

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 No. 145 & 147 J.R.**

**BETWEEN**

**ZUZANA GOGOLOVA AND EDILBERTO SANTIAGO VALCARCEL NINA**

**APPLICANTS  
2008 No. 145 J.R.**

**AND  
BARBARA AMOATONG AND PETER ENNIM**

**APPLICANTS  
2008 No. 147 J.R.**

**AND  
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENTS**

**Interim Decision of Ms. Justice Finlay Geoghegan delivered the 1st day of May, 2008**

1. This interim decision is given in two applications for judicial review which were heard together on 17th April and in which I reserved my judgment including a decision as to whether it is necessary for me to seek a preliminary ruling from the Court of Justice pursuant to Article 234 of the EC Treaty on the interpretation of Directive 2004/38/EC to enable me give judgment in each of the applications listed in the title. The applications are regarded as test cases as there are other pending applications which are factually similar and raise similar issues.

2. In each case, the applicants are a married couple, one of whom is an EU citizen living and working in Ireland and the other her spouse and a non-EU national. Both couples were married outside of Ireland and subsequent to their marriage, the non-EU spouses sought and obtained in their respective countries visas to enter Ireland. Each visa was marked "join EU spouse". On arrival in Ireland they were permitted to enter and subsequently applied for a residence card in Ireland pursuant to Directive 2004/38/EC.

3. Each non-EU national spouse was refused a residence card by the respondent in reliance upon Article 3(2) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) ("the 2006 Regulations") which were made to give effect to Directive 2004/38/EC in Ireland. This requires an applicant to submit evidence showing lawful residence in another EU Member State prior to arrival in Ireland.

4. The applicants in each case were given leave by the High Court to apply *inter alia* for:

1. An order of *certiorari* quashing the decision of the respondent to refuse their application for a residence card; and
2. An order of *mandamus* requiring the respondent to grant to the second named applicant (in each case) a residence card in accordance with the applicants' rights under the EC Treaty and under Article 10 of Directive 2004/38/EC; and
3. Damages.

The claim for damages has been left over until after the determination of the applications for *certiorari* and *mandamus*.

5. The issues of Irish law and questions of interpretation of Directive 2004/38/EC arising from the submissions of the parties on the applications for orders of *certiorari* of the respondent's decision to refuse residency based on Article 3(2) of the 2006 Regulations are almost identical to those raised in four applications for judicial review heard together in which I made a request for a preliminary ruling from the Court of Justice by decision of the 14th March, 2008 (*Metock and Others v. Minister for Justice, Equality and Law Reform* [2008] IEHC 77 and Case C- 127/08). The first question upon which I sought a ruling in those proceedings is:

(1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC.

6. The President of the Court of Justice has ordered that the accelerated procedure should be applied to Case C-127/08 pursuant to Article 23 (a) of the Statute of the Court of Justice and the first paragraph of Article 104(a) of the Rules of procedure of the Court of Justice. The Court of Justice has fixed an oral hearing in the preliminary reference on the 3rd June, 2008.

7. There is difference in the factual position of the applicants herein to those in the four cases which are the subject of the preliminary reference in Case C-127/08. For the reasons set out in my decision of the 14th March, 2008, it appears to me that the immigration history of the applicants is not relevant to the question as to whether or not Directive 2004/38/EC permits a Member State to have a general requirement that non-EU national spouse of union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in or that he or she be entitled to benefit from the provisions of Directive 2004/38/EC such as exists in Article 3(2) of the 2006 Regulations in Ireland.

8. The parties agree that it is not necessary to seek a preliminary ruling from the Court of Justice on any additional questions on the interpretation of Directive 2004/38/EC to enable me decide the applications for *certiorari* herein.

9. However, in these proceedings, unlike the four proceedings the subject matter of preliminary reference C-127/08, the applicants also seek an order of *mandamus* directing the respondent to issue a residence card pursuant to Article 10 of Directive 2004/38/EC. In Irish law, the purpose of an order of *mandamus* is to secure the performance of a public duty imposed on a public body by law. The applicants must establish that there exists a duty imposed by law which the respondent is failing to perform. In these proceedings the applicants rely upon the obligations which they contend are imposed on the respondent as the relevant authority of the Member State by Articles 3.1, 7, 9 and 10 of Directive 2004/38/EC in accordance with the principles of direct effect and which they submit they are entitled to enforce against the respondent.

10. The primary submission made on behalf of the applicants in support of the claim for the order of *mandamus* is that Articles 3.1, 7, 9 and 10 of the Directive 2004/38/EC are unconditional and sufficiently precise in their terms to be capable of being relied upon by an individual against the authorities of a Member State. It is submitted that each of the respondents has a right to reside in Ireland with his EU citizen spouse who is living and working here and the respondent is obliged to issue to each of the second named applicants a

residence card as provided for in Article 10 of Directive 2004/38/EC.

11. The respondent submits in response that Articles 3.1, 7, 9 and 10 do not have direct effect as Directive 2004/38/EC confers on a Member State a discretion to require prior lawful residence in another EU Member State before a non-EU spouse of an EU citizen living and working in Ireland may benefit from its provisions.

12. The applicants submit that for the Court to give judgment on the applications for orders of *mandamus* it is necessary to seek a preliminary ruling pursuant to Article 234 of the EC Treaty on the following question (in addition to question 1 in Case C- 127/08):

Are Articles 3.1, 7, 9 and 10 of Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004 on the rights of citizen of the union and their family members to move and reside freely within the territory of the Member States unconditional and sufficiently precise in their terms as to be capable of being relied upon by an individual against the authorities of a Member State?

The respondent does not agree that it is necessary to refer such a question.

### **Background Facts to Applications**

13. In proceedings [2008] No. 145 J.R. the first named applicant is a citizen of Slovakia and the second named applicant is a citizen of Peru. They met whilst working in the United States in 2002. They married in Peru on 22nd April, 2006. On 29th May, 2006 the first named applicant took up employment in Ireland. The applicants applied to the Irish Consulate in Peru for a visa for the second named applicant to join the first named applicant in Ireland. He was granted a "join EU spouse" visa valid from 10th October, 2006 to 9th January, 2007. He entered Ireland on that visa on 17th November, 2006 and was granted permission to remain in Ireland until 17th December, 2006. He was not permitted to work. He was informed by the authorities that he should apply for residence on an EU1 Form and did so on 23rd November, 2006. In a letter of 27th July, 2007 he was informed of a decision to refuse him an EU residence card as he had not satisfied Article 3(2) of the 2006 Regulations.

14. He subsequently sought a review of the decision which was refused. He made a complaint to the European Commission. The second named applicant travelled to Slovakia for short periods in October and December, 2007. He has been granted a residence card valid to 9th December, 2010 by the Slovakian authorities.

15. On 11th February, 2008, by Order of the High Court, he was granted leave to seek the applications for Judicial Review herein. At the commencement of the hearing, the Court was informed that agreement had been reached between the applicants and the respondent that the respondent would now grant to the applicant pursuant to Irish national procedures what is termed "a stamp 4 permit". This enables the second named applicant to take up employment in Ireland. However, there remain a number of significant differences between the stamp 4 permit issued pursuant to national procedures and a stamp 4 put on a passport pursuant to Directive 2004/38/EC. The parties prepared an agreed statement on the difference between the two stamps.

16. In [2008] No. 147 J.R., the first named applicant is a citizen of the Netherlands and the second named applicant a citizen of Ghana. They met in Ghana in 2002. The first named applicant moved to Ireland and commenced employment here in 2006. The applicants married in Ghana on 22nd January, 2007. On 14th March, 2007, the Irish Embassy in Ghana issued the second named applicant with a visa marked "join EU spouse". He arrived in Ireland on 6th June, 2007 given permission to enter but not permitted to work and required to present to Garda National Immigration Bureau for registration within three months. He presented himself on 12th June, 2007 and was directed to apply for residence to the respondent. He did this and ultimately by letter of 24th November, 2007 was refused by reason of his failure to satisfy Article 3(2) of the 2006 Regulations.

17. In the meantime, the first named applicant had become pregnant and had been in correspondence with the respondents by reason of the applicant's term their "dire straits" because of the employment restriction on the second named applicant. Unfortunately the first named applicant suffered a miscarriage in December, 2007 and states that she has been advised medically that this was induced by stress.

18. By letter of 5th February, 2007, the respondent, through his officials, informed the applicants that the second named applicant would be permitted to remain in Ireland under national provisions on stamp 4 conditions. This enables the second named applicant to reside and work in Ireland for an initial period of one year. It was also agreed on behalf of the respondent that during this period the respondent would consider the application for what were termed "EU Treaty rights" under the provisions of Directive 2004/38/EC. The second named respondent took up the stamp 4 under national provisions and is now working in Ireland. There remains, however, the significant differences between the position of the respondent as the holder of the stamp 4 pursuant to national provisions and his decision if granted a residence card pursuant to Directive 2004/38/EC as set out in the statement agreed between the parties.

19. One of the differences between the positions of the second named applicants with immediate effect is that if at present they seek to travel outside of Ireland within the EU they may require visas for the other Member States and on their return to Ireland require a visa for re-entry. This would not apply if they held the equivalent stamp issued pursuant to Directive 2004/38/EC. There are also a number of significant long term consequences of the differences set out in the agreed statement.

### **Conclusion**

20. I have determined that it does not appear necessary at present in these proceedings to seek a preliminary ruling from the Court of Justice on the additional question of interpretation of Directive 2004/38/EC suggested by counsel for the applicants or any other question. The only question upon which I consider at present I need the ruling of the Court of Justice to give judgment on the applications for *mandamus* is the first question upon which I have already sought a ruling in Metock Case C-127/08. The reasons for which I have reached this conclusion are as follows.

21. The only ground upon which the respondent opposes the contention that Articles 3.1, 7, 9 and 10 of Directive 2004/38/EC have direct effect is that such provisions must be interpreted in the context of what he submits is the implicit discretion given to Member States to require prior lawful residence in another Member State by non-EU family member of a Union citizen before being entitled to benefit from the provisions of Directive 2004/38/EC.

22. The respondent, through his counsel, accepted in the course of submissions, that if the implicit discretion to require prior lawful residence contended for by him does not exist, or if the prior lawful residence requirement in article 3(2) of the 2006 Regulations is not consistent with Directive 2004/38/EC, then the applicants in these proceedings are persons to whom article 3.1 of Directive 2004/38/EC applies. It also follows from the fact that there is no dispute that each of the non-EU applicant spouses is an EU citizen living and working in Ireland that articles 7, 9, and 10 also now apply. No other submission was made on behalf of the respondent as to why, in accordance with the case law of the Court of Justice in Case C-88/81 *Becker* and Case C-103/88 *Fratelli*, the provisions of

articles 3.1, 7, 9 and 10 of Directive 2004/38/EC are not unconditional or sufficiently precise in their terms as being capable of being relied upon by an individual against the authorities of the Member State. In particular, no submission was made in reliance upon articles 27 or 35 of Directive 2004/38/EC as applicable herein.

23. Accordingly, it appears to me that there is no dispute between the parties that the law as stated by the Court of Justice in Case C-103/88 *Fratelli* in particular, is the law which this Court should apply in determining the applicants' claim that articles 3.1, 7, 9 and 10 are capable of being relied upon by the applicants against the respondent as the relevant authority of the Member State. In that judgment, the Court of Justice stated:

"28. In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

29. In its judgments of 19 January 1982 in Case 8/81 *Becker v. Finanzamt Muenster-Innenstadt* (1982) ECR 53, at p.71 and 26 February 1986 in Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* ((1986) ECR 723, at p.748) the court held that wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where the State has failed to implement the Directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

30. It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a Directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31. It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a Directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the Directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a Directive before the national courts are met, all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions.

32. With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussions of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State."

24. On the dispute between the parties herein, the only issue which this Court has to determine whether the obligations imposed upon the respondent and rights of the applicants in relation to the issue of a residence card to the non-EU applicant spouses in accordance with Articles 9.1 and 10.1 of Directive 2004/38/EC are unconditional and sufficiently precise to bring into play the above principles of direct effect. If they are unconditional and precise, it appears to me to follow from the above that such provisions are capable of being relied upon by the non-EU applicants against the respondent.

25. There is no dispute that the provisions are precise. The only question of interpretation of the Directive which I have to determine is whether they are unconditional. Having regard to the submissions of the parties the resolution of that issue, appears to me to require in substance only a ruling from the Court of Justice on the first question which I referred in my decision of 14th March, 2008, in *Metock and Ors.* and which is now the subject of an accelerated procedure as Case C-127/08/

26. If the question already referred is determined as contended for by the applicants, then it seems to me subject to any additional issue raised by the judgment of the Court of Justice in its ruling in Case C-127/08, it will follow, in accordance with the principles in Case C-8/81 *Fratelli* that articles 3.1, 7, 9 and 10 have direct effect and are capable of being relied upon by the applicants against the respondent. It will also follow, on the submissions already made, that the applicants are entitled to the orders of *mandamus* sought.

27. If, on the other hand, the question already referred is resolved in favour of the respondent and it is determined that Directive 2004/38/EC permits a Member State to have a general requirement that a non-EU spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC, then it also appears to follow that articles 3.1, 7, 9 and 10 of Directive 2004/38 could not be considered to be unconditional so as to be capable of being relied upon by an individual against the authorities of a Member State. The entitlement to a residence card would not be unconditional as it would be dependent upon whether or not the Member State had determined to exercise the discretion contended for to impose the condition of prior lawful residence.

28. I am conscious that the applicants in these proceedings have a quite different immigration history to at least certain of the applicants in the proceedings giving rise to the rulings sought in Case C-127/08. Also that one of the parties in these proceedings, namely the respondent, is a party to those proceedings and will have an opportunity of participating in the preliminary reference in Case C-127/08 whereas the applicants herein will not have an opportunity to make submissions to the Court of Justice in relation to the ruling which may also determine their proceedings. However, on the question of interpretation in relation to lawful residence already referred, the applicants in these proceedings have not raised any additional or differing submission or argument to those made on behalf of the applicants in the proceedings in *Metock and Ors* Case C-127/08. I have also noted that Mr. Anthony Collins S.C. who appears for the applicants in these proceedings, is also instructed by one of the applicants in the *Metock* proceedings which may explain the absence of any additional or differing submissions in these proceedings.

29. Finally whilst I have expressed the view in my decision of 14th March, 2008, in *Metock and Ors.* that it does not appear to me that the immigration history of the applicants is relevant to the issue of interpretation relating to prior lawful residence, it may be that the Court of Justice takes a differing view and as has been submitted, they have taken into account the status of applicants in other decisions such as Case C-1/05 *Jia*.

30. Notwithstanding the above it does not appear to me that I should exercise my discretion now to make a reference seeking a ruling on a similar question albeit in different factual circumstances and with a different potential application. To do so would impose additional costs on the parties and an additional case on the Court of Justice. As the Court of Justice has granted accelerated procedures to Case C-127/08 even if the Court's ruling gives rise to the need to refer a further question (not now anticipated) in these proceedings the parties will not be greatly delayed.

31. In my decision making the reference in *Metock and Ors.* I referred at paragraph 71 to the fact that there were other proceedings

before the High Court not yet heard where the respondent had refused applications for residence cards from non EU spouses who had been permitted to enter Ireland on a "join EU spouse" visa. Those proceedings included the present proceedings. It appears to me that in accordance with the principle of co-operation between the Court of Justice and national courts which underlies Article 234 of the EC Treaty, that I should now in the context of the preliminary ruling sought in Case C-127/08, inform the Court of Justice that these proceedings have now been heard and that I have determined not to make an additional reference (for the reasons set out) but do need the Court of Justice's ruling in Case C-127/08 to enable me give judgment herein.

32. I am making an order today reserving my judgment on these applications until after the determination by the Court of Justice of the preliminary ruling in *Metock and Ors.* Case C-127/08 and directing that a copy of this decision should be sent by the Registrar to the Court of Justice as part of the exchange between the national court and the Court of Justice in Case C-127/08. I also direct that a copy of this decision be furnished to the applicants in *Metock and Ors. v. the Minister for Justice, Equality and Law Reform* as the respondent who is a party to those proceedings will have received it as part of these proceedings.