**Upper Tribunal**
**(Immigration and Asylum Chamber)**

TM (EEA nationals – meaning; NI practitioners) Zimbabwe [2017] UKUT 165 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Belfast**
**On 7 November 2016**
**And 23 February 2017**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**T M**
(ANONYMITY ORDER MADE)

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms F Connolly, Counsel
For the Respondent: Mr S Whitwell, Presenting Officer (7 November 2016)
Ms M O'Brien, Presenting Officer (23 February 2017)

1. *Schedule 1, paragraph 1 (d) of the Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547) amended the definition of EEA national to exclude those who are also British Citizens, but that change was subject to the transitional provisions set out in Schedule 3 of those regulations. Similar provisions were added to the Immigration*

*(European Economic Area) Regulations 2016 by the Immigration (European Economic Area) (Amendment) Regulations 2017 (SI 2017/1) which amended schedule 6 of the 2016 Regulations by adding a new paragraph 9.*

2. *Although the reg 1 (2) of the 2016 regulations revoked the Immigration (European Economic Area) Regulations 2006, they are preserved for the purposes of appeals, as are the rights of appeal by an amendment to Schedule 4 of the new EEA Regulations made by the Immigration (European Economic Area) (Amendment) Regulations 2017 (SI 2017/1).*

3. *While the representatives regulated by OISC and members of the Bar of Northern Ireland are both entitled under section 84 of the Immigration and Asylum Act 1999 to provide immigration services, section 11 of the Code of Conduct of the Bar of Northern Ireland precludes barristers from taking instructions from persons other than lawyers who are governed by a professional body (which does not include OISC).*

## DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S T Fox, dismissing his appeal under the Immigration (European Area) Regulations 2006 ("the 2006 EEA Regulations") against a decision made by the respondent on 6 February 2015 to refuse to issue him with a residence card as confirmation of his permanent right of residence as the spouse of an EEA citizen.

2. The appellant is a citizen of Zimbabwe. He is married to CM who holds dual Irish and British citizenship. It is his case that she was exercising Treaty rights as an EEA national, from February 2009 until September 2014, and that as he had been married to her during the whole of that period, he was entitled to a residence card pursuant to reg. 15 of the 2006 EEA Regulations.

3. Although the respondent accepted that CM had been exercising Treaty rights between February 2009 and February 2013 and again from November 2013 until present, she was not satisfied that she had been exercising Treaty rights between those dates, and thus there was a break of continuity of residence. The respondent noted that although it had been said that this period had been due to unpaid maternity leave, no evidence to that effect had been provided, nor was there sufficient evidence to show that she had the relevant sickness insurance policy to demonstrate that she was self-sufficient during this period.

4. On appeal, Judge Fox found:

   (i) Following McCarthy v SSHD [2011] EUECJ C-434/09, as CM had not exercised Treaty Rights, she could not at any point be said to be exercising Treaty Rights, and so the appeal fell to be dismissed in any event [17];

   (ii) Even were the appellant to have shown McCarthy did not apply, there was insufficient evidence to show that CM was self-sufficient, or that she had been in receipt of Employment and Support Allowance and/or Disability Living

Allowance, despite claiming that she had been unable to work owing to being ill [ 14], [19 ]- [20].

5. The appellant sought permission to appeal to the Upper Tribunal on the grounds that Judge Fox had erred:

   (i) In failing to take account of the transitional provisions in the Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547) ("the 2012 Regulations"), the effect of which was that the appellant fell to be treated as the family member of an EEA national, the decision in McCarthy notwithstanding;

   (ii) In misapplying reg.6 (2) of the 2006 EEA Regulations in holding that in order to show CM was ill or unable to work, she needed to show that had been in receipt of either Employment and Support Allowance ("ESA") or Disability Living Allowance ("DLA"); and, had failed to explain why he had rejected the evidence of Ms M's GP.

**The Law**

6. As at the date of decision, and the hearing on 7 November 2016, the relevant regulations were the 2006 EEA Regulations. Although Schedule 1, paragraph 1 (d) of the Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547) amended the definition of EEA national to exclude those who are also British Citizens, (subsequent to the ECJ handing down judgment in McCarthy), that change was subject to the transitional provisions set out in Schedule 3 which provided, so far as is relevant:

> **Amendments to the definition of EEA national**
>
> **2.**—(1) Where the right of a family member ("F") to be admitted to, or reside in, the United Kingdom pursuant to the 2006 Regulations depends on the fact that a person ("P") is an EEA national, P will, notwithstanding the effect of paragraph 1(d) of Schedule 1 to these Regulations, continue to be regarded as an EEA national for the purpose of the 2006 Regulations where the criteria in subparagraphs (2), (3) or (4) are met and for as long as they remain satisfied in accordance with subparagraph (5).
>
> (2) …
>
> (3) The criteria in this subparagraph are met where F—
>
> (a) was on the 16th July 2012 a person with a right to reside in the United Kingdom under the 2006 Regulations; and
>
> (b) on the 16th October 2012—
>
> (i) held a valid registration certificate or residence card issued under the 2006 Regulations;
>
> (ii) had made an application under the 2006 Regulations for a registration certificate or residence card which had not been determined; or
>
> (iii) had made an application under the 2006 Regulations for a registration certificate or residence card which had been refused and in respect of which an appeal under regulation 26 could be brought while the appellant is in the United

Kingdom (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002.

…

(5) Where met, the criteria in subparagraph (2), (3) and (4) remain satisfied until the occurrence of the earliest of the following events—

…

(d) the date on which F ceases to be the family member of an EEA national; or

(e) the date on which a right of permanent residence under regulation 15 of the 2006 Regulations is lost in accordance with regulation 15(2) of those Regulations.

(6) P will only continue to be regarded as an EEA national for the purpose of considering the position of F under the 2006 Regulations.

7. Since the hearing on 7 November 2016, the 2006 EEA Regulations have been superseded by the Immigration (European Economic Area) Regulations 2016 (the "new EEA Regulations") which adopted the same definition of EEA national as set out in Regulation 2 of the 2006 EEA Regulations. Although initially the new EEA Regulations did not include the transitional provisions provided for in the 2012 Regulations set out above, that was remedied by the Immigration (European Economic Area) (Amendment) Regulations 2017 (SI 2017/1) which amended schedule 6 of the new EEA Regulations by inserting the 2012 provisions set out above as new paragraph 9 of that Schedule.

8. On 28 October 2009, the appellant was issued with a residence card valid for five years and so fell within Sch3 article 2(3)(b) (i) (see Sch 6 article 9 (3) (b )(i) of the new Regulations). There is no indication that any of the criteria in article 2 (5) (Sch 6 article 9 (6) of the new Regulations) apply, and thus he was entitled to the benefit of the transitional provisions which preserve for him the original definition of EEA national which did not exclude those who were also British Citizens.

9. For whatever reason, the judge did not engage with the transitional provisions set out above, and erred in his application of McCarthy which, due to those provisions was not determinative of the issues.

10. As the judge then went on to consider at [19] – [23] whether the appellant could, nonetheless, have succeeded, that error is not necessarily determinative of the outcome as the judge went on to consider whether Ms M had otherwise been a qualified person at all material times.

11. Reg. 6 of the 2006 EEA Regulations provided, so far as is relevant:

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;

…

(2) Subject to regulations 7A(4) or 7B(4), 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;

12. There is no indication that the judge properly engaged with reg. 6, given the emphasis on the appellant having to show that CM had been entitled to benefit. The question he should have asked is whether she had been temporarily unable to work, and given that she did return, whether that was indicative that, following Samin v Westminster [2012] EWCA Civ 1468, there had been a realistic prospect of return to work.

13. Contrary to what the judge appears to have considered, there is no requirement for CM to have been on Employment Support Allowance or Disability Living Allowance. Further, the reasoning with respect to the letter from the GP is infected by this error, the judge directing himself at [19] to the irrelevant issue of whether the appellant was able to look for work. While that might be relevant to eligibility for benefit, it is not directly relevant to the issue under consideration.

14. For these reasons, I set the decision of the First-tier Tribunal aside. It was not, however, possible to remake the decision there and then. That is because Ms Connolly had to withdraw, it becoming apparent that the appellant's representatives were not solicitors (although registered with OISC). That is because section 11 of the Code of Conduct of the Bar of Northern Ireland precludes barristers from taking instructions from persons other than lawyers who are governed by a professional body (which does not include OISC), members of the government legal services, employed barristers, members of staff of ombudsmen or from approved professional bodies which does not include OISC[1].

15. While the representatives regulated by OISC and members of the Bar of Northern Ireland are both entitled under section 84 of the Immigration and Asylum Act 1999 to provide immigration services, unknown to either the representatives or Ms Connolly, she could not take their instructions. I adjourned the hearing for the issue of representation to be resolved.

**Remaking the decision**

16. By the time that the appeal came before me again, the 2006 EEA Regulations had been superseded by the new EEA Regulations. Although the new regulations revoked the 2006 EEA Regulations by operation of reg 1 (2), (and seemingly revoked all the appeal rights thereunder) they are preserved for the purposes of appeals, as are the rights of appeal by an amendment to Schedule 4 of the new EEA Regulations made by the Immigration (European Economic Area) (Amendment) Regulations 2017 (SI 2017/1) which introduces the following provision into Schedule 4:

[1] The position for Advocates in Scotland is different. Under the Faculty of Advocates Code of Conduct, Appendix D, Appendix 2 (iii), an Advocate can take instructions from someone who is registered with OISC.

3. Appeals

(1) Notwithstanding the revocation of the 2006 Regulations by paragraph 1(1), those Regulations continue to apply—

(a) in respect of an appeal under those Regulations against an EEA decision which is pending (within the meaning of regulation 25(2) of the 2006 Regulations) on 31st January 2017;

(b) in a case where a person has, on 31st January 2017, a right under those Regulations to appeal against an EEA decision.

(2) For the purposes of this paragraph, "EEA decision" has the meaning given in regulation 2 of the 2006 Regulations and the definition of "EEA decision" in regulation 2 of these Regulations does not apply

17. By regulation 15 (1) (b) of the 2006 EEA Regulations, a non EEA national acquires the right of permanent residence if he has resided in the United Kingdom with an EEA national for a period of 5 years in accordance with the regulations. In practical terms, that means that he must show that he has in that period complied continuously with the requirement in reg. 14 to have been the family member of a qualified person which in turn requires it to be shown that the EEA national has at all times in the relevant period been a "qualified person" as defined in reg. 6. As set out above.

18. I observe in passing that the new EEA Regulations are worded slightly differently, avoiding the use of "he".

19. I was greatly assisted by both representatives who were able to narrow down the issues before me. It was agreed that CM had started employment in 2009, and had worked until 8 February 2012 when she went on maternity leave. The couple's child was born on 4 April 2012. Although CM returned from maternity leave on 5 November 2012, she was unable to work and was then in receipt of statutory sick pay until 29 January 2013 when she resigned owing to illness. She did, however, start work again in November 2013, and has remained in employment since then.

20. The only remaining issue between the parties is thus whether CM retained her status as a worker between February 2013 and November 2013 on the basis that she was temporarily unable to work owing to illness, that is, does meet she requirements of reg. 6 (2) (a)?

21. I am satisfied that, following Samin v Westminster, that as CM did return to work, and has remained in work, the absence was temporary. I am satisfied also on the basis of the letter from her GP dated 16 February 2015 that he had been treating her between February 2013 and November 2013 for severe depression and that during that time is was his advice to her that she was not fit to work. While on the previous occasion some doubt had been case on this letter owing to the apparent discrepancy as to where the family were living in 2013, that has been resolved and no submissions were made that this letter was unreliable. In the circumstances, I find that the letter from the sponsor's GP demonstrates that her absence from work was due to illness. It follows therefore that the sponsor had retained her status as a worker, and that accordingly, the

appellant fulfils all the requirements of the new (and previous) EEA Regulations. I therefore allow the appeal on that basis.

**SUMMARY OF CONCLUSIONS**

1 The decision of the First-tier Tribunal involved the making of an error of law. I set it aside.

2 I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2006.

Signed Date: 16 March 2017

Upper Tribunal Judge Rintoul