IAC-FH

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/36067/2014
IA/36077/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd September 2015	**On 20th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DR ANTONIO MANZI
MS AIGUL ZHURYN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellants: Mr D Clarke, Senior Presenting Officer
For the Respondent: Dr A. Manzi

DECISION AND REASONS

The Appeal

1. Although the Secretary of State is the appellant in this case, for ease of reference I shall refer to the parties as they were before the First-tier Tribunal.

2. The Secretary of State appeals against the decision promulgated on 17th April 2015 of First-tier Tribunal Judge Malcolm who allowed the Appellants' appeal against the decisions of the Respondent dated 28th August 2014 to

refuse their application for Permanent Residence in accordance with Regulation 15(1)(a) of the Immigration (EEA) Regulations 2006 ('the 2006 Regulations').

3. Judge Malcolm allowed the appeals on the basis that the Appellants qualified under Regulation 15(1)(a) and specifically that the presenting officer conceded that they met the requirements of Regulation 6(1)(d) and Regulation 4(1)(c)(ii) of the 2006 Regulations. The judge made findings that the Appellants met the requirements of Regulation 4(1)(c)(i).

4. Permission to appeal on error of law grounds was granted by Upper Tribunal Judge Clive Lane on 4th August 2015. This was on the basis that the grounds of appeal detailed matters which were sufficient to render arguable the extent and meaning of concessions supposedly made by the Presenting Officer before the First-tier Tribunal.

5. The grounds submitted that: 1. The judge had misunderstood in recording that the Presenting Officer conceded Regulation 6(1)(d) as this would mean that it was conceded that the Appellant was a qualified person. However this was not the case as the judge also recorded that the Presenting Officer did not accept that Regulation 4(1)(c)(i) was met. Ground 2 was that the judge recorded that the Presenting Officer conceded that the appellant meet Regulation 4(1)(c)(ii) as they both held Italian EHIC certificates. It was the Secretary of State's case that the case of Ahmad [2014] EWCA Civ 988 held that NHS treatment does not establish the required element of self-sufficiency under the Regulations and that as binding case law, the Presenting officer has conceded a matter when she not in a position to do so as it was not lawful.

Ground 1

6. Although Upper Tribunal Judge Lane had directed that both parties provide statements 14 days before the hearing from both parties before the First-tier Tribunal on 31 March 2015 detailing the exact form of any concessions which may have been made by the Presenting Officer, neither party complied with that direction. I proceeded therefore on the basis of the information before me and indicated to both parties that the Record of Proceeding before me from 31 March 2015 indicated that the concessions were in the terms recorded by the judge in the decision.

7. Mr Clarke was of the view that the critical issue was in relation to Comprehensive Sickness Insurance Cover (CSIC) and whether as a matter of fact EHIC could be considered to be CSIC (which it was agreed was Ground 2).

8. In relation to Ground 1, there is merit in the argument that there is inconsistency in the claimed concession on Regulation 6(1)(d) that the appellant 'could be regarded as self-sufficient' yet the presenting officer was unable to concede that the appellants met Regulation 4(1)(c)(i) which provides that:

> '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;….'

9. To the extent therefore that the judge recorded, and appeared to accept unchallenged, this concession, there was an error of fact. However I am not satisfied that there is any error of law as it was clear that the judge did not rely on this concession (which would have effectively meant that no findings at all would have been needed on self-sufficiency) as the judge went on to make findings, including at paragraph 15 and 16 that Dr Manzi was self-sufficient. Although the findings at paragraphs 15 and 16 might have been clearer it is evident from the totality of the findings, that the judge accepted the evidence that Dr Manzi satisfied Regulation 4(1)(c)(i).

10. I am satisfied that there was no material error of law therefore and there is no merit in Ground 1.

Ground 2

11. It was Mr Clarke's argument that the case of Ahmad (above) identified (including at paragraph 36) that CSIC cannot include the public healthcare system of the host state as that 'would defeat the object of the Directive' and 'render the Directive meaningless since the burden on the host state can only arise if there is a health service.'

12. Mr Clarke therefore submitted that the apparent concession by the Presenting Officer before the First-tier Tribunal was not relevant as a strict application of the law, as set out in Ahmad (which was decided on 16 July 2014 and therefore before the hearing of the First-tier Tribunal on 31 March 2015) indicated that the possession of EHIC cards does not constitute CSIC. Mr Clarke relied on an NHS print out dated 24 September 2014 in relation to the EHIC card which indicates that :

> 'An EHIC will enable you to access state-provided healthcare in European Economic Area (EEA) countries and Switzerland at a reduced cost or sometimes for free. It will cover your treatment until you return to the UK'.

13. However, although Mr Clarke relied on Ahmad the issue of EHIC was not specifically considered as the case before the Court of Appeal related to a student who was entitled to NHS care. Dr Manzi therefore sought to distinguish this from his own case and I am of the view that there is merit in the argument that the Ahmad case was concerned with an individual who was entitled to NHS care. I also note that the print out provided by Mr Clarke refers to UK issued EHICs and their use in other Member States which is not the case in this appeal.

14. Although as noted above, Ahmad did not specifically address the issue of EHIC, Mr Clarke relied on the case's identification of CSIC not including the

public healthcare system of the host state because that would defeat the object of the Directive.

15. Article 7.1.(b) of the Directive 2004/38/EC provides:

> '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:
>
> ...
>
> (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'.

16. Dr Manzi made the point that the respondent's policies make it clear that entitlement to NHS care is not and has never been considered as CSIC. I am satisfied that a distinction has been made by the Secretary of State between someone who (as in Ahmad) was entitled to access the NHS (which could not be considered CSIC) and possessing an EHIC issued by another member state, as with the Appellants.

17. Dr Manzi provided a copy of the EEA3 form, similar to the form on which he made his application to the respondent. The form before me is EE3 Version 06/2014. And to be used for applications on or after 2 June 2014. In section 11, documents to be provided it states:

> 'You must provide either a private comprehensive sickness insurance policy document that covered for medical treatment in the majority of circumstances, or a European Health Insurance Card (EHIC) that covered the 5-year period of residence in the UK.'
>
> The current EEA(PR) form also allows for the provision of an EHIC card as evidence of CSIC.

18. The fundamental point in this case is that, contrary to Mr Clarke's submission, the evidence relied on by Dr Manzi indicates that the Secretary of State distinguishes between access to the NHS which is not acceptable and an EHIC issued by another Member State, which is acceptable as CSIC.

19. There was no authority for Mr Clarke's submission that, although the guidance produced by Dr Manzi from the European Directorate Instructions clearly supported the proposition set out at paragraph 18 above (i.e., that an EHIC is acceptable to the respondent as evidence of CSIC on self-sufficiency permanent residence applications) this was out of date post-Ahmad. He produced no policy in support of this contention and although he contended in the alternative that Ahmad and the Directive had to override any such policy, as I have already indicated, Ahmad did not address the issue of possession of an EHIC specifically. I am not satisfied that it has been shown that Ahmad is authority for the proposition that an EHIC cannot be acceptable as CSIC.

20. Therefore there was no adequate evidence before me to suggest that the second concession made by the Presenting Officer before the First-tier Tribunal in March 2015, that the Appellants had appropriate Italian EHIC cards for the relevant periods (and therefore had CSIC), was not properly made and in line with then (and current) Home Office policy.

21. Therefore there is no merit in Ground 2 and no material error of law.

22. I also record that, subsequent to the hearing, I received by post further submissions from Dr Manzi including the August 2014 European Operational Policy document informing caseworkers of the Ahmad judgement and reiterating that whilst NHS access is not CSIC, an EHIC issued by another Member State remained acceptable. However as this evidence was received post-hearing, not in compliance with directions and the respondent has not had an opportunity to comment, I have placed no reliance on this additional evidence and the accompanying submissions.

23. In any event, for the reasons set out in paragraphs 6 to 21 of this decision, the Secretary of State's appeal cannot succeed.

Notice of Decision

24. The decision of the First-tier Tribunal did not contain an error of law and shall stand.

Anonymity

25. No anonymity direction was sought or made either before the First-tier Tribunal or the Upper Tribunal.

Signed Date: 28 September 2015

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award was sought or made.

Signed Date: 28 September 2015

Deputy Upper Tribunal Judge Hutchinson