

**THE HIGH COURT
JUDICIAL REVIEW**

2009 1052 JR

BETWEEN/

DANA HASSAD ZADA AND ALINA SIRKOVSKAJA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE COMMISSIONER OF AN GARDÁ SÍOCHANA

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 1st day of October, 2010.

1. This case raises a single issue which can be expressed in the form of the following question: is the respondent entitled and/or obliged by Article 10 (2) (a) of Directive 2004/38 of the European Parliament and the Council of 29th April, 2004 ("the Directive") to refuse to deliver to the first named applicant a "residence card" unless and until he produces to the respondent a currently valid passport?

2. The circumstances which give rise to that question are as follows. The first named applicant is a native of the Republic of Iran who arrived in the State in September, 2005 and applied for asylum. That application was unsuccessful but he has resided here since. The second named applicant is a national of Estonia who arrived in the State in January 2005 and it is not disputed that she has been in employment here since that time and is therefore a Union citizen who enjoys a right of residence under Article 7 (1) (a) of the Directive. On 2nd February, 2007 the applicants married in Waterford.

3. In December 2008, the first named applicant applied to the respondent on form EU 1 as a "family member" and spouse of the second named applicant for a "residence card" as provided for in Article 9 of the Directive. In completing that form the applicant provided the detailed particulars required by Regulation 7 (1) (b) and Schedule 2 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 ("the Regulations"), which constitute the transposition into national law of the provisions of the Directive. Those particulars included item 5 of that Schedule 2 namely "Number, date and place of issue of the applicant's passport/national identity card (original document to be provided)". Because the applicant claimed not to possess a passport from his country of origin and never to have had one, the particulars in question related to his national identity card/birth certificate described as a "Shenashnameh" issued by the Iranian authorities and containing his picture, his certificate of birth and a fingerprint of his index finger.

4. By letter of 25th May, 2009, the applicants were informed that the first named applicant's application had been approved. The letter informed the first named applicant, *inter alia*, as follows:

"I wish to inform you that your application has been approved as you fulfil the relevant conditions set out in the Directive and Regulations. In order to obtain the residence card of a family member of a Union citizen (Stamp 4 EU Fam) you Dana Hassad Zada and the Union citizen Alina Sirkovskaja must report to your local immigration office located at Waterford Garda Station. In order to satisfy the immigration officer of your identity you, Dana Hassad Zada must produce a valid passport and the E.U. citizen, Alina Sirkovskaja must produce a valid passport or national identity card. Your passport will be endorsed with the appropriate permission to remain which will be valid for a five year period."

Thus, although the letter expressly approves the application on the basis that the conditions have been shown to be fulfilled, the delivery of the residence card is made subject to proof of identity being produced to the immigration officer by presentation of a valid passport.

5. On 27th May, 2009, the first named applicant did as instructed and attended at Waterford Garda Station where he produced his national identity card and requested the issue of the residence card. He explained that he did not possess a passport. The officer to whom he reported refused to hand over a residence card in the absence of the production of the first named applicant's valid passport. Some days later he made a second attempt but the immigration officer again refused to issue the residence card because of the non production of a valid passport. On 10th July, 2009, the applicants' solicitors wrote to the immigration officer to reiterate the request for the residence card and explained that the first named applicant had suffered persecution in Iran and feared that if he approached the Iranian Embassy in Dublin to obtain a passport, his family in Iran would be at risk of persecution in Iran.

6. It was in those circumstances, accordingly, that the present proceeding for judicial review was commenced and by order of 19th October, 2009, the Court granted leave to the applicants to make this application seeking, primarily, an order of *certiorari* to quash the decision of the respondents refusing issue of the residence card together with related declaratory relief and an order of *mandamus* compelling the respondents to issue the residence card to the first named applicant. The grounds in respect of which leave was granted are as follows:

(1) The first and/or second named respondents requirement for the issue to the first named applicant as a person qualified for the purpose of a residence card under the European Communities (Free Movement of Persons) Regulations 2006 and 2008 of prior production of a valid Iranian passport is unlawful because it is disproportionate and because it is *ultra vires* the said Regulations and/or Council Directive 2004/38/EC.

(2) Further, or in the alternative, in the premises the rules of natural justice and fair procedures and/or the rules of constitutional justice require the first and/or second named respondent to permit the first named applicant to prove his identity upon production of a national identity card or by any alternative means.

(3) In the premises, the refusal by the first named respondent to issue a residence card to the first named applicant, without the said applicant first producing his passport, is in breach of the applicant's legitimate expectations.

7. The scheme of the Directive can be simply described. Every citizen of the European Union has a fundamental Treaty-derived right to move freely from one Member State to another and to enter and reside there subject only to the limitations and conditions laid down in the Treaty. This principle of freedom of movement is one of the fundamental concepts of the internal market and the Directive seeks to both facilitate and encourage the exercise of the right. The benefit of the right extends from the individual Union citizen so entitled to the members of the citizen's family as defined in Article 2. In accordance with Article 6 a Union citizen has a right to move to a second Member State and reside there for up to three months without any condition or other formality apart from the requirement to hold a valid identity card or passport. A Union citizen has a right of residence in another Member State for a period longer than three months where the conditions of Article 7 are complied with including, as is the case with the second named applicant here, that of being a worker in employment. A Union citizen who has resided legally for a continuous period of five years in a host Member State acquires a right of permanent residence there. (Article 16.1)

8. As mentioned, the right of movement and residence enjoyed by a Union citizen extends to defined "family members" even where the family members are not themselves nationals of any Member State. In effect, for the purpose of the exercise of the right of free movement and residence, Union law regards the family as a unit and the only distinction that is made in the Directive as between family members who are themselves Union citizens and those who are non nationals of the Member States is in relation to the administrative formalities that a family member is required to comply with when exercising the entitlement to accompany or join the Union citizen who has taken up residence in a host Member State. (See Article 8 as compared with Articles 9 to 11.)

9. So far as concerns Union citizens exercising their entitlements under the Directive, Article 8 authorises Member States to require Union citizens to register with relevant authorities. This probably reflects the administrative system at local authority level in many Member States where all persons resident in a locality are required to be registered with the municipality or local authority. Ireland has not availed of the facility of introducing such a registration system for Union citizens. It is to be noted that, as mentioned above, under Article 6 any Union citizen has a right to move to a second Member State and to reside there for up to three months subject only to the formality of holding either a valid national identity card or a valid passport. Where the registration obligation exists, the incoming Union citizen residing for more than three months is to be issued with a registration certificate subject only to the formalities prescribed in Article 8.3 including proof of identity which can be established by the alternatives of presenting either a national identity card or passport. When the incoming Union citizen is to reside for more than three months as a family member of a Union citizen who qualifies under Article 7.1 a)-c), Article 8 prescribes as an administrative formality the presentation of either the validity identity card or a passport.

10. So far as concerns the administrative formalities applicable to family members of a Union citizen who are not themselves nationals of a Member State, the provisions of Articles 9 and 10 are relevant to the issue now raised in this proceeding:

Article 9:

- (1) Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.
- (2) The deadline for submitting the residence card application may not be less than three months from the date of arrival.
- (3) Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 10:

(1) The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

(2) For the residence card to be issued, Member States shall require presentation of the following documents:

- (a) A valid passport;
- (b) A document attesting to the existence of a family relationship or of a registered partnership;
- (c) The registration certificate or, in the absence of a registration system, any other proof of residence in the host member state of the Union citizen whom they are accompanying or joining;
- (d) In cases falling under points (c) and (d) of Article 2 (2), documentary evidence that the conditions laid down therein are met.
- (e) Omissis.
- (f) Omissis.

It will be noted therefore that Article 10.2 is addressed to the Member States and is expressed in mandatory terms: "**shall** require presentation...".

11. There is thus a clear distinction made between the formality prescribed for a family member who is a Union citizen and one who is not a national of a Member State. The former has alternative means of establishing identity: the latter does not. Thus the position of the respondent Minister on this issue is straightforward. He says that Article 10.2 is addressed directly to the Member States and is binding upon him. "For the residence card to be issued Member States shall require the presentation of ... a valid passport". That, he says, is what he has done in this case. In the course of argument the Court enquired of counsel for the respondents whether, if the applicant had proof of his identity by means other than the passport, it would be relevant for the Court to consider the proportionality or reasonableness of the Minister's insistence upon the production of the passport? In response the Court was informed that such an issue did not arise. The position of the Minister was that the production of the passport was a mandatory pre-condition to the

handing over of the residence card and that proof of identity by alternative means was not open to the Minister to accept upon a proper construction of Article 10.2.

12. The position of the applicants, on the other hand is equally straightforward. As explained in more detail below, the first named applicant relies upon the pre-existing case law of the Court of Justice of the European Union relating to the legislation which, it is argued, has been consolidated into Directive 2004/38/EC. According to that case law, the right of residence cannot be denied by a Member State to a family member of a Union citizen by reliance upon an administrative formality of this kind where the family member is in a position to unequivocally prove identity by other means and where all other conditions of benefiting from the right of residence are clearly met. The applicants further argue that, in any event, the specific provisions of Article 10.2 (a) of the Directive have not been transposed into the 2006 Regulations. Thus, item 5 of Schedule 2 requires particulars of either the national identity card or of a passport. In that regard the Irish regulations are more favourable to the position of the first named applicant and he is entitled to rely upon them as such. Recital (29) to the Directive expressly allows this: "This Directive should not affect more favourable national provisions".

13. In the judgment of the Court the applicant's case is unfounded for a number of reasons.

14. First, as already indicated, on any reading of the Directive a clear and deliberate distinction is made as between the formalities which may be required of a Union citizen and those which may be applied to family members who are not nationals of a Member State. In addition to the provisions already cited in paras. 10 and 11 above, it is to be noted that the basic distinction is underlined by Article 5.1 which defines the terms upon which the initial right to enter a Member State may be exercised:

"5.1 Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a **valid identity card or passport** and shall grant family members who are not nationals of a Member State leave to enter their territory with a **valid passport**. No entry visa or equivalent formality may be imposed on Union citizens.

5.2 Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No. 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of a valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member states shall grant such persons every facility to obtain the necessary visas..."

15. Thus, possession of a residence card issued to a family member by a Member State under Article 10 exempts a family member from the requirement to have an entry visa to a second Member State. The second Member State is therefore entitled to the assurance that the residence card was originally issued on the basis that the conditions of Article 10.2 have been complied with including proof of identity by the presentation of a valid passport by the non-national.

16. Iran is one of the states listed on the Common List of Article 1 (1) of Regulation (EC) No. 539/2001 and, as the first named applicant is not a recognised refugee, he was required to be in possession of a visa when crossing any external border of a Member State including that of Ireland. Thus, by the issue to the first named applicant of a residence card under the Directive, the Minister would confer upon him an entitlement to exemption and would do so without having required compliance with the obligation to present a valid passport.

17. Accordingly, upon a reading of the Directive, the requirement of the presentation of a valid passport is mandatory in the case of a non-national of a Member State. The alternative of presentation of a national identity card is not permitted presumably because the Union has no means of assessing the authenticity of such cards or the basis upon which they may have been issued in the third country of origin.

18. Secondly, in the judgment of the Court, the reliance placed upon the case law of the Court of Justice arising out of the earlier directives which were replaced by the Directive is not well founded. As appears from the title to the Directive, it replaced and repealed the pre-existing provisions in Directives 64/221 EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. It should also be noted that Council Regulation (EC) No. 539/2001 of 15th March, 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as currently in force, replaced Council Regulation (EC) 574/1999 of 12th March, 1999 which in turn replaced Council Regulation (EC) No. 2317/95 of 25th September, 1995, the latter Regulation having been annulled by the judgment of the Court of Justice of 10th June, 1997 in *Case C-392/95 Parliament v. Council* [1997] E.C.R. 1-3213.

19. There is no doubt that the previous case law in question particularly the judgment of the Court of Justice in *Case C-459/99* of 25th July, 2002, in *MRAX v. Belgium* could be construed at first glance as being supportive of the arguments now advanced by the applicants. Thus, in answer to the first question referred to the Court by the Belgian Conseil d'Etat includes in its first paragraph the ruling:

"...a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148."

20. The present case does not, of course, involve the sending back at the border of this Member State of the first named applicant but rather its obligations to issue him with a residence card in the absence of production of a valid passport or, for that matter, a visa for entry to the State.

21. The answer given in the *MRAX* judgment to the second question posed is also relevant:

"On a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit or to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully."

22. It is important, however, to have regard to the particular legislative and procedural context in which those answers were given by the Court of Justice. As already mentioned, the legislative context was that of the pre-existing directives now replaced by the Directive. The procedural context was not that of a case of a specific individual or married couple but a general challenge brought by

the applicant association *MRAX* ("Movement to Combat Racism, Anti-semitism and Xenophobia") in the Belgian courts to the legality of a ministerial circular concerning the documents to be produced in Belgium in order to obtain a licence to contract a marriage or to reunite a family on the basis of a marriage contracted abroad.

23. Prior to the consolidation of these earlier provisions in the Directive, the Community legislation had dealt separately with the conditions governing the rights of inter-state movement, entry and residence of Community nationals depending upon whether the rights were exercised as employed persons or by persons exercising the freedom of establishment as self-employed. Thus the former rights were provided for in Regulation 1612/68 in conjunction with Directives 68/360 and 64/221. The latter legislation was contained in Directives 73/148 and 64/221. (See recital 4 to the Directive).

24. In facilitating the exercise of the right of inter-state movement of workers, Article 3 of Directive 68/360 provided:

"1. Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a **valid identity card or passport**.

2. No entry visa or equivalent document may be demanded save from members of the family who are not nationals of a Member State. Member States shall accord to such persons every facility for obtaining any necessary visas." (Emphasis added.)

The persons referred to in Article 1 of Directive 68/360 were the "nationals of the Member States and members of their families to whom Regulation 1612/68 applied" namely those defined in Article 10 of the latter Regulation as follows:

"1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) His spouse and their descendants who are under the age of 21 years or are dependants;

(b) Dependant relatives in the ascending line of the worker and his spouse."

25. Thus the formality of presenting either a valid identity card or a passport applied without distinction to both the nationals of a Member State and to his or her spouse, child or dependant.

26. This approach has, however, clearly been revised in the codification of the pre-existing legislation in the Directive in order, no doubt, to achieve the objective identified in recital (7) of the Directive namely:

"The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls."

It is also important to note recital (14) to the Directive:

"The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members."

27. Accordingly, when the provisions of Articles 5.1, 6, 8.3 (first indent) and 8.2 (a) distinguish between Union citizens and non-nationals of the Union by reference to the formality of either the identity card or passport in respect of the former and only the passport for the latter, it is clear that the Directive is explicitly and deliberately departing from the basis upon which the earlier legislation had been formulated. The requirement of Article 8.2 (a) is thus a specific and mandatory requirement addressed to the Member States which cannot be derogated from without bringing about the result which is sought to be avoided in recital (14) namely the creation of divergent administrative practices in the application of the rules facilitating the exercise of the rights of movement and residence.

28. The Court is therefore satisfied that the stance of the respondent on this issue (see para. 11 above) is correct: he is obliged to insist upon proof of nationality and identity by means of the production of a passport in the case of a family member who is not a national of a Member State of the Union. Clearly, unless the family member can establish identity the validity of the asserted conjugal relationship may also be in doubt. This conclusion is not altered by the judgment of the Court of Justice of 17 February 2005 in Case C-215/03 *Oulane* [2005] ECR I-1215. That case was concerned with the distinct position of a national of a Member State and not with that of a national of a third country seeking to take up residence in the Community as a family member. The Court held that, as a Community national, the family member could not be precluded from establishing nationality and identity by a means other than that of a passport or national identity card when the host Member State permitted its own nationals to rely on such alternative proof.

29. Thirdly, the Court considers unfounded the argument (see para 12 above,) to the effect that the requirement in Article 10.2 a) of the Directive cannot be relied upon by the respondent because it has not been transposed and given effect by the Regulations. On a correct reading, the Regulations do in fact require that a qualifying family member of a Union citizen seeking to exercise the right of residence present a valid passport. It should be noted that the provisions of the Regulations governing the stages of entry, (Regulation 4 (2)); residence for up to 3 months, (Regulation 6 (1) (a) (ii)); residence for more than 3 months, (Regulation 7 (1) (a)); and permanent residence, (Regulation 12 (1)), are effectively cumulative. Thus to enter the State lawfully, the qualifying family member who is not a national of a Member State must possess "a valid passport as evidence of his or her nationality and identity...". (Regulation 4(2)). To reside for up to 3 months he or she is required by Regulation 6 (1) (a) (ii) to hold a valid passport. The qualifying family member may then reside for more than 3 months in accordance with Regulation 6 (2) (b) provided the Union citizen in question satisfies one or more of the conditions in subparagraph (a) (i), (ii) or (iii) of Regulation 6 (2). But the family member cannot so qualify without having first qualified to enter the State and to reside there for up to 3 months because an application to register as a family member and obtain the necessary residence card can only be made under Regulation 7 (1) (a) when the family member has been resident (and therefore lawfully resident,) for not less than 3 months.

30. Thus the possession of a valid passport as proof of nationality and identity is at all stages a condition of the entitlement to the exercise by a qualifying family member of the rights concerned. In the case of a qualifying family member who is not a national of a Member State, an alternative means of proof is not provided for. It cannot be said therefore that the Regulations have failed to give effect to Article 10 (2) (a) of the Directive. It follows that illegal entry to the State (in the sense of entry on the basis of an application for asylum held to be unfounded,) and the subsequent passage of more than 3 month's presence in the State cannot be relied upon to avoid the necessity to comply with a condition which otherwise applies to all qualifying family members who are not

nationals of a Member State of the Union.

31. In these circumstances the Court cannot consider that the respondents' insistence on production of a passport could be said to be invalid as disproportionate even if it is supposed (*quod non*) that the respondent retains some margin of discretion to derogate from the otherwise mandatory condition of Article 10.2 (a).

32. Finally, it must be pointed out that this is not a case in which the applicant is a stateless person who cannot possibly produce a passport. It is at least implied that he could possibly obtain one but is reluctant to approach an Iranian embassy for that purpose because he claims to fear some form of retaliation by the Iranian authorities against unspecified family members still living in Iran. While the first named applicant expresses this fear in the grounding affidavit, no evidence is put before this Court to substantiate it. He refers in his affidavit to the fact that he arrived in the State in September 2005 and made a claim for asylum which was refused. However, no evidence has been given as to the basis of that claim other than a reference (in para. 11 of the affidavit) to his having suffered persecution in Iran. Nor has the reason for the rejection of the application been given to the Court. The applicant also asserts that he was a "draft evader" by which the Court understands that he had avoided compulsory military service in Iran. He says that as such he is not eligible to apply for an Iranian passport but neither the factual nor the legal basis for this assertion has been substantiated.

33. The first named applicant undoubtedly faces a dilemma in that having entered the State purporting to be a refugee, he has been refused asylum. As a result, he is unlawfully present in the State and claims to be unable or, at least unwilling, to take such steps as might remedy his situation such as returning temporarily to Iran or applying for a passport. However, the purpose of the Directive and the Regulations is that of giving effect to the Treaty right of free inter-state movement and residence of Union citizens and their family members: it is not their purpose or function to resolve difficulties or anomalies which immigrants may have created for themselves by the pursuit of unsuccessful claims for asylum under the Geneva Convention.

34. The application for judicial review must, accordingly, be refused.