Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36063/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 29 April 2016	**On 11 May 2016**
Prepared on 3 May 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

S. K.
(ANONYMITY DIRECTION)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Markus, Counsel instructed by Howells Solicitors LLP
For the Respondent: Mr Johnson, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Germany, now aged 22. She has lived in the UK since the age of six. At the age of nine she was taken into the care of her local authority, and she has not lived with her mother and step father since. She now has no contact with them. She has been on medication for a number of issues for many years, and upon completing her secondary education became a residential student with a trust who provides support

to meet her needs, and some employment, and this remains her situation.

2. On 7 August 2014 the Appellant applied for a residence card asserting by reference to the Immigration (European Economic Area) Regulations 2006 ["EEA Regulations"] that as a German national she had lived in accordance with the Regulations for a continuous period of five years in her own right, and alternatively, that she was under 21 and the direct descendant of a German national who had exercised treaty rights in the UK since 1999, and was thus a family member by reference to Regulation 7(1)(b) who did not need to show dependency or membership of his household because she was herself a German national. The Respondent was invited to apply her policy of pragmatism for victims of domestic violence in recognition of the difficulties victims have in obtaining the documentary evidence necessary to make out their claims.

3. That application was refused on 30 August 2014 on both limbs. The Respondent was not satisfied that the Appellant met the requirements of Regulation 6 or 15(1) and considered that she was not therefore a "qualified person" in her own right for the requisite period, and, was not satisfied that she was related to the sponsor as claimed, or indeed, that he was a "qualified person" for the requisite period of time as claimed.

4. The Appellant appealed to the First Tier Tribunal against that refusal, and her appeal was heard on 29 June 2015, and then dismissed by Immigration Judge Cope in a decision promulgated on 14 September 2015.

5. The Appellant sought permission to appeal that decision to the Upper Tribunal in grounds that also double as the skeleton argument in support of the appeal. Permission was granted by First Tier Tribunal Judge Parkes on 8 February 2016 on both of the two grounds advanced. These sought to challenge the decision upon both of the two alternative limbs by which the application was made, and appeal advanced.

6. The Respondent has served no Rule 24 response, and has lodged no cross appeal against the Judge's finding that the Appellant is a German citizen, and that her mother and step father are also German citizens and resident in the UK, both of which appeared to have been disputed by the Respondent in her original decision.

7. Thus the matter comes before me.

Article 8

8. I note that an Article 8 appeal was advanced before the First Tier Tribunal, and dismissed by Judge Cope on the simple basis that there was no removal decision. I also note that the decision under appeal did not contain a s120 notice to the Appellant, and that it is not suggested by either party that one was served otherwise. In the light of the guidance to be found in Amirteymour [2015] UKUT 466, and, TY (Sri Lanka) [2015] EWCA Civ 1233, I am satisfied that the Tribunal was obliged to confine itself to the claim under the EEA Regulations, and that the Appellant was not entitled to argue that the decision under appeal was a breach of her Article 8 rights. I need say no more about that aspect of the appeal.

Was the Appellant a "qualified person" at any stage?

9. It is common ground that by Regulation 4(1)(d)(iii) a student is defined (inter alia) as one who has comprehensive sickness insurance cover ["CSIC"], and that the Appellant has never held CSIC. She has never had the financial resources to acquire CSIC on her own account, and as a child of nine who was taken into the care of her local authority it has clearly never occurred to that local authority that there was any obligation upon it to provide her with CSIC in order to safeguard her interests. No doubt the issue was never raised either because of her practical ability to access the resources of the NHS free of charge, or, because as a German citizen, no one ever considered that there was any need, or obligation, to consider further her immigration status, or, to seek to secure a permanent right of residence for her position by reference to the EEA Regulations.

10. The first limb of the appeal raised therefore the short point of whether it was proportionate given the Appellant's particular circumstances for the Respondent to refuse to treat her as ever having been a "qualified person", notwithstanding the admitted lack of any CSIC. Absent that requirement, the Appellant would have acquired directly the right to reside permanently in the

UK some considerable time ago, probably by the end of 2006, because the Respondent took no issue before the Judge over the sufficiency of the resources available to the Appellant as one in the care of her local authority, and it was accepted that she was in full time education throughout her childhood in the UK. (I pause to note that it was precisely because she was in full time education that third parties were able to identify and raise the concerns that ultimately led to the care order being made in relation to her.)

11. It was not argued before the Judge that the Appellant's ability to access the NHS was of itself, the equivalent to holding CSIC. That proposition has been repeatedly rejected by the Upper Tribunal and the Court of Appeal, most recently in Ahmad [2014] EWCA Civ 988. To the extent that the Judge understood the argument advanced on behalf of the Appellant (as set out in paragraphs 22-24 of Counsel's skeleton argument) as being such a proposition [69-74], then I accept that he misunderstood that argument.

12. Before the Judge the Appellant had argued that in the light of the guidance to be found in Baumbast [2003] 3CMLR 23, whilst the exercise of the right of residence could be subordinated to the legitimate interests of a member state, the national measures adopted to safeguard those interests must be applied in accordance with the principle of proportionality; ie they must be necessary and appropriate to attain the objective pursued by the member state. (The need to comply with the principle of proportionality was also expressly recognised in Ahmad [2014] EWCA Civ 988.) It was argued that the Respondent's decision in this case failed to do so given her circumstances as a child in care, and the unnecessary cost to the local authority of providing CSIC when she was able to access the NHS free of charge, and thus that her decision failed to demonstrate any proper consideration of the Appellant's individual circumstances, or any application of the principle of proportionality to them.

13. The Respondent has not challenged by way of any Rule 24 response the assertion made in the grounds of appeal drafted by Mr Markus, that the Appellant's case was put in this way by him before the Judge. Certainly Mr Markus' assertion in the grounds that he did put the case in this way is amply supported by the skeleton argument that he had supplied to the Respondent and Judge Cope in advance of the hearing [ApB p6]. The

absence of any reference to the principle of proportionality, or to the decision in Baumbast in the course of the Judge's decision demonstrates that the Judge must somehow have misunderstood the argument being advanced, and thus failed to engage with it. Indeed the Judge's complaint that there was a failure in the EEA Regulations to provide for a means of recognising the very particular circumstances of an applicant such as this one, simply reinforces that view [75].

14. The applicant in Baumbast succeeded in showing that in the light of his own particular circumstances, the refusal to allow him the right of permanent residence on the ground that he did not hold CSIC, was a disproportionate interference with the exercise of the right of residence that he derived from Article 18(1). The Appellant was entitled to a consideration of her own particular circumstances in the same way, in order that the Respondent might properly and lawfully decide whether to refuse her the right of permanent residence on the simple ground that she had never held CSIC was, or was not, a proportionate interference in her Article 18 right of residence.

15. Quite simply the letter of 30 August 2014 which gives the Respondent's reasons for the refusal of the application does not demonstrate any appreciation of the Appellant's own particular circumstances, or any consideration of the issue of proportionality to those circumstances. Thus in my judgement the decision under appeal was not made in accordance with the law, and in my judgement the failure of the Judge to identify that decision as such, and thus to set that decision aside so that the Appellant's application remained outstanding and awaited a lawful decision, amounted to an error of law on his part.

16. Mr Johnson for the Respondent argued in reliance upon the decision in Ahmad that even if the Appellant's circumstances were to be considered in the light of the issue of proportionality, her application was still one that was bound to be dismissed, so that the error was not a material one. I do not agree that the likely outcome is as clear and obvious as he seeks to suggest, the Appellant's circumstances are compelling as the Judge recognised himself, and a situation such as hers is likely to be rare. In any event his argument rather misses the point; which is that the decision under appeal was demonstrably not made in accordance with the law, and

thus the Appellant was entitled to succeed in her appeal to the Tribunal to that limited extent.

17. Whilst I note that Mr Johnson placed particular weight upon the dismissal of the appeal in Ahmad I note that in that case the applicant was an adult citizen of a non member state who claimed to derive a right of residence indirectly through the status of his economically inactive EEA national spouse. There were no particular circumstances in his case that would engage the principle of proportionality, and the argument in his appeal therefore turned upon the quite different point of whether access to the NHS should properly be considered to be the equivalent of CSIC. In dismissing his appeal the Court of Appeal made express reference to "*the need to apply the CSIC condition in accordance with the general principles of EU law including in particular the principle of proportionality*", but on the facts of the case that simply did not arise as an issue [44-50]. To be fair to him I note that Mr Johnson accepts that the Appellant's circumstances are in no way equivalent to those of the applicant in Ahmad.

18. Accordingly in my judgement ground 1 is made out.

Did the Respondent properly apply her own policy; 10/2011

19. It is common ground before me that the Respondent's decision makes no reference to the existence of the European Operational Policy 10/2011, "The Pragmatic Approach", or to any decision as to whether or not to exercise any discretion the case worker derived from it. This was however a policy to which those acting on behalf of the Appellant had made specific reference, and prayed in aid, asserting that she was the victim of domestic violence, and that as such she should not be expected to be able to produce the same level of evidence in support of her application as would ordinarily be expected of her [J4].

20. Mr Johnson has sought to argue before me that the Appellant was not a victim of domestic violence, and so argued that the policy had no application to her, thereby justifying the approach adopted by the Judge [59]. I am satisfied that this argument, and the Judge's approach, are misconceived for two reasons.

21. First, the report of concerns about unexplained injuries by the Appellant's school to the local authority, was the trigger for intervention. The reasons for the local

authority acting so as to seek a care order were sufficient of themselves, even without the allegations that the Appellant had subsequently made herself once she was older, to establish her as a victim of domestic violence. The local authority and the Family Court would not have intervened as they did without good reason, and it is absurd to suggest otherwise. Moreover the Appellant had given evidence of what had occurred to the Judge in her written evidence. What was being challenged before the Judge by the Respondent, if anything, was the absence of corroboration for those allegations, although in my judgement corroboration could be found if needed in the actions of the local authority and the Family Court. Whilst I accept that the Appellant had not produced documentary evidence in the form listed in paragraph 8 of the policy, it is quite plain from the wording of the policy itself that this was never intended by the Respondent to be an exhaustive list, and in my judgement the evidence that the Appellant did produce was overwhelming on the issue.

22. Second, and in any event, the Respondent did not challenge that the Appellant was a victim of domestic violence in her decision to refuse the application, and indeed she made no reference to the policy in issue at all. Nor was the Appellant's claim to be a victim of domestic violence ever challenged before the Tribunal.

23. Mr Johnson's fall back position, which was also the line adopted by the Judge [58], was that the Appellant had failed to demonstrate that she would be placed at risk of harm by an approach to the family member in question, and that as a result the policy was not engaged. There is in my judgement no merit in this argument either, which takes far too narrow an approach to the policy. An applicant is not required to demonstrate a real risk of future harm arising from an approach to the individual concerned in order for the policy to be engaged, and the policy does not state that they are. The rationale of the policy is plainly to avoid situations in which victims are unable to provide the evidence to demonstrate their entitlement to the treaty rights that they have already acquired, either because of their distaste of making an approach for help to their former abuser, or, because they have made allegations to the police against their former abuser and it would be inappropriate for them to then seek that individual's help, or, through a well founded fear of further harm at the hands of their former abuser arising from doing so.

24. As it happens, in this case the Appellant's solicitors had made an approach to her step-father for copies of any records he held that would assist in demonstrating that he was a qualified person for the requisite length of time. They had not disclosed her whereabouts in so doing. He had produced some documents in response, but recognising that these were incomplete, and that he could not be compelled to do any more than he had done, the Respondent's assistance had then quite properly been sought by specific reference to the policy. As Mr Johnson accepted it is very far from clear what, if any, steps were taken by the Respondent in response to that request in order to pursue the detailed enquiries envisaged by the policy, or what consideration was given to the terms of the policy and the discretions set out therein.

25. Given the arrival of the Appellant, her mother, and her step father in the UK in 1999, (and the Judge's acceptance that all were German citizens) the ability to identify whether her step father was a qualified person in the period 1999-04 was central to establishing that he, and therefore she as a child, had acquired a permanent right of residence in 2004, or in any period thereafter prior to 2009.

26. The available evidence suggests that for much of the time the Appellant's step father was a qualified person in the period 7 October 1999 to 15 May 2006, either because he was in employment or claiming job seekers allowance, although the available evidence does not identify what his status was between May 2002 and June 2004. The Judge declined to infer that he was a qualified person in this period too, and pointed out (not unreasonably) that he could simply have been outside the UK in this period. Mr Markus does not challenge that. His point is that had the caseworker appreciated that the policy applied to the Appellant, then a senior caseworker would have had to determine what, if any, further enquiries should be made into this period, and/or, whether to exercise a discretion to allow the application in any event given the particular circumstances of the case and the level of evidence provided. Since there is no evidence to suggest that the policy was ever considered by the caseworker, there is no evidence to suggest that the existence of these discretions was appreciated, or that any decision to exercise them or not was ever taken. There is considerable force in that argument.

27. For my part I am satisfied that the Judge did make an error of law in his approach to the policy. It was plainly engaged by the evidence produced to the Respondent in support of the application, yet the decision to refuse the application makes no reference to it, and fails to demonstrate that the case worker appreciated the existence of the discretions contained therein, or, that they were exercised. Thus in my judgement the decision under appeal was not made in accordance with the law, and in my judgement the failure of the Judge to identify that this was the case, and thus to set that decision aside so that the Appellant's application remained outstanding and awaited a lawful decision, amounted to a material error of law on his part.

Disposal

28. The parties were agreed that if that was my conclusion upon either ground 1, or ground 2, that I should set aside the Judge's decision to dismiss the appeal, and that I should go on to remake that decision so as to allow the appeal to the limited extent that the Respondent's decision to dismiss the application was not made in accordance with the law. That leaves the Appellant's application outstanding and awaiting a lawful decision.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 14 September 2015 did involve the making of an error of law that requires that decision to be set aside and remade.

I remake the decision so as to allow the appeal to the limited extent that the Respondent's decision to dismiss the application was not made in accordance with the law.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes

Dated 3 May 2016