



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: EA/03555/2017  
EA/03563/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 31<sup>st</sup> August 2018

Decision & Reasons Promulgated  
On 5<sup>th</sup> September 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Azizur Rahman and Salma Khanom  
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr N Rahman, instructed by Taj Solicitors.

For the Respondent: Mr D Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appealed against the decision of the First Tier Tribunal which dismissed their appeal against the Secretary of State's refusal on 17<sup>th</sup> March 2017 to grant them residence cards under Regulation 6 of the European Economic Area Regulations 2016 (EEA Regulations 2016).
2. The appellant is a German national and his wife, the second appellant is a citizen of Bangladesh.

3. In a determination dated 9<sup>th</sup> May 2018, Judge of the First Tier Tribunal Hodgkinson dismissed the appellant's appeal and recorded the background history:
  - (i) Mr Rahman's contention was that the appellants were self-sufficient with reference to regulations 6 and 4 [4]. There was no suggestion the appellants were qualified in any other category.
  - (ii) The appellants travelled to the United Kingdom on 23rd May 2016. The appellant had worked in Germany until he experienced serious and significant medical problems in 2001. They entered the United Kingdom to see their son and his family.
  - (iii) On 19 August 2016 the lead appellant sought a residence card as evidence of his exercising treaty rights in the United Kingdom as self-sufficient person and his wife applied as a spouse and family member.
  - (iv) The reasons for refusal letter from the Secretary of State confirmed the appellant had provided insufficient evidence of his self-sufficiency as he only appeared to have an income of €350 per month for himself and his wife.
  - (v) The refusal made it clear that the respondent did not accept the appellant was exercising treaty rights self-sufficient person
4. The judge stated at paragraph 9

*'thus, the RFRL makes it clear that the respondent does not accept that the appellant is exercising treaty rights self-sufficient person, the other specific element to be satisfied, in accordance with the requirements of the regulations, as set out below, is that comprehensive sickness insurance, in the United Kingdom is required in relation to both appellants'.*
5. The judge made the following findings:
  - (i) it was common ground the appellant was in receipt of a German work pension in the approximate sum of £320 per month which was paid into his UK bank account and both appellant resided with their son and his wife (British citizens).
  - (ii) The judge made no finding in respect of the sufficiency of the income because of his findings in relation to the requisite comprehensive sickness insurance and this was raised with Mr Rahman at the hearing.
  - (iii) It was the appellant's case that the requisite relevant comprehensive sickness insurance cover was in place and produced the originals at the hearing of recently issued German health cards for both appellants valid until 31 December 2022. Those cards were issued by a German health insurance company by the name of AOK and replaced earlier cards valid to 30 June 2018. The appellants considered they had European health insurance certificate (EHIC).
  - (iv) The judge was referred to further relevant documentation and translation and page 43 a letter related to the earlier AOK health insurance card, but the letter did not explain how the card worked or the level of cover in medical terms.
  - (v) At page 47 of the bundle was a further letter from AOK dated 15 January 2018 addressed the appellant at his current United Kingdom address stating:

*'Information*

*Health insurance protection for family members living in your home country*

*Health insurance policy number: X846051441 – 10/07/1951*

*Dear Mr Rahman,*

*we have applied to register your dependence with the British insurance provider. As soon as we receive confirmation here, we will be able to order an AOK insurance card for your wife'*

- (vi) there was no indication who the British insurance provider might be
- (vii) there were no policy documents and a further document at page 50-51 of the bundle did not set out what cover was provided by the German insurance policy
- (viii) a letter (translated) from the Deutsche Rentenversicherung (the German statutory pension scheme) dated 11 February 2018 addressed to the appellant, referred to deductions for a contribution by the appellant to a health insurance scheme in Germany. *'Those deductions comprise the appellant's contribution to a health insurance game the sum of €30.57 per month an additional contribution to health insurance, in the sum of €4.19 per month and the appellant's contribution to nursing care insurance, in the sum of 10 years and \$.68 per month. These are shown as deductions from the appellants monthly German pension. They may relate to the AOK insurance to which I have referred above'* [27].
- (ix) No policy document was produced relating to the insurance or any independent documentary evidence which established the level of that insurance cover. Documents did not establish that the German insurance scheme referred to, provided comprehensive sickness insurance cover to appellants. The judge found it was not clear precisely what cover that policy did provide to the appellant United Kingdom any
- (x) there were various and NHS medical documents but no indication the insurance cover had paid anything to the NHS or indeed anything had been paid at all to anyone. There were no invoices for treatment
- (xi) the judge acknowledged Mr Rahman contended it was accepted in the RFRLs that the comprehensive sickness insurance cover was in place as there was acknowledgement that the German health cards been produced as evidence of medical insurance and was no indication that the insurance was inadequate
- (xii) the judge acknowledged that the respondent did not specifically address the question of the requisite sickness insurance but the Home Office presenting Officer did not accept that the requisite comprehensive health insurance cover was in place and the judge found he was required to consider whether every relevant aspect of the relevant regulations was satisfied and found that it had not been. The judge confirmed that Mr Rahman did not request an adjournment of the appeal hearing.
- (xiii) The judge was not aware of the specific definition as to what was deemed to be comprehensive sickness cover as referred to in regulation 4(1)(c)(ii). The judge stated  
*'however logically it is former insurance cover which is reasonably wide scope. Clearly it is the appellants to prove their case. The documentation produced in sufficient to*

*discharge the burden as the reasons I have indicated none of the documentation before me establishes what sickness insurance cover is provided in the United Kingdom by the AOK scheme referred to if any'.*

### **Application for Permission to Appeal**

6. The application for permission to appeal was on the following grounds:
- (i) comprehensive sickness insurance was held by both appellants. The judge acknowledged that the appellants held CSI issued by a German insurance company AOK valid to 31/12/2022. The appellant both held CSI by the principal appellant being self-sufficient person.

Although the judge stated there was no specific definition of health insurance he failed to consider the Home Office guidance on European Economic Area nationals: qualified persons (Version 4 of 01/02/2014) which stated that for applications for a registration certificate or a residence card one of the documents needed to show CSI was a valid European health Insurance card (EHIC) issued by an EEA member state other than the UK.

The judge failed to consider that (a) both appellants had the relevant documents to demonstrate that they held CSI, (b) the principal appellant's pension had deductions that contributed to the health insurance scheme every month, (c) the appellants were not reliant on public funds.

The refusal letter had accepted the appellant had provided "*evidence of medical insurance via German health card valid until 30/06/18*".

The respondent had concluded that the appellant provided insufficient evidence and self-sufficiency was the issue, as the evidence only covered up to 24 April 2016, but the judge failed to acknowledge the updated documents provided to date in the appellant's bundle.

The judge at paragraph 30 acknowledged the respondent was not entitled to challenge the issue of CSI at the trial. The issue was the lack of documents provided.

Both appellants had CSI in accordance with the Home Office guidance. The judge failed to address the self-sufficiency issue for which ample documents and explanations were provided. The judge failed to give due weight to the appellants' documentation.

### **The Hearing**

7. At the hearing, Mr Rahman drew my attention to the Home Office guidance version 5, (which was similar to version 4) and which repeated that set out in the written grounds of appeal. There was only one issue that was self-sufficiency. Both appellants had valid comprehensive sickness insurance, and that could be seen from the documentation within the bundle.

8. Mr Clarke noted that the judge identified that at paragraph 20 that self-sufficiency engaged considerations of the requisite comprehensive sickness insurance cover under regulation 4. The issue was raised at the hearing and the judge was entitled to raise it. The appellant had significant medical problems and pre-existing illnesses prior to entering the United Kingdom. The judge found there was no explanation of how the card worked and if the E card was sufficient why was further insurance needed by AOK? There was no policy documentation and no explanation of the level of cover. For this application the appellant needed comprehensive insurance. The findings were open to the judge. This was a residence card application and the EHIC card was relevant if the residence was temporary and further if there was a statement of intent to that effect by the appellants. These appellants had resided in the United Kingdom since 2016. As such the EHIC card did not assist and that was made clear by the guidance. The provisions regarding permanent residence are different. The question was whether under the European law the appellant would be a burden on the host state. There was insufficient evidence on that point and is the judge stated it was for the appellant to prove his case. Mr Clarke relied on the authority of **Ahmad v Aire Centre** [2014] EWCA Civ 988 and referred me to paragraph 71. There was no statement of intent.
9. Mr Rahman responded that the definition of comprehensive sickness insurance was clear and it was in the guidance. It was for the Home Office if not satisfied with the application, to request a statement of intent and to satisfy the Secretary of State on the point of temporary residence. **Ahmad** was not relevant. Both appellants had current and valid EHIC cards.

## Conclusions

10. The EEA Regulations which apply in this instance are as follows:

### ***‘Qualified person’***

6. – (1) *In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as –*

- (a) *a jobseeker;*
- (b) *a worker;*
- (c) *a self-employed person;*
- (d) *a self-sufficient person; or*
- (e) *a student.*

### ***“Worker”, “self-employed person”, “self-sufficient person” and “student”***

4. – (1) *In these Regulations –*

- (a) *“worker” means a worker within the meaning of Article 39 of the Treaty establishing the European Community(1);*

(b) *“self-employed person” means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community;*

(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;*

11. The Secretary of State’s refusal letter addressed to the lead appellant (and the letter to the wife was in similar terms) identified that for both appellants, their VAF notes stated the purpose of their visit was to visit their son, and they arrived on 23 May 2016 but on 19 August 2016 applied for a registration certificate and a residence card which contradicted the purpose of their visit. The reasons for refusal letter cited both regulation 4 and 6 and set out regulation 4 in full.
12. The letter also recorded the evidence that had been provided, which included reference to the German health card valid to 30 June 2018. There was no specific acknowledgement as to the nature of the card.
13. The letter proceeded to state that the appellants had  
*‘therefore, provided insufficient evidence of your self-sufficiency is the evidence only covers up to 29/4/2016 and there is no evidence of how you have been exercising treaty rights in the UK from that date. It does not appear that you are self-sufficient as you only appear to have an income of €350 a month for you and your wife. Your son is claimed to meet all your other living costs but have provided no evidence.*  
*You have failed to provide evidence that you are a qualified person’.*
14. The refusal letter did not specifically accept the health card as evidence of comprehensive sickness insurance and specifically went on to state that the appellant had failed to provide evidence he was a qualified person. The provisions in relation to a qualified person includes the reference to self-sufficient person which is defined at regulation 4(1)(c) and to which the judge referred.
15. I am not persuaded that the judge ‘acknowledged’ that the Secretary of State was a not entitled to raise the issue of comprehensive insurance at the hearing before the first tribunal. That is a misunderstanding of the judge’s approach and finding. He recorded that it was *Mr Rahman’s* position that, as a result of the refusal letter, the respondent was not now entitled to challenge that issue.
16. The judge turned his mind to the issue of the CSI and openly addressed it, and as he recorded, no application for an adjournment was made by Mr Rahman at the hearing despite the issue being raised. I also note that the grounds to the first Tier Tribunal made reference to the comprehensive sickness insurance and produced evidence thereto. The appellants’ representatives clearly therefore were aware that the matter was a live issue.

17. It was open to the judge to conclude that he must be satisfied that the regulations were fulfilled and that he was entitled to make the findings on the health insurance that he did.
18. As Mr Clarke indicated the lead appellant has significant health issues, of which the judge was clearly aware, but there was no policy document for the appellants which outlined the extent of the insurance cover. The regulations confirmed that the cover must be comprehensive. Even with the further insurance documents provided in respect of the second appellant, which were not before the first Tier Tribunal judge, there was still no policy documents to identify the extent of cover.
19. Mr Rahman relied on the guidance stating that the cards which were produced were EHIC cards and sufficient because the appellants were not applying for permanent residence. He noted that the guidance specifically identified the EHIC cards as being an acceptable form of insurance.
20. At regulation 4(1)(c) however there is reference to *comprehensive* sickness insurance cover and the guidance considers that comprehensive sickness insurance is any form of insurance that will cover the costs of the majority of medical treatment an EEA national may receive in the UK.
21. Mr Clarke submitted that an EHIC card is only relevant if the applicant is here temporarily. That he stated was clear from the guidance. As indicated these appellants entered the UK in May 2016. The witness statements confirmed that they had been added to the council tax. Can it be said that by the date of the hearing before the judge that they were in the UK temporarily? Although Mr Rahman emphasised that the guidance for applications for a document certifying permanent residence refers to an EHIC card there is also a statement to the effect that  
*'you can only accept the valid EHIC as CSI if the applicant is living in the UK on a temporary basis'*  
*if it is clear from other information they provide they are in the UK temporarily you do not need to request further information. For example, a student may be undertaking a year long course and a provisional job offer in their country*  
*if it is not clear and they have not provided specific evidence you must request a statement of intent showing they are in the UK on a temporary basis. The statement signed and dated by the applicant and assessed on its individual merits'.*
22. The refusal letter as identified above made it clear that it was not considered that the appellants were in the UK on a temporary basis because they no longer remained as visitors. The question is what is the nature of 'temporary'? The guidance also refers to applications for permanent residence as requiring applicants to show they had an 'EHIC... for the whole of their 5 years continuous residence', which indicates that an applicant can be here for 5 years in a temporary capacity. The issue on the intention of the length of the visit in my view is not material for the following reason.
23. The 'European Economic Area Nationals: Qualified Persons' guidance sets out the provisions in relation to medical insurance and states,

*'Applications for a registration certificate or a residence card - EHIC is provided*

*If the applicant provides a valid EHIC as evidence of CSI, it must have been issued by a member state other than the UK, because the member state that issued the card will cover the cost of treatment.*

*You can only accept the valid EHIC as CSI if the applicant is living in the UK on a temporary basis'.*

24. Mr Rahman contended the card produced was an EHIC card but it was not issued by the German State. The judge found, as set out above, that the health card was issued by a German company AOK. There was no evidence that the company was an agent for the state. Without an EHIC card there is no reciprocal arrangement. As the judge found there was no evidence of reimbursement for NHS care. The point made by the guidance is that there must be a valid EHIC issued by an EEA member state other than the UK so that claims may be made.
25. As such the judge, rightly, proceeded to consider the extent of the medical insurance cover.
26. With regard health insurance the key provisions, and which underpin the regulations, are found within the Directive 2004/38/EC ("the Directive"). The Recital at 10 is important and provides as follows:

*(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.*

The relevant provision within the Directive for those relying on self-sufficiency is Article 7 which identifies that

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...'*

27. As explained in **Ahmad** at [22]

*"Buxton LJ disposed of the argument in the following terms ([10]-[11]):*

*"10. ... That argument overlooks the fundamental reason for the insurance requirement that was identified as the basis of the scheme of the Directive in Chen: to prevent the presence of the EU citizen placing a burden on the host state. Use of free state medical services exactly creates such a burden. And in any event, even if the argument were otherwise valid its factual premise is false: Mr Gill did not demur from the assumption that, as citizens of a third country, W and X would not be entitled to free care under the NHS."*



11. *It is also because of the nature of the NHS that the social security payments currently being made by W do not count as 'insurance' for these purposes. The NHS scheme is not financed solely out of the social security scheme, but is largely tax-financed. Contribution to the social security fund cannot therefore serve as any sort of proxy for insurance designed to remove from the taxpayer the burden of providing health care.'*

28. The question as to the comprehensive nature of the cover is a relevant factor and there was insufficient evidence regarding a policy document. In effect the documentation did not address the issue of payment and this was important in view of the significant health concerns. This was not merely a matter of limited discrepancies, as in Baumbast and R (Free movement of persons) [2002] EUECJ C-413/99 (17 September 2002) regarding insurance cover, but a complete absence of the policy documents no doubt because of reliance on the EHIC card point. Even before me the documentation was inadequate.

29. In **Ahmad** the question of proportionality acknowledged but the differing facts from Baumbast were relevant. As stated at [44]

*'The CJEU in Baumbast v Secretary of State for the Home Department [2002] CMLR 23 held that the host state must apply the condition for CSIC in accordance with the general principles of EU law, including in particular the principle of proportionality. Thus, the host state should disregard minor discrepancies. These might arise when the cover was not totally comprehensive. The issue on this appeal is whether that extends to disregarding the requirement for CSIC in the circumstances of this case. Mr Kadri QC submits that to require CSIC in the present case is disproportionate'.*

30. **Ahmad** identified at [49] and [50] that Baumbast was generous in interpretation

*'Furthermore, in Lekpo-Bozua v Hackney LBC, this court has described Baumbast as "the high watermark of resort to proportionality under Article 18" (referring to Maurice Kay LJ in Kaczmarek v Secretary of State for Work and Pensions [2008] EWCA Civ 1310, [14]). In other words, Baumbast is likely to represent the furthest the host state will have to go to tolerate any divergence from the condition for CSIC in Article 7. As explained above, the facts of this case are materially different.*

*In my judgment, there is nothing in the appellant's case which makes the requirement for CSIC disproportionate. The period of time during which the CSIC must be held is short, and there is no other way in that period of protecting the host state'.*

31. The judge's approach to proportionality was not materially flawed. In this instance there was no indication as to the cover that the appellants had despite the health card. There was identified that both the appellants had very significant health problems. The first appellant had brain tumours removed in 2001, on-going problems with his stomach and a series of problems for which appointments on the NHS had been arranged. The second appellant was described in the witness statements as having very significant health problems. There was no indication of the cover needed and the judge rightly stated no indication of the policy cover for either appellant. The appellants had never worked in the UK, and merely entered as visitors and as the judge found had received treatment on the NHS. That there was no claim for

reimbursement is a matter for the UK authorities, but it cannot be said that there may be 'minor discrepancies' in the extent of the insurance 'cover' because information on that policy was not produced.

32. The first appellant had had significant recourse to the NHS and there was an absence of evidence to show sufficient resources to guard against the possibility of being a financial burden on the host state with regard his health needs. His minimal pension could not be assessed to cover his health needs because there was no indication of the cost of his health care.
33. For the reasoning given, I am not persuaded that there was a material error of law in Ftt Judge Hodgkinson's decision and I find the decision will stand.

Signed

*Helen Rymington*

Date 1<sup>st</sup> August 2018

Upper Tribunal Judge Rymington