Neutral Citation Number: [2010] IEHC 153

THE HIGH COURT

JUDICIAL REVIEW

2009 392 JR

BETWEEN

OLALEKAN OLUWAGBEMINIYI SHYLLON

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Herbert delivered on the 28th day of April 2010.

The following facts were agreed in the course of this application.

The applicant is not a national of any Member State of the European Union. He entered this Member State of the European Union on the 26th August, 2000. An application by him for asylum in this State was refused. A Deportation Order was made in respect of him on the 3rd June, 2005. On the 26th July, 2005, he married, in this State, a United Kingdom national then residing and employed here in exercise of her Treaty rights as a Union Citizen.

On the 22nd February, 2006, the applicant was granted a one year Residence Card on the basis of his marriage to this Union Citizen in employment in the State. It is stated that unhappy differences subsequently arose between the applicant and his spouse. He states that he has had no contact with her since February 2007. On the 19th October, 2007, the applicant sought retention of the right of residence in this State on an individual and permanent basis.

By a letter dated the 3rd June, 2008, admitted into evidence, the applicant was advised by the respondent that his application was refused and that it was intended to issue notification that the respondent proposed to make a Deportation Order in respect of him. This notification took the form of a letter dated 13th June, 2008, sent by registered post to the applicant and by ordinary pre-paid post to his solicitors. This letter, admitted into evidence, advised the applicant that under the provisions of s. 3(4) of the Immigration Act 1999, (as amended), he had to choose one of three options:

> Leave the State voluntarily,
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> Consent to the making of a Deportation Order or,
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> Apply for Subsidiary Protection or make representations to remain temporarily in the State, -
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> And respond in 15 working days, failing which a Deportation Order would be made in respect of him.

By a letter dated the 21st July, 2008, admitted into evidence the solicitors for the applicant responded as follows:-

> "Mr. Shyllon is married to a UK National and has been granted residency in the State on a previous occasion based upon his entitlements under EU Treaty Law.
>
> We submit that he retains this entitlement to residency in a personal capacity under EU Law. We have been instructed to issue Judicial Review proceedings in connection with a recent refusal of his present permission to remain in the State.
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> Under these circumstances and because the Minister for Justice, Equality and Law Reform is named in those proceedings we believe that we reserve the right to make further submissions at a later date."

This letter was acknowledged on the 30th July, 2008. By a letter dated the 21st October, 2008, admitted into evidence, the EU Treaty Rights Section of the Irish Naturalisation and Immigration Section of the Department of Justice, Equality and Law Reform wrote to the solicitors for the applicant in the following terms:-

> "Dear Sir/Madam,
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> I am directed by the Minister for Justice, Equality and Law Reform to refer to your above named client. As your client is separated from his EU national spouse in order for him to renew his permission to remain (Stamp 4 based on his marriage to an EU citizen) one of the qualifying criteria is that he must have started legal divorce proceedings or must be already legally divorced from his spouse, provided that prior to the initiation of divorce or annulment proceedings the marriage lasted at least three years including one in this State.
>
> Our decision letter of 03 June 2008 stands as your client no longer resides with his EU national spouse who is no longer exercising her EU Treaty Rights within the State and divorce or annulment proceedings have not been initiated. All further correspondence in relation to this matter should be addressed to: The Repatriation Unit, Irish Naturalisation and Immigration Service, Department of Justice, Equality and Law Reform, 13/14 Burgh Quay, Dublin 2.

Please find your client's Nigerian passport enclosed."

A letter in response from the solicitors for the applicant, dated the 20th January, 2009, admitted into evidence, refers to the first paragraph of the above letter of the 21st October, 2008 and then states as follows:-

> "We refer to our above named client and to your letter of the 21st October, 2008, refusing to review the decision of 3rd June 2008, whereby the Minister refused our client's application for renewal of his permission to reside in the State on the basis of marriage to an EU national.
>
> It is stated in your letter of the 21st October 2008 that: (cites the first paragraph of that letter).
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> Our client married Ms. Olufunke Omotola Oshibami, a British national, on the 26th July 2005 in Cork. Our client subsequently made an application for residency in the State on the basis of marriage to an EU national on or about 27th July 2005. Our client was granted one year's residency pursuant to Regulation 1612/68 by decision dated 22nd February, 2006. Unfortunately unhappy differences arose in the marriage between our client and his wife, which was notified to the Department by letter dated 19th October 2007 along with an application for renewal of our client's permission to reside the State on a personal basis. As noted above, the Department refused that application on 3rd June 2008 on the basis of failure to furnish EU spouse's passport or ID, failure of the EU national to sign the EU 1 form, and lack of evidence of EU national exercising Treaty rights.
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> Our client is at present unable to institute divorce proceedings against his wife, who has deserted him, as it is a requirement pursuant to s. 5 of the Family Law (Divorce) Act 1996, that spouses must live apart for four of the previous five years prior to the institution of divorce proceedings. As unhappy differences arose in our client's marriage in 2007, our client is not entitled as a matter of Irish law to institute divorce proceedings until 2011 at the earliest. Our client further instructs us that he is not currently aware of his wife's whereabouts although he believes she may have returned to the United Kingdom. Our client further instructs that there are no grounds upon which he can seek an annulment of his marriage, which was a valid and subsisting marriage up to the time of the desertion of his wife.
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> At the present time it is therefore impossible for our client to satisfy the Department's requirement referred to in the letter of the 21st October 2008 that 'he must have started legal divorce proceedings or must be already legally divorced from his spouse'.
>
> We therefore call upon the Department to review its refusal to renew our client's application for residency in the State on the basis that the letter of 21st October 2008 imposes a condition which it is impossible for our client to fulfil. Failure to indicate a willingness to review this refusal within a period of 21 days from today's date will lead to the institution of judicial review proceedings, in which case this letter will be used to fix you with the costs of the application."

No reply to this letter was received from the respondent or the Department of Justice, Equality and Law Reform. On the 27th August, 2009, a Motion on Notice was issued, seeking, *inter alia,* an Order of *Certiorari* by way of judicial review quashing the decision of the respondent dated the 21st October, 2008, to refuse to renew the applicant's residence card in accordance with EU Directive 2004/38/EC of the 29th 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.

It is submitted on behalf of the respondent that it is not open to the applicant to question by way of judicial review, the decision of the respondent to refuse the applicant's request for retention of a right of residence in this Member State of the European Union, as the application was not made within the permitted period. It was accepted by both parties to this application, that the decision sought to be impugned does not fall within the provisions of s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000. The time within which the application may be brought must therefore be determined by reference to the provisions of O.84, r. 21(a) of the Rules of the Superior Courts. This rule mandates that any application for leave to apply for judicial review shall be made promptly and in any event within six weeks from the date when grounds for the application first arose, where the relief sought is *certiorari*, unless this Court considers that there is good and sufficient reason for extending that period.

I find that the date when grounds (if any) for the present application first arose, was the date when the letter of the 3rd June, 2008, was delivered to the applicant in the ordinary course of post. It will be recalled that a copy of this letter of the 3rd June, 2008, was also sent to the applicant's solicitors who continue to represent him in this application. This letter communicated a decision of the respondent capable of being quashed.

At paragraph 14 of his grounding affidavit sworn on the 15th April, 2009, the applicant admits that this letter dated the 3rd June, 2008, was received by him but does not state when. The 3rd June, 2008, fell on a Tuesday. In the ordinary course of post, a letter posted in Dublin on the 3rd June, 2008, must be presumed to have been delivered in Crosshaven, Co. Cork, on Friday 6th June, 2008, there being nothing to suggest the contrary. The refusal of the applicant's request communicated by this letter is clear and unambiguous and, it is not suggested that the applicant was mislead by or was unable to understand the contents of this letter. I am unable to accede to the submission of Ms. Brazil, counsel for the applicant, that the refusal of the respondent of the applicant's request was by means of the letter dated the 21st October, 2008. The first sentence of the second paragraph of that letter of 21st October, 2008, commences significantly with the words: "Our decision letter of 03 June 2008 stands . . . ."

The Motion on Notice seeking leave to issue judicial review proceedings was issued on the 1st April, 2009. One of the reliefs sought is an Order of *Mandamus* requiring the respondent to reconsider in accordance with law, the applicant's application for renewal of his residence card pursuant to Directive 2004/38/EC. I am satisfied that this should properly be regarded as a form of consequential relief only, so that the appropriate minimum permitted time for seeking judicial review in this instance was six calendar months (O. 122, r. 1 of the Rules of the Superior Courts) from 6th June, 2008. This application was therefore made 3 months and 25 days outside the maximum period allowed by O. 84, r. 21(1) of the Rules of the Superior Courts. However, the Supreme Court and this Court have repeatedly emphasised that the single most important obligation on the part of an applicant seeking relief by way of judicial review is

to act "promptly". In this case I find that the applicant did not so act.

No evidence on affidavit has been placed before the Court seeking to explain and excuse this delay, either by reference to circumstances relating to the applicant himself or to circumstances which arose in the course of the legal process. As was pointed out by Hedigan J. in *J.A. v. Refugee Appeals Tribunal and Ors.* (Unreported, High Court, 18th December, 2008), at para. 13 of the judgment, in the absence of an affidavit by the applicant dealing specifically with the matter the court will not admit a proffered explanation for delay based upon alleged inefficiency or incompetence on the part of his legal representatives. In any event, no such explanation was proffered by the applicant in the instant case.

In *G.K. v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 81, Finnegan P. (as he then was) indicated other matters to which the Court should have regard in considering whether there was good and sufficient reason for extending the period within which the application could be made. This decision was considered by the Supreme Court in *C.S. and B.S. and N.K. v. The Minister for Justice, Equality and Law Reform and Attorney General* [2005] 1 I.R. 343, per McGuinness J.

In the present application there is no evidence that the applicant showed reasonable diligence in seeking access to the court. Not only was the application not made promptly, it was made 3 months and 28 days outside the maximum permitted period of 6 months. At all material times the applicant had the advice and services of his present solicitors. The basis of his application to the respondent, through the solicitors, as appears from the admitted correspondence was straightforward and did not involve complex facts or law. There is no evidence whatsoever of language difficulties being an issue in this case.

In *G.K. v. The Minister for Justice, Equality and Law Reform and Ors* [2002] 2 I.R. 419 Hardiman J. delivering the judgment for the Supreme Court held as follows, p. 423:-

> "I believe that the use of the phrase 'good and sufficient reason for extending the period' still more clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in the particular circumstances. The statute does not say that the time may be extended if there were 'good and sufficient reason for the failure to make the application within the period of fourteen days' [provided by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000]. A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits. The phrase used 'good and sufficient reason for extending the period' does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case.
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> On the hearing of an application such as this it is, of course, impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

I am not satisfied that the applicant in this application has demonstrated that he has an arguable or *prima facie* case.

The European Communities (Free Movement of Persons) (No. 2) Regulations 2006, (S.I. No. 656/2006), which came into operation on the 1st January, 2007, gives effect to Directive 2004/38/EC. In seeking to retain a right of residence in this Member State on an individual and personal basis the applicant seeks to rely on the provisions of Article 13(2) of the Directive and para. 2(a) of Regulation 10 which provides that:-

> "Subject to subparagraph (B) a Family Member of a Union Citizen who is not a national of a Member State may retain a right of residence in the State on an individual and personal basis in the event of the Union Citizen's divorce or annulment of his or her marriage."

As the application was determined by the respondent in the present case on the 3rd June, 2008, the provisions of EC (Free Movement of Persons) (Amendment Regulations) 2008, (S.I. 310/2008) do not apply in this instance.

As the spouse of a Union Citizen, the applicant is undoubtedly a "qualifying Family Member". The facts admitted or agreed demonstrate that the Union Citizen and the applicant, though separated and living apart, are not divorced and there has been no annulment of their marriage.

In the case of *Aissatou Diatta v. Land Berlin* Case 267/83 [1985] 2 E.C.R. 567, the European Court of Justice held that a marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses lived separately even where they intend to divorce at a later date. In that case the applicant was a Senegalese national married to a French national who resided and worked lawfully in what was then West Berlin. Shortly after their marriage she joined her husband in Berlin. She obtained a Residence Permit on the 13th March, 1978, which was valid until the 16th July, 1980. In August 1978 she and her husband separated and she intended to obtain a divorce. She rented accommodation for herself and resided there. Her application for renewal of her Residence Permit was refused on the ground that she and her husband no longer lived together. The European Court of Justice held that Regulation 10 of Regulation (EEC) No. 1612/68 of Council of 15th October, 1968, did not require that the spouse must live permanently with the worker under the same roof.

While the provisions of Article 10 of the Regulation (EEC) No. 1612/68 are not in the same terms as Regulation 6 of the EEC (Free Movement of Persons) (No. 2) Regulations 2006, in my judgment the finding of the European Court of Justice, regarding the continuation of the marital relationship, even if *obiter*, would apply equally to the proper interpretation of the 2006 Regulations.

The applicant, on the facts admitted or established by the affidavit evidence manifestly cannot bring himself within the provisions of Regulation 10(2)(b). Therefore he has no right to seek a residence permit on an individual and personal basis on foot of this provision. Section 5 of the Family Law (Divorce) Act 1966, which provides, *inter alia,* that the Court must be satisfied that on the date of the institution of the proceedings for a divorce decree the spouses had lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years, is part of the General Law of this State. It is not, as claimed by the applicant, an unreasonable condition imposed by the respondent making it impossible for him to renew his residency permit. The applicant has no right whatsoever to retain any right of residence in this Member State unless he can bring himself within one of the provisions of S.I. 656/2006. This, on the evidence before this Court at the hearing of this application he is unable to do.

The applicant has not pointed to any express provision in either Domestic Law or European Law enabling the separated non-national spouse of a Union Citizen, which Union Citizen no longer resides in and is employed or is self employed in the host Member State, to retain a right to reside in that host Member State until such time as a Decree of Divorce or a Nullity may be obtained. Statutory Instrument 656/2006 (as amended by S.I. 310/2008), makes express residence provision for Union Citizens and non-national family members of a Union Citizen lawfully residing and exercising Treaty rights in this Member State. This Regulation also makes express residence provision for a Union Citizen and non-national family members of a Union Citizen who was lawfully residing and exercising Treaty rights in this Member State, but who is dead, or has left this State leaving children residing here and enrolled in an educational establishment here and in the actual custody of the parent remaining in this Member State, or has terminated the family membership by a decree of nullity or a decree of divorce obtained from a competent authority or, has reached pensionable age, or has taken early retirement or, is incapacitated from work due to an accident at work or an occupational illness. The purported rights contended for by the applicant, which would have the effect of transforming a consequential right into a personal right and, would involve a very material interference with the sovereign right of this Member State to control its own borders, could only, in my judgment be created by a clear and express legislative provisions and, could not arise by way of inference or by implication.

In these circumstances the court does not consider that there is good and sufficient reason for extending the period allowed for seeking leave to apply for judicial review and the court will dismiss the application accordingly.