

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 294 J.R.]

BETWEEN

S.S.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 22nd day of May, 2017

1. The above mentioned applicant has applied for leave to maintain judicial review proceedings seeking to quash the decision of the respondent of 6th March 2017 refusing the application for a retention of EU Treaty Rights and further for an order for *mandamus* requiring the respondent to consider the fresh application for retention of EU Treaty Rights in accordance with her invitation to do so in a decision of 29th October 2016.

2. The applicant is a national of India and arrived in Ireland in February 2009. He married an EU citizen on the 11th February 2010 and was afforded EU Treaty Rights to remain in Ireland either in March 2010 or September 2010 (depending upon whether you are looking at the statement of ground or the affidavit of the plaintiff). A child was born to the couple on 16th August 2010. In December 2013 the parties separated in that the wife and child moved to the United Kingdom. The applicant remained in Ireland and applied on 1st May 2014 for retention of EU Treaty Rights. On the 15th July 2015 the EU Treaty rights afforded in 2010 were revoked. A fresh application was processed on 5th August 2015 on the basis that his estranged wife had returned to the jurisdiction and was exercising her EU Treaty Rights at the time of initiation of judicial separation proceedings.

3. At para. 10 of the grounding affidavit it is suggested that the judicial separation proceedings were initiated in August 2015. However, it is also stated that the proceedings issued in September 2015. It states that "at that date" the estranged wife was exercising her EU Treaty Rights. At para. 19 of the grounding affidavit it is stated that the applicant's estranged wife left the jurisdiction shortly after the judicial separation proceedings had commenced in July 2015.

4. It remains entirely unclear therefore when the estranged wife left the jurisdiction. Furthermore it does appear that if the proceedings were issued in September 2015 this would be the date of commencement thereof. Neither the proceedings nor the evidence of the estranged wife's return to and subsequent departure from this jurisdiction are exhibited.

5. In the decision of the 6th March 2017 (the impugned decision) the applicant's application bearing date 18th November 2016, which is based upon the initiation of the judicial separation proceedings, were referred to. It stated that a decision was taken not to accept the retention application on the basis that the applicant did not at the date of application hold a valid residence card and although a valid residence card was not required the applicant must have a valid and subsisting right of residence in order to be in a position to retain this right on a personal basis. The decision states that as the applicant did not have this requirement he cannot seek to retain a right of residence which he no longer holds.

6. In the within application for leave it is argued that such a decision is not based on any regulation or provision. The applicant asserts that the matter is covered by Regulation 10 of Statutory Instrument No. 548/2015 European Communities (Free Movement of Persons) Regulations 2015. In this regard the applicant argues that when reference is made in Regulation 10 (2) (a) of the 2015 Regulations to the marriage or civil partnership of the EU citizen being dissolved or annulled, this incorporates reference to the granting of a decree of judicial separation.

7. The further argument raised by the applicant is to the effect that the ECJ judgment in Case C – 218/14 *Singh and Others v. Minister for Justice and Equality*, a judgment of the Court (Grand Chamber) of 16th July 2015, is not relevant to the instant matter because it is argued that the estranged wife was within the State at the time of commencement of the judicial separation proceedings. In *Singh*, the ECJ held that the non EU spouse of an EU citizen cannot retain a right of residence under Directive 2004/38 if prior to the commencement of the divorce proceedings the EU citizen left the territory of the State.

8. It appears therefore that in order to establish any prejudice by virtue of the 6th March 2017 decision the applicant must show arguable grounds to the effect that the applicant's situation is not captured by the ECJ judgment in *Singh* aforesaid and in addition that the regulations in Ireland and in particular Regulation 10 (2) (a) of the 2015 Regulations incorporates reference to circumstances whereby a marital breakdown is finalised by the Courts in the context of judicial separation proceedings.

9. I am not satisfied that judicial separation proceedings might be said to be a first step in the divorce process, as argued in submissions, or indeed that a dissolution referred to in the regulations incorporates reference to judicial separation proceedings by reason of :-

1. The Judicial Separation & Family Law Act 1989 was introduced in Ireland in 1989 at a time when divorce was not available. It cannot therefore be said that judicial separation is part of the process of securing divorce.
2. It is possible to have a decree of judicial separation set aside by consent of the parties, however, no such facility exists in respect of a decree of divorce or declaration of nullity.
3. Parties might apply for divorce without ever applying for judicial separation and similarly parties might apply for judicial separation but not subsequently apply for divorce. They are two separate reliefs with distinct effect.
4. Dissolution involves a cessation, conclusion, ending or discontinuation of a former status. Clearly in a divorce context

dissolution of a marriage occurs in that the parties are no longer spouses. On the other hand s. 8 of the Judicial Separation Family Law Reform Act 1989 provides for the effect of a decree of judicial separation by stating:

"8 (1) Where the court grants a decree of judicial separation it shall no longer be obligatory for the spouses who were the parties to such proceedings to cohabit."

It is clear from s. 8 (1) of the 1989 Act aforesaid that parties status as spouses, one to the other, survives the granting of judicial separation.

10. I am not satisfied therefore that it is arguable that the dissolution referred to in Regulation 10 (2) (a) of the 2015 Regulations incorporates reference to judicial separation.

11. Insofar as the ECJ *Singh* decision is concerned the applicant argues that he can distinguish himself from that decision by reason of the fact that at commencement of the judicial separation proceedings the EU citizen was in the State exercising her EU Treaty Rights. The difficulty in this regard would be:

1. At para. 9 of the grounding affidavit the applicant states that his estranged wife returned to the jurisdiction in July 2015. However, no date was afforded as to when she departed the State. The judicial separation proceedings were issued apparently in September 2015 and this would appear to be the date of commencement thereof. However, given the fact that the affidavit suggests that the proceedings were commenced in July, August and September of 2015, it is not at all clear as to which of these months the applicant is referring to at para. 20 of his affidavit when he says that at the time of commencement of the dissolution proceedings his wife was present in the State and exercising her EU Treaty Rights.

2. At para. 12 of the Background Facts contained within the Statement of Grounds the following sentence is included in brackets:

"John should we be up front and state how long that work was for?"

3. At para. 14 of the Background Facts in the Statement of Grounds the following statement is made:

"14 the applicant's wife left the jurisdiction shortly after the Judicial Separation proceedings had commenced in July 2015. (John we said earlier this was September)".

12. By reason of the foregoing therefore and notwithstanding para. 21 of the grounding affidavit of the applicant (which states that for the sake of completeness and candour the estranged wife was absent from the State between 2013 and 2015 and subsequently left shortly after the judicial separation proceedings commenced) by reason of

(1) lack of detail as to the date when the EU citizen came to Ireland in 2015, her subsequent date of departure, and the extent to which she was working during this period and

(2) the confusion and alternate dates herein before outlined.

13. I am not satisfied that the facts are sufficiently clear to raise arguable grounds that the applicant can distinguish himself from the *Singh* judgment.

14. Independently of the foregoing it is considered worrisome that the applicant's legal representatives considered whether or not to be "up front" with the Court as to the estranged wife's work within the State in or about mid 2015 to ground their claim that she was exercising her EU Treaty Rights, and ultimately appear to have decided not to be "up front" as the duration of the estranged wife's work activity in Ireland in 2015 was not detailed.

15. In the circumstances the application for leave is refused.