Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05516/2014
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THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 19 December 2014	**On 31 March 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MS JOANNA CHOMA-LUCENA
MR RICARDO JOSE WAVRICK DE LUCENA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr W Criggie, Hamilton Burns WS
For the Respondent: Ms R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal McGavin dismissing the appeals under the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations").

2) The first appellant is of Polish nationality and was born on 29 October 1982. The second appellant is of Brazilian nationality and was born on 9 May 1979. The appellants are a married couple. In August 2013 the appellants each applied for a permanent residence card. The application of the first appellant was made on the basis that she had resided in the UK in accordance with the EEA Regulations for a continuous period of 5 years from 24th March 2008. As her spouse the second appellant was her family member under the EEA Regulations and the outcome of his application depended on that of the first appellant. The Secretary of State refused the

application by the first appellant on several grounds and the appellants appealed. Before the Judge of the First-tier Tribunal there was only one issue in respect of which the first appellant failed to show that she was exercising Treaty rights for a continuous period of 5 years. During the final few months of the 5 year period, from August 2012 until March 2013, when the first appellant was a student and no longer in employment, the first appellant was unable to show that she was in possession of comprehensive sickness insurance, as required by reg. 4(1)(d)(ii) of the EEA Regulations.

3) Before the First-tier Tribunal the first appellant sought to rely upon her European Health Insurance Card, otherwise known as an EHIC. The judge recorded that this allowed anyone who was insured by or covered by a statutory social security scheme of an EEA country to received medical treatment in another member state for free or at a reduced cost if treatment became necessary during their visit. In the decision of the Court of Appeal in W (China) [2006] EWCA Civ 1494 the equivalent card at that time was found not to amount to comprehensive sickness cover because social security contributions as an employee did not count as sickness insurance in terms of the relative Directive. The judge found that, although the first appellant had been making social security contributions in the UK or another member state, this did not amount to comprehensive sickness insurance. The first appellant was unable to produce any health insurance policies for the period in question.

4) In the application for permission to appeal the appellants cited Commission guidelines on the implementation of Directive 2004/38 stating:

> "Any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle as long as it provides comprehensive coverage and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover Member States must act in compliance with the limits imposed by community law and in accordance with the principle of proportionality."

It was further argued that under the relevant NHS regulations it was unlawful to charge anyone for health services in the UK if that person was ordinarily resident here. This provision did not exclude EEA nationals. In addition, NHS care was a social security benefit falling within the scope of Regulation 883/04, which meant that it should be enjoyed by an EEA national on the same basis as a national of the Member State. Accordingly if a British citizen would not be charged for a particular service by the NHS then an EEA national should not be charged. In support of this view reference was made to a decision of the Upper Tribunal in Secretary of State for Work and Pensions v SW [2011] UKUT 508 (AAC). It was further submitted that the European Health Insurance Card was obtained in February 2012 and covered the appellant for the period between August 2012 and March 2013 when she was studying without also being in employment, whereas previously she had been both studying and working. This card had been obtained in order to comply with the guidance issued by

the Home Office on EEA applications which stated that such cards were sufficient evidence of comprehensive sickness insurance.

5) Permission to appeal was granted in May 2014 on the basis that the case of W (China) was concerned with self-sufficient persons rather than workers or students. In granting permission the judge observed that it was not clear whether the points made about access to the NHS in the application for permission to appeal were put before the First-tier Tribunal.

6) A rule 24 notice on behalf of the respondent pointed out that the Tribunal was bound to follow the decision of the Court of Appeal and this would not amount to an error of law. No Home Office guidance had been produced to show that a European Health Insurance Card was regarded as meeting the requirements of the Regulations.

7) At the hearing before us Mr Criggie, for the appellants, acknowledged that in July 2014 the Court of Appeal issued a further decision on comprehensive sickness insurance in Ahmad [2014] EWCA Civ 988. This was on "all fours" with the current case. Mr Criggie acknowledged that between August 2012 and March 2013 the first appellant was a student only and was not in employment. In order to rely on her EHIC issued in 2012 in Poland she would have to have been in the UK only temporarily. The evidence did not suggest the first appellant was here only temporarily. Mr Criggie explained that the first appellant was in the UK on a valid basis under the EEA Regulations. The appeal was against only the refusal of permanent residence cards. Mr Criggie further pointed out that the couple have a son, aged 5, who was born in the UK.

8) Ms Patterson put before us the current Home Office guidance on reliance on an EHIC, which confirmed that this was accepted only in relation to temporary residence.

9) As Mr Criggie acknowledged, it is clear from the recent decision of the Court of Appeal in Ahmad that a student in the position of the first appellant would require comprehensive sickness insurance, as found by the Judge of the First-tier Tribunal, and that her European Health Insurance Card would not suffice. On this basis the Judge of the First-tier Tribunal was right to find that the first appellant could not show that she had been residing in the UK in accordance with the Regulations for a continuous period of 5 years because for the final part of that period from August 2012 until March 2013 the first appellant did not have comprehensive sickness insurance. Accordingly the Judge of the First-tier Tribunal did not err in law and her decision shall stand.

Conclusions

10) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

11) We do not set aside the decision.

Anonymity

12) The First-tier Tribunal did not make an order for anonymity. We were not asked to make an order and see no reason of substance for so doing.

Signed

Upper Tribunal Judge Deans