Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05891/2014

THE IMMIGRATION ACTS

At Field House
On 25th June 2015

Decision and Reasons Promulgated
On 17th August 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MRS LUXMI RANI PERMALL
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Walsh, Counsel instructed by Bindmans LLP.
For the Respondent: Mr.E.Walker, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Mauritius. On 5 September 2013 she applied for confirmation of her right to reside permanently by reason of European Treaty provisions, namely, the Citizenship Directive. This is implemented domestically in the Immigration (European Economic Area) Regulations 2006 (hereinafter referred to as `the 2006 regulations').

2. Her application was refused on 14 January 2014. Her appeal was heard by First-tier Immigration Judge Barker on 27 August 2014. In a decision promulgated on 16 September 2014 it was dismissed under the 2006 Regulations and on human rights grounds. She has been granted permission to appeal to the Upper Tribunal in relation to the application of European law.

The facts

3. The facts are not in dispute. In March 2004 she `met' a Mr Permall online. He is a French national born on 20 April 1979 and he had been living in the United Kingdom with his father since the age of 16. Mr Permall had been working in the United Kingdom since 2003. In June 2007 the appellant came to the United Kingdom with leave for six months and her relationship with Mr Permall continued to develop.

4. Believing it would help the appellant's immigration status Mr Permall obtained British citizenship. His certificate of nationalisation is dated 28 February 2008.

5. The appellant left the United Kingdom and returned again on 22 February 2009. On 18 March 2009 she and Mr Permall married. They then travelled to Mauritius for a religious marriage ceremony in July 2009. The appellant was granted entry clearance as the spouse of a British citizen, valid until 13 November 2011. She was subsequently granted leave to remain until 17 November 2013. The relationship has ended: the parties have divorced with a decree absolute granted on 9 August 2013.

The issues arising

6. There are three points of note from the above. Firstly, her former husband is a dual British and French national. Secondly, the appellant entered the United Kingdom as a spouse under the immigration rules and not as a family member under the 2006 Regulations. Thirdly, the marriage has ended in divorce.

7. The difficulty for the appellant flows from the amendments to the 2006 Regulations. On 16 July 2012 the regulations were amended to reflect developing caselaw. Crucially, the general interpretation section at regulation 2 was amended to read:

> "'EEA national' means a national of an EEA state who is not also a United Kingdom national."

8. This change to the Regulations was in response to the judgement of the Court of Justice of the European Union in the case of McCarthy (see 434/09). Because of her former husband's British nationality the respondent concluded the essential ingredient of a sponsoring EEA national did not exist. The respondent referred to the transitional

arrangements but these applied to third country nationals who had previously relied upon the regulations. As stated earlier, the appellant had not relied upon the regulations but upon the immigration rules.

The First-tier Tribunal

9. Before Judge Barker it was accepted by the parties that the appellant could not meet the requirements of the amended regulations. Mr Walsh had appeared at the First –tier Tribunal and argued, as he does now, that the amended regulations do not meet the Citizen's Directive and are not in line with the case of McCarthy. Following from this it was argued that the appellant's former husband was exercising Treaty rights rather than rights as a British national.

10. At paragraph 23 of the decision Judge Barker stated:

> "Whilst I accept that Mr Permall was working and therefore would be considered a worker if the regulations applied I am not persuaded that it can be said that he was exercising Treaty rights in the UK after his naturalisation in 2008…"

The judge went on to say:

> "The appellant at no time was in the UK as a family member of a qualified person and was not residing in the United Kingdom on that basis. Her permission to reside in the UK was as a spouse under the immigration rules…"

11. Judge Barker refers to the amendment to the definition of an EEA national in the 2006 regulations at paragraph 24 of the decision. It was noted that Mrs McCarthy's case considered whether the Directive applied to a citizen who had never exercised the right to free movement and always resided in the Member State of which they were a national, albeit they were a national of another Member State also. The present situation is different in that Mr Permall did move from his country of origin to the United Kingdom. Paragraph 25 of the decision refers to submissions made in relation to the McCarthy case:

> "The Tribunal was also referred to paragraph 32 of the judgement which states: "First, according to Article 3(1) of Directive 2004/38 all Union citizens who `move to' or reside in a Member State `other' than that of which they are a national are beneficiaries of that directive". However paragraph 34 states: "Since, as stated in paragraph 29 of this judgement, the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member State, cannot apply to a union citizen whose enjoys an unconditional right to residence due to the fact that he resides in the Member State of which he is a national."."

12. At paragraph 26 a judge concludes :

> "… Paragraph 34 quoted above seems to indicate that the Directive cannot apply to a person who enjoys the unconditional right of residence in the Member State in which he is a national. The effect of the alteration to the definition would appear to be in line with paragraph 34 of McCarthy. Whilst there may be circumstances which the amendment does not meet (in that regard I have noted the correspondence of the solicitors with the European Directorate General to Justice) in the present circumstances I do not find that the appellant's rights are prejudiced …"

13. At paragraph 27 the judge went on to say:

> "… Even if I am wrong and the amendment is not in line with the Directive there were other grounds on which the appellant did not meet the requirements for a retained right of residence, namely, that she had not been a family member of`an EEA national in the UK as she had always resided in the UK on the basis that she was a spouse of a British citizen and therefore would not have met the requirements in the Regulations in any event."

The Upper Tribunal

14. The application for permission to appeal makes the point that Mr Permall moved from France to the United Kingdom and then began working here. Directive 2004/58/EC extends to all Union citizens who moved to and reside in a Member State other than that of which they are a national and to their family members. Consequently, it was argued that the situation is distinct from that in McCarthy where Treaty rights had never been exercised and so she was not a beneficiary of the Directive.

15. The appellant satisfies the requirements of paragraph 10 of the 2006 regulations which deals with retained rights of residence but for the issue of her former husband's dual nationality. Before divorce the marriage had lasted at least three years and the parties had resided in the United Kingdom for at least one year during its duration. The appellant is in employment. It is argued by Mr Walsh that the fact the appellant availed of the immigration rules to reside rather than Treaty rights is an irrelevant consideration as those rights have direct effect.

16. In the First-tier Tribunal the appellant's representative relied upon the decision of Kaheci and Inan C-9/10. In that case, a Turkish national had acquired Dutch nationality whilst residing there. The issue before the ECJ was whether they could then avail of certain benefits for Turkish nationals in an agreement between Turkey and the EU aimed at integrating Turkish nationals into the host Member State. The court concluded they could as otherwise this would impede the aims of the agreement.

17. At hearing in the Upper Tribunal the above points are repeated.

Consideration.

18. When Mr Permall came to the United Kingdom at the age of 16 it was as a member of his father's family. His father was exercising Treaty rights as a French worker in the United Kingdom. From 2003 Mr Permall was directly benefiting from Treaty rights when he began to work. On 28 February 2002 he became a citizen of the United Kingdom. From that point on he had the full benefits of British citizenship. The issue then is the effect this has on his status and as a consequence that of his family members.

19. Factually, the case of McCarthy –v- SSHD C-434/09 was considerably different. Ms McCarthy was a national of the United Kingdom who had always lived here. She was in receipt of State benefits. There was no movement from one European State to another. On her behalf it was argued there was an exercise of Treaty rights because she was also a dual Irish national.

20. The issue referred was whether she was a beneficiary within the meaning of article 3 of Directive 2004/38. This defines beneficiaries as all Union citizens who moved to or reside in a Member State other than that of which they are nationals. The Treaty was being argued to confer upon her Jamaican husband a right of residence which would not otherwise arise under the immigration rules. The question formulated was whether article 3 (1) of the Directive applied to a Union citizen who had never exercised their right to free movement, who had always resided in a Member State of which they are a national and who also was a national of another Member State. The court concluded at paragraph 31:

> "A literal, teleological and contextual interpretation of that provision leads to a negative reply to that question."

21. At paragraph 34 the Court in McCarthy said :

> "… Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the member states, cannot apply to the Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State in which he is a national."

22. Whilst this provided an answer to Mrs McCarthy's situation it has to be read as subject to the subsequent comment that this was not a purely internal situation and consideration had to be given as to whether the domestic measures had the effect of depriving a citizen of the genuine enjoyment of their free movement.

23. The representatives for the present appellant wrote to the European Commission and a Ms Boulanger replied on 31 July 2014. Her status within the Commission is not apparent but she is responding to a letter addressed to a Mr Meduna who was involved in preparing the Commission's Opinion in the McCarthy case. She indicated that a dual UK/ EU national cannot be automatically excluded where they would be a beneficiary of the Directive. She referred to the qualified nature

of the question answered by the Court of Justice and what she described as the blanket disqualification of dual UK nationals in the amendment to the 2006 regulations. She indicated the Commission was contemplating initiating infringement proceedings against the United Kingdom.

24. It is apparent that the McCarthy decision was dealing with a narrow factual situation. Mrs McCarthy had never exercised her free movement rights and was found not to be a beneficiary for the purposes of article 3(1). The fact she was a national of another Member State did not alter the position. At paragraph 46 it was stated the fact she had not made use of the right to freedom of movement did not mean the situation was purely internal. The judgement repeatedly refers to the notion of citizenship of the Union and that article 20 TFEU precludes national measures depriving Union citizens of the genuine enjoyment of the substance of the rights. In Mrs McCarthy's case the refusal of residence documentation did not deprive her of the genuine enjoyment of those rights. Paragraphs 51 to 55 discusses national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of their rights. Ms Boulanger in her letter sets out five situations where issues arise because of a blanket disqualification of dual UK nationals.

25. The decision of Kahveci and Inan (C-7/10 and C-9-10) was dealing with the interplay of movement rights and the EEC-Turkey Association agreement. In that case, the first appellant had been issued with a residence permit by the Dutch authorities subject to the restriction that he reside with his spouse. His spouse was also a Turkish national who had acquired the Netherlands nationality and was part of the Dutch labour force. He was subsequently imprisoned and the Dutch authorities decided to withdraw his residence permit. It was argued that this contravened the EEC Turkey Association agreement. The Dutch court found that he could not be regarded as a family member of a Turkish worker because although his wife had retained Turkish nationality she also held Dutch nationality. The second case concerned a Turkish national who came to the Netherlands to join his father, a Turkish national as well as a national of the Netherlands. The appellant had been issued with a residence permit, which again was withdrawn upon his imprisonment. The question referred was whether the family member of a Turkish worker lost the benefit of the EEC Turkey Association agreement when the family member had acquired the nationality of the host Member State. The EA Turkey Association agreement was aimed at improving the treatment of Turkish workers and members of their families with a view to achieving gradually freedom of movement. The court concluded that that aim would be impeded if acquisition of the nationality of the host member state required a worker who retained Turkish nationality to forego the benefit promoting family reunification. Whilst the decision is concerned with dual national rights the context is completely different from the present. It does help illustrate that a person who has the

nationality of the host State is not necessarily thereby deprived of movement rights from inter county agreements.

26. Mr. E. Walker provided a copy of the decision in EN and AN (EEA regulation 12: British citizens) Kenya [2008] UKAIT 00028. The appellants where Kenyans who had applied for family permits to join their mother and stepfather, a dual British and Irish national. The Tribunal was considering whether a person could be regarded as residing in the United Kingdom in accordance with the EEA regulations for the purposes of regulation 12 which concerns the issue by an entry clearance officer of an EEA family permit. Significantly, the tribunal stated that regulation 12 was a matter of pure United Kingdom law outside the requirements of European law because it has the effect of ensuring that a British citizen residing in United Kingdom is treated as such rather than as being a national of a Member State. It is akin to entry clearance. At paragraph 11 the Tribunal pointed out that article 3(1) of the Directive provides that it applies to all union citizens who move to or reside in a Member State *other than that of which they are a national* (the Tribunal's emphasis). The Tribunal noted that the regulations contain provisions about the admission and residence of EEA nationals and that a British citizen has no restriction. The Tribunal concluded a person who is a British citizen who may also be an EEA national cannot properly be described as a person residing under the regulations. However, this decision has to be read in the context of regulation 12 rather than the wider issues raised in McCarthy and dual nationality.

Conclusions

27. I see nothing from the cited cases which would cause me to doubt the validity of the amendment to the definition of an EU national in the 2006 regulations as applied to the facts here. Unlike Mrs McCartney, Mr Permall had made use of the right of freedom of movement. He also has an unconditional right of residence as a British citizen. He does not come within the definition of an EEA national following the 16th July 2012 changes to the 2006 regulations. It may be that certain factual situations will call into question the compatibility of the exclusion of joint UK citizen’s .In the present case however it has not been demonstrated that it prevents Mr Permell from enjoying his rights of movement within the community. His former wife now faces her present difficulties because of those changes. However, I do not find it established on the facts that the Citizenship Directive has been thwarted.

28. Following on from this I considered if the appellant was assisted by the transitional provisions contained at schedule 3 of the Immigration (European Economic Area)(Amendment)Regulations 2012. Although the Treaty has direct application these provisions are intended to protect individuals who had acted in reliance on the earlier Regulations. They provide that notwithstanding the change to the

definition of EEA national, the Regulations will be still satisfied were the family member on the 6th July 2012 had a permanent right of residence. This does not apply in the appellant's situation. The second category is the person had a right to reside under the regulations as at the 6th July 2012 and held relevant documentation or had made an application. Again, this does not apply. In the appellant's case she had relied on the domestic immigration rules not the Regulations. My conclusion therefore is that the appellant is not assisted by the transitional provisions.

29. Having considered the arguments advanced I find no error of law in the decision of First-tier Tribunal Judge Barker. The decision has been carefully prepared and clearly sets out the arguments advanced. Adequate findings are made and the arguments considered. At paragraph 27 the judge concluded that the appellant had not been deprived of her rights under European law by the change in the definition of EEA national which I would concur with.

Decision.

The decision of the First-tier tribunal dismissing the appellant's appeal does not contain a material error of law and shall stand

Deputy Upper Tribunal Judge Farrelly