Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48773/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2014	**On 15 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMAD HARB
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr T S Chodha, Counsel

DETERMINATION AND REASONS

Background

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Burnett allowing Mr Harb's appeal against her decision to refuse to issue him a permanent residence card. Although the Secretary of State is now the appellant in this appeal and Mr Harb is the respondent, it is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall refer to Mr

Harb as "the appellant" from now on and the Secretary of State as "the respondent".

2. I was not asked and saw no reason to make an anonymity direction.

3. The appellant is a citizen of Lebanon, born on 25 April 1976. His wife, Ms Migle Harb, née Tomkeviciute, is a citizen of Lithuania, who exercised her right as an EU citizen to travel to the UK to work in around September 2005. She met the appellant shortly afterwards. They married on 20 October 2007. Their daughter, Maya, was born on 25 October 2008. Ms Harb developed pre-eclampsia during pregnancy and Maya was born prematurely at only 28 weeks. Sadly, she developed significant disabilities and has been diagnosed with diplegic cerebral palsy. As a consequence, Ms Harb has not returned to her former work in hotels. Since June 2009 Ms Harb has received Disability Living Allowance for Maya and, since June 2010, Carer's Allowance. In April 2011 she commenced some casual work from home, ironing clothes. In 2012 the appellant and Ms Harb had another child.

4. The appellant was granted a residence card valid for five years. He applied for permanent residence on 31 May 2013, relying on Ms Harb's self-employment. However, his application was refused on 7 November 2013 because he had not provided evidence that Ms Harb had exercised her Treaty rights for 5 years (Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006, as amended ("the EEA Regulations")). The reasons for refusal letter which accompanied the decision notice stated the appellant had only provided evidence that Ms Harb was working for two years. There was insufficient evidence to show Ms Harb had been self-employed. The appellant appealed on generic grounds.

5. Judge Burnett considered the appeal with care. He noted the appellant did not pursue his case on the basis that Ms Harb was self-sufficient. He identified the key issue as being whether she had been exercising her Treaty rights between June 2008, when she stopped working and studying, and September 2010, which ended the five-year period following Ms Harb's arrival in the UK to work. The judge considered the case of *Shabani (EEA – jobseekers; nursery education)* [2013] UKUT 00315 (IAC) and drew guidance from it on the issue of whether a woman lost the status of worker by giving up work to look after children. The Tribunal was bound by the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Dias* [2009] EWCA Civ 807 to the effect that worker status was lost in such circumstances, although the Supreme Court had referred the point to the Court of Justice in *Sant Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.

6. Judge Burnett interpreted Regulation 6(2)(a), which states that a person who is no longer working shall not cease to be treated as a worker (and therefore be a 'qualified person') if she is temporarily unable to work as the result of an illness or accident. He reasoned that Ms Harb had left work to become Maya's carer due to her illness. The judge held that the illness did not have to be that of the EEA national. He found Ms Harb was a worker during the relevant period and allowed

the appeal.

7. The respondent sought permission to appeal, arguing the judge erred in his application of *Shabani*, which had held that a woman who left the labour market to look after children did not retain her status as a worker. Further the judge erred in his interpretation of Regulation 6(2) because the illness had to be that of the qualified person. Permission was granted by the First-tier Tribunal.

8. I heard submissions as to whether the judge made a material error of law. Mr Nath's submissions were brief. He said Ms Harb lost her status as a worker and the judge had therefore erred. Mr Chodha pointed out that *Shabani* had not been mentioned at the hearing. He said Ms Harb had not wished to give up employment and to abandon the labour market. Instead this had been forced on her by circumstances beyond her control. It had been planned that Ms Harb's sister would look after Maya after she reached the age of four or five months but, given Maya's condition, Ms Harb was not willing or able to go through with this. Mr Nath agreed there were compassionate circumstances but argued the judge did not apply the law.

9. I raised the issue of whether Ms Harb's inability to work was temporary. Mr Chodha said the interruption was temporary as shown by the fact Ms Harb managed to take on some self-employment later on.

10. Neither representative could assist me with any authority on the issue identified by Judge Burnett that the illness did not have to be that of the worker herself in order to preserve the latter's status as a worker for the purposes of Regulation 6(2)(a).

11. I reserved my determination.

The issue for determination

12. The parties are in agreement that the appellant's application for a permanent residence card under Regulation 18(2) depends on whether he can show that he has gained a permanent right of residence under Regulation 15(1)(b). There is no dispute about the fact he is the 'family member' (spouse) of Ms Harb. He must show that he has "resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years." Regulation 15(1)(b) has been the subject of guidance from the Tribunal (see, for example, in *OA (EEA – retained right of residence) Nigeria* [2010] UKAIT 00003), paragraphs 20 to 30). The appellant must show that he was residing with Ms Harb for a continuous period of five years and that throughout that period she was a 'qualified person', within the meaning of Regulation 6.

13. There are no issues about the fact the appellant and Ms Harb have resided together in the UK for a continuous period of five years. The only issue, as Judge Burnett identified, is whether Ms Harb was a qualified person during the entirety of that period. It is accepted she was employed until June 2008 when she left her

employment due to pregnancy. The period under examination is therefore the 27 months between June 2008 and September 2010. The appellant argues only that Ms Harb was a 'worker', having abandoned his case as originally put that she was self-sufficient. Ms Harb was not a jobseeker or student during the period. She began self-employment after the period in question.

The law

14. The relevant legal provisions are as follows. The EEA Regulations give effect to the UK's obligations under the Directive 2004/38/EC of the European Parliament and Council, of 29 April 2004 ("the Citizens' Directive"). This states in relevant part as follows:

> "**Article 7 Right of residence for more than three months**
>
> 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
>
> …
>
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
>
> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).
>
> 3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
>
> (a) he/she is temporarily unable to work as the result of an illness or accident;
>
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
>
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

…"

15. These provisions are given effect in domestic law by Regulation 6 of the EEA Regulations which, at the time in question, read 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.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) …"

16. The Tribunal has previously confirmed that the provisions of the EEA Regulations

relating to temporary inability to work are faithful to the terms of the Citizens Directive (see, for example, *FMB (EEA Reg 6(2)(a) – 'temporarily unable to work') Uganda* [2010] UKUT 447 (IAC), paragraph 25).

Determination

17. There is no dispute about the underlying facts in this appeal. In order to determine whether Judge Burnett made a material error of law and therefore a decision dismissing the appeal has to be substituted, I have asked myself whether Ms Harb was, between June 2008 and September 2010, a 'worker' for the purposes of EU law notwithstanding the fact she had given up her job. This breaks down into the following questions:

    (1) was Ms Harb's inability to work temporary?
    (2) was Ms Harb's inability to work the result of an illness?
    (3) can Ms Harb rely on the illness of Maya?

18. The first point to note in interpreting these provisions is that the term 'worker' must be interpreted broadly in EU law because it defines the scope of a fundamental freedom provided for by the TFEU (see, for example, *Lawrie-Blum v Land Baden-Württemberg* Case 66/85, [1986] ECR 2121, at paragraphs 16-18).

19. Secondly, Recital 5 of the Directive emphasizes the need for family members to be able to move with Union citizens.

20. Thirdly, the CJEU has recently held that Article 7(3) of the Directive does not contain an exhaustive list of the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status (see *Saint Prix v Secretary of State for Work and Pensions Case* C-507/12, paragraph 38).

21. That case decided that Article 45 TFEU must be interpreted to mean that a woman who gives up work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of worker provided she returns to work or finds another job within a reasonable period after the birth of her child. Given Maya was born on 25 October 2008, it is at least arguable Ms Harb retained her status as worker until at least the end of 2008 on that basis alone. However, as this falls well short of the five-year qualifying mark, the appellant must rely on showing she was temporarily unable to work as a result of Maya's illness.

Was Ms Harb's inability to work temporary?

22. As noted, Mr Chodha referred to the fact Ms Harb started some work in April 2011. However, the situation must be judged by reference to the facts in existence in the period in question, ending in September 2010. To put it another way, facts taking place after that period cannot be used to prove the existence of the situation seven months earlier.

23. The meaning of "temporary" was considered in *FMB (Uganda)*. This held as follows:

> "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."

24. In reaching their conclusions, the Tribunal did not attempt to suggest any limit to the time for which a state of affairs can properly be described as 'temporary'. However, in arriving at their conclusions they noted that the provision providing for permanent residence on the ground of permanent incapacity from work requires a person to show more than two years' continuous residence (see Article 17.1(b) of the Directive). This provides support for the notion that Ms Harb could theoretically show she was temporarily unable to work for the 27-month period in question.

25. Turning to the facts again, I note that, following her birth, Maya was received care for three months in the Special Care Baby Unit in Chelsea and Westminster Hospital, during which time she suffered bleeding in the brain followed by hydrocephalus. A shunt was inserted in January 2009. The diagnosis of cerebral palsy was made during this time. Maya was slow to grow and had initial feeding difficulties. She started to sit independently at 14 months and started crawling in about May 2011. She has had fits and has been given a diagnosis of epilepsy. She has hip displacement which may require surgery to correct. She has global developmental delay. Since September 2013 Maya has attended John Chilton School, where she receives speech and language therapy.

26. I note that Ms Harb's witness statement explains that Maya needed full-time nursing, as she suffered from pain, coughing and vomiting. There were times she did not sleep all night. There were many medical appointments to attend. Maya's disability was such that her husband could not have managed to take care of her. Ms Harb has established herself in the work force by remaining employed for almost three years prior to taking maternity leave. She intended to return to work when Maya was born. She was prevented from fulfilling that intention by the imperative need to provide care for Maya. It is likely Ms Harb retained an intention to return to employment when the circumstances permitted. From the perspective of the exercise of her freedom of movement, she had not left the workforce as at September 2010.

27. I shall therefore proceed on the basis that the first question, whether Ms Harb's inability to work was temporary, can be answered in the affirmative.

Was Ms Harb's inability to work the result of an illness?

28. This question requires the appellant to demonstrate the cause of Ms Harb's giving

up work was Maya's illness. Plainly the reason Ms Harb did not return to work was to care for Maya due to her medical conditions.

Can Ms Harb rely on the illness of Maya?

29. The final question is perhaps the most difficult hurdle for the appellant to surmount. He seeks a wide interpretation of the Regulation which, on the face of it, makes provision for workers who are temporarily unable to work due to their own accident or illness. Judge Burnett relied on the absence of a pronoun to limit the illness in question to that of the worker. Had the intention been to limit its effect in this manner, this could have easily been achieved by the insertion of the words "his or her".

30. I have already noted the guidance of the Court of Justice in interpreting these provisions in paragraphs 18 and 19 above. In addition, I note the Court of Justice agreed with the Commission that a Union citizen would be deterred from exercising her right to freedom of movement if she risked losing her status as worker if she became pregnant (see paragraph 44). EU law guarantees special protection for women in connection with maternity. Whilst a wider interpretation than that called for by the facts of this case may not be permissible, it seems to me that the special protection given to women by EU law in connection to pregnancy and the subsequent diagnosis of Maya's serious illness are sufficient to bring Ms Harb within Regulation 6(2)(a) during the period in question.

31. In conclusion, I find that Judge Burnett's decision does not contain a material error of law and shall stand.

DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision allowing the appeal is confirmed.

No anonymity direction.

Signed **Date 15 July 2014**

Neil Froom,
sitting as a Deputy Judge of the Upper Tribunal