Neutral Citation Number: [2011] IEHC 29

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 1271 J.R.]

BETWEEN

EL MOKHTAR EL MENKARI AND SIMONE KRIVICKAITE

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 28th day of January 2011

1. In this case the applicants challenge as unlawful the refusal of the respondent Minister to issue the first named applicant with a Residence Card under the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ("the Regulations") and an order of *mandamus* compelling him to do so.

2. The first named applicant is a native of Morocco who arrived in the State as an asylum seeker in March 2005. The Court has not been furnished with any further information as to the subsequent success or otherwise of that application, but in July 2007, the first named applicant had the good fortune to meet and "start a relationship with" the second named applicant who is a native of Lithuania and who had come here to work. She has been in full time employment with the SuperValu supermarket chain in Blessington, Co. Wicklow since October 2007. On the 12th February 2009, the applicants married in Wicklow.

3. On the 2nd March 2009, an application was made to the respondent for the issue to the first named applicant of an EU Residence Card as the spouse of a resident and working EU citizen, the second named applicant. There was a subsequent exchange of correspondence in which the Department sought the submission of additional documentary proofs but on the 20th August 2009 the first named applicant was informed that the application was refused for the following reasons:-

> *"Letter dated 31/03/09 and signed by Kathleen Murtagh stating the El Mokhtar El Menkari is residing at Eyre Powell Hotel and has done so since the 15th December 2008. Couple got married on the 12th February 2009 and their address and future address are listed as 5 Westpark, Blessington, Co. Wicklow. All other evidence of residence refers to EU citizen residing at Belssington Orchard, Co. Wicklow. EU citizen has applied a letter stating that El Mokhtar El Menkari is residing with her at Blessington Orchard.*
>
> *This letter dated 05/01/2009 and contradicts the letter dated 31/03/09 signed by Kathleen Murtagh.*
>
> *Refusal as the proofs of residency have a number of inconsistencies and therefore I am not satisfied that the applicant and his EU spouse are residing together in the State."*

4. A request for a review of that refusal decision was shortly afterwards lodged on behalf of the first named applicant by the Refugee Legal Service prior to the matter being taken over on behalf of the applicants by Messrs Kelleher O'Doherty, Solicitors. (The applicants say it was made on or about 24 August 2009; the respondent in the written legal submissions appears to accept that the request was made by letter of 8 September 2009.) On 22nd October 2009 that firm wrote demanding a decision on the request and threatening proceedings if it was not received within 21 days. By letter dated 28/10/2009 the Irish Naturalization and Immigration Service of the Department stated that the application had been received "in this office" (presumably the "EU Treaty Rights Review Section",) only on 22/10/2009 and reiterated that the application had been refused because the first named applicant had "failed to submit satisfactory evidence of residence in the State with his EU citizen spouse" The letter required the submission of documentary proof of such residence in the form of a letter from a landlord and proof of registration of the tenancy together with joint bank statements or individual bank statements for the applicants.

5. By letter of the 6th November 2009, the applicants' solicitors stated that their clients' landlord, who resided in the United Kingdom, had asked for the necessary letter confirming registration of the tenancy and submitted separate bank statements for each of the applicants. Each of these bank statements was addressed to the account holder (the first and second named applicants respectively) at "27 Blessington Orchard, Blessington, Co. Wicklow". The first named applicant explained the discrepancy such as it was, in the addresses as arising from the fact that, as an asylum seeker, he was required under the "Direct Provisions Scheme" to reside at Eyre Powell Hotel in Newbridge, Co. Kildare and that he was under the impression that he would suffer adverse consequences if he did not retain that address. In fact, however, he says that he resided with his wife at 27 Blessington Orchard four days a week and that at the time these proceedings were brought, had moved to reside there on a full basis.

6. The present proceeding was then commenced and by order of 14 December 2009 Peart J. granted leave *ex parte* to seek reliefs by way of *certiorari*, declaration and *mandamus* in respect of the grounds set out in the Statement of Grounds.

7. There can be no doubt but that the Minister is entitled to conduct all proper inquiries so as to ensure that an EU Residence Card is issued only to a qualified applicant. For that purpose he is entitled to insist on the necessary proofs as to the marital relationship, the citizenship of the EU spouse, residence and the employment or other basis of qualification of the EU citizen under the Regulations. The Minister is also entitled to take reasonable steps and to make appropriate inquiries to ensure that the rights conferred by the Regulations are not being abused by being based upon false documentation, fictitious employment or a sham marriage. For that

purpose the Minister has at his disposal the resources of the Department and its agencies for the purpose of carrying out any necessary visits, interviews or other inquires and verification of documentation.

8. In this case a replying affidavit on behalf of the first named respondent has been filed which is confined to an explanation of the procedure employed within the Department for processing applications for Residence Cards together with an indication of the volume of applications that had to be dealt with in 2009. It is said that in that year the relevant section received 2712 applications for Residence Cards of which 1537 were approved and 932 refused. There were also, apparently, 576 applications for review of decisions of which 158 were successful so far as those had been dealt with during that year.

9. It is therefore clear that by the time the present application came to be heard, not only had no decision been taken by the Department upon the review application but no further inquiries appear to have been carried out in order to resolve the discrepancy in the addresses or to verify whether the explanation given by the first named applicant in that regard was correct or believable.

10. In these circumstances the Court is satisfied that the application must succeed but only in part. It is not contested that the second named applicant is an EU citizen who is residing in the State and is in full time employment. Nor is it contested that the applicants are married. It is not, in the judgment of the Court, an essential condition of qualification for an EU Residence Card under the Regulations that a validly married couple must reside continuously under the same roof within the State. As with many families, it may well be necessary or economically more efficient for one or other of them to maintain a separate *pied a terre* if they are employed in different jobs at the opposite ends of the country. Thus, the mere fact that the first named applicant may have had a reason to maintain a separate address for part of a week following his marriage to the second named applicant does not deprive the applicants of the benefit of their entitlements under the Regulations. At any rate, if the implication of the respondent's query in relation to the discrepancy in the addresses is that the marriage is a sham, the onus lay with the Minister to so state and to so prove once the applicants had furnished the above explanation.

11. In these circumstances the Court is satisfied that it would be inappropriate to grant an order of *certiorari* in respect of the refusal decision of the 20th August 2009, because the Minister had a good reason to query the discrepancy in the addresses. The refusal on that basis cannot be said to be wrong or unreasonable. It might be said, however, to be precisely the type of case in which the administrative review course is apt and useful because the answer to the doubt raised may lie in an explanation rather than in the need to contest facts or produce new evidence. The Court is equally satisfied, however, that once a review was applied for under Regulation 21 there arose a duty upon the part of the Minister to make whatever inquiries where considered necessary in order to resolve that issue so as to give a decision upon the review application within a reasonable time. Having regard to the target period of six months provided in Regulation 7 (2) for the issue of a card, it is clearly in excess of a reasonable period for a decision on a review application to be delayed for a longer period particularly when the explanation has crystallised the net issue for decision by the Minister and the review request is not, in effect, a new application requiring the verification and appraisal of new information or proofs not previously considered by the Minister.

12. As no such decision upon the review application had been made by the hearing of the present proceedings – a period of eight months since the request - the Court will grant an order of *mandamus* directing the Minister to make a decision on the application within 28 days of the perfection of the order in these proceedings.

13. In the light of the above decision is it unnecessary to consider a number of other arguments raised by the applicants as to the alleged incompatibility of the provisions of the Regulations with the corresponding provisions of Council Directive 2004/38/EC thereby implemented. The Court accepts however that no administrative formality required of a non-national family member under Article 9 of the Directive involves proof that an EU citizen and spouse are continuously resident at the same address. What is required is a "document attesting the existence of a family relationship". There is not, in the judgment of the Court any material discrepancy between the terms of the Directive in that regard and those of the Regulations (including the list in Schedule 2).

14. Finally, the Court does not accept the argument put forward on behalf of the Minister that an application for judicial review cannot be brought in advance of the making of a decision on a request for review of the refusal made under Regulation 21. Article 31 of the Directive (which applies to the refusal of a Residence Card by virtue of Article 15(1),) requires the availability of procedures of both judicial and administrative redress against adverse decisions. The review provided for in Regulation 21 is clearly an "administrative review" in that it is allocated to a Departmental officer. In Irish law it is unnecessary for such a Regulation to provide expressly for access to a "judicial redress procedure" because of the general availability of judicial review under O. 84 of the Rules of the Superior Courts against any administrative decision effecting rights or imposing liabilities – at least in the absence of any statutory exclusion of that Order. An applicant may ultimately be penalised in costs for embarking upon a judicial review application without first availing of an administrative review and the Court may even exercise its discretion to refuse relief where administrative redress has not first been exhausted. (See by analogy in that regard the judgments given in recent years concerning applications for judicial review of reports of the Refugee Applications Commissioner under s 13 of the Refugee Act 1996 when an appeal to the Refugee Appeals Tribunal under s.15 of that Act was available: *B.N.N. v. R.A.C.* [2008] IEHC 308; and *A.D. v. R.A.C.* [2009] IEHC 77, for example.) It does not, however, follow from the mere existence of the administrative review facility that there can be no access to such judicial redress. The initial refusal of a Residence Card is an autonomous decision with adverse legal consequences for the person concerned. As such, it is in principle susceptible of judicial review. Further, there may well be reasons given at first instance for the refusal which are unlikely or incapable of being reversed by an administrative review and which are therefore more apt to be resolved immediately by judicial review.

15. As the Court does not propose to grant an order of *certiorari* that issue does not fall to be considered in this case. While it is true that this proceeding was commenced three months after the review request appears to have been made and the Minister did point out that there were many such requests pending and that they would be dealt with in chronological order, the Court does not consider that the initiation of the proceeding could be considered premature when the letter of 28 October 2009 gave the clear impression that the Minister did not consider himself under any obligation to take a decision on the review at any particular time by stating "…please note that there is no set time limit … with regard to a decision on this review..". No indication, however approximate or tentative, was given as to the delay that might be expected. If a decision had been issued before the case came on for hearing of the substantive application for relief, the Minister might have been able to maintain that, so far as an application for *mandamus* was concerned, the proceeding had been premature and unnecessary. As that was not done, the Minister cannot now be heard to make such a case.

16. The Court will therefore grant relief in the terms indicated above.