reference to existing authority both of the United Kingdom courts and the Court of Justice of the European Union. Her conclusion endorses that which we had already reached. In relation to the case before her, her conclusion was as follows:

> "[70] I would dismiss this appeal. If an EEA national enters the UK and is not involved in an economically active activity, for example because she is a student, her residence and that of her family members will not be lawful unless she has CSIC [Comprehensive Sickness Insurance Cover] while she is a student in the five years following her arrival. Accordingly her family members will not be able to qualify for permanent residency in the UK.
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> [71] So Mrs Ahmad had to have CSIC while she was a student. This condition must be strictly complied with. The fact that she would be entitled to treatment under the NHS, and was thus at all times in substantially the same position as she would have been had she had CSIC, is nothing to the point. Her failure to take out CSIC put the host state at risk of having to pay for healthcare at a time when the Ahmads had not then achieved the status of permanent resident and she was not economically active."

10. Judge Quigley also allowed the appeal on human rights grounds under Article 8 of the European Convention on Human Rights. Her reasons for doing so are wholly obscure. There was and is no question of the claimant being required to leave the United Kingdom, so long as he is the spouse of a qualified person, which at the date of the decision and at present, he is. His wife is working full-time, and he is living with her. It is wholly impossible to construct an argument demonstrating why it is disproportionate within the sense of Article 8 for his residence here to be in the status of the spouse of a qualified person rather than that of a permanent resident; and the judge made no reference to any such argument. The Secretary of State's decision on the claimant's application makes no difference at all to the exercise of the rights of private or family life by either the claimant or his wife.

11. For the foregoing reasons we consider that the First-tier Tribunal erred in its conclusions both on the regulations and on Article 8. We set aside Judge Quigley's decision. We substitute a determination dismissing the claimant's appeal against the Secretary of State's decision.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER
Date: 28 August 2014