Neutral Citation: [2014] IEHC 143

THE HIGH COURT

JUDICIAL REVIEW

[No. 2012/839/J.R.]

BETWEEN

M. Y.

AND

R. Y. AND N. Y. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M. Y.) AND Z. Y. (A MINOR SUING B HIS FATHER AND NEXT FRIEND M. Y.) AND F. Y. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M. Y.)

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

-AND-

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

NOTICE PARTY

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 20th day of March 2014

1. This is an application for judicial review seeking, *inter alia*, a declaration that the first and second named applicant's residency in the State from the 13th February 2004 to 30th June 2005 is reckonable within the meaning of section 6A of the Irish Nationality and Citizenship Acts 1956 to 2004. Leave to seek judicial review was granted by Clark J. on 26th November 2012. When the matter came on for hearing it was agreed that a preliminary issue should be addressed which, depending on its outcome, might dispose of the action. The question posed to the court by the parties is in the following terms: "Was the Minister correct in discounting the period of 13th February 2004 (the date the Immigration Act 2004 Act came into effect) to 30th June 2005 (the date of birth of the twin children) in his computation of reckonable residence under the Irish Nationality and Citizenship Act 1956 (as amended)."

Background:
2. The first and second named applicants in this case are a married couple from Pakistan who are currently residing in the State with their three children. The third named applicant is an Irish citizen born on 5th May 2002 and is a son of the first and second named applicants. The fourth and fifth named applicants are twins born in the State to the first and second named applicants on 30th June 2005. This case arises from an application on behalf of the twins for Irish passports which was rejected by the Minister for Foreign Affairs and Trade because the parents lacked the required period of residence prior to birth being three out of the previous four years (or 1095 days).

Residence History:
3. The first named applicant arrived in the State on 27th August 2001 on a student visa which was valid from 26th June – 25th September 2001. This period was later extended to 1st July 2002. His wife, the second named applicant, arrived in the State without a visa in April 2002. Their first child was born in the State as an Irish citizen on 5th May 2002. The first and second named applicants state that they made an application for residency in 2002, however no response appears to have been received from the relevant authority and no copies of the application are available. In any event, following correspondence with the Department of Justice the first and second named applicants applied for permission to remain in the State by virtue of their parentage of an Irish born child. Permission to remain in the State was duly granted to the first and second named applicants on 19th July 2005 pursuant to the 'IBC/05 scheme' to last until 19th July 2007. The fourth and fifth named applicant twins were born on the 30th June 2005. The first and second named applicants' visas with permission to remain were later renewed and extended to the 19th July 2010 and were once again renewed and extended to 19th July 2013.

4. On or about the 26th January 2009, application was made for Irish passports on behalf of the fourth and fifth named applicants. These applications were refused by the Department of Foreign Affairs on the basis that the first named applicant did not have the necessary stamps on his passport to indicate sufficient reckonable residence for the purposes of the Irish Nationality and Citizenship Act 1956 as amended. Following correspondence between the applicants' solicitors and the relevant authorities, this position was clarified to indicate that the applicants lacked sufficient reckonable residence owing to the commencement of the Immigration Act 2004. The crux of the issue in this case is the denial by the respondent that the first and second named applicants have accrued reckonable residence for the purposes of s. 6A(1) of the Irish Nationality and Citizenship Act 1956 (as amended) between the 13th February 2004 and 30th June 2005 on the basis that they did not have permission to be in the State during the said period in contravention of s. 5 of the Immigration Act 2004 which rendered that period not reckonable pursuant to s. 6B(4) of the Irish Nationality and Citizenship Act 1956.

Relevant Statutory Provisions:
5. At this juncture, it is useful to set out the relevant statutory provisions which are referenced throughout this judgment:

> s. 6A(1) of the Irish Nationality and Citizenship Act 1956 (as amended):
>
> "6A.—(1) A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a

period of not less than 3 years or periods the aggregate of which is not less than 3 years."

s. 6B(4) of the Irish Nationality and Citizenship Act 1956 (as amended):

"6B(4) A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if—

(a) it is in contravention of section 5(1) of the Act of 2004…"

Immigration Act 2004:

"5.—(1) 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.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State."

Applicants' Submissions:

6. Counsel draws attention to a letter from the respondent of 21st November 2012, which states: "For the avoidance of doubt, our Clients accept that the First and Second Named Applicants could not have had permission to remain in the State under the Immigration Act 2004 prior to the 13th February 2004 and therefore for the purposes of these proceedings, that that period should have been included in the period of reckonable residence" and submits that it flows from this that reckonable residence can exist without formal or written permission at all, so long as it is not in contravention of the Immigration Act 2004.

7. Further the applicants claim that the respondent has incorrectly interpreted s. 5(2) of the Immigration Act 2004 insofar as it is submitted that a person is not "in contravention" of that Act upon the passing of the Act but rather is in contravention of the Act if they did not have some permission predating the Act, such permission to be carried over by the Act and which is deemed to be a permission within the meaning of s. 5(1) of the Act. It is submitted that the Immigration Act 2004 looks backward to residence prior to its commencement to determine the question of its 'contravention' and that it does not determine its contravention from the date of the passing of the Act. Therefore, it is contended that a person who has any sort of permission prior to the commencement of the Immigration Act 2004 is entitled to a continuation of that permission after the commencement of that Act and further that the respondent has acknowledged the first and second named applicants have a pre-commencement reckonable residence.

8. It is submitted that by acknowledging that the first and second named applicants have reckonable residence prior to the passing of the Immigration Act 2004, as a matter of law this can only be because they had a "permission given to him or her before the passing of this Act" as without such a permission they would be in contravention of the Act notwithstanding that the Act had not been passed at the relevant time. The effect of the Immigration Act 2004, it is asserted, it to look backward in relation to old permissions and redefine those existing permissions as being either lawful or unlawful under the Act. As such, the applicant submits that the period of reckonable residence that is allowed for by the respondent between 1st July 2002 and the commencement of the Immigration Act 2004 is a type of permission which has not yet been formalised as to when it may expire (as there was an ongoing decision making process on residency where no proposal to deport had been made) but it causes the period of residence to be reckonable. In the view of the applicant, because the first and second named applicants were acknowledged to have been reckonably resident prior to the passing of the Immigration Act 2004, this must continue after the passing of the Act.

9. It is also contended on behalf of the applicants that the period of residence which has been acknowledged to be reckonable (prior to 13th February 2004) is reckonable because residence, unaccompanied by a specific permission to reside but pending the outcome of an application for residence on foot of citizenship of a child and in the absence of a proposal to deport, was "residence" within the meaning of s. 6A(1) of the 1956 Act as amended. Counsel states that this being the case for periods prior to the enactment of the Immigration Act 2004 must continue for periods after it by reference to the provisions of s. 5. Further, it is submitted that the only conceptually sound solution to the exclusion of residence in contravention of the Immigration Act 2004 but the inclusion of periods of residence which existed prior to the passing of that Act is to hold that a permission that was interim (in the sense that a final determination of rights in relation to their Irish born child was awaited), continues as a 'permission' after the commencement of the 2004 Act and is not in contravention of that Act.

10. The applicants in their submissions use various examples to demonstrate the practical effect of the approach taken by the respondent in its interpretation of the period of reckonable residence. In this regard, counsel posits the hypothetical scenario of a child born between 1st January 2005 and 13th February 2005 who had a parent who had resided unlawfully in the State for four years. The applicant contends that if it was in fact impossible to be in contravention of the Immigration Act 2004 prior to 13th February 2004 then it would mean that when the changes to the Irish Nationality and Citizenship Act 1956 were brought into effect on 1st January 2005, that parent would meet the criteria of s. 6A and s. 6B on the basis of three years unlawful pre-Immigration Act 2004 residence. The applicant states that this is clearly contrary to the intention of the Oireachtas in enacting both pieces of legislation and that the appropriate approach would be to consider unlawful residence prior to the Immigration Act 2004 to be in contravention of s. 5 owing to the absence of "any permission given to him or her before the passing of this Act."

11. In this regard, the applicant claims that a clear indication that the first named applicant was not unlawfully in the State either before or after the passing of the Immigration Act 2004 is that the respondent never proposed to deport him or requested him to leave the State pending a decision being made in his case. Counsel for the applicant refers to an averment in the affidavit of Michael Flynn, a civil servant in the Department of Justice and Equality, in support of this view, where it is stated that the policy of the respondent post the decision of the Supreme Court in *L. and O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 was to consider the rights of the parents of an Irish citizen child (in relation to an application for residency) in the context of their proposed deportation. As the respondent eventually granted the rights of residency the subject matter of the application, counsel claims that the first named applicant must have been resident for the purposes of processing that application and should only have become illegal in the State if that decision proved negative.

12. Further in this regard, the applicants state that the jurisdiction to grant a permission to reside in the State which is based on the possibility of a future right to reside, exists in Irish law. The applicants point to the provisions of Reg. 7(3) of S.I. 656/2006 EC (Free Movement of Persons) Regulations 2006 and s. 9 of the Refugee Act 1996. Counsel notes that s.9 of the Refugee Act 1996 is expressly excluded for the purposes of 'reckonable residence' while Reg. 7(3) is not. It is submitted that both examples ground the principle that a person can be lawfully resident in the State pending a positive decision on their immigration status.

Respondent's submissions:
13. Counsel concedes that the first named respondent and the notice party have accepted that they erred in initially treating the period prior to the commencement of the Immigration Act 2004 on 13th February 2004 as not being reckonable. However, the respondent maintains that the first and second named applicants do not have reckonable residence during the period from 13th February 2004 to 30th June 2005, when the fourth and fifth named applicants were born. As such, the first and second named applicants did not have sufficient reckonable residence of three out of the previous four years preceding the birth of the fourth and fifth named applicants who were accordingly not entitled to be granted an Irish passport.

14. The respondent is of the view that the applicants are confusing the factual issue of whether or not a person had a permission prior to the entry into force of the Immigration Act 2004 with the legal issue of whether a person who did not have such a permission prior to that date could be said to have contravened the Act before it entered into force. It is stated that a person cannot contravene a statutory provision before it enters into effect and as such counsel points out that whether a person had a permission granted prior to 13th February 2004, he or she could not have contravened the 2004 Act prior to that date. However, it is asserted that from 13th February 2004 onwards, if a non-national did not have a permission either granted prior to that date (continuing in force) or granted after that date under the new Act, he or she would thereafter contravene s. 5(1) of the Act. As such, the respondent is of the view that the fact that the statutory declaration of unlawful presence could only take effect when the Act came into force does not alter history so as to confer a back-dated permission on persons who had no permission to be in the State prior to the entry into force of that Act.

15. Counsel submits that the applicants are in error in their view that simply because the respondent has found the period prior to 13th February 2004 to be reckonable, that the first and second named applicants should be considered to have had permission to be in the State prior to that date and that these notional permissions must be considered to have continued to exist after that date. On the contrary, the respondent states that the plain effect of s. 5(1) of the Immigration Act 2004 was to declare henceforth unlawful all periods of residence by non-nationals in respect of which they did not have either a permission already granted before the Act came into force or a new permission under the Act granted after it came into force. In the respondent's view there is no basis for any interpretation of the section which serves to legitimise periods prior to the commencement of the Act in respect of which a non-national did not have a permission to be in the State. Further the respondent believes the applicants err in maintaining that the Act continued the effect of these notional retrospective permissions after it came into force and essentially that s. 5(1) in fact had a result the direct opposite of the clear statutory intention.

16. The respondent asserts that the Minister has not in any way acknowledged or accepted that the first named applicant had a permission during the period from 2nd July 2002 to the 13th February 2004. Rather, it is noted that it is a matter of fact that the first named applicant did not have a permission to be in the State during this period. However, the respondent states that the first named applicant was not in contravention of s. 5(1) of the Immigration Act 2004 during this period as it had not entered into effect. As s. 6B(4) of the 1956 Act only discounts periods of residence which breach s. 5(1) of the Immigration Act 2004, it is only the period after the 13th February 2004 that is not reckonable. At hearing the respondent noted that the position of the Minister in this regard was taken following advices provided by counsel and in light of the decision of Cooke J. in *AN.O v. Minister for Justice, Equality and Law Reform* [2009] IEHC 448.

17. Counsel also addresses the contention made by the applicants that they had a permission to reside in the State while their longer term application was pending. In this regard, the respondent accepts that such a permission can exist in principle, however the statutory provisions mentioned by the applicant (Reg. 7(3) of S.I. 656/2006 EC (Free Movement of Persons) Regulations 2006 and s. 9 Refugee Act 1996) are not germane to the present case. It is the respondent's view that a person is not "lawfully" present in the State pending a decision whether or not to grant permission unless statute expressly provides for this. In this regard, the respondent submits that the provisions referred to by the applicants relate to specific cases where statute requires this effect for different, but readily discernable reasons. As such, while the respondent could have granted the applicant permission to remain in the State prior to the 19th July 2005, he did not. The failure of the respondent to issue a proposal to deport thereafter is not the equivalent of granting a permission to be in the State, it is submitted. As a result, the respondent affirms that the first and second named applicants did not have permission to be in the State and were not lawfully in the State. Counsel notes that the first and second named applicants were in a similar position to many non-national parents of citizen children and that the respondent ultimately brought in the IBC/05 scheme as a policy decision to deal with the situation and not as an acknowledgement of any legal right to reside in the State. In the respondent's view the fact that an application has been made for a permission does not confer a temporary or interim permission to remain on the applicant.

Findings:
18. I am persuaded by the force of the respondent's arguments. In my view I would be turning my face from the plain meaning of the statutory provisions if I were to uphold the applicant's arguments. Section 5(1) of the Act of 2004 cannot be interpreted as meaning that persons who had no permission to be in the State prior to the commencement of the provision should or could be regarded as having some form of ersatz permission to be in the State. I agree that residence in the State (not governed by an historic permission or by a new permission) by non nationals prior to the commencement of the provision is to be regraded as unlawful on or after the commencement date. Such periods of residence are nonetheless reckonable for the purposes of section 6A(1) of the 1956 Act. There is no basis for any interpretation of the sections of either of the Acts which legitimises periods of residence prior to the commencement of the Act of 2004 in respect of which a non-national did not have permission to be in the State.

19. The applicants' case rests on the proposition that their unregulated presence in the State could not have been in breach of the 2004 Act and therefore the Minister is not entitiled to discount periods related to unregulated presence. The weakness in this argument is that though it could not have been a breach of the 2004 Act to have been in the State without permission prior to the commencement of the Act, from the date of its commencement, presence in the State without historic or new permission was unlawful and any period thereafter is non reckonable for the purposes of calculating the three year period required under section 6 of the 1956 Act.

20. The force of the respondent's position is underscroed by their acceptance that the period of the First and Second Named Applicants' unregulated residence in Ireland prior to the 13th February 2004 was not capable of contravening the Immigration Act 2004 and these periods are therefore reckonable under section 6A(1) of the Irish Nationality and Citizenship Act 1956. I reject the argument which suggests that this pre-February 2004 period must be viewed as somehow acquiring a cloak of legality and that the implied legality attaching to such presence in the State continued or carried over after the commencement of the Act.

21. Presence in the State without permission prior to 13th February 2004 is reckonable for the purposes of Section 6A(1) of the 1956 Act. This is so not because of a forgiving attitude by the State towards such unregulated residence or presence but because it is only presence or residence in breach of section 5 of the Immigration Act that may not be counted and clearly the pre-commencement circumstances of the first and second named applicants could not breach a statute not yet enacted and therefore the Minister would

have no legal basis not to count that period, its unregulated nature notwithstanding.

22. Recalling that the agreed question to be decided as a preliminary issue asked if the Minister was correct in discounting the particular period in computing reckonable residence, the answer is "Yes". I will hear the parties as to what should now happen to the proceedings.