Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27503/2013

THE IMMIGRATION ACTS

Heard at Belfast	**Decision & Reasons Promulgated**
On 14 January 2015	**On 17 February 2015**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MRS JUDY HY SETO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr e Dorman, Counsel instructed by Tim McQuoid Solicitors
For the Respondent: Mr Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Canadian national born on 9 August 1973.

2. On 10 January 2013 she applied for a residence card as the spouse of an EEA national exercising treaty rights in the United Kingdom. The application was refused by the respondent in terms of the Reasons for Refusal Letter dated 20 June 2013. The appellant sought to appeal against that decision, which appeal came before Judge of the First-tier Tribunal Balloch on 20 June 2014.

3. The appellant is married to Leigh Damian Byrne who is an Irish citizen and also, having been born in County Armagh, entitled to British citizenship. They married on 27 July 2012. The appellant entered the United Kingdom on 9 August 2012 as a visitor using her Canadian passport. It is contended that at all times the appellant's husband had been exercising EEA treaty rights as a student or a worker.

4. At the time of the application on 10 January 2013 the appellant had submitted evidence that her husband was then a student, currently in education, from Queen's University Belfast.

5. The point was not taken in the Reasons for Refusal Letter that the appellant's husband was not an EEA national. The issue that was taken was that no evidence had been produced that he held comprehensive sickness insurance in the United Kingdom in the capacity as student. It was not accepted that the NHS provided that insurance as required.

6. At the hearing Judge Balloch concluded that the NHS did not provide the comprehensive insurance that was required. However, that was perhaps a more academic point at the date of the hearing because by then the appellant's husband was working and that that particular requirement did not apply. However, consideration was given both to the case of **McCarthy (European citizen) [2011] EUECJ C-434/09 (05 May 2011)** and to the Immigration (European Economic Area) Regulations 2006, in particular to paragraph 1 of schedule 1 to the Immigration (EEA) (Amendment) Regulations 2012. It was the finding of the Judge, having regard to both matters that the appellant's husband was not to be regarded as an EEA national, whether residing in Ireland or in Belfast he was a national of both countries.

7. In those circumstances the appeal in respect of the Regulations was dismissed.

8. Consideration would seem also to have been given to Article 8 of the ECHR, the appeal in respect thereof dismissed.

9. Grounds of appeal lodged against those decisions seek to argue that the Judge was in error in finding that the NHS did not provide the sufficient cover, also contended that the provisions of the 2012 Amendment Regulations stripping the appellant's spouse of his EEA rights in the UK was in breach of citizen rights. Also it was contended that the approach to Article 8 was defective.

10. Mr Dorman, who represents the appellant, relies upon the grounds of appeal.

11. He submits that the Judge fettered her discretion in failing to make a finding that NHS coverage meets the definition or consideration of comprehensive health insurance for the purposes of Regulation 4(d) of the Immigration (European Economic Area) Regulations 2006.

12. In reply Mr Shilliday invites my attention to the decision of the Court of Appeal in **Ahmed [2014] EWCA 988**.

13. At paragraph 19 it cited the reasoning of the Upper Tribunal to why an entitlement to free NHS treatment does not satisfy the requirement of the Regulations for a student. The Tribunal found that there was a material distinction between that requirement and the free entitlement to NHS treatment, the fundamental position being of course that the EEA national and/or spouse would not be a burden on the host state so far as that matter is concerned. That was highlighted in the judgment of Buxton LJ in **W (China) v SSHD [2006] EWCA Civ 1494** cited at paragraphs 20 to 23 of the judgment. In essence, the Court of Appeal held that the requirement for comprehensive health insurance went beyond the NHS treatment.

14. It seems to me that the case of **Ahmed** clearly supports the contention that was found by the Immigration Judge at the appeal. In any event it is now somewhat academic, given that the appellant's husband is now working rather than a student.

15. The key issue in the appeal is, however, whether or not the appellant's husband is exercising EEA treaty rights whilst working in the United Kingdom so she can derive the right of residence as his spouse.

16. Paragraph 1 of schedule 1 to the Immigration (European Economic Area) (Amendment) Regulations 2012 states:-

> "Paragraph 1 of schedule 1 to these Regulations makes various changes to the interpretation provisions of Regulation 2(1) of the 2006 Regulations. These amendments include provisions which:-
>
> (b) make it clear that a person will not be regarded as an EEA national where they are also a United Kingdom national. This amendment of the definition of an EEA national reflects the ECA's judgment in the case of **C-439/09 Shirley McCarthy v Secretary of State for the Home Department**. Schedule 3 to these Regulations make transitional provisions to address the position of persons who have acted in reliance n the previous definition'."

This Regulation came into effect on 16 October 2012.

17. The appellant's husband has worked or studied in Ireland and in Belfast, both countries of which he is a national.

18. It would seem, therefore, in the light of those Regulations that the concession seemingly made in the reasons for refusal that the appellant's husband was an EEA national exercising treaty rights was in error. Certainly, at paragraph 19, the First-tier Tribunal Judge notes that particular fact.

19. In paragraph 19 the Judge notes the arguments placed before her by Mr Dorman that the effect of the Regulations has been to deprive the appellant's husband of his treaty rights.

20. Mr Dorman accepts, for the purposes of this appeal, that the Judge was bound by the Amendment Regulations to find that the appellant's husband was not exercising treaty rights in Belfast. Nevertheless, he continues with the argument that such was unlawful within the scheme of EU law and said that the Regulations, having changed, the appellant was in a more detrimental position than an EEA national from another country which was not what the **McCarthy** decision intended. I am asked to make a reference to Article 26. The question as to whether or not the provisions of the 2012 Amendment Regulations, stripping the appellant's spouse of his EEA rights, offend the principal of equivalence under European Union laws and/or whether the 2012 Amendment Regulations go further than the ECJ intended following its ruling in **McCarthy**.

21. It is submitted that paragraph 59 in **McCarthy** is less draconian in its intention than the 2012 Regulations.

22. For my part I fail to see that such a point has merit. Paragraph 59(2) provides as follows:-

> "Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and also a national of another Member State, providing that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States."

23. For my part I can find little in that that is not reflected in the Regulations. So far as the appellant's husband is concerned, he gave evidence before the First-tier Tribunal. During 1998 and 1999 he worked in County Clare, Ireland. Between 2000 and 2012 he worked in China as a teacher and it was there that he met his wife, the appellant. At the end of August 2013

he had a full-time post and then various temporary posts in Belfast. He was joined by the appellant when living in Northern Ireland.

24. He has not sought to exercise his right of free movement. The Judge found in paragraph 35 of the determination that since October 2012 he has been without any EEA treaty rights and the appellant cannot meet the requirements of the transitional arrangements.

25. I do not detect any error of law in the approach taken by the First-tier Tribunal Judge to the issue of the Regulations themselves.

26. The Judge went on however to consider Article 8. As Mr Shilliday has indicated to me, whether or not it is necessary in an application for a residence card, per se, for Judges to consider Article 8 is a matter that is shortly to be considered by the Upper Tribunal. The reality is, however, that in this case it was considered and a decision was made. It is also submitted that the consideration given was in error of law in two respects, the first respect being an expectation as to a test of insurmountable obstacles has been considered by the Judge. Secondly, also that the position in **Gulshan** has significantly changed in that there is no longer a requirement for an intermediate position to show arguably good grounds granting leave outside the Immigration Rules. The decision maker may consider Article 8 unhampered by any preliminary requirement.

27. It seems to me that on those matters there are merits to the appeal.

28. In those circumstances the decision of the Immigration Judge in relation to the EEA Regulations shall stand. Although there is justifiable criticism addressed to the decision letter itself it would not seem that there is any merit in sending the matter back for reconsideration by the Secretary of State given the state of the jurisprudence on this matter.

29. The decision on Article 8 of the ECHR shall however be set aside to be re-made.

30. Given the requirement no doubt of evidence as to family and private life, it is appropriate that it is heard by the First-tier Tribunal, having regard to paragraph 7 of the Senior President's Practice Directions.

31. I do not set any particular directions, those will be matters for the First-tier Tribunal. That might be particularly so if there comes a decision by the Upper Tribunal which is referable to the jurisdiction of Judges to entertain Article 8 matters in the absence of any specific application being made to the Secretary of State for that aspect to be considered.

Signed Date

Upper Tribunal Judge King TD