THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 205 J.R.]

BETWEEN

KELECHI CHRISTINA UKA

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL,

AND THE MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 13th October 2017 2017

Introduction

1. By order made on the 11th April 2016, Faherty J granted leave to the applicant to apply by way of judicial review for an order of *certiorari* quashing the decision of the Minister for Justice and Equality ('the Minister'), dated 22 January 2016, that the applicant has no right to permanent residence in the State under Article 16(2) of Directive 2004/38/EC 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 Directive').

2. No leave was granted to seek any relief against the fourth respondent, the Minister for Social Protection, and I will order that the proceedings be struck out against that respondent on that basis

Background

3. The applicant is a Nigerian national. He avers that he entered the State in February 2003 – unlawfully, as the Minister contends - before applying for asylum in July 2004. That application was unsuccessful.

4. On 9 March 2005, the applicant married a Union citizen (a Polish national) who was then working and residing in the State, having taken up employment here on 21 August 2004. The applicant avers that he began residing with the person concerned on 24 July 2004 although in his written legal submissions he asserts that they commenced residing together in June 2004.

5. On 19 January 2006, the Minister granted the applicant permission to reside in the State for five years as the spouse of a Union citizen exercising EU Treaty rights in the State under Article 10 of EEC Regulation 1612/68.

6. The applicant avers that his spouse left the State on 7 July 2009, although elsewhere he has variously stated that she left on 29 July 2009 and in August 2009. The applicant further avers that, by a remarkable coincidence, his spouse had entered the State on 7 July 2004, exactly five years prior to the most likely date of her departure from it, in order to seek employment and that she had commenced employment on 16 August 2004. In his grounding affidavit, the applicant goes on to aver that his spouse was 'to come back in 2012' and was 'visiting Ireland regularly after her departure' but there is no evidence before the Court that she ever returned to reside here.

7. The applicant avers that he and his spouse separated in February 2009, although nothing turns on that for the purpose of the present application, since a period during which a third country national ('TCN') has resided in a Member State as the spouse of a Union citizen working in that Member State, even after the parties have separated and, indeed, commenced living with other partners, must be included in the calculation of whether that TCN has legally resided with that Union citizen in the host Member State for a continuous period of five years for the purpose of Article 16(2) of the Citzens Directive; Case C-244/13 *Ogieriakhi v Minister for Justice* [2014] ECR I-2068.

8. In or about January 2011, in the context of the applicant's attempts to renew the five year residence permission that had been granted to him in January 2006, it became evident that his Union citizen spouse had departed from the State. Through the appropriate official, the Minister wrote to the applicant on 7 February 2011 informing him that, in light of that discovery, it was proposed to revoke the applicant's permission to reside in the State.

9. Having considered the applicant's submissions on that proposal, the Minister wrote to the applicant again on 17 October 2011, noting that he had previously been granted permission to remain in the State on the basis of his marriage to a Union citizen who was then exercising Treaty rights, and further noting that the Union citizen concerned was no longer resident in the State, having departed from it in July 2009, before concluding that the applicant had no further or other entitlement to remain in the State. Accordingly, the Minister's proposal of the same date to make a deportation order in respect of the applicant was enclosed with that letter.

10. On 7 November 2011, a firm of solicitors wrote to the Minister on behalf of the applicant making representations against his deportation, in which they acknowledged that his Union citizen spouse had left the State in July 2009.

11. On 29 August 2012, the applicant wrote to the Minister to inform him of the birth of a daughter on 11 January 2012 through another relationship. In that letter the applicant alleged that, despite his Union citizen spouses 'claim' to have left the State, she had returned regularly and, indeed, had given birth to a son here in 2012 who might be his child.

12. Nothing further happened until, on 7 May 2014, another firm of solicitors wrote to the Minister on the applicant's behalf, asserting his entitlement to permanent residence in the State under the Citizens Directive. The Minister replied, by letter dated 22 May 2014, rejecting that claim. However, by letter dated 13 June 2014, the Minister informed the applicant that he had been granted permission to remain within the State subject to conditions for a period of three years.

13. On 19 October 2015, the applicant submitted a 'Form EU 5' to the relevant unit within the Minister's department. That form is the one stipulated for a TCN family member who seeks to continue to reside in the State in, amongst other circumstances, the aftermath of the departure of a Union citizen from the State. That circumstance is provided for under Article 12(3) of the Citizens Directive, and the requirements of that provision are transposed into the domestic law of the State by Regulation 9(3) of the European Communities (Free Movement of Persons) Regulations 2006, as amended by the European Communities (Free Movember of Persons) Regulations 2008 ('the 2006 Regulations'). It is difficult to see on what basis under those provisions the applicant could have qualified for the retention of a right to reside in the State after his Union citizen spouse's departure from it.

14. However, in the accompanying cover letter of the same date, the applicant confirmed that he was applying for recognition of a permanent right of residence in the State, pursuant to the terms of Article 16(2) of the Citizens Directive. The applicant cited two decisions of the Court of Justice of the European Union ('CJEU') in support of his position: first, Case C-162/09 *Secretary of State for Work and Pension v Lassal* [2010] ECR I-9217; and second, Case C-244/13 *Ogierakhi v Minister for Justice* [2014] ECR I-2068, submitting, in particular, that his 'factual situation in law' was identical to that of Mr Ogierakhi, the plaintiff in the second case.

15. The Minister replied by letter dated 22 January 2016 setting out his position. In short, it is that the applicant's right of residence as the family member of a Union citizen under Article 7(2) of the Citizens Directive, as transposed by Regulation 6 of the 2006 Regulations, had ceased when his Union citizen spouse left the State in July 2009. The unstated but unavoidable implication of this position is that the Minister did not accept that the applicant could qualify as a TCN family member who had legally resided in the State with a Union citizen exercising free movement rights for a continuous period of five years. And that is the determination now under challenge.

The law
16. Chapter IV of the Citizens Directive concerns the right of permanent residence in a Member State. Section 1 of that Chapter addresses eligibility for that status. The text of Article 16, which is included in that section, is headed 'General rule for Union citizens and their family members.' It states:

> '1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
>
> 4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

17. In *Lassal*, already cited, the CJEU held that continuous periods of five year's residence completed before the date of transposition of the Citzens Directive, in accordance with earlier European Union law instruments, must be taken into account for the purposes of the acquisition of the right of permanent residence pursuant to Article 16(1).

18. In *Ogieriakhi*, already cited, the CJEU found, as has already been noted, that a TCN who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that TCN was no longer provided or made available by his or her spouse with Union citizenship.

The arguments
19. The fundamental difficulty that the applicant faces in claiming a right to permanent residence in the State under Article 16 of the Citizens Directive is that, according to the best evidence available to the Minister at the material time and to the Court now, his Union citizen spouse did not become a worker in the State until 21 August 2004, his marriage to her did not occur until 9 March 2005, and she left the State on 7 July 2009.

20. Thus, it would appear that, for the purposes of Article 16(1) of the Citizens Directive, the applicant's Union citizen spouse fell over a month short of residing legally in the State for a continuous period of five years between taking up employment on 21 August 2004 and leaving the State on 7 July 2009.

21. Moreover, it would appear that, for the purposes of Article 16(2) of the Citizens Directive, the applicant fell almost four months short of residing legally with his Union Citizen spouse in the State for five continuous years between when she became his spouse on 9 March 2005 and when she left the State on 7 July 2009.

22. The applicant relies on a number of arguments to suggest that a different calculation should apply in relation to each of these periods.

23. First, the applicant baldly asserts that his 'factual situation in law' was, and is, identical to that of Mr Ogierakhi, the plaintiff in Case C-244/13 *Ogierakhi v Minister for Justice* [2014] ECR I-2068. While it is, of course, correct to say that the legal principles identified in that case are equally applicable to this one, it is not correct to suggest that the facts of the two cases are the same. In *Ogierakhi,* the plaintiff married a Union citizen exercising free movement rights in the State in May 1999 and resided legally with her in the State (for the purposes of the Citizens Directive) until she departed from it in December 2004. That is a continuous period of more than five and a half years.

24. It must not be forgotten that, at paragraph 34 of its judgment in *Ogierakhi*, the CJEU observed:

> '[I]n considering Article 16(2) of [the Citizens Directive], the Court has held that the acquisition of a right of permanent residence by family members of a Union citizen who are [TCNs] is dependent, in any event, on the fact that, first, the Union citizen himself satisfies the conditions laid down in Article 16(1) of that directive and, secondly, those family members have resided with him for the period in question (*Alarape and Tijani*, EU:C:2013:290, paragraph 34).'

25. Second, the applicant asserts, although it has not been proved in evidence and was never submitted to the Minister prior to the decision now under challenge, that his Union citizen spouse entered the State in June 2004 to seek employment. The applicant points out that, in Case C-292/89 *R. v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745, the European Court of Justice ('ECJ') held (at para.16) that the effectiveness of Article 48 of the EEC Treaty, (now Article 45 of the Treaty on the Functioning of the European Union ('TFEU')) on the free movement of workers is secured by giving the persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, wherever appropriate, the necessary steps in order to be engaged. The ECJ found (at para. 21) that a period of six months is not insufficient for that purpose.

26. Of course, it is also true that, under Article 6 of the Citizens Directive, all Union citizens (and their family members) have the right of residence on the territory of another Member State for a period of up to three months without any conditions or formalities other than the requirement to hold a valid identity card or passport.

27. The applicant argues that, accordingly, the period between June 2004 (when he asserts, though has not proved) his Union citizen spouse entered the State and 21 August 2004, when she took up employment in the State, should be included for the purpose of the appropriate calculation, with the result that she should be considered to have continuously resided in the State for over five years between June 2004 and 7 July 2009.

28. I cannot accept that argument. In Case C-529/11 *Alarape and Tijani v Secretary of State for the Home Department*, already cited, the CJEU has made clear (at para. 37) that for the purposes of acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State under Article 16(2) of the Citizens Directive, only the periods of residence of those family members which satisfy the condition laid down in Article 7(2) of that directive may be taken into consideration.

29. Similarly, in Joined Cases C-424/10 and C-425/10 *Ziolkowski* EU:C:2011:866, the CJEU held (at para. 46) that the concept of legal residence implied by the terms 'have resided legally' in Article 16(1) of [the Citizens Directive] should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(2).

30. The relevant condition under Article 7(2) in this case is that the Union citizen concerned was (in accordance with Article 7(1)(a)) 'a worker in the host Member State'. Thus, the period that she spent in the State either as a person seeking to apprise herself in the State of offers of employment and taking the necessary steps to be engaged or as a person exercising her rights under Article 6(1) of the Citizens Directive is not reckonable in the calculation of whether she has resided legally for a continuous period of five years in the State.

31. Third, the applicant argues that, since under Article 16(2) of the Citizens Directive, continuity of residence is not affected 'by temporary absences not exceeding a total of six months a year', in some way the first six months after his Union citizen spouse's departure from the State should be treated as such a temporary absence and included in reckoning his period of continuous residence with her. I am quite satisfied that there is no basis for that submission in law or logic. Any absence from the State falls to be considered as what it is – either temporary, longer term or permanent. The first six months of a longer term or permanent absence from the State is not a temporary absence. Even if an absence from the State of greater than six months is not intended to be permanent (i.e. the Union citizen still hopes or intends to return to the State at some point in the future) the first six months of that period still could not sensibly be construed as *a temporary absence not exceeding a total of six months*.

32. The preponderance of the evidence before the Minister in January 2016 suggested that the applicant's Union citizen spouse had returned to Poland to reside there indefinitely. In Case C-218/14 *Singh & Ors v Minister for Justice and Equality* EU:C:2015:476, the CJEU made clear (at paras. 64-65) that where the Union citizen exercising free movement rights leaves the host Member State and settles in another Member State or in a third country, the TCN spouse of that Union citizen no longer meets the conditions for enjoying a right of residence in the host Member State under Article 7(2) of the Citizens Directive. Accordingly, this argument cannot succeed.

33. Finally, the applicant argues that, as a matter of fact, on one construction of certain print-outs from the records of the Department of Social Protection in respect of the applicant and his Union citizen spouse that have recently been exhibited on behalf of the Minister, it might be concluded that the applicant's Union citizen spouse had, in June 2011, a current address in the State and was then in continuing receipt of child benefit within the State. It is far from clear to me that the relevant records can be properly construed in that way but, even if they could, the applicant made no such case to the Minister prior to the decision under challenge and, thus, cannot now rely on that material to impugn that decision. If there is any substance to the suggestion that the applicant's EU citizen spouse was, in fact, still exercising free movement rights in the State in June 2011, such that she was continuously resident in the State for the purposes of Article 16 of the Citizens Directive between 21 August 2004 and June 2011, then, so far as I can see, the applicant is in no way precluded from making that case to the Minister, if he seriously wishes to do so. However, the relevant documents cannot form the basis for a challenge to the decision that the Minister made on 21 January 2016 at a time when those documents were not before the Minister and the applicant was making no such case.

Conclusion

34. For the reasons stated, the applicant has no entitlement to the relief claimed. These proceedings must be dismissed. I will hear the parties in relation to the appropriate consequential orders.