THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 802JR]

BETWEEN

MAZHAR MAHMOOD and AZHAR MEHMOOD

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 20th June 2019

Introduction

1. This is the judicial review of the decision of the Minister for Justice and Equality ('the Minister'), dated 4 October 2016, to uphold on review a first instance decision of 22 December 2015 to refuse the application under Reg. 7(2) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 ('the 2006 Regulations') of the second applicant, Azhar Mehmood, a national of Pakistan, for a residence card as a permitted family member of his brother, the first applicant Mazhar Mahmood, a British - and, hence, European Union – citizen, exercising free movement rights in the State ('the review decision').

2. Both sides agree that the application fell to be considered under the review of decisions provision in Reg. 21(4) of the 2006 Regulations because, although those Regulations were revoked with effect from 1 February 2016 by the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), the transitional provision at Reg. 31(28) of the new regulations provides that, where a person had sought a review under Reg. 21(1) of the old ones that had not been determined by that date, Reg. 21 of the old regulations continued to apply to the determination of that review. The applicants had sought a review on 8 December 2015 and, thus, it came within the scope of the transitional provision.

3. Both the 2006 Regulations and the 2015 Regulations that replaced them were made for the purpose of giving effect to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Citizens' Rights Directive'). The requirements of the Citizens' Rights Directive have not changed.

4. These proceedings have come about because the first paragraph of the decision recites, in material part, '[t]he decision to refuse your application ... has been reviewed in accordance with Regulation 25 of [the 2015 Regulations]', and the reason given for upholding that decision was, in relevant part, that the second applicant did not qualify as a 'permitted family member' under Reg. 3(5) of those regulations, suggesting that the Minister had overlooked or ignored the application of the transitional provision in conducting that review.

Procedural history and grounds of challenge and opposition

5. The application is based on a statement of grounds dated 20 October 2016, supported by an affidavit of the first applicant, sworn on the same date.

6. By Order made on 24 October 2016, Humphreys J granted leave to seek an order of *certiorari* quashing the review decision on three of the grounds set out in that statement. Those three grounds amount, in substance, to just two (and, arguably, because of the compendious nature of each, could probably be expressed as just one).

7. The first ground (combining the first and second grounds as they are expressed in the statement of grounds) is that, in conducting the review of the decision to refuse the second applicant a residence card under the 2015 Regulations, rather than the 2006 Regulations, the Minister acted: *ultra vires*; in breach of the transitional provision of Reg. 31(28) of the 2015 Regulations; in breach of the applicants' entitlement to natural and constitutional justice and fair procedures; or in a combination of some or all of those unlawful ways.

8. The second ground (expressed as the third) is that the decision to refuse the second applicant's review application was arrived at in breach of; fair procedures, natural and constitutional justice; [the 2006 Regulations]; [the 2015 Regulations]; or any combination of some or all of those lawful requirements.

9. The Minister's statement of opposition is undated but was filed on 26 July 2017. It is supported by an affidavit, sworn on 17 July 2017 by Stacy Morris, a higher executive officer in the EU Treaty Rights Section of the Irish Naturalisation and Immigration Service ('the INIS') as part of the Department of Justice and Equality.

10. In that statement of opposition, the Minister joins issue with the applicants' claims that the review decision was made *ultra vires*, unlawfully or in breach of the applicants' right to natural and constitutional justice and fair procedures.

11. In addition, the Minister puts forward two affirmative pleas. The first is that, while the review decision refers in error to the 2015 Regulations, the review was carried out under the 2006 Regulations. The second plea, made in the alternative and strictly without prejudice to the first, is that, even if the review had been conducted under the 2015 Regulations, there could have been no prejudice to the applicants because there is no material difference between the 2015 and 2006 Regulations as each would apply to the facts of the applicants' case.

Background to the review decision

12. In her affidavit, Ms Morris avers in material part as follows. An executive officer prepared a recommendation on the residence card application on 26 September 2016 ('the recommendation'). The recommendation refers only to the 2006 Regulations.

13. As review officer, Aengus J Casey prepared a decision on the review on 3 October 2016 ('the review officer decision'). The review officer decision recites that the review was considered under the 2015 Regulations, before adding, confusingly, that in reaching a

determination, the review officer had regard to Reg. 31(3) of the 2016 Regulations. The reference is confusing because that regulation is a transitional provision, which provides that, in cases where evidence of permitted family member status had been submitted in accordance with Reg. 5(1) of the 2006 Regulations but no first instance decision had been made, that Regulation would continue to apply in the determination of that status, which, if granted, would be deemed to have been granted under the 2015 Regulations.

14. Ms Morris exhibits both the recommendation and the review officer decision, each of those documents, neither of which – she acknowledges –is routinely provided to an applicant by the EU Treaty Rights Review Unit

15. Ms Morris provides this explanation for the reference to the 2015 Regulations in the review decision:

> 'As is the usual practice within the EU Treaty Rights Review Unit, Aengus Casey used a template letter from the I.T. system within the Department as the basis for the [review decision] and he inserted the reasons for the refusal of the Residence Card into the template letter. Prior to September 2016, the template for a refusal of a Residence Card referred to in the 2006 and 2008 Regulations but it was amended in September 2016 to refer to the 2015 Regulations. While Aengus Casey inserted the grounds on which the decision to refuse the Residence Card had been made, he omitted to amend it to refer to 2006 and 2008 Regulations. This was a purely administrative error which was not adverted to or to the institution of the within proceedings. After the Minister was made aware of the within proceedings, they were discussed within the EU Treaty Rights Section and Aengus Casey confirmed, at the time, that he had made an error and used the template which referred to the 2015 Regulations. He no longer works in INIS and is not in a position to swear this affidavit on behalf of [the Minister].
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> The I.T. system includes only one template letter for the refusal of a Residence Card upon review. It was considered that having two separate templates for a refusal on review, one for the 2006 & 2008 Regulations and another referring to the 2015 Regulations, was problematic from an I.T. point of view. Therefore a decision was made to change the template to refer to the 2015 Regulations in September 2016, on the basis that few reviews remained to be considered under the 2006 and 2008 Regulations, the majority falling to be considered under the 2015 Regulations.'

New or previously unspecified ground

16. When they received the review decision, the applicants could not have known why it referred to the 2015 Regulations and not the 2006 ones. However, they did not seek clarification or an explanation before issuing High Court proceedings asserting that the review decision was bad in law because it had wrongly considered the residence card application under the 2015 Regulations. It is true that they had not been provided with a copy of the recommendation and review officer decision, which underpin the Minister's review decision, but nor had they sought to be provided with those documents before issuing these proceedings based on that assertion. When the Minister explained, in opposition to that claim, that the application had been correctly considered under the 2006 Regulations but that the review decision incorrectly recited that it had been considered under the 2015 Regulations due to an administrative error, the applicants shifted their ground.

17. Almost four months after the Minister filed opposition papers and just two weeks prior to the hearing of the application for judicial review, the applicants filed their written legal submissions. In those submissions, in the guise of the identification of legal issues, they supplemented the claim that the review decision was wrongly made under the 2015 Regulations on the basis of which they had sought, and been granted, leave to apply for judicial review, with the following new (or newly specified) ground instead:

> (a) The review decision is bad in law because it contains an error on the face of the record in reciting that the review was conducted in accordance with Reg. 25 of the 2015 Regulations, rather than Reg. 21 of the 2006 Regulations.

18. In addition, in their identification in their written submissions of the legal issues that arise, the applicants expand or refine their claim that the review decision was wrongly made under the 2015 Regulations by joining issue with the Minister's assertion that, even if that was so (which the Minister denies), there could have been no prejudice because of the absence of any material difference between the 2015 and 2006 Regulations as each would apply to the facts of the applicants' case.

Argument and analysis

i. the Minister's preliminary objection

19. In the Minister's written submissions, dated 22 November 2017 and filed five days later, the Minister raises a preliminary objection to any consideration of the new or previously unspecified ground that is now raised in the applicants' written submission in the guise of one of the legal issues that they say fall to be determined but which was not identified in their statement of grounds, either clearly or at all.

20. The requirement to clearly identify each ground upon which judicial review is sought and, where the scope of any such ground is overbroad or unclear, the arguments to be advanced in support of it was explained by Murray CJ in *A.P. v Director of Public Prosecutions* [2011] 1 IR 729 (at 732-3) in the following way:

> '[4] Judicial review constitutes a significant proportion of the cases that come before the High Court and before this Court on appeal. A party seeking relief by way of judicial review is required to apply to the High Court for leave to bring those proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. In most cases the applicant must demonstrate that he or she has an arguable case in respect of any particular ground for relief and there are also statutory provisions setting a somewhat higher threshold for certain specified classes of cases.
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> [5] In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.
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> [6] It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds.

> [7] Moreover, if, in the course of the hearing of an application for leave it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.
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> [8] There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant which in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.
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> [9] The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.
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> [10] In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained.'

21. O'Donnell J (*nem. diss*.) in *Keegan v Garda Síochána Ombudsman Commission* [2015] IESC 68, (Unreported, Supreme Court (O'Donnell, McKechnie, Clarke, MacMenamin and Laffoy JJ), 30th July, 2015) (at para. 42):

> 'It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures are limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action. But administrative action is intended to be taken in the public interest, and the commencement of judicial review proceedings may have a chilling effect on that activity, until the issue is resolved one way or another. Because of the impact of such proceedings, it is necessary to obtain leave of the court before commencing proceedings. It is important therefore that the precise issues in respect of which leave is obtained should be known with clarity from the outset. This also contributes to efficiency so that judicial review is a speedy remedy.'

22. In this case, there can be no doubt that the particular 'legal issue' identified in the applicants' written submissions involves the attempted introduction of a new ground or, at the very least, a new argument that goes well beyond the scope of those that informed the particular, albeit very general, grounds upon which leave to seek judicial review was sought and granted. That is because that newly identified ground or argument arises self-evidently from a consideration of the material exhibited to the affidavit that Ms Morris swore in support of the Minister's statement of opposition, which – of course – postdates the grant of leave.

23. The applicants might have responded to that objection by submitting that that is just the point; they were not aware of that material at the time when they originally sought and obtained leave because the Minister had not yet disclosed it. In that regard, they could have pointed to the observation of Fennelly J for the Supreme Court in *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 IR 570 (at 581-2) that a well-established reason for permitting the amendment of a statement of grounds is where the respondent has revealed a new ground of argument in answer to the application, as appears to have happened in *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 and *Dooner v Garda Síochána Complaints Board* (Unreported, High Court, Finnegan J, 2nd June, 2000).

24. But, had that response been made, there would be several difficulties with it in this case. The first is that there is no reason to believe that the relevant material would not have been made available to the applicants or their legal representatives on request, had such a request been made, though it was not.

25. The second and more fundamental difficulty is that the applicants chose not to apply to amend their statement of grounds in that respect either prior to, or in the course of, the hearing of the application. Instead, they rested on the submission that the issue in question was captured by the very broad terms of the grounds upon which they were granted leave to seek judicial review and that they should be permitted to argue it, notwithstanding the clear objection of the Minister in both in his written submissions and at the hearing.

26. I cannot reconcile the applicants' submission with the authorities already cited, or with the following vivid passage from the decision of Cooke J in *Lofinmakin (a minor) v Minister for Justice & Ors* [2011] IEHC 38, (Unreported, High Court, 1st February, 2011):

> '8. The Court would take this opportunity to emphasise that judicial review under O. 84 of the Rules of the Superior Courts is not a form of a forensic hoopla in which a player has at once tossed large numbers of grounds in the air like rings in the hope that one at least will land on the prize marked "certiorari". In the judgment of the Court a Statement of Grounds under O. 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed by such an order.
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> 9. Particularly in the context of an application for judicial review in the asylum list against narrative decisions such as those of the Refugee Applications Commissioner, the Refugee Appeals Tribunal or deportation orders supported by the usual "Examination of file" memorandum, it is inadequate and unacceptable that applications be grounded upon bald assertions that a contested measure is unreasonable, irrational, unlawful, unfair, disproportionate or otherwise flawed without identification of the specific feature, fact or omission in the measure which is alleged to constitute the basis of the proposed annulment.'

27. I conclude that the Minister's objection is well-founded. Any other conclusion would fly in the face of the principles clearly identified by Murray CJ in *A.P.*, O'Donnell J in *Keegan*, and Cooke J in *Lofinmakin*. The purpose of those principles is to ensure, in so far as may be possible, the essential fairness and justice of the judicial review process.

28. Lest I am mistaken, I propose to briefly address the merits of that new ground or argument, in addition to those of the grounds

that the applicants were given leave to raise, although my conclusions on the former must be considered *obiter dicta*.

ii. 2015 Regulations wrongly applied

29. The evidence adduced on behalf of the Minister clearly establishes that the review of the decision to refuse the residence card application of the second applicant was carried out under the 2006 Regulations.

30. In oral argument on their behalf, though not in their written submissions, the applicants suggested that the Minister's evidence should be rejected as inconsistent with the express language of the review decision, which recites that the review has been conducted in accordance with Reg. 25 of the 2015 Regulations and, later, that the Minister had determined that the second applicant did not fulfil the criteria in respect of 'permitted family member' as set out in Regulation 3(5) of the Regulations (also, clearly, a reference to the 2015 – and not the 2006 – Regulations).

31. However, the Minister has provided an explanation, in the form of sworn evidence, for those mistaken references, and I can see no reason to reject it. I accept the Minister's evidence that the 2006 Regulations were properly applied, despite the incorrect recital on the face of the review decision.

32. Thus, it is unnecessary to consider the Minister's alternative argument that, even if the review had been erroneously conducted under the 2015 Regulations, there could have been no prejudice to the applicants because there is no material difference between the 2015 and 2006 Regulations as each would apply to the facts of the applicants' case.

33. In response to that ground of opposition, the applicants had constructed an elaborate argument on the significance of the difference in wording between the definition of permitted family member under the 2006 Regulations and that under the 2015 Regulations, to the effect that the former provided a broader definition of permitted family member and, hence, a more favourable treatment of any qualifying third country national, that the second applicant was entitled to invoke.

34. Shortly put, 'other family members' ('OFMs') under Art. 3(2) of the Citizens' Rights Directive, are, amongst others, third-country-national ('TCN') family members of the Union citizen (outside the core definition of family member provided by Art. 2(2)) 'who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence'. In transposing that category of family members, Reg. 2(2) of the 2006 Regulations defined a "permitted family member", to include, amongst other persons, such a person 'who, in his or her country of origin, habitual residence or previous residence- (a) is a dependant of the Union citizen, [or] (b) is a member of the household of the Union citizen'. Reg. 5(1) of the 2015 Regulations adopts a different approach in transposing the same category. It defines a permitted family member, in relevant part, as one 'who in the country from which the person has come – (i) is a dependant of the Union citizen, [or] (ii) is a member of the household of the Union citizen'.

35. Allowing for the principle of conforming interpretation, the applicants argue that the 2006 Regulations provide a more favourable treatment to Union citizens than that strictly required under the Citizens' Rights Directive, as Art. 37 of the Directive expressly permits, because the term 'country of origin, habitual residence or previous residence' captures a wider range of TCN family members than the term 'country from which the person has come'. For my part, I doubt that as a proposition of logic, since the requirements of dependency or household membership are couched in the present tense *i.e.* 'is a dependant' not 'is or was at any time in the past a dependant'. A person can only live in one country at any one time.

36. Hence, I see no obvious basis for the conclusion that the category of persons who are - not 'were' - dependent in the country from which they have come, should be any narrower than the category of persons who are - not 'were' - dependent in their country of origin, country of habitual residence or, merely, country of previous residence. Either way, there is only one country a person can have come from as a dependant, or member of the household, of the Union citizen concerned. There is an obvious infelicity in the use of the present tense to describe dependency in another country when the person concerned is already in the State but that problem of syntax applies equally to the formulation used in the 2006 Regulations, the 2015 Regulations, and, indeed, Art. 3(2)(a) of the Citizens' Rights Directive (which refers to persons 'who, in the country from which they have come, are dependants').

37. In any event, I do not have to decide the issue in this case.

38. If it were necessary to decide it, and if I were to do so in the applicants' favour, even that would not assist them on the uncontroverted facts of this case. That is because, as the applicants' legal representatives clearly asserted in the letter that accompanied the application for a residence card, that application was made on the basis of the second applicant's dependency on the first applicant in Pakistan. No attempt is made to explain how, in those circumstances, the applicants could have been in any way prejudiced by the failure to apply what they contend is the more favourable treatment provided by the definition of 'permitted family member' under the 2006 Regulations than that provided by the definition of that term under the 2015 Regulations. That is to say, it remains entirely unclear how it might be argued that the second applicant was then dependent on the first applicant in Pakistan as his country of origin, habitual residence or previous residence but not then dependent on him in Pakistan as the country from which he had come.

iii. error on the face of the record

39. As I have already refused the applicants permission to raise this ground, what follows under this head is necessarily *obiter*.

40. It is clear that the recital on the face of the review decision that it has been conducted 'in accordance with Regulation 25 of [the 2015 Regulations] is an error on the face of the record.

41. I am prepared to accept for the purpose of argument, although without deciding, that neither the officer's review decision nor the recommendation form part of the record and cannot be relied upon to supplement it. I will also assume, without deciding, that the affidavit of Ms Morris, filed on behalf of the Minister, should not be considered 'for the purpose of adding to, explaining or contradicting' the review decision, accepting for the sake of argument that the decision in *State (Crowley) v Irish Land Commission* [1951] IR 250 remains good law.

42. The applicants contend that relief should not be withheld on *de minimis* grounds. In doing so, they rely on the decision of Smyth J in *Wu v Minister for Justice and Equality* [2002] IEHC 163 (Unreported, High Court, 25th January, 2002), finding that an error of the face of a deportation decision, whereby a refugee status application was wrongly described as refused rather than withdrawn, could not be characterised as so peripheral or technical as to be *de minimis*. The applicants also rely on the dictum of Cooke J in *V.C.B.L. v Refugee Appeals Tribunal & Ors* [2010] IEHC 362, (Unreported, High Court, 15th October, 2010) (at para. 15) that the common law

concept of error on the face of the record 'applies to some misdescription or mistake in a document essential to the power being exercised which has the effect of depriving the exercise of jurisdiction.'

43. Must the acknowledged error in the identification of the applicable Regulations have that effect in this case? I do not think so. In *Albatros Feeds Ltd v Minister for Agriculture and Food* [2005] IEHC 65, (Unreported, High Court (Kelly J), 7th March, 2005), in rejecting the respondent Minister's argument that certain directions that were *ultra vires* the particular statutory provisions they invoked on their face were nonetheless valid because they could have been lawfully made on a different jurisdictional basis, the court admitted of the possibility that extenuating circumstances (which it found to be absent in that case) could permit such an error to be excused.

44. In this case, the Minister has adduced extensive evidence of extenuating circumstances concerning the erroneous use of the wrong template. If I had to decide the point, I would be inclined to excuse what, on the uncontroverted evidence before me, was an administrative error in the use of a template form. Borrowing the words of O'Neill J in *K v Taafe* [2009] IEHC 243 (Unreported, High Court, 15th May, 2009) (at para. 4.16), in light of the fact that the review decision goes on to correctly apply the requirements of the 2006 Regulations to the substance of the residence card application, that error is, in my opinion, inconsequential and does not invalidate that decision.

45. Nor could I accept the applicants' final argument on this point, which is that the error on the face of the review decision represents a breach of the applicants' right to good administration, protected by Art. 41 of the Charter of Fundamental Rights of the European Union ('CFREU'). The error concerned relates to the misidentification of the domestic law provision under which the review was being conducted. It did not involve the misapplication or non-application of any provision of the Citizens' Rights Directive. No authority has been identified for the proposition that the right to good administration under Art. 41 of the CFREU requires a decision to be quashed, rather than corrected or explained, where it contains an inadvertent misstatement on its face of the legislative basis upon which it has been considered.

Conclusion

46. The application for judicial review is refused.