Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34354/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 October 2014	**On 24 October 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WAQAS RAUF

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms M Masood, Counsel instructed by Denning Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of a Designated Judge of the First-tier Tribunal allowing the appeal of a citizen of Pakistan (hereinafter "the claimant") against the decision of the appellant (hereinafter "the Secretary of State") to refuse to issue him a residence card as confirmation of his right of residence under Community law. The appeal was allowed under the Immigration (EEA) Regulations 2006 although the judge's reasons for allowing it are not entirely clear.

2. The application that had been made to the Secretary of State was an application for a residence card based on the applicant being the husband of an EEA national exercising treaty rights. The treaty right identified was that the claimant's wife was "a worker". It is not wholly clear if the First-tier Tribunal allowed the appeal because she was a worker of a particular kind or because she was a student.

3. Mr Tufan's position is quite plain and it is that whichever of these two reasons was relied on by the judge he was wrong. The appeal should have been dismissed because the evidence did not support the concluding analysis of the First-tier Tribunal.

4. I deal first with the suggestion that the sponsor is a worker. If she is a worker she is a worker who is not working but it is trite law that a person does not cease to be a worker because that person is temporarily unable to work as a result of illness or accident. The sponsor in this case, if I may say so respectfully, has had a tragic personal life. He was a widow when she married the claimant. I am satisfied that she had been to the United Kingdom before 2007 although she rather unfortunately indicated in her witness statement that 2007 was her first visit. Having done some work of some sort in the United Kingdom she had the horrible experience of being involved in a road traffic accident in Egypt in which her then husband was killed. She was damaged and has not properly recovered, albeit that the accident was some eight years ago.

5. There was medical evidence before the First-tier Tribunal but nobody had really engaged in the question of the prognosis and whether or not the sponsor would ever become fit to work again. The answer is not obvious. The medical evidence was plain that at the time of writing the medical report she was not fit to work. The medical practitioner said as much. It is also plain that she has some sort of permanent disability. The sponsor is likely to need elbow crutches for the rest of her life but without in any way diminishing the extreme unpleasantness of such a disability it does not follow from that that she is never going to be able to work again. The fact is that the evidence was just silent on this crucial point. It is not plain to me if the judge (a) thought that the sponsor's illness was only temporary or (b) if it was only temporary how he could possibly reach such a conclusion. I reject the suggestion that it was an inference that was reasonable to draw from the evidence. It was not. This is not a case, for example, where an ordinarily healthy person who is smitten by a winter cold. Common knowledge would dictate that a complete recovery is highly likely in a relatively short time even though a patient might be quite incapable of doing anything productive for a short time. This is a case of a person who, sadly, has not been fit for many years but about whom medical evidence does not say if she can expect ever to work again. The evidence was just not there to support the conclusion that she was temporarily unable to work. If that was what the judge had decided I have to say that he was wrong.

6. Alternatively it may be that the judge decided that the sponsor was a student. There is evidence that she is a student of some kind but it does not follow that if she was a student she was entitled to be in the United Kingdom and for her husband to be here as a consequence. It is a requirement of the Rules that a student needs comprehensive medical insurance. This was a point that was not anticipated before the hearing and it was not addressed in the evidence. There was no evidence before the First-tier Tribunal that the sponsor had comprehensive sickness insurance. There has been an attempt to rectify this problem by

producing a European medical card which, according to the claimant, meets the requirements of the rules. Mr Tufan, for the Secretary of States, says very confidently that it does not have the required effect but neither party was really able to help me decide with any great confidence if it was satisfactory or not.

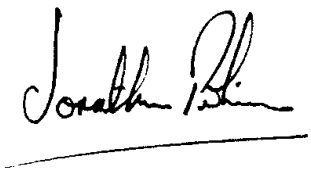
7. I have to say I am inclined to the view that it is not evidence of insurance that satisfies the rules. It is only proof of a degree of emergency medical treatment being temporarily available (see, for example, Ahmad v Secretary of State for the Home Department [2014] EWCA Civ 988, particularly paragraph 71) but I am quite unashamed to say that I do not really know. What is plain to me is that it was a point that was anticipated before the hearing before the First-tier Tribunal and it should have been addressed if, in fact, it is the appellant's case that he is entitled to be in the United Kingdom as the husband of a student who is an EEA national.

8. Here the appellant is attempting to use Rule 15(2)(a) of the Upper Tribunal Procedure Rules to fill a hole in the evidence that should never have been allowed to open. If the answer was obvious to me then I may have used my discretion differently but the answer is not obvious and I am not prepared to admit the evidence now. I bear in mind in making that decision that it does not leave the claimant without a remedy. If it is his case that he is entitled to be here because his wife is a student he can make an application and I do not think that is a task that would be particularly expensive or particularly time-consuming.

9. I am satisfied, having gone through this with considerable care from representatives who were I acknowledge both helpful and patient, that the evidence before the First-tier Tribunal did not support the decision to allow the appeal either on the basis that the sponsor was a worker or on the basis that the sponsor was a student.

10. The judge should not have allowed the appeal and I substitute a decision setting aside his decision and dismissing the appeal of the claimant against the decision complained of.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 22 October 2014