Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001813
on appeal from EA/50796/2020
IA/02478/2021

THE IMMIGRATION ACTS

Heard at Field House
On 18 August 2022

Decision & Reasons Promulgated
On 6 October 2022

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MOHAMMED ANJOB ALI
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 29 October 2020 to refuse him a residence card as the family member of an EEA citizen exercising Treaty rights in the UK, pursuant to Regulation 7(1)(c) of the Immigration (European Economic Area) Regulations 2016 (as amended).

2. The appellant is a citizen of Bangladesh. His daughter-in-law is an Italian citizen.

3. **Vulnerable appellant.** The First-tier Judge treated the appellant as a vulnerable witness, as he had suffered a stroke in January 2022 and had

only been released from hospital on 31 January 2022, just three weeks before the First-tier Tribunal hearing. The appellant was treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance.

4. No vulnerability issues arise today as the appellant has opted not to have an oral hearing.

5. **Mode of hearing.** At the appellant's request, the hearing listed for 18 August 2022 was vacated and the Tribunal was requested to consider the appeal on the papers. The Upper Tribunal invited written submissions from the parties. Kalam Solicitors, who represent the appellant, simply sent their grounds of appeal again, and nothing was received from the respondent.

6. We therefore consider the appeal on that basis.

Background

7. The appellant was born in Sylhet, Bangladesh in 1956 and is now 66 years old. He last entered the UK on 18 February 2007 and overstayed his six-month visit visa, which expired on 18 August 2007. While in the UK, he has never worked.

8. The appellant's son had been supporting him for some years. The appellant had no bank account in the UK because he lacked the documents required to open one. When his son still lived in Bangladesh, he would send money to people he knew who lived in the UK, and they would pass it on to the appellant. His son did the same when he was living and working in Brazil.

9. The appellant's son met his Italian wife in Portugal. His wife returned to live in Brazil and the appellant's son joined her there, and on 18 July 2017, they married in Brazil.

10. They returned to Europe in 2017, the year their daughter was born. They lived in Italy, the daughter-in-law's country of nationality, and on 3 December 2018 they registered their Brazilian marriage with the Italian authorities. The appellant's son has an Italian residence card.

11. The couple remained in Italy for two years. On 13 April 2019, they came to live in the UK and have lived here since then. It is the appellant's case that he has lived with them ever since they came back.

12. In June 2019, the appellant's son got a job with Ahmed Pizza Ltd, trading as Papa John's Pizza, in Burgess Hill. He has worked there since then, earning less than £15,000 a year. The appellant has no income and his son and daughter-in-law support him financially, physically, and emotionally. They give him spending money, and pay for all necessary costs, for whatever he needs, as well as food, rent and utilities.

13. In a decision sent to the parties on 10 December 2019, and anonymised, First-tier Judge Corrin dismissed the appellant's international protection appeal.

14. The appellant's daughter-in-law was working until 1 January 2020, when she began her maternity leave. On 17 January 2020, the appellant's son and daughter-in-law had a son.

15. His daughter-in-law has not returned to work: their 5-year-old daughter has been diagnosed with severe Autism Spectrum Disorder. She cannot speak or communicate, sleeps poorly, behaves in a socially inappropriate way, and is sometimes aggressive. She will hurt herself or her young brother if not monitored. She becomes very anxious and stressed, and is often overwhelmed by what is going on around her.

16. The appellant's granddaughter needs monitoring 24/7, with which the appellant helps his daughter-in-law, as his son is working. The family receive Disability Living Allowance and Carer's Allowance, paid into his son's bank account.

17. On 25 June 2020, the appellant's daughter-in-law was granted EUSS pre-settled status. On 8 September 2020, the appellant sought an EEA residence card based on his status as her direct family member. On 14 September 2020, the appellant's son was also granted EUSS pre-settled status.

18. On 29 October 2020, the respondent in her refusal letter said that the appellant had not provided adequate evidence that he was a dependent direct family member; there was insufficient evidence that he was living with his son and daughter-in-law, or of financial dependency, and nor had he shown that his daughter-in-law was exercising Treaty rights in the UK.

19. On 4 August 2021, when the witness statements were signed, the appellant's son and daughter-in-law were expecting their third child, who was born in December 2021.

20. The appellant appealed to the First-tier Tribunal.

The 2019 First-tier Tribunal decision

21. On 22 May 2017, the appellant applied for international protection and/or leave to remain on human rights grounds. The application was refused on 17 November 2017 and the appellant appealed to the First-tier Tribunal.

22. He was treated as a vulnerable witness by reason of his chronic obstructive pulmonary disease, cardiovascular disease, and longstanding anxiety and depression. He stated that he was illiterate and care was taken to ensure that he understood the documents before the Tribunal by oral explanation and/or translation.

23. The First-tier Judge found the appellant not to be a truthful witness. He made no mention in 2019 of living with his son and daughter-in-law in the UK, as he now says he did, nor did he explain how he was managing financially.

24. The appeal was dismissed. The appellant was appeal rights exhausted on that appeal in December 2019.

25. The findings in the 2019 decision, particularly the credibility findings, are the *Devaseelan* starting point for the present appeal.

26. To the extent that it is necessary to do so, we discharge the anonymity order made in that decision.

First-tier Tribunal decision

27. Following a hearing on 21 February 2022, First-tier Judge Hendry dismissed the EEA residence card appeal. The appellant was represented at the hearing, but there was no Presenting Officer for the respondent.

28. The appellant gave evidence, with his vulnerability and memory issues taken into account. His memory was affected by his recent stroke, and the Judge accepted that he was 'quite frail'.

29. The appellant adopted his witness statement. He used a walking frame now, and was not able to do some things he was able to do previously. He did not read English, although he had been in the UK for 15 years, so he could not remember details of his current or previous addresses. He could remember the house numbers.

30. His third grandchild had now been born.

31. In oral evidence, the appellant confirmed that his son and daughter-in-law buy food for the whole family and pay for the accommodation where they all live. He has no bank account of his own, because he has no documents. He had been registered with his current GP since February 2021. There had been two previous temporary addresses occupied by the family but he could remember no more than the house number '177' for most recent previous house.

32. The appellant's daughter-in-law also adopted her statement, the contents of which are included in the background summary above. In oral evidence, she said that her 5-year-old daughter was sick, her middle son was only two, and now she had a new born baby to look after. She was no longer able to work: she looked after the three children, and her father-in-law, while her husband worked.

33. The appellant's son also adopted his statement. He said that his wife had worked from June 2019 to December 2020 when she gave up work to look after their autistic daughter, who had a tendency to bite herself if she could not see her mother. The youngest child was now 2 months old. The

appellant's daughter-in-law wanted to work but could not do so in the circumstances, so the son worked long hours to support the family.

34. The appellant could no longer help with the children, because of his stroke, which had left him unable to do much for himself. The appellant had never had the right to work in the UK and his son had been supporting him from Bangladesh, Portugal, Brazil, and Italy for many years, by sending money through friends.

35. The First-tier Judge accepted at [90] that the appellant was being supported financially by, and living together with, his son and daughter-in-law. The Judge found the appellant to be a dependent family member of his daughter-in-law, the sponsor.

36. The Judge went on to consider whether the daughter-in-law was a qualified person within the meaning of Regulation 6 of the 2016 Regulations. For the appellant, Mr Mustafa had relied on Regulation 6(2)(a) which included as a 'worker' a person who was no longer working 'provided that the person…is temporarily unable to work as a result of an illness or accident'.

37. The respondent argued that the sponsor's inability to work was permanent, given her daughter's illness, not 'temporary', and further, that the illness or accident must be to the EEA national, not someone else.

38. The First-tier Tribunal found that the sponsor was not a qualified person, applying the decision of the UK Social Security and Child Support Commissioners in CIS/3182/2005. He dismissed the appeal.

39. The appellant appealed to the Upper Tribunal.

Permission to appeal

40. The appellant advanced 5 grounds of appeal, of which four concerned the proper construction of Regulation 6(2) of the 2016 Regulations, and the fifth reminded the Upper Tribunal that pursuant to *HK v Secretary of State for Work and Pensions* [2017] UKUT 421 (AAC) whether a worker was unable to work due to illness or accident was a question of fact for the fact-finding Tribunal.

41. Permission to appeal was granted on the basis that the First-tier Judge had arguably erred in applying the First-tier Tribunal decision of the Commissioner Rowland, sitting in the UK Social Security and Childcare Commissioners in CIS/3182/2005 without inviting submissions thereon, and overlooking a later decision by the same Commissioner in CIS/408/2006 [2007] UKSSCSC which was more helpful to the appellant.

42. When granting permission, First-tier Judge Haria did not limit her grant, though she said that the *HK* point was 'merely a statement of law as opposed to asserting that the Judge erred'.

Rule 24 Reply

43. There was no Rule 24 Reply from the respondent.

44. That is the basis on which this appeal came before the Upper Tribunal.

‘Qualified persons’ (Regulation 6, EEA Regulations 2016)

45. The 2016 Regulations contain a mandatory extension of the definition of qualified person to include persons who are outside the workforce for a number of specified reasons. For the purpose of this decision, the relevant provision is Regulation 6(2)(a):

> “**“Qualified person”**
>
> 6.—(1) In these Regulations—…
> “qualified person” means a person who is an EEA national and in the United Kingdom as—…
> (b) a worker; …
>
> (2) A person who is no longer working must continue to be treated as a worker provided that the person—
> (a) is temporarily unable to work as the result of an illness or accident; …”

The Regulations do not state whose illness or accident triggers Regulation 6(2)(a).

46. There is very little authority on the scope of Regulation 6(2)(a). The decisions of the UK Social Security and Childcare Commissioners in CIS/3182/2005 and [2007] UKSSCSC CIS_408_2006, referred to in the grounds of appeal and the grant of permission, are fact-specific decisions of Commissioner Rowland sitting in the First-tier Tribunal.

47. More authoritative guidance is to be found in the Upper Tribunal decisions in UTIAC i *FMB* (EEA reg 6(2)(a) – ‘temporarily unable to work’) Uganda [2010] UKUT 447 (IAC), and in UTAAC in *HK.* In *FMB,* a Presidential panel led by Mr Justice Blake summarised the Upper Tribunal’s guidance on the meaning of ‘temporary’ in the judicial headnote thus:

> *A state of affairs is ‘temporary’ if it is not permanent. Accordingly, for the purposes of reg 6(2)(a) of the Immigration (European Economic Area) Regulations 2006, a person whose inability to work as a result of illness or accident is not permanent is temporarily unable to work.*

48. It is clear from that decision that the illness in question does not have to be that of the qualified person themselves. The factual matrix in *FMB* was similar to that in this appeal:

> “27. In this appeal it was accepted on the basis of the medical evidence that there was a genuine inability to work on the part of the claimant’s

father. A finding of temporary inability to work for an extended period would not be sustainable if a person having given up work owing to illness then abstained from working voluntarily. The evidence in this appeal, however, shows the claimant's father to have been unable to work until such time as developments in medication together with new combinations of medication stabilised and relieved his condition sufficiently to enable him to commence his studies. "

49. In *HK,* dealing with entitlement to incapacity benefits, Upper Tribunal Judge Jacobs said this*:*

> "4. Regulation 6(2)(a) provides that a person 'shall not cease to be treated as a worker ... if he is temporarily unable to work as the result of an illness'. As I said in CIS/4304/2007:
>
> > 35. The second question is: by what test or standard is the claimant's ability to work to be determined? Regulation 6(2)(a) implements Article 7(3)(a) of the Directive and must be interpreted and applied accordingly. Inability to work is a concept used in EC legislation and, in order to ensure uniformity in that legislation between Member States, it must be interpreted in the same way throughout the EU. It cannot, therefore, depend upon the particular domestic legislation governing incapacity benefits. The language of the legislation has to be interpreted and applied as it stands. The context provides some guidance. It ensures continuity of worker status for someone who would otherwise be employed or looking for work. That employment or search for employment provides the touchstone against which the claimant's disabilities must be judged. The question is: can she fairly be described as unable to do the work she was doing or the sort of work that she was seeking?
>
> In other words, the claimant's ability to work has to be decided as a purely factual matter without regard to the particular tests applied by domestic legislation, in this case the employment and support allowance legislation."

50. The circumstances in which the Upper Tribunal may interfere with a finding of fact by a First-tier Judge, who has seen and heard the evidence, are narrow: see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justices Chadwick and Maurice Kay agreed:

> "90. It may now be convenient to draw together the main threads of this long judgment in this way. ...
>
> 1. Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;
>
> 2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision."

Analysis

51. The Judge's reasoning at [99] that the sponsor could not bring herself within the qualified person definition appears to us to be irrational, given the guidance in *HK.* We do consider it to meet the *R (Iran)* standard for interference with a factual conclusion.

52. Having regard to the remaining factual matrix as determined by the First-tier Judge, including the Judge's acceptance that this appellant is a dependent family member of the sponsor daughter-in-law, we consider that she falls to be treated as a qualified person.

53. The sponsor daughter-in-law's evidence, which the Judge did not reject, was that she had worked for 9 months before the birth of her second child. She still wanted to work, but with an autistic spectrum disorder child, two younger children, one just a few months old, and the appellant's frailties after his recent stroke, she could not do so at present.

54. We find on the facts that the sponsor is 'temporarily unable to work as a result of illness or accident', in this case the illness of her eldest child, and also of the appellant, who previously was able to help her care for her autistic spectrum child and manage the younger children. The sponsor therefore retains the status of 'worker' and is a qualified person able to sponsor the appellant.

55. The appellant's appeal is allowed.

DECISION

56. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision. We remake the decision by allowing the appellant's appeal.

Signed Judith AJC Gleeson Date: 26 August 2022
Upper Tribunal Judge Gleeson