

THE HIGH COURT
JUDICIAL REVIEW

2009 1173 JR

BETWEEN

FAISOL OLUWANIFEMI SULAIMON (AN INFANT, SUING BY HIS FATHER AND NEXT FRIEND FATAI A. AYIMLA SULAIMON)
APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT**JUDGMENT of Mr Justice Ryan delivered the 9th July 2010**

1. The applicant's father, who is a national of Nigeria, arrived in Ireland in 2001. In July, 2002 his then wife gave birth to their daughter, who is an Irish citizen. In March, 2005 he applied for permission to remain under the IBC/05 Scheme. By letter dated the 7th July, 2005 (received by the applicant's father on the 11th July, 2005) he was informed that the Minister for Justice, Equality and Law Reform ("the Minister") had decided to grant him permission to remain in the State for two years until the 7th July, 2007. The letter said "this letter is not in itself evidence of permission to remain in the State and should not be used for any purpose other than to register at your local registration office." Upon registration, he would be given a certificate to show that he had been given permission to remain and what the relevant conditions were. The father attended at a registration office on the 22nd July, 2005.

2. In early June, 2007, in anticipation of the expiry of his permission to remain, he applied for renewal of his permission to remain. The acknowledgement included the following in bold print:-

"Should your current leave to remain in the State expire while your renewal application is under consideration, you are advised to contact your local Garda National Immigration Officer to have your current permission to remain extended. You will require this acknowledgment letter, your passport and your GNIB card. This applies only to those who require evidence of entitlement to remain in the State for employment, social welfare and travel purposes."

The father did not require evidence of his permission to remain for any of those purposes and did not apply for an extension of his permission to remain when it expired on the 6th July, 2007.

3. The Minister decided to renew the father's permission to remain for a further three years until the 7th July, 2010. This was communicated by letter dated the 23rd July, 2007, which the father received on the 24th July, 2007, which said:-

"Please note that your permission to remain in the State will only become operative when you have registered at your local Registration Office".

It added that the Garda National Immigration Bureau ("the GNIB") would issue him with a certificate of registration if satisfied that he had obeyed the laws of the State, had not been convicted of any offence or been involved in any criminal activity, and had paid a fee of €100. The certificate would show that he had been given permission to remain in the State. He registered on the 14th August, 2007. The applicant was born in Dublin on the 24th August, 2008.

4. In October, 2008 the father applied to the Department of Foreign Affairs for a passport for his son. On the 31st October, 2008 the Passport Office refused that application on the basis that the father did not have reckonable residence in Ireland during the four years preceding the child's birth. He was informed that he could apply to the Department of Justice, Equality and Law Reform for a certificate of nationality, which would then enable him to apply for an Irish passport on behalf of his child. Appended to the letter of refusal was the calculation of his reckonable residence, which found that he had been lawfully resident in the State for 1,092 days, i.e. three days short of three years (1,095 days). The period of residence was calculated by reference to the GNIB stamps on his passport. Included were the period from the 22nd July, 2005 to the 7th July, 2007 (716 days) and the period from the 14th August, 2007 to the 23rd August, 2008 (376 days). Excluded were the periods from the 7th July, 2005 to the 21st July, 2005 inclusive and the period from the 8th July, 2007 to the 13th August, 2007 inclusive.

5. By letter dated the 25th February, 2009, the applicant's solicitors requested the Department of Foreign Affairs to review its decision. On the 27th March, 2009, that Department affirmed its refusal, citing the guidelines of the Department of Justice, Equality and Law Reform whereby the only acceptable proofs of lawful residence are immigration stamps in passports or registration cards/booklets that are given to persons registering with the GNIB. These were the only documents that could be objectively verified by the Department of Foreign Affairs. The Department observed that the letters of the 7th July, 2005, and the 23rd July, 2007, were stated not to constitute evidence of the father's permission to remain and clearly indicated the need to register with the local immigration office. The father could pursue his son's claim to citizenship with the Department of Justice, Equality and Law Reform.

6. On the 18th May, 2009, the applicant applied to the Minister for a certificate of nationality, pursuant to s. 28 of the Irish Nationality and Citizenship Act 1956, ("the INCA 1956") as amended. By letter dated the 16th August, 2009, an officer of the Minister's Citizenship Division refused that application. The officer indicated:-

"For certain non-nationals, periods of lawful residence commence only when a GNIB officer decides to issue a stamp on the basis of checks carried out to ensure that a person is still meeting all the conditions which would allow them to remain. The requirement to renew GNIB registration at regular periods allows for greater control over the immigration process and is a matter of vital importance in calculating reckonable residence. Lawful residence can only be proved by a thorough examination of GNIB stamps."

7. The officer reiterated that correspondence with the father had stated that his permission to remain would only become operative when he had registered. He said the Passport Office had been correct to determine that the applicant is not a citizen and in those circumstances, s. 28 of the INCA 1956 did not apply.

8. By letter dated the 28th September, 2009, the applicant requested the Minister to reconsider the matter. It was submitted that the applicant's father was entirely blameless for the Minister's administrative delay in considering his renewal application in 2007. It was also noted that there is no statutory basis for the Minister's insistence on the father having immigration stamps on his passport in order for his residence in Ireland to be reckonable.

9. On the 5th October, 2009, the Minister's agent again refused the application, using essentially the same language as the decision of the 16th August, 2009. Clark J. granted leave to the applicant to seek judicial review of the Minister's decision of the 5th October, 2009.

10. Section 6A of the INCA 1956 (as inserted by s. 4 of the Irish Nationality and Citizenship Act 2004) regulates the citizenship entitlements of certain children born in Ireland to foreign national parents. Section 6A(1) provides that no person shall be entitled to citizenship unless one of his parents has been resident in Ireland for a period of not less than three years or periods the aggregate of which is not less than three years, during the period of four years immediately preceding his birth. In other words, the child's parent must have been lawfully resident for at least three of the four years prior to the child's birth.

11. Section 6B (4) (a) of the Act of 1956, as amended, provides that a period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under s. 6A if it is in contravention of s. 5(1) of the Immigration Act 2004, which provides:-

"No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister."

12. Section 1 of the Immigration Act 2004 provides that "permission" shall be construed in accordance with s. 4. Section 4(1) provides:-

"Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission")."

13. The question for decision in the case is whether the Minister was correct in excluding from the calculation of reckonable residence the periods between the making of the decision to permit the father to remain in the State and the dates when he attended the registration office and registered. If either the two periods is included, the father will have sufficient residence to entitle his child (the applicant) to a certification of nationality.

14. Did either or both of the Minister's letters of the 7th July, 2005, or the 23rd July, 2007, amount to permission to remain? Or was it the case, as the Minister contends, that his letters merely enabled the father to obtain the necessary permission from an immigration officer at the registration office. If the letters themselves gave permission and were not merely conditions precedent to obtaining permission, then the periods were wrongly excluded.

15. The fundamental question is whether the father was in the State during the above periods or either of them in accordance with the terms of a permission or permissions given by the Minister. The two letters are as follows. The first is dated 7th July, 2005, and reads:-

"I am directed by the Minister for Justice, Equality and Law Reform to refer to your application for permission to remain in the State on the basis of your parentage of an Irish born child.

As an exceptional measure, I am to inform you that the Minister has decided to grant you permission to remain in the State for two years until 07/07/2007. Your case will be reviewed at the end of this period. The following conditions apply to your permission to remain in the State:

That you will obey the laws of the State and will not become involved in criminal activity,

That you will make every effort to become economically viable in the State by engaging in employment, business or a profession,

That you will take steps (such as appropriate participation in training or language courses) to enable you to engage in employment, business or a profession,

That you accept that the granting of permission to remain does not confer any entitlement or legitimate expectation on any other person, whether related to you or not, to enter the State.

Please note that this letter is not in itself evidence of permission to remain in the State and should not be used for any purpose other than to register at your local registration office. If you live in the Dublin Region this is located at the Immigration Registration Office, Garda Síochána, 13/14 Burgh Quay, Dublin 2.

If you live elsewhere, you should register at your local Garda District Headquarter Station. You will be presented with a certificate of registration which shows that you have been given permission to remain and which sets out the condition in which you have been given permission to remain. That certificate is an important document and care should be taken to ensure that you retain it in your safekeeping.

You may work in the State without the need for a work permit and set up in business without seeking the permission of the Minister.

Yours sincerely."

16. The letter of the 7th June, 2007 is as follows:-

"I am directed by the Minister for Justice, Equality and Law Reform to acknowledge receipt of your Application for renewal of your (IBC/05) permission to remain in the State on the basis of your parentage of an Irish born child.

Please find the following original documents returned herewith.

Applicant's passport No. A1355693.

Should your current leave to remain within the State expire while your renewal application is under consideration, you are advised to contact your local Garda National Immigration Officer to have your current permission to remain extended. You will require this acknowledgement letter, your passport and your GNIB Card. This applies only to those who require evidence of entitlement to remain in the State for employment, social welfare and travel purposes.

We will write to you when a decision has been reached in your case and all other original documentation submitted with your IBC/05 renewal application will be returned to you at that stage.

Any further correspondence on this issue should be sent to the Irish Born Children Unit, Department of Justice, Equality and Law Reform, PO Box 1003, Dublin 2 and the '69/Reference No. above' must always be quoted.

Yours sincerely."

17. In neither letter is it stated that the Minister's consent is predicated on the fulfilment of a condition that the recipient attend at the registration office. The first letter said that it was not itself evidence of permission to remain. In order to obtain such evidence, the father had to get the necessary documentation. Something similar seems to have been intended by the second letter, although the words are different. The Minister had given permission to remain, but it was necessary for the addressee to take an administrative step to get the documentation to evidence the permission. There is of course a distinction between the permission and the document that is evidence of the permission. This is the point that, in my view, the Minister has failed to take into account.

18. The facts are not in dispute and what has to be considered is a fairly abstruse point of interpretation which is unrelated to any issue of practical significance. There is no question but that the applicant's father has actually been living here for more than the required statutory period. There is no doubt that he has been in continuous residence since 7th July, 2005. And it is also clear that his presence in the country has been with the permission of the Minister. So what is the problem? It is said that he has been in the State otherwise than in accordance with a permission that comes within the definition of the Immigration Act 2004. On the respondent's case, even if the Minister gave permission using his official seal, that would still not be sufficient. The argument is that the only permission that conforms to the statutory requirement is a permission given by an immigration officer in the form of a document or an inscription and nobody else, not even the Minister himself, can provide a permission that is in any respect lawful and effective. It should be remembered that the immigration officer can only exercise this function "on behalf of the Minister." If the respondent's interpretation were correct, the principal would be unable to do what his agent was authorised to do on his behalf.

I am satisfied that the applicant's father has been in the State with the permission of the Minister since 7th July, 2005, and that the applicant is entitled to a certificate of nationality. I propose to order accordingly.