Upper Tribunal
(Immigration and Asylum Chamber)

FMB (EEA reg 6(2)(a) – 'temporarily unable to work') Uganda [2010] UKUT 447 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 November 2010	.....

Before

MR JUSTICE BLAKE, PRESIDENT
SENIOR IMMIGRATION JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FB

Respondent

Representation:

For the Appellant: Mr J Gulvin, Home Office Presenting Officer
For the Respondent: Mr P Richardson of Counsel

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.

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a determination by Immigration Judge Oxlade. In a decision dated 17 February 2010 the Secretary of State refused the Claimant a permanent residence card under reg 15(1)(b) of the Immigration (European Economic Area) Regulations 2006. The Claimant's appeal was allowed by the Immigration Judge and permission to appeal was granted on the Secretary of State's application.

2. The claimant was born on 5 January 1988 and is a national of Uganda. She first entered the United Kingdom as a visitor on 1 July 2004. On 18 November 2004 she was granted residence as a family member of an EEA national, namely her father, who is a Swedish national. She was refused a permanent residence card in the decision giving rise to this appeal because the Secretary of State was not satisfied that her father was a qualified person who had exercised Treaty rights in the United Kingdom for a continuous period of 5 years.

3. The acquisition of a permanent right of residence is addressed in reg 15 of the 2006 Regulations in the following terms:

> "15(1) The following persons shall acquire the right to reside in the United Kingdom permanently:
>
> (a) an EEA national who has resided in the United Kingdom in accordance with these regulations for a continuous period of 5 years;
>
> (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these regulations for a continuous period of 5 years;
>
> (c) a worker or self-employed person who has ceased activity;
>
> (d) the family member of a worker or self-employed person who has ceased activity;
>
> (e) a person who was a family member of a worker or self-employed person where –
>
> (i) the worker or self-employed person has died;
> (ii) the family member resided with him immediately before his death; and
> (iii) the worker or self-employed person has resided continuously in the United Kingdom for at least the two years immediately before his death or the death was a result of an accident at work or an occupational disease;
>
> (f) a person who –
>
> (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
>
> (ii) was, at the end of that period, a family member who has retained the right of residence."

4. Rights of residence prior to acquisition of a permanent right of residence are set out in the Regulations at regs 13 and 14. Regulation 13, headed "Initial right of residence", states:

> "13 – (1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding 3 months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA state.
>
> (2) A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.
>
> (3) But –
>
> (a) this regulation is subject to regulation 19(3)(b); and
>
> (b) an EEA national or his family member who becomes an unreasonable burden on the social assistance system of the United Kingdom shall cease to have the right to reside under this regulation."

5. Regulation 14(1), headed "Extended right of residence", begins as follows:

> "14 – (1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person."

6. The definition of a "qualified person" is found in reg 6. In terms of reg 6(1) a "qualified person" means a person who is an EEA national and in the United Kingdom as –

> (a) a job seeker;
>
> (b) a worker;
>
> (c) a self-employed person;
>
> (d) a self-sufficient person; or
>
> (e) a student.

7. Regulation 6(2) sets out circumstances in which a person who is no longer working does not cease to be treated as a worker for the purpose of reg 6(1)(b). These circumstances include, at reg 6(2)(a), that the person "is temporarily unable to work as the result of an illness or accident".

8. Regulation 15(1)(c) refers to a permanent right of residence being acquired by a worker or self-employed person who has ceased activity. This term is defined in reg 5, which includes at reg 5(3) the following definition of a worker or self-employed person who has ceased activity:

> "(3) A person satisfies the conditions in this paragraph if –

(a) he terminates his activities in the United Kingdom as a worker or self-employed person as a result of permanent incapacity to work; and

(b) either –

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom."

9. When this appeal was heard before the Immigration Judge, the evidence of the claimant's father was accepted that he came to the United Kingdom in 2002 and worked as a teacher until the summer of 2004, when he was forced to give up work owing to illness. The Immigration Judge concluded that the claimant's father worked for about 2 years from around September 2002 until September 2004 and during that period fell within the definition of a "worker" in the EEA Regulations. The claimant's father remained incapable of work from 2004 until February 2008, when he enrolled as a student.

10. The Immigration Judge noted in the EEA Regulations the distinction between a worker who is temporarily unable to work as a result of illness or accident, and remains a worker under reg 6(2)(a), and a worker who has ceased activity because of permanent incapacity to work in terms of reg 5(3)(a). While a worker who is temporarily unable to work remains a qualified person under reg 6, a person who terminates his activity as a worker as a result of permanent incapacity to work is not a qualified person under reg 6 but may be a worker who has ceased activity under reg 5(3) provided the conditions therein are satisfied. If those conditions are satisfied, then the worker who has ceased activity will acquire a permanent right of residence under reg 15(1)(c).

11. The Immigration Judge accepted a submission on behalf of the claimant that any inability or incapacity to work which was less than permanent must be regarded as temporary. The length of the period of incapacity was not determinative. It was argued before the Immigration Judge that the purpose of the EEA Regulations was to facilitate the exercise of Treaty rights by EEA nationals and this required that their family members should be able accompany or follow them and put down roots in a Member State. The Immigration Judge was satisfied that the claimant's father was a worker from 2002 to 2004, when he was teaching, and from 2004 to 2008, when he was temporarily unable to work as the result of illness. In February 2008 he became a student and as such remained a qualified person under reg 6(1). Accordingly he was a qualified person continuously from 2002. On this basis the appeal by his daughter, as his family member, was allowed.

12. The grounds originally relied upon by the Secretary of State in the application for permission to appeal were brief and, it transpired,

misconceived. The Secretary of State submitted that the Immigration Judge should have taken account of reg 13(3)(b), in terms of which the claimant's father ought to have been regarded as an unreasonable burden on the social assistance system of the United Kingdom and had therefore not been residing in the United Kingdom in accordance with the Regulations for a continuous period of five years, as required to qualify for a permanent right of residence. It was on this ground which permission to appeal was granted. Before us Mr Richardson pointed out that reg 13, on which the Secretary of State was relying, was headed "Initial right of residence" and set out, at reg 13(1), the right of an EEA national to reside in the United Kingdom for a period not exceeding 3 months provided a passport or national identity card was held. In terms of reg 13(3)(b), an EEA national who became an unreasonable burden on the social assistance system of the United Kingdom ceased to have the right to reside "under this Regulation", meaning reg 13. Accordingly the restriction in reg 13(3)(b) in relation to an EEA national who was an unreasonable burden on the social assistance system applied only in respect of the initial right of residence for 3 months.

13. We accept that Mr Richardson's submission in respect of the application of reg 13(3)(b) is correct in that this particular provision of the Regulations has no application to the present appeal.

14. One day prior to the hearing before us the Secretary of State sought to submit two additional grounds on which to challenge the determination of the Immigration Judge. The first of these was that the Immigration Judge erred in law in relation to the question of what constituted temporary inability to work. The term "temporary" ought not to have been interpreted as any period which preceded permanent incapacity.

15. The second additional ground advanced on behalf of the Secretary of State was that the Immigration Judge did not make adequate findings on the claimant's father's current status as a student. In particular, it was submitted that the Immigration Judge did not make sufficient findings on whether the requirements of reg 4(1)(d), which sets out the conditions under which a student is to be regarded as a qualified person, were satisfied.

16. Mr Richardson submitted that not only had he not received the Secretary of State's amended grounds prior to the hearing, but that it was far too late for the Secretary of State to seek to amend the grounds, more than 3 months after the application for permission was made. He acknowledged, nevertheless, that as the issue of whether the cessation of work by the claimant's father was temporary had been argued before the Immigration Judge, he would be in a position to address us on this question. He further submitted that the merits of the additional grounds should be a relevant factor in deciding whether to admit them for consideration.

17. For our part we decided to hear submissions as to the merits of the additional grounds before deciding whether to admit them.

18. So far as the second ground is concerned, it can be disposed of briefly. By the time the claimant's father enrolled as a student, in February 2008, he would already have acquired a right of permanent residence, if he was eligible to do so, either as a worker or as a worker who had ceased activity. Accordingly the question of whether he satisfied the requirements of reg 4(1)(d) as a student from February 2008 was not material to the outcome of this appeal. The focus of the appeal was on whether the Immigration Judge was entitled to conclude that the claimant's father remained a worker from 2004 onwards because of his temporary inability to work as a result of illness, in terms of reg 6(2)(a). For as long as the claimant's father remained within the definition of a worker, he was a qualified person in terms of reg 6(1) and his family members were entitled to reside in the United Kingdom with him for as long as they remained family members. It is not disputed in this appeal that the claimant is her father's family member. After the claimant's father had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years he would acquire a permanent right of residence under reg 15(1)(a) and his daughter, if she had resided in the United Kingdom with him in accordance with the Regulations for a continuous period of 5 years, would acquire a permanent right of residence under reg 15(1)(b).

19. In relation to whether the claimant's father required a permanent right of residence, the crucial issue arising from the findings of the Immigration Judge was whether the claimant's father continued to be a worker, and accordingly, a qualified person, for 5 years from 2002, notwithstanding that from 2004 he became unable to work owing to illness. If his inability to work was temporary, then he remained within the definition of a worker for the 5 year period.

20. For the Secretary of State, Mr Gulvin submitted that a temporary period of incapacity could not be as significant in length as four years, although he was not able to refer to any authority on the point. He acknowledged that if a person's incapacity was neither temporary nor permanent, then it was difficult to define it further.

21. For the claimant, Mr Richardson submitted that if incapacity was not permanent, then in terms of the ordinary meaning of language, it was temporary. He put to us two further arguments. The first of these relied upon certain regulations where requirements were expressed as a finite period. In this regard he referred us by way of an example to reg 5(3)(b), which requires that the person who has ceased activity as a result of permanent incapacity to work has resided in the United Kingdom continuously for more than two years prior to the termination. Mr Richardson submitted that by contrast no period of time was specified in reg 6(2)(a) in relation to temporary inability to work. This omission should be regarded as deliberate.

22. Secondly, Mr Richardson argued that when the EEA Regulations were read as a whole, reg 6(2)(a), relating to temporary inability to work, and reg 5(3)(b), relating to permanent cessation of activity, dove-tailed together in a manner implying that a person not permanently incapable of work was to be regarded as temporarily incapable of work.

23. For our part we consider that there is considerable merit in the argument advanced on behalf of the claimant as to the meaning of the words "temporary" and "permanent", in the sense that if a person's inability or incapacity is not permanent, then it should be regarded as temporary. The definition of "permanent" in Collins English Dictionary (1991) is given as "1. Existing or intending to exist for an indefinite period" and "2. Not expected to change for an indefinite time; not temporary". The definition of "temporary" is given as "1. Not permanent; provisional" and then "2. Lasting only a short time; transitory". These definitions give strong support for the argument that a state of affairs which is not permanent is temporary although, reflecting Mr Gulvin's submission, temporary is also regarded as lasting only a short time. We note that reg 5(3)(a) refers to "permanent incapacity to work" while reg 6(2)(a) refers to a person who is "temporarily unable to work" but we do not consider that in this appeal anything material hinges on any distinction between being incapable of work or unable to work.

24. To assist us in our interpretation of the Regulations we have also had regard to the Council Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which the Regulations are intended to implement. Article 7 of the Directive sets out the right of residence for more than three months, which is conferred by article 7.1(a) on workers or self-employed persons in the host Member State and, by article 7.1(d) on their family members accompanying or joining them. In terms of article 7.3(a) a Union citizen who is no longer a worker retains the status of worker where he or she is temporarily unable to work as the result of an illness or accident. Article 16 sets out eligibility for the right of permanent residence, which as a general rule is conferred upon Union citizens who have resided legally for a continuous period of five years in the host Member State and upon their family members who are not nationals of a Member State. Article 17 provides certain exemptions for persons no longer working in the host Member State and their family members. In particular article 17.1(b) confers the right of permanent residence on working or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work. In terms of Article 17.3, irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State under Article 17.1.

25. An examination of the Directive shows that the provisions in the EEA Regulations relating to temporary inability to work and permanent incapacity to work, and the consequences flowing therefrom, are faithful to the terms of the Directive. In addition, article 16, which sets out the general rule on eligibility for the right of permanent residence, is a significant statement of principle conferring the right of permanent residence on Union citizens and their family members who have resided legally for the required period of five years in the host Member State.

26. Having regard to the wording of the relevant provisions of the EEA Regulations, in particular regs 5(3)(b) and 6(2)(a), to the terms of the Directive, and to the meaning of the words "temporary" and "permanent", we are satisfied that the Immigration Judge did not make an error of law in categorising the claimant's father's inability to work as temporary and in concluding that he was a qualified person who had acquired a permanent right of residence under reg 15(1). It follows from this that the claimant herself is entitled to a permanent right of residence as a family member under reg 15(1)(b). Although the claimant attained the age of 21 shortly before applying for permanent residence, it has not been suggested that she ceased to be a family member in terms of Regulation 7. Accordingly, as the Immigration Judge made no error of law, the determination allowing the appeal shall stand.

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.

28. Finally, we note that Mr Richardson put before us a determination by an Immigration Judge in respect of the claimant's stepmother (IA/13184/2010), although he did not refer to it in argument. In the determination in respect of the stepmother's appeal, the Immigration Judge found on the evidence that the claimant's father was temporarily unable to work. The Immigration Judge went on to find that even if this was wrong, the claimant's father had resided lawfully in the United Kingdom for more than two years from his arrival in June 2002 until the termination of his employment, recorded as having taken place in August 2004, and thereby satisfied the definition of a person who terminates his activity in the United Kingdom as a worker as a result of permanent incapacity to work, in terms of reg 5(3). On this alternative basis the claimant's father qualified for a permanent right of residence under reg 15(1)(c). The appeal before us, however, was not argued on this basis and indeed, the principal finding by the Immigration Judge in the claimant's stepmother's appeal was that the claimant's father's inability to work was

temporary, although prolonged. There is no material inconsistency between the appeals in this regard.

DECISION

29. The making of the previous decision involved the making of no error on a point of law. Accordingly the previous decision allowing the appeal shall stand.

Signed  Date

President of the Upper Tribunal,
Immigration and Asylum Chamber