

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2012 795 JR

BETWEEN/

ANNA MARIA MOLDOVAN (a minor suing by her father and next friend Sorinel Moldovan) and SORINEL MOLDOVAN
Applicants

AND

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

Respondent

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2012 832 JR

BETWEEN/

SARAH DUNGA (a minor suing by her father and next friend Viorel Dunga) and VIOREL DUNGA
Applicants

AND

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 17th December, 2013

Introduction

1. Both of these cases are concerned with the time which may lawfully be taken by the respondent to determine an application for a passport. In each, the first named applicant is an Irish-born child of Romanian parents, whose claim to citizenship, and hence entitlement to a passport, was grounded upon the residence in Ireland before her birth of a parent for the statutorily-prescribed period. The second named applicant in each case is the father of the child.
2. The background to the issue is the change in the legal regime applicable to Romanian nationals residing in this State brought about by the accession of Romania to the European Union. In summary, prior to the 1st January 2007 Romanian citizens were not entitled to enter the State without permission. Between 2007 and 2012 they were entitled to enter and remain in accordance with regulations set out hereunder. During that period they were free to engage in self-employment but required permits to take up employment.
3. The applications for passports were made in the course of the summer of 2012, and in each case the applicants were informed that the respondent would not be in a position to process them pending a Departmental review of the documentary requirements pertaining to cases involving parents of Romanian or Bulgarian nationality.
4. In both cases, a decision was, ultimately, made in favour of the applicants after the institution of these proceedings and they now seek damages in respect of the alleged delay in making that decision. They also seek their costs.

The passport application -Moldovan

5. The infant applicant in this case was born in Dublin on the 11th December, 2010. The application for a passport was made on her behalf on the 6th June, 2012 and was based on her birth in the State and a prescribed statutory declaration by her father, the second named applicant, that during the period of four years immediately preceding her birth he had resided in the State, as a national of Romania (i.e. a Member State of the European Union), from the 1st January, 2007 to the 11th December, 2010 (the date of his daughter's birth) and from the 1st December, 2010 to the present.

6. The application and statutory declaration were accompanied by:

- (a) the passport of the second named applicant.
- (b) Notices of Assessment to income tax addressed to the second named applicant for the years ending 31st December 2007, 2008, 2009 and 2010. The earnings and assessment for the year ending 31st December, 2007 are both nil.
- (c) Electricity bills for April -June 2011 and October- December, 2011 relating to the applicants' home address as of the date of the first named applicant's birth and of the passport application.
- (d) UPC bills dated March and May, 2012 for that address.

(e) Two electricity bills addressed to the second named applicant at a different address dated April 2009 and February 2010.

(f) A letter on behalf of the landlord of the applicants' home, dated 22nd September, 2010, confirming both the receipt of a sum of money in respect of the first four weeks rent for the property and the commencement of the tenancy on the 27th of that month.

(g) A letter dated the 1st December, 2011 from the landlord of the property referred to at (d) above, confirming that the second named applicant and his partner had been tenants there from the 31st May, 2007 to the 2th September, 2010. The author states that they were "excellent tenants and people of the utmost good character".

(h) A letter dated the 30th April, 2012 from a General Practitioner confirming that the first named applicant was a registered patient and that she lived with her parents.

(i) A phone bill addressed to the first named applicant's mother at the property referred to at (d) and (f) above and dated January, 2010, confirming that no payment was due and that the account had been closed on the 10th of that month.

G) The first named applicant's birth certificate.

7. On the 28th June, 2012 an official of the Passport Office wrote to the second named applicant, referring to the application as follows:

"I wish to advise that the Passport Service is not currently in a position to make a decision on your child's entitlement to an Irish passport. Processing of the application has been delayed pending the conclusion of a Departmental review of the documentary requirements that apply to children born in Ireland on or after 1 January 2005, to parents who, though EU citizens, are also citizens of Romania or Bulgaria.

The Passport Service will be in contact with you again in the near future once the documentary requirements have been clarified. "

8. By letter dated the 24th August, 2012 the applicants' solicitor wrote to the Passport Office, referring to the letter of the 28th June. The case was made that the second applicant had established the lawfulness of his residence and thereby proved that his child was an Irish citizen. The respondent was informed that the family wished to go abroad on holiday but could not do so without a passport for the child. A decision was requested within the next 21 days, failing which the applicants intended to seek an order of *mandamus*.

9. This was replied to by letter dated the 6th September, 2012 in the following terms:

"You will be aware that this passport application was made under the provisions of the Passport Act, 2008 which provides that the Department of Foreign Affairs and Trade must be satisfied that the above applicant is an Irish citizen before issuing her a passport. In this context Irish citizenship is determined by the provisions of the Irish Nationality and Citizenship Act 2004, and guidelines issued by the Department of Justice and Equality, which is the Department with responsibility for citizenship and immigration matters. This Act provides that persons born in the State on or after 1 January 2005, where neither parent is an Irish or British citizen, may claim citizenship by birth in the State (and thereby establish eligibility for a passport) only where a parent has been lawfully resident in the State for three of the four years preceding their birth.

As the Department of Justice and Equality is the Department that ultimately determines the acceptable forms of evidence for the purpose of confirming residency in the State for citizenship matters, the Passport Service has sought clarification from that Department as to the specific evidence which may be accepted as proof of residency for nationals from certain countries, including Romania.

Once clarification has been received, the Passport Service will contact your client immediately.

Meanwhile, it is open to the parents of Anna Maria Moldovan to pursue the matter directly with the Department of Justice and Equality. Should they obtain a certificate of nationality for their daughter, the Passport Service would then be in a position to issue a passport on the basis of this document. "

Application for judicial review

10. The applicants sought and were granted leave to apply for judicial review on the 19th September, 2012 (Cross J.). The reliefs in respect of which leave was granted were:

1. An order of *certiorari* quashing the decisions of the respondent of 28 June 2012 and 6 September 2012, wherein the Applicant's passport application.

2. An order of *mandamus* compelling the respondent to determine the First Named Applicant's application for a passport in the premises that the Applicant has fulfilled and complied with all the statutory requirements for the said determination.

3. A Declaration that the First named Applicant fulfilled and complied with all statutory requirements for the said determination and that the Respondent is obligated to make a determination on the basis of the application before him.

4. A Declaration that the Second Named Applicant, having complied with section 6B(2) of the Irish Nationality and Citizenship Act, 1956 (as amended by section 4 of the Irish Nationality and Citizenship Act, 2004) and Article 3 of the Irish Nationality and Citizenship Regulations, 2005 (S.I. No.1/2005), is lawfully entitled to be regarded as having been resident in Ireland for the purposes of section 6A of the Irish Nationality and Citizenship Act, 1956 (as amended by section 4 of the Irish Nationality and Citizenship Act, 2004) in the absence of proof to the contrary.

5. In the alternative, and without prejudice to the foregoing, a Declaration that, if the respondent is permitted to demand additional forms of evidence for the purpose of confirming lawful residency, it is the Respondent, and not the Minister for

Justice and Equality, who must determine same, and must do so within a reasonable period of time, and not having done so, is obligated to proceed with the determination of the application as it stands.

6. A Declaration that the actions and or omissions of the Respondent are unreasonable, ultra vires, contrary to statute and regulation and in breach of the Applicants' rights pursuant to EU law, the Constitution and the European Convention on Human Rights Act, 2003.

7. Damages for breach of the First Named Applicant's Constitutional rights, statutory duty and/or breach of fair procedures, natural and constitutional justice, in the premises that the Respondent's failure to determine the First Named Applicant's application for a passport, has interfered with, and continues to interfere with, her right to travel and has caused hardship, loss, distress and unnecessary and unlawful delay in the process.

8. Liberty to issue a notice of motion in respect of an interim or interlocutory injunction compelling the Respondent to determine the First Named Applicant's application for a passport within 14 days or such other period as may be determined by the Court.

9. If necessary, an order extending the time to bring the within proceedings.

10. Further or other order.

11. Costs.

11. The Statement of Grounds sets out the relevant legislation (considered below).

12. It is pleaded that the second named respondent was lawfully resident in the State from the 1st January, 2007 to the 31st March, 2007 pursuant to Article 6(1) of Directive 2004/38, which was transposed into Irish law in Article 6(1) of S.I. 656/2006; and that he was further lawfully resident from the 1st January, 2008 to date as a self-employed person pursuant to Article 6(2)(a)(i) of the regulations.

13. It is further pleaded that the respondent is obliged to accept the statutory declaration of the second named respondent as proof of residency; It was open to the respondent to seek additional information or documentation but he chose not to. It was also open to him to refuse the application on the basis that he was not satisfied that the applicant was an Irish citizen. However, it is pleaded that the Minister is not entitled to withhold a decision premised upon the future determination of acceptable forms of evidence for the purpose of confirming residency. In the circumstances he was obliged to determine the application within a reasonable period of time and had wrongfully refused so to do.

14. The first named applicant contends that her right to travel, pursuant to the Constitution and to Article 20 of the Treaty on the Functioning of the European Union, has been unlawfully restricted by the respondent's refusal to make a decision.

15. Damages are claimed on the basis of denial of the constitutional right to travel which, it is asserted, has caused hardship, loss, distress and interference with the rights of the family. There is an allegation that the respondent "appears to be discriminating against the second named applicant on the basis of his nationality", contrary to Article 14 of the European Convention on Human Rights.

16. In his grounding affidavit, sworn on the 10th September, 2012 the second named applicant says that he and his partner, the first named applicant's mother, are Romanian citizens and citizens of the European Union. He says that he arrived in the State "on or about December, 2006" [sic]. From January to March, 2007 he had no work but resided here lawfully on the basis of Article 6(1) of S.I. 656 of 2006. He registered with the Revenue secure any work in that capacity until January, 2008. From April 2007 until January 2008 he was in paid employment without having a work permit, which he now understands was unlawful. He does not know whether his employer was tax compliant or not. The applicant says that he was lawfully self-employed and tax-compliant in 2008, 2009 and 2010. He also says that his partner was lawfully resident during the requisite period.

17. It is averred that the passport application was made in June 2012 because the family wished to travel to Romania for a holiday. The actions or omissions of the respondent "completely restricted" the ability of the family members to travel.

The respondent's case -Moldovan

18. The Statement of Opposition puts in issue nearly every factual and legal matter asserted by the applicant. However, for the purposes of this judgment it seems to me that the relevant contentions made on behalf of the respondent are as follows.

19. The respondent says that he did not refuse to process the application. He is legally required to ensure that every applicant is an Irish citizen before issuing a passport. The discharge of this duty may from time to time require a review of the process by which this determination is made. In this case, the respondent informed the applicants that clarification was being sought from the Department of Justice and Equality as to the forms of evidence acceptable for the purpose of confirming residency in respect of Romanian nationals.

20. It is pleaded that the respondent is not obliged to accept a statutory declaration at face value but is entitled and/or obliged to take all reasonable and prudent steps to obtain verifiable evidence as to the truth of the declaration and the underlying circumstances of the application. It is denied that in this case the respondent had decided not to seek further information or documentation and he reserved the right to seek such further evidence in due course. In deciding whether such further information or documentation should be sought, he is entitled to consult with the Minister for Justice and Equality. Any lapse of time in this case has not been unreasonable, unduly delayed or inexpedient.

21. It is denied that the constitutional right to travel or the provisions of Article 20 of the Treaty on the Functioning of the European Union have any application to the case. It is further denied that any compensatable hardship has been occasioned.

22. With specific reference to the facts of the case it is pleaded that the second named applicant entered the State unlawfully in 2006, and that any subsequent residence within the State was unlawful and therefore not reckonable for the purposes of the Passport Act.

23. In the affidavit of Kevin Walzer, Assistant Principal in the Passport Office, it is averred that the application in this case was delayed "because the submitted evidence has not shown the applicant's entitlement to Irish citizenship and thereby a passport". However, he also says that "... it was one of a small number of cases" affected by a Departmental review of evidential requirements

relating to applications based on the residence of a Romanian or Bulgarian parent.

24. Dealing with the specifics of the case, Mr. Walzer refers to the averment in the second named applicant's affidavit that he entered the State in December, 2006 and says that no evidence has been provided that his entry and subsequent residence was lawful under the terms of the Immigration Act, 2004. He says that the Garda National Immigration Bureau has confirmed that there is no record of his registration in the State in 2006, as would have been required at that time.

25. Enquiries with the Department of Social Protection revealed that the second named applicant was allocated a PPSN number on the 13th December, 2006. This was on foot of an approved application made by him in which he stated that he moved to Ireland on the 2nd October, 2006- not December.

26. Mr. Walzer refers to the admission made by the second named applicant that he worked without a work permit from April 2007 to December, 2007 and it is stated that this rendered at least that part of his residence unlawful. It is the view of the respondent that there is "no real evidence" in relation to the period from January to April, 2007 and that it therefore appears to him that this period was also unlawful.

27. Referring to the year 2008, Mr. Walzer says that the Department of Social Protection's records show twelve weeks of paid contributions made by an employer, with no contributions as a self-employed person. No evidence of his business activity or registration details was provided to substantiate his status as a self-employed person from March, 2007.

28. The records showed that he worked both as a self-employed person and periodically as an employee in 2009 and 2010.

29. Mr. Walzer avers that Tax Assessments may prove that money was earned in the State but

"they are not always direct evidence of actual and lawful residence."

30. As of the date of swearing the affidavit (the 29th November, 2012) the respondent's "provisional" position was stated to be that

"...the aforesaid Tax Notices should be supplemented by better or more relevant documentary evidence (such as evidence of the Second named Applicant's Social Insurance contributions, contracts, issued invoices for his services, public liability insurance details et cetera, as well as any Registration Certificate and/or correspondence relating to his alleged self-employed status) to verify the bona fides and ongoing nature of his alleged operations within the territory of the State."

31. Mr. Walzer also refers to enquiries made as to the citizenship status of the infant applicant under Romanian law. It was confirmed that she would be entitled to dual citizenship and therefore to a Romanian passport. However, the procedure involved in obtaining one would entail travelling to Romania and remaining there until the passport was issued, which could take up to three months.

32. It should perhaps be noted that all of the enquiries referred to were made after the institution of the proceedings.

33. According to Mr. Walzer there can be wide variations in the time taken to process a passport application, depending on the nature of the information provided by the applicant. It is common for the respondent to seek information from other government agencies. In this case, it was necessary to seek clarification from the Department of Justice and Equality to clarify aspects that fell within the competence of that Department. As a general proposition, Mr. Walzer says that it is necessary that the process be rigorous, given the importance attached to holding an Irish passport and the fact that cancellation or revocation is rare.

Applicants' response- Moldovan

34. Having considered the contents of Mr. Walzer's affidavit, the applicants' solicitor wrote to the Chief State Solicitor and also to the Passport Office on the 29th November, 2012. Some complaint was made in relation to the fact that, for the first time, documents had been listed in the affidavit as being necessary for the establishment of proof of the first named applicant's citizenship. Without prejudice to the contention that all statutory and regulatory requirements had already been met, the following documents were forwarded:

- (a) P60s for Ana Sorina Suciú (the first named applicant's mother) for 2007, 2009 and 2010
- (b) A letter to Ms. Suciú from the Private Residential Tenancies Board dated the 27th November, 2007 informing her that the landlord had registered her tenancy with the Board
- (c) A letter from an insurance company to the second named applicant dated the 28th September, 2009 enclosing car insurance documents
- (d) A similar letter dated the 28th June, 2010
- (e) Letter confirming hospital appointment for Ms. Suciú on the 24th March, 2009
- (f) Letter confirming NCT appointment for the second named applicant for the 29th August, 2008
- (g) A letter to the second named applicant from Hyundai announcing a product recall dated the 24th September, 2010
- (h) A motor tax renewal form addressed to the second named applicant notifying him that his current tax would expire in May 2009
- (i) An NCT certificate dated 20th August, 2012
- (j) ESB bills in the name of the second named applicant with dates from the 1st December, 2008 to 4th October, 2010
- (k) Bank statements in the name of the second named applicant dating from the 23rd October, 2007 (this statement bears the number 2) to 9th February, 2009 (number 6)
- (l) Bank statements in the name of Ms. Suciú from 1st October, 2007 (number 2) to 1st April, 2010 (number 12).

The passport application - Dunga

35. The first named applicant in this case was born in Dublin on the 13th September, 2011. Her father, the second named applicant, is also a Romanian national. He applied on her behalf for a passport on the 14th June, 2012 and made a statutory declaration that he had resided lawfully in the State for an aggregate period of three out of the four years preceding her birth, commencing on the 25th January, 2007.

36. The application form and statutory declaration were accompanied by:

(a) Notices of Assessment to Income Tax for the years 2007, 2008 and 2009.

(b) A letter from the Department of Social and Family Affairs dated 1st October, 2009 giving the Department's calculation of the second named applicant's means for the purpose of a claim for Jobseeker's Allowance. The calculation includes consideration of his wife's insurable employment.

(c) A similar letter dated the 28th April, 2011.

(d) A rent book confirming the tenancy of the second named applicant, commencing on the 3rd January, 2008, at the address given in on the first named applicant's birth certificate.

(e) The first named applicant's birth certificate.

37. The respondent replied by letter dated the 29th June, 2012 informing him, in the same terms as the letter set out at paragraph 7 above, of the anticipated delay because of the Departmental review.

38. The applicants' solicitor wrote to the respondent on the 3rd September, 2012. As in the *Moldovan* correspondence, the case was made that the applicants had complied with the relevant legislation and the passport should be granted within 21 days failing which application would be made to court.

39. On the 6th September, 2012 the respondent replied in identical terms to the letter set out at paragraph 9 above.

40. Leave to seek judicial review was granted by the High Court (Peart J.) on the 1st October, 2012. The reliefs in respect of which leave was granted were identical to those in *Moldovan*, save that one additional relief was sought, being a Declaration that there is an express or implied statutory obligation on the respondent to determine passport applications within a reasonable period of time and that the Respondent has failed so to do.

The respondent's case - Dunga

41. The same general arguments are made as outlined above in respect of *Moldovan*.

42. It is stated that the application was delayed because the submitted evidence had not shown the applicant's entitlement to Irish citizenship and thereby a passport.

43. Mr. Walzer repeats his averment that the submitted documents relating to tax liability amounted only to evidence of declared income earned in the relevant years and were not necessarily direct evidence of actual and lawful residence.

44. It is noted that in the second named applicant's affidavit he refers to having been self-employed from February 2007 to July, 2009 and to getting Jobseeker's Allowance thereafter. Mr. Walzer says in this regard that it had not been made clear in the passport application that the second named Applicant had been in receipt of this allowance and that consideration would have to be given to the question whether this had any effect on the reckonability of that period of time.

45. It is averred that the respondent's "provisional" position as of the date of swearing the affidavit (the 23rd November, 2012) was that

"... the aforesaid Tax Notices should be supplemented by better or more relevant documentary evidence ... "

referring to the same type of documents as those listed in paragraph 30 above.

Applicants' response- Dunga

46. On the 26th November, 2012 the applicants' solicitor forwarded a further list of documents, again by reference to the matters raised in Mr. Walzer's affidavit. These documents were:

(a) A rent book for 35 Summerhill Parade with a commencement date of the 3rd January, 2008

(b) A letter from the HSE concerning rent supplement dated the 19th September, 2011

(c) A letter from UPC dated the 25th June, 2012

(d) An Airtricity bill dated the 10th November, 2011

(e) A letter dated the 26th May, 2009 from a General Practitioner confirming that the applicant's brother (born on the 2nd January 2006) was a patient of the practice and lived at the Summerhill address with his parents

(f) A letter dated the 22nd November, 2011 from the Department of Social Protection concerning action to assist job-seekers to find employment

(g) Bank statements in the name of the second applicant from October, 2008 to October, 2011

(h) A letter dated the 29th October, 2008 from the Revenue Commissioners confirming the registration of the second named applicant for income tax

(i) Income Tax assessments for the year 2008

(j) Bank statements in the name of Mrs. Dunga from dates in 2008, 2009, 2010 and 2011

(k) A letter from the Department of Social Protection dated the 6th June, 2009 regarding Early Childcare Supplement

(l) Tax documents in the name of Mrs. Dunga from 2008 and 2009 relating to PAYE income

(m) Correspondence from Mrs. Dunga's employer and the Department of Social Protection regarding Maternity Leave and benefit in September, 2011, including letter dated 7th September, 2011 seeking a copy of her work permit.

(n) Certificates of Relevant Contracts Tax Deduction for various periods beginning in March, 2007 and correspondence relating to such certificates.

47. It should be noted that Relevant Contracts Tax Deduction arises, or arose at the material time, where one party works as a subcontractor for a main contractor. The latter deducts tax from payments made to the former, who could then claim the tax back under certain circumstances. The certificates relate to work done for particular main contractors during specified periods.

THE DEPARTMENTAL REVIEW

48. In considering the question of length of lawful residence in the State for the purposes of these two cases it was necessary for the respondent to have regard to the applicable immigration regime. It is common case that, following the accession to the European Union of Romania and Bulgaria, the position for nationals of those States during the period from the 1st January, 2007 to the 1st January, 2012 was that they were entitled to remain in Ireland for longer than three months if *inter alia* they had employment (for which a work permit was required) or were self employed.

49. It appears from correspondence exhibited to Mr. Walzer's affidavit that, for about the first four years of that period, nationals of those states were required by the Passport Service to support an application for a child's passport with documents such as tax and social welfare documents, bank statements and utility bills verifying their actual residence in the state. This was similar to the requirements in respect of other EU nationals.

50. However, in the course of certain judicial review proceedings taken against the Minister for Justice and Equality in 2011, the latter Minister was apparently advised by counsel that work permits might also be necessary to establish the lawfulness of declared periods of residence. The case appears to have concerned the parent of a child to whom a passport had been issued but this court has not been provided with any details thereof.

51. Arising from that, advice was provided by the Attorney General to the respondent in these proceedings as to the potential exercise of his power to revoke a passport where evidence of a work permit had not been given.

52. The Passport Service then sought clarification from the Department of Justice and Equality on the work permit issue. According to a letter written on the 10th October, 2012 by the Director of the Passport Service to the Assistant Secretary of that Department, the absence of such clarification was, by that date, causing "*significant delays and difficulties in terms of meeting [the Service's] obligations.*" Reference was made to increased correspondence from solicitors, the Ombudsman office, ministerial representations and threatened judicial review proceedings.

53. It appears that the review and clarification process was not completed until some time in late 2012.

PROGRESS OF THE PROCEEDINGS

54. By letters dated the 1st October, 2012 both applicants requested a decision from the respondent on the passport applications, or in the alternative temporary travel documents pursuant to the provisions of s.15 of the Passports Act, 2008. A follow-up letter was sent to the Chief State Solicitor on the 16th October, noting that no response had been received, asserting that the respondent was "not engaging" with the applicants and threatening to seek interlocutory relief. The writer also states

"We are aware that the Department is actively engaging with other applicants who are children of Romanian citizen parents. "

55. The Chief State Solicitor replied on the following day, stating that instructions were being taken. It was contended that an application for interlocutory relief would be misconceived in that any interlocutory order would decide the substantive issue.

56. Both applicants then issued motions seeking interlocutory relief which came before the court (Kearns P.) on the 30th November, 2012. On enquiry by the court, it was indicated on behalf of the respondent that decisions in each case could be expected in December and the motions were therefore adjourned.

57. On the 21st December, 2012 the respondent confirmed that the infant Sarah Dunga would be issued with a passport.

58. By letter of the same date, the second named applicant in *Moldovan* was informed that a negative decision could be anticipated and he was invited to make further submissions. Submissions were accordingly made on his behalf but a negative decision was subsequently communicated. This, the court is informed, led to a second set of judicial review proceedings which ultimately settled in the applicant's favour. The terms of the settlement included the issue of a passport.

59. Notwithstanding these developments, it is contended that neither case is moot since damages and costs are sought in both.

60. Having reserved judgment, the Court subsequently asked the parties whether they were prepared to provide more information as to the basis upon which the decisions to issue passports to the applicants were made. There was some resistance to this request, counsel for the applicants arguing that the case was not about the merits of the passport applications so much as the decision-making process, while counsel for the respondents suggested that the court's request meant that the applicants had failed to discharge the onus of proof. At that stage I communicated the view that a) I did not consider that a claim for damages and costs could properly be determined without reference to the merits and b) the case had not been contested by the respondent on the basis that the applicants had put insufficient material before the court. As a result, the relevant correspondence was furnished. The applicants also submitted "statements of fact" but, as these are not agreed and the respondent has objected to their inclusion, I have not had regard to them.

61. In making this request, the court was cognisant of the views expressed by Herbert J. in *Garibov v Minister for Justice, Equality and Law Reform* [2006] IEHC 371 that in considering whether it was reasonable for an applicant to seek judicial review,

"...the court cannot reasonably have regard to events which developed after that date and could not have been reasonably predicted prior to that date."

62. Herbert J. did however go on to say that

"Subsequent events might be relevant to the question of whether it was reasonable [of] the Applicants to have persisted in their application in certain circumstances."

Further correspondence- Moldovan

63. On the 20th December, 2012 the applicant's solicitor made enquiry as to the status of both applications. The respondent gave separate replies, stating that in the light of recent advice received from the Department of Justice and Equality, new guidelines had now been finalised and put into operation. In the case of *Moldovan*, the applicant's father was informed that it was the preliminary view of the respondent that (i) the infant applicant was not an Irish citizen and (ii) her father had knowingly or recklessly provided information and/or documentation which were false or misleading in a material respect.

64. The Department's assessment of reckonable residence was based on the view that the second named applicant entered the State unlawfully in 2006, there being no record of a permission to enter and remain in respect of him. Further, all but the first two days of 2007 were deemed not to be reckonable on the basis that, if he had entered the State on the 2nd October, 2006 he was required to obtain a work permit to remain beyond the 2nd January, 2007. According to his affidavit he had no work from January to March, 2007 and worked for the rest of that year without a permit. The whole of 2008 and 2009 were considered reckonable, and 344 days of 2010 up to the date of birth of the applicant on the 10th December of that year. The total reckonable residence was thus calculated as being 1,077 days - 18 days short of the requirement.

65. The second applicant was invited to make representations before the making of a final decision, which he did on the 31st January, 2013. In the written submission made on his behalf it was accepted that he had been unlawfully in the State from the 2nd October, 2006 to the 31st December, 2006, since he was a third country national during that time. However, it was contended that his residence became lawful on the 1st January, 2007 with the accession of Romania to the European Union. He then had the benefit of Article 6 of the European Communities (Free Movement of Persons) Regulations, 2006, which came into operation on that date and which entitled him to reside in the State for a period of three months on the basis of possession of a valid passport. He was therefore entitled to claim 90 days lawful residence during 2007 and, as he had not claimed lawful residence in respect of 2006, he had not given false or misleading information.

66. Without prejudice to this argument, it was asserted that the statutory criteria in respect of citizenship were also met by the reckonable lawful residence of the applicant's mother and a fresh application was made on that basis. In the submission Ms. Suciuc is referred to as "Mrs. Moldovan" and as the spouse of the second applicant. It appears that Ms. Suciuc had engaged in employment without a work permit but it was argued that she was entitled to do so, being the spouse of an EU national with a right of residence (namely Mr. Moldovan, who was lawfully self-employed from the 1st January, 2008). Further arguments are made in relation to the regime applicable to such a spouse.

67. The Department responded by requesting evidence as to the marriage between the second named applicant and Ms. Suciuc. However, this submission was in fact without merit inasmuch as the couple are not married and indeed had never claimed to be in the course of these proceedings. It is noted above that the grounding affidavit refers to Ms. Suciuc as the second named applicant's partner. It was subsequently accepted in correspondence that the submission had been made in error and it has not been maintained since that the applicant could qualify for citizenship on the basis of her mother's residence.

68. On the 1st March, 2013 the Respondent replied that the position in relation to the grounds for refusal in respect of the second named applicant remained unchanged. Noting that it was agreed that the 2006 period could not be counted, having been unlawful, Mr. Walzer goes on to say that

"As your client was unlawfully in the State on 1 January 2007, i.e. the date of Romania's accession to the EU, he is not considered to be entitled to claim that his residence in the first three months of 2007 was lawful. Furthermore, as he was unlawfully resident in the State for three months before 2007, he cannot claim the subsequent three months as being lawful residence by virtue of Article 6 of Directive 2004/38."

69. It was repeated that, since the four-year period before the first named applicant's birth included part of 2006, the absence of any reference to residence in that year in the declaration made by the second named applicant was misleading.

70. Having been informed that there were no further submissions to be made, the respondent issued a formal refusal of the passport application on the 4th March, 2013. As already noted, this led to a second set of judicial review proceedings (the respondent having refused to consent to amendment of the existing proceedings) which, in late April 2013, settled on terms including the issue of a passport to the infant applicant.

Further correspondence - Dunga

71. On the 20th December, 2012 the respondent wrote to the applicants' solicitor referring to the receipt of recent advice from the Department of Justice and Equality and the finalisation of guidelines. As a result, a decision had been made to issue a passport to the infant applicant. The letter does not set out the content of the advice or guidelines.

RELEVANT LEGISLATION

72. It is common case that the circumstances of each of the applicants are to be considered by reference to ss. 6A and 6B (2) and (4) of the Irish Nationality and Citizenship Act, 1956, as inserted by s.4 of the Irish Nationality and Citizenship Act, 2004.

73. Section 6A (1) provides that

A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.

74. Section 6B (2) relates to proof of such residence and provides as follows:

Where a national of-

- (a) a Member State (other than the United Kingdom of Great Britain and Northern Ireland),*
- (b) ...*
- (c)*

makes a declaration in such manner as may be prescribed that he or she has resided in the island of Ireland for such period as is stated in that declaration, he or she shall, for the purposes of section 6A, be regarded as having been resident in the island of Ireland-

- (i) for that period, if during the entire of that period he or she was a national of a Member State, or*
- (ii) (omitted)*

unless the contrary is proved.

75. It is an offence to knowingly or recklessly make a false declaration.

76. The form of the declaration is prescribed by the Irish Nationality and Citizenship Regulations (S.I. 1/2005). These regulations also provide that the declaration is to be accompanied by

- (a) the passport, national identity card, or certificate of nationality, and*
 - (b) such other documentation as may be required by the Minister for Foreign Affairs [and Trade]*
- relating to the person making the declaration.*

77. Section 6 of the Passports Act, 2008 provides as follows:

6. -(1) *A person who is an Irish citizen and is, subject to this Act, thereby entitled to be issued with a passport, may apply in that behalf to the Minister in accordance with this section.*

(2) An application for the issue of a passport to a person shall be -

- (a) made in such form as may be specified by the Minister for that type of passport,*
- (b) accompanied by such information and documents in relation to the person as the Minister may require under section 7, and*
- (c) accompanied by the appropriate fee (if any).*

(3) An application for the issue of a passport to a child may be made on behalf of the child-

- (a) by a parent or guardian of the child ...*

(4) Omitted.

7.-(1) *Before issuing a passport to a person, the Minister shall be satisfied-*

- (a) that the person is an Irish citizen, and*
- (b) as to the identity of that person.*

(2) The Minister may require an applicant for a passport to provide such information as the Minister may require for the purposes of the application and to produce to him or her such documents as he or she considers necessary or expedient to enable him or her to perform the functions of Minister under this Part.

(3) The Minister may require that information furnished to him or her under this section shall be accompanied by a statutory declaration made or affidavit sworn by the applicant concerned to the effect that, to the best of the applicant's knowledge and belief the information is correct in every material respect and that the applicant has taken all reasonable steps to ensure the accuracy of the information.

78. Section 12(1)(a) provides that the Minister is to refuse to issue a passport if, inter alia, he or she is not satisfied that the person is an Irish citizen.

79. Section 15(2) deals with emergency travel certificates and provides that the Minister may issue such a certificate where-

- (a) there is reasonable cause to believe that the person is or may be an Irish citizen,*
- (b) there is reasonable cause to believe that-*

- (i) a passport that was issued to the person has been lost, stolen or damaged or is temporarily unavailable, or*
- (ii) the person does not hold a valid passport, and*

(c) the person provides evidence of his or her intention to undertake travel immediately, but, by reason of the circumstances of urgency in relation to the application, the person is unable to comply with the requirements of this Act regarding the issue of a passport to him or her.

80. The application for an emergency travel certificate is to be made in such form as may be specified by the Minister and accompanied by such information and documents as may be required.

81. The cancellation of passports is provided for in s.18. The circumstances in which a passport may be cancelled include a situation where

"the Minister becomes aware of a fact or a circumstance, whether occurring before or after the issue of a passport, that would have required or permitted him or her to refuse under section 12 to issue the passport to the person had the Minister been aware of the fact or the circumstance before the passport was issued. "

82. It should be noted that s.19 of the Act makes provision for an appeal against a decision of the Minister relating to refusal or cancellation of a passport.

83. There is no provision for any time-limit with regard to the making of a decision by the Minister.

84. The right of European Union citizens to enter and reside in the State is provided for in the European Communities (Free Movement of Persons) (No.2) Regulations, 2006 (S.I. 656/2006), which implement Directive 2004/38. Article 6 of the Regulations, which came into operation on the 1st January, 2007, provides in relevant part:

6(1) Subject to Regulation 20, a person to whom these Regulations apply may reside in the State for up to 3 months on condition that he or she-

- (a)(i) where the person is a Union citizen, holds a valid national identity card or passport,*
- (ii) where the person is not a Union citizen, holds a valid passport, and*
- (b) does not become an unreasonable burden on the social welfare system of the State.*

6(2)(a) Subject to regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she

- (i) is in employment or is self-employed in the State,*
- (ii) has sufficient resources to support himself or herself, his or her spouse and any accompanying dependants, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants.*

(b) Omitted

(c) Subject to Regulation 20, a person to whom subparagraph (a)(i) applies may remain in the State on cessation of the activity referred to in that subparagraph if-

- (i) he or she is temporarily unable to work as the result of an illness or accident,*
- (ii) he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FAS,*
- (iii) subject to subparagraph (d) he or she is in duly recorded unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FAS, or*
- (iv) except where he or she is involuntarily unemployed, he or she takes up vocational training related to the previous employment.*

(c) In a case to which subparagraph (c)(iii) applies, the right to remain referred to in paragraph (c) shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period.

Submissions

85. On behalf of the applicants, Mr. Shortall BL submits that as a citizen, the first named applicant has rights under both the Constitution and EU law to a passport and to the right to travel. Such rights may lawfully be restricted only in specific, defined circumstances, none of which apply here.

86. This is well-established law and there is no necessity to set out the authorities relied upon.

87. Reliance is placed on the statutory presumption of residence arising from the making of the prescribed statutory declaration under s.6 of the Irish Nationality and Citizenship Act, 1956 as amended. It is contended that, the requirements of the statute having been complied with and the respondent not having sought further information, he was then obliged to make a decision.

88. The suggestion by the respondent that the applicants could have applied to the Minister for Justice and Equality for certificates of citizenship is rejected, on the basis that there was no statutory obligation on them to make such application and that it would have been pointless in circumstances where it appeared that the respondent was awaiting directions from the latter Minister.

89. It is further submitted that the right to a decision within a reasonable period of time is, as held by Edwards J. in *K.M and D.G. v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 234, an aspect of the right to constitutional justice. In that case Edwards J. listed the factors to be taken into account in determining reasonableness as being:

1. *The period in question;*
2. *The complexity of the issues to be considered;*
3. *The amount of information to be gathered and the extent of the enquiries to be made;*
4. *The reasons advanced for the time taken; and*
5. *The likely prejudice to the applicant on account of delay.*

90. Considering these factors, Counsel says that the time taken in respect of these applicants must be compared with the respondent's advertised turn around time of between one and 15 days. The issues are said not be complex, and in any event should have been determined many years ago, given that the Treaty of Accession in respect of Romania was signed in 2005. It is accepted that the respondent was entitled to seek further information but it is pointed out that he never formally did so. The affidavit sworn on his behalf, making reference to the necessity for further documentation, came months after the applications. The reasons advanced for the delay should not be accepted as valid in circumstances where matters should have been clarified some years ago. In respect of the issue of prejudice, it is said that the first named applicants in each case have been prejudiced "to a considerable extent".

91. Damages are claimed on the basis that there has been a breach of the applicants' rights, sounding in damages, under the Constitution, under EU law and under the European Convention on Human Rights Act, 2003.

92. The applicants also seek their costs on the basis that it was necessary or at least reasonable to institute proceedings in order to vindicate their rights.

93. On behalf of the respondent Mr. Wade BL submits that the respondent never claimed an unfettered discretion as to the length of time taken to reach a decision but did stand on his right to take a reasonable time.

94. There was no dispute as to the law relating to the right of a citizen to a passport or the right to travel. It was argued, rather, that the preliminary question was whether these applicants were in fact citizens. In this regard it is the statutory obligation of the respondent to be satisfied that an applicant is a citizen and there is an onus on the applicant to establish citizenship.

95. It was contended that the applicants were mischaracterising what had happened as a refusal to make a decision. It was not, and the applicants had been informed of the review and the expected delay arising therefrom.

96. On the provisions s.6B2 of the 1956 Act, counsel submitted that this was simply an aid, creating a rebuttable presumption which could not be relied upon to the exclusion of the respondent's obligations and the powers of the Minister for Justice and Equality with regard to citizenship.

97. It was submitted that decisions on passport applications are processed in chronological order (although there was no averment to this effect), that they vary in the length of time taken and that it is impossible to put a time scale on the process in any individual case. These particular applications depended largely on the length of lawful residence of the parent in each case, which raised "reasonably" complex issues of Irish and EU law.

98. On the claim for damages, it was also submitted that there was no evidence of loss or prejudice or any matter warranting an award of damages. There was no evidence of wrongful infringement of a Constitutional right since there was no right to obtain a passport in any particular period of time. In any event, in these cases the passports had been issued within a very short period after the key decision had been made to accept that citizenship had been established.

99. The respondent seeks an order for costs on the basis that, had the matter proceeded to full hearing, it was highly likely that he would have been successful. It was submitted in furtherance of this claim that the applicants' whole proceedings were misconceived. There was, it was contended, no decision by the respondent which was amenable to judicial review.

100. The issue of mootness is raised in the respondent's submissions, and authorities dealing with the costs of moot cases such as *Nearing v Minister for Justice* [2010] 4 I.R. 211, and *Mansouri v Minister for Justice* [2013] IEHC 527 are cited. However, the respondent has also stated that

"Neither party has treated this as a moot. Hence the substantive issue is before the Court for determination and accordingly it is respectfully submitted that the issue of costs should follow the event."

Discussion and conclusions

101. With some misgivings, I am not treating these cases as moot, on the basis that there is substantive claim for damages which has been fully argued by both parties.

102. There is no controversy between the parties as to the right of a citizen to travel and to hold a passport and I see no necessity to set out the authorities in respect of such rights. The question whether there has been a violation of the applicants' rights in this regard depends on whether there has been an unlawful refusal to make a determination on their status as citizens, or alternatively, an unlawful failure to make such determination within a reasonable period of time. Should the applicants succeed under either heading, the question of remedy would then arise. This would not necessarily include a right to damages- there is no authority for the

proposition that every legal error by a decision-making body must sound in damages.

103. As far as the first issue is concerned I am satisfied that the respondent did not refuse to carry out his statutory function to make a decision.

104. It is clear from the affidavit of Mr. Walzer and the correspondence with the Department of Justice and Equality that the respondent had in place a set of guidelines, which were in operation from 2007 to 2011, for dealing with applications based upon the residence of a parent of Romanian or Bulgarian nationality. These guidelines appear to have assimilated the position of such applicants to that of the children of other EU nationals, which cannot be a cause for complaint. In 2011 an issue arose as to whether the guidelines were correct insofar as they did not require proof of permission to work, and clarification was then sought from the Department of Justice and Equality.

105. Criticism has been made of this step on the basis that it is this respondent who must make the decision and not the Minister for Justice and Equality. I consider this criticism to be misconceived. Entitlement to citizenship in such cases depends on the lawful residence in the State of an applicant's parent. It is the Minister for Justice and Equality who is responsible for the immigration regime and thus for establishing the criteria for lawful entry and residence for third country nationals. In my view it would be irresponsible for the Minister for Foreign Affairs and Trade to take it upon himself to determine such matters without reference to the legal concerns raised by the Department of Justice and Equality and it was therefore appropriate, once the issue had arisen, to consult with and seek clarification from that Department.

106. It is further clear from the letter to the Department of Justice and Equality that the respondent was fully conscious of the impact that the delay was having on the ability of the Passport Service to meet its obligations to applicants awaiting decisions. I think it only proper to point out also that the applicants were notified within a short time of lodging their applications that there would be a delay, and the reason for such delay. Thereafter correspondence was replied to promptly and in a reasonably substantive manner, without resort to perfunctory acknowledgement letters.

107. In the circumstances, there was no unlawful refusal to make a decision such as would give rise to an order of *certiorari*, *mandamus* or declaratory relief and no question of damages can arise under this heading.

108. The next issue is whether the respondent failed to decide the applications within a reasonable time. It seems to me that this is very closely bound up with the previous issue since the underlying explanation for the time taken is the same- the respondent waited for the conclusion of the review undertaken in consultation with the Department of Justice and Equality. I have already held that this did not amount to a refusal to decide the applications. However, that does not necessarily determine the matter.

109. The applicants have laid great stress on the statutory presumption provided for in s.6 of the Act of 1956 as amended. They acknowledge the right of the respondent to seek additional information but argue that where that is not done, the respondent is obliged to act on the presumption.

110. The respondent, for his part, emphasises his obligation as set out in the Passports Act, 2008 to satisfy himself that an applicant is an Irish citizen and says that the statutory declaration cannot necessarily be taken at face value.

111. There is perhaps a degree of tension between the two provisions. I consider that for present purposes it is sufficient to hold that the statutory declaration gives rise to a rebuttable presumption of actual residence. This relieves both the applicant and the Minister of the perhaps impossibly onerous burden of establishing the actual whereabouts of the former throughout all of the relevant period of time. However, the Minister is also empowered to seek further information relating to residence such as rent books, utility bills, social welfare or tax documents. This is appropriate in that absence of such documentation might in itself raise doubts as to actual residence. Where the issue is the *lawfulness* of such residence, the Minister is also entitled to seek information relevant to that issue. In the instant cases, the lawfulness of residence was related to lawfulness of entry and of economic activity and the respondent was entitled to require information regarding such matters.

112. Applying the criteria set out by Edwards J. in *K.M* as to the reasonableness of the time taken, I find as follows:

1. *The period in question*

113. In the case of *Moldovan* the passport application was made in June, 2012. The decision to issue a passport was, after an initial refusal in March, 2013 ultimately made in April, 2013. In the case of *Dunga* the initial application was in June, 2012 and the decision to issue a passport was communicated in December of that year.

114. I do not find it particularly helpful to compare this with the respondent's advertised turn-around time of one to 15 days - it seems to me that this clearly relates to applications without any complications, such as renewal of a passport or perhaps the issue of a passport to a child born in the State where the parents are already citizens. There has to be, in this as in many areas of everyday life, a realistic appreciation of the fact that there may be a queue of applications raising more complicated issues and that the decision-maker will have limited resources to deal with that queue.

2. *The complexity of the issues*

115. In the circumstances of these cases it was necessary to consider the relevant issues arising from domestic law and from Directive 38/2004 in determining whether there had been lawful residence for the necessary period of three years out of the four years prior to the birth of the child. This was not hugely complex, but was not straightforward. The set of guidelines which had been in operation without, apparently, causing problems from 2007 to 2011 had, it would appear, given rise to an issue in 2011 which necessitated the departmental review. It is not, in my view, fair to characterise this as a situation which should have been sorted out back at the time of the Treaty of Accession- clearly, the respondent thought that the guidelines put in place from 2007 onwards were appropriate. It would not be the first time that an administrative process has been found to have a lacuna, and it is not legally improper to attempt to rectify defects when they arise.

3. *The amount of information to be gathered and the extent of the enquiries to be made*

116. Having regard to the fact that the entitlement of the applicant children depended on the lawful entry and residence of their fathers, it was necessary and appropriate for the applicants to provide information in addition to the content of the prescribed statutory declaration. It was also appropriate for the respondent to make enquiries from the Gardaí and from the Department of Social Protection. In the case of *Moldovan* this was particularly appropriate since, as it has turned out, the statutory declaration conflicted

with the information from the Department of Social Protection in relation to the arrival of the second named applicant in the State. It then became apparent that his original entry into the State had been unlawful. This applicant has maintained that the declaration was not misleading in that he did not, in that declaration, assert lawful residence for the period before the 1st January, 2007. However, by that logic the statutory declaration did assert that he was lawfully resident during 2007, while in his later submission to the respondent it was conceded that he could not include the nine months of that year spent working without a work permit. Further, a submission was made on his behalf which was simply a waste of everyone's time in which an argument based on the legal rights of spouses was advanced in relation to his partner.

4. The reason advanced for the time taken

117. The primary reason given for the time taken was the Departmental review and I have already indicated that it was appropriate for the respondent to engage with the Department of Justice and Equality on this Issue.

118. It may however be worth mentioning that it does seem from the evidence that, in putting on hold applications relating to parents from Romania and Bulgaria, the respondent did not give sufficient consideration to the fact that individual cases would not all raise the same issue. In particular it appears that it may not have been asked whether the issue which gave rise to the review - the need to prove permission to work - was relevant in each case. I draw this inference from the fact that neither of these applicants was asked for any additional information arising from their applications. It was not until the affidavit of Mr. Walzer was filed that it became apparent that such information was required.

119. It seems to me that this is a particularly significant factor in the *Dunga* application, where it was the second named applicant's case that he had been self-employed from early 2007. Having seen Mr. Walzer's affidavit, he furnished the Relevant Contracts Tax Deduction certificates to substantiate that case. The decision to issue the passport was made shortly afterwards with no further query from the respondent. This, in other words, was not a case where proof of permission to work could arise. However, it was always going to be necessary for this applicant to furnish more information than had been included with the initial application and in the circumstances the delay attributable to the review was not inordinate.

5. The likely prejudice to the applicants

120. The only prejudice ever asserted in these cases was that the applicants' families wished to travel to Romania for holidays. I do not make light of this - it may well be that like many immigrants they had not seen their families for a considerable period of time. However, it does not come close to the kind of prejudice that would render the delay under consideration unlawful.

121. Having regard to this analysis of the evidence in the case I conclude that the applicants have not succeeded in demonstrating unreasonable delay in the processing of their cases.

122. In considering the question of costs, I find that there is a significant distinction to be made between the two cases.

123. In *Moldovan*, the second named applicant asserted delay in making a decision on foot of an application which the he subsequently had to concede was not, to put matters neutrally, fully accurate. He did not disclose his unlawful entry into the State and arguably gave the impression that he was claiming lawful residence during a period when he was working illegally. I do not use the word "misleading", since that would suggest a finding on my part of a criminal offence, but in my view a claim for damages in the circumstances was unsustainable and should not have been made. Having been made, it should not have been persisted with when the discrepancies in his account came to light. In particular, it should not have been persisted with after the passport was issued. I see no reason in this case why costs should not follow the event.

124. The situation relating to *Dunga* is different in that no complaint is made of the content of his application other than the necessity to provide further documentation relating to his self-employment. In this regard, it is clear that, while a query was raised in the affidavit of Mr. Walzer in relation to the fact that he had been in receipt of Job-Seekers Allowance, this does not appear to have been a problem once the self-employment status was dealt with. Furthermore, there is the point, discussed above, that his situation does not appear to have been one that would have been affected by the issue under review in the Department. I propose to make no order on costs in this case.