Upper Tribunal
(Immigration and Asylum Chamber)

MAH (dual nationality – permanent residence) Canada [2010] UKUT 445 (IAC)

THE IMMIGRATION ACTS

Heard at Belfast	**Determination Promulgated**
On 28 October 2010	.....

Before

MR JUSTICE BLAKE, PRESIDENT

MR CMG OCKELTON, VICE PRESIDENT

SENIOR IMMIGRATION JUDGE DEANS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAH

Respondent

Representation :

For the Appellant: Mrs M O'Brien, Home Office Presenting Officer

For the Respondent: Mr B Cox, Law Centre (NI)

British citizen born in Northern Ireland prior to 2001 was an Irish national from birth; when he terminated his activity as a worker as a result of permanent incapacity to work he acquired a permanent right of residence under reg 15(1)(c) of the Immigration (European Economic Area) Regulations 2006; there was no requirement for him to have moved to the UK; on marriage his non-EEA national spouse acquired a permanent right of residence under reg 15(1)(d); McCarthy v SSHD [2008] EWCA Civ 641 considered.

DETERMINATION AND REASONS

Introduction

1.
This is an appeal against a determination by Immigration Judge Farrelly. The claimant was born on 8 May 1958 and is a national of Canada. She appealed against a decision dated 2 February 2010 by the Secretary of State refusing her a residence card under the Immigration (European Economic Area)

Regulations 2006 (“the Regulations”). Her appeal was allowed by the Immigration Judge. Permission to appeal was granted on the application of the Secretary of State.

2.
The claimant’s application for a residence card was based on her marriage on 26 August 2008 to Mr GO, from whom she separated shortly afterwards. Mr GO has lived all his life in Northern Ireland except for a period from 2000-2003 when he lived in Scotland. He is a citizen of the Republic of Ireland as well as being a British citizen. It was argued before the Immigration Judge on behalf of the claimant that as an EEA national Mr GO had acquired a permanent right of residence in the United Kingdom under the Regulations and the claimant was entitled to a permanent right of residence in the United Kingdom as his family member.

The EEA Regulations

3.
Regulation 15 sets out categories of person who acquire the right to reside in the United Kingdom permanently. These include, at reg 15(1)(c) “a worker or self-employed person who has ceased activity” and at (d) “the family member of a worker or self-employed person who has ceased activity.” The Regulations are designed to give effect to the UK’s obligations under the EU Citizens Directive 2004/38/EC.

4.
Regulation 5, so far as relevant to this appeal, states:

“5 - (1) In these Regulations, “worker or self-employed person who has ceased activity” means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

…

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

(a)
he terminates his activity 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 2 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.”

The IJ’s findings

5.
The Immigration Judge found as a fact that the claimant is married to an Irish citizen who has dual nationality through having been born in Northern Ireland. The claimant’s husband, Mr GO, was born on 15 June 1950. He was described in his marriage certificate as a retired lorry driver. It appears that he last worked around 1992. He gave up working after he experienced a myocardial infarction and

has been in receipt of state benefits since 1992. The Immigration Judge had before him a letter dated 29 December 2008 from Mr GO's GP stating that Mr GO was permanently incapable of work owing to ill-health. His incapacity is based on ischaemic heart disease and arthritis. The Immigration Judge had other evidence before him relating to Mr GO's condition and to his receipt of state benefits, which included Disability Living Allowance and Incapacity Benefit. In the absence of evidence to the contrary, the Immigration Judge found Mr GO became permanently incapable of work in 1992.

6.
On the basis of this finding, the Immigration Judge was satisfied that Mr GO was a worker who had ceased activity, in terms of reg 5(3), having terminated his activity in the United Kingdom as a worker as a result of permanent incapacity to work and having resided in the United Kingdom continuously for more than two years prior to the termination. Mr GO had a permanent right of residence in terms of reg 15(1)(c) as a worker who had ceased activity and the claimant, as his family member, had a permanent right of residence under reg 15(1)(d).

7.
In reaching this conclusion the Immigration Judge made a finding to the effect that Mr GO, if not an Irish citizen, was at least entitled to Irish citizenship in 1992 when he terminated his activity as a worker. For the claimant to succeed she had to show that her husband was an EEA national who had resided in the United Kingdom continuously for more than two years prior to terminating his activity as a worker.

The submissions

8.
In the application for permission to appeal, the Secretary of State submitted that the Immigration Judge erred in law in finding that the appellant's husband was exercising Treaty rights in 1992 as he did not become an Irish citizen until 2008. The evidence before the Immigration Judge showed that Mr GO was issued with an Irish passport on 22 December 2008. The Secretary of State contended that while Mr GO might have been entitled to claim Irish citizenship from birth, he did not actually claim citizenship until after his marriage with the claimant had taken place. Accordingly, Mr GO was not exercising Treaty rights in the two years prior to terminating his activity as a worker in 1992 and did not meet the requirements of Regulation 15.

9.
On behalf of the claimant, Mr Cox laid before us the relevant provisions of Irish nationality law. The starting point is the Irish Nationality and Citizenship Act 1956, section 6, which in its original form states:

"6. - (1) Every person born in Ireland is an Irish citizen from birth.

(2) Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth or becomes an Irish citizen under sub-section (1) or would be an Irish citizen under that sub-section if alive at the passing of this Act.

(3) In the case of a person born before the passing of this Act, sub-section (2) applies from the date of its passing. In every other case, it applies from birth.

(4) A person born before the passing of this Act whose father or mother is an Irish citizen under sub-section (2), or would be if alive at its passing, shall be an Irish citizen from the date of its passing.

(5) Sub-section (1) shall not confer Irish citizenship on the child of an alien who, at the time of the child's birth, is entitled to diplomatic immunity in the State."

10.
It is accepted that the reference in section 6(1) to Ireland refers to the island of Ireland.

11.
The 1956 Act was amended by the Irish Nationality and Citizenship Act 2001 which substituted a new section 6, providing in part as follows:

"6. – (1) Every person born in the island of Ireland is entitled to be an Irish citizen.

(2) (a) subject to sub-sections (4) and (5), a person born in the island of Ireland is an Irish citizen from birth if he or she does, or if not of full age has done on his or her behalf, any act which only an Irish citizen is entitled to do.

(b) the fact that a person so born has not done, or has not had done on his or her behalf, such an act shall not of itself give rise to a presumption that the person is not an Irish citizen or is a citizen of another country.

(3) A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country."

12.
In terms of section 6(2) of the amended provision, an act which only an Irish citizen is entitled to do refers principally to applying for an Irish passport. Further amendments to section 6, with which we are not concerned here, have been made by the Irish Nationality and Citizenship Act 2004.

Conclusions

13.
In this appeal we are concerned primarily with the nationality or citizenship of the claimant's husband, Mr GO, from 1990 to 1992, which covers the two years prior to his terminating his activity as a worker. This issue falls to be determined under section 6 of the Irish Nationality and Citizenship Act 1956 in its original form, prior to the 2001 amendments. Under sub-sections 6(1) and (3) of the 1956 Act, it is apparent that the claimant's husband was an Irish citizen from birth. It was not necessary for him to apply for a passport to complete that entitlement. The claimant's husband was an Irish citizen prior to terminating his activity as a worker in 1992.

14.
While this resolves the main issue before us, we should also address some incidental or subsidiary matters which were raised at the hearing. The first of these was whether there was sufficient evidence to support the finding by the Immigration Judge that the claimant's husband terminated his activity as a worker in 1992 as a result of permanent incapacity to work. At paragraph 33 the Immigration Judge acknowledged the difficulty which is encountered by one member of an estranged couple seeking to obtain evidence about the other and the Immigration Judge noted at paragraph 52 of his determination that the medical evidence was "minimal". Submissions were made to the Immigration Judge in relation to the burden of proof. Reference was made in particular to Article 14(2) of the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which includes the following provision:

“In specific cases where there is reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.”

15.
On the basis of this provision the Immigration Judge suggested at paragraph 41 of his determination that the burden of proof was shared and that the host Member State needed to have reasonable doubt before enquiring if a person had a right of residence. The Immigration Judge then went on to find at paragraph 42 that “the applicant must set out the basic proofs to show that there is entitlement.”

16.
Before us Mrs O’Brien acknowledged that there was no contradictory evidence before the Immigration Judge (or indeed before us) as to the claimant’s husband’s incapacity, or lack of it. It could not be argued that the findings by the Immigration Judge were irrational on the material before him. Accordingly, we accept that the findings made by the Immigration Judge as to the claimant’s husband’s employment history and incapacity for work should stand.

17.
The next issue was the question of whether the Regulations, which came into force on 30 April 2006, apply to the claimant’s husband’s termination of activity as a worker in 1992. In this regard we note that the conditions to be satisfied in reg 5(3) are expressed in the present tense and state a “person satisfies the conditions … if – (a) he terminates his activity …” Did it follow from this that the provision of Community law to which we should have regard were those in effect at the time when the claimant’s husband terminated his activity in 1992?

18.
In answering this question, we note that the Regulations give effect to the Citizen’s Directive 2004 (cited above), which itself supersedes earlier provisions of Community law. In particular, Article 17.1(b), which makes provision for a permanent right of residence for a person who has resided continuously in the host Member State for more than two years and stopped working there as a result of permanent incapacity to work, is referred to in Recital 19 as deriving from Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State. The relevant provision is to be found at reg 2.1(b) of the Commission Regulation of 1970.

19.
This provision shows that although the current Regulations came into force as recently as 30 April 2006, the relevant provision in reg 5(1) and (3) has a history going back to 1970, some 20 years before the period with which we are concerned.

20.
Further, Mr Cox put before us the judgment of the European Court of Justice in Case C-162/09 Lassal, 7 October 2010 in which it was held that continuous residence for a period of five years or more which ended prior to the Citizen’s Directive coming into effect would nevertheless satisfy the period of continuous residence necessary to acquire a permanent right of residence under the Directive, notwithstanding that the Directive itself was not in effect when the period of residence came to an end.

21.

We are satisfied for both these reasons that the terms of the 2006 Regulations apply to the events of the period 1990-92 as found by the Immigration Judge. Our view in relation to this is further supported by having regard to the Secretary of State's decision itself, which was made on 2 February 2010 under the 2006 Regulations as having effect at the date of decision. In this appeal in order to determine entitlement under the Regulations it is necessary to look at evidence of events which took place prior to the Regulations taking effect. This evidence is material for the purpose of ascertaining entitlement and we are not restricted to having regard only to events occurring after the Regulations came into effect.

22.
The final argument we must consider is potentially of greater significance. The claimant's husband has lived all his life in the United Kingdom. He has not moved from one Member State to another to exercise a right under the Treaties. This raises the question of whether the claimant's husband can be regarded as having been exercising Treaty rights without ever having moved from one Member State to another in order to do so.

23.
In relation to this we have had regard to the judgments of the Court of Appeal in McCarthy v Secretary of State for the Home Department [2008] EWCA Civ 641 and the subsequent developments in that case, namely referral to the European Court of Justice on appeal to the House of Lords. In McCarthy the appellant was a dual British/Irish national who had always resided in the United Kingdom. Her husband, as a non-EEA national, sought a residence card on the basis of the appellant's residence in the United Kingdom as a national of a Member State. It was conceded that the appellant was not a "qualified person" under Regulation 6 of the Regulations. Instead it was argued that she had acquired a permanent right of residence under reg 15(1)(a) as an EEA national who had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years.

24.
The Tribunal in McCarthy had previously found that the appellant **had never worked** and had not been residing in the United Kingdom in the exercise of rights as an EEA national but as a citizen of the United Kingdom. Her rights were derived from her United Kingdom nationality and not from Community law. Accordingly, she had not been residing in the United Kingdom "in accordance with the Regulations", nor in accordance with the rights conferred by the Citizens Directive giving Union citizens rights of free movement and residence within the territory of the Member States. This conclusion was upheld by the Court of Appeal. In the leading judgment, however, Pill LJ stated that if the appellant had been found to have been residing in the United Kingdom in the exercise of Treaty rights, he would not have found against her, as the Tribunal had done, on the basis that she had not "moved" to the United Kingdom but had always resided here. On this point Pill LJ concluded, at paragraph 33 of the judgement:

"On the second issue, I disagree with the Tribunal's finding, at paragraph 29, (though it may have been no more than an additional reason for the finding on the first issue) that the Directive invariably imposes a requirement that there is movement from one country to another and that "the movement required excludes the appellant". "

In summary it appears that what defeated Ms McCarthy's application was that she was never a worker within the meaning of EU law and consequently could not have exercised EU Treaty rights to reside in another State. We observe that the UT AAC reached a similar conclusion as to this decision

in the case of Secretary of State for Work and Pensions v AA [2009] 249 (AAC), 27 November 2009 at [11] to [12]. We agree with this analysis.

25.
Before us Mrs O'Brien pointed out that the Secretary of State was still a party to the McCarthy litigation. As a matter of policy, however, the Secretary of State did not take the view that a dual British/Irish national residing in the United Kingdom could not in any circumstances be treated as a Union citizen exercising Treaty rights.

26.
Whereas in McCarthy the appellant had to show she was an EEA national who had been residing in the United Kingdom "in accordance with the Regulations", in terms of reg 15(1)(a), by contrast in the present appeal the claimant has to show that her husband was an EEA national who had resided in the United Kingdom continuously for more than two years prior to terminating his activity as a worker, in terms of reg 5(3). Regulation 5(3) is predicated on the person in question being an EEA national who is present in the United Kingdom, in terms of reg 5(1). There is no specific requirement in reg 5(1) or (3) equivalent to the requirement in reg 15(1)(a) to the effect that the person must have been residing in the United Kingdom "in accordance with the Regulations". Accordingly, the claimant and her husband do not fall within the parameters of the decision in McCarthy , as presently set out in the judgments of the Court of Appeal prior to the reference to the European Court of Justice, the outcome of which is awaited.

Error of law by the IJ

27.
We have already set out above our conclusions on the application of the Regulations to the facts of this appeal. The specific finding made by the Immigration Judge which was challenged by the Secretary of State was whether the claimant's husband was an Irish citizen in 1992 and therefore exercising Treaty rights at that time. In our view, although in general the determination is carefully argued throughout, the finding made by the Immigration Judge in relation to this point is not sufficiently clear. At paragraph 44 of his determination the Immigration Judge wrote:

"I am prepared to accept on the balance of probability that from birth her husband had the option of claiming Irish citizenship. It is not known if he claimed Irish citizenship earlier but I would accept on the balance of probabilities it would have been granted had he sought it."

28.
Then at paragraph 60 the Immigration Judge stated:

"It has not been demonstrated that he was an Irish citizen in 1992. I am prepared to accept that had he claimed Irish citizenship then this would have been granted. If he were not an Irish citizen in 1992 then he would not have been exercising Treaty rights."

29.
We are satisfied on the basis of the evidence put before us in the form of the Irish Nationality and Citizenship Act 1956 before amendment that the claimant's husband was an Irish citizen from birth. This is the provision that the Immigration Judge should have applied if it was placed before him. It is not necessary for us to consider the position of someone whose claim to Irish nationality depends on the amendments made to Irish nationality law in 2001. We would accept generally that a mere entitlement to acquire a nationality does not mean that you are to be treated as a national at a time

before you applied. The IJ's reasoning appears therefore to have been erroneous. A definitive view of what Irish law provides on the question may have to await a case that depends on it.

30.
Accordingly his decision is set aside and we remake it as follows, based on the remaining findings of fact made by the Immigration Judge.

31.
The Claimant's husband was an Irish citizen working in the United Kingdom between 1990 and 1992. In 1992 he terminated his activity in the United Kingdom as a worker as a result of permanent incapacity to work. Accordingly he fell within the definition of a worker who has ceased activity in terms of reg 5(1) and (3). As a worker who had ceased activity he acquired the right to reside in the United Kingdom permanently under reg 15(1)(c). His spouse acquired on marriage to him the right to reside in the United Kingdom permanently as the family member of a worker who has ceased activity, in terms of reg 15(1)(d). The fact that the couple are separated has no material bearing and the claimant remains her husband's family member by virtue of marriage in accordance with reg 7(1)(a). The claimant is, accordingly, entitled to a residence card on this basis.

DECISION

32.
The decision of the Immigration Judge involved the making of an error on a point of law and is set aside. Our decision is that the appeal is allowed under the Regulations.

Signed Date

Senior Immigration Judge Deans

Judge of the Upper Tribunal