

**THE HIGH COURT**  
**JUDICIAL REVIEW**

2010 858 JR

**BETWEEN****PETER DECSI AND HUAN ZHAO****APPLICANTS****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENT****AND****2010 861 JR****BETWEEN****INGA LEVALDA AND MOINUDDIN SYED****APPLICANTS****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENT****JUDGMENT of Mr. Justice Cooke delivered the 30th day of July, 2010.**

1. This is the full statement of the Court's reasons for the decision given in summary form in these two cases on 30th July, 2010. The two cases were heard together because the same issue of law arises in each and there are no material differences in the respective circumstances of the parties which might affect the determination of that issue. The issue arises out of what is said to be a recent change of policy on the part of the respondent Minister in relation to the granting of provisional residence permission to spouses or family members of E.U. citizens pending a decision on their application for a residence card under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 ("The Regulations"). Briefly stated, the question raised in each case concerns the point in time at which the spouse of an E.U. citizen who is not a national of a Member State is entitled to take up employment: is he or she entitled to take up employment as from the date of acknowledgment of receipt of the application for a residence card or must he or she wait until the respondent has given a decision on the application?

**Factual context**

2. In the first of these cases Mr. Decsi is a citizen of Hungary who arrived in the State in October 2006 and took up employment in the construction industry. He has been employed with a security company since November 2009. The second named applicant in that case is a national of China who has been in the State on a "Stamp 2" student visa since 1998. She has been working part time with the same security company. They married in the State on 18th March 2010 and made an application under the Regulations for the issue of a residence card to the second named applicant under cover of their solicitor's letter dated 31st May, 2010. Having first been requested to submit the application on a new Form EU 1 "Application for a Residence Card for non-EEA National Family Members", they received an acknowledgment by letter of 16/06/2010 from the E.U. Treaty Rights Section of the Irish Naturalisation and Immigration Service. In addition to acknowledging receipt of the application and its supporting documentation, the letter contained the following:

"While your application is pending, you ... may bring the following documents to your local immigration office at Garda National Immigration Bureau ...

- (1) this letter,
- (2) your national passport,
- (3) the national passport or national identify card of Peter Decsi,
- (4) evidence of your relationship with Peter Decsi.

Your local immigration office may provide you with a Stamp 3 endorsement in your passport that is valid strictly for the period of your application expiring on 02/12/2010. This stamp will allow you to remain in Ireland while your application is being processed, on condition that you do not enter into employment or engage in business or profession in the State. Please note that receipt of a Stamp 3 for this period is not an acknowledgment of having an entitlement to residence under E.U. Treaty rights. This will be determined in due course when your application will either be approved or refused. Should you currently hold an alternative existing permission to reside in the State, please note that in the event that you opt to avail of this temporary stamp 3 for the duration of your application, it may have implications for your current permission. The onus is on the applicant to ensure that they are in possession of a valid permission to remain in the State

at all times...”

3. Under the conditions attached to her student visa, the second named applicant was entitled to take up employment for 20 hours per week during term time and 40 hours per week during vacation periods. The second named applicant, however, had, since marrying the first named applicant, been offered promotion to a full time post in the security company which she would be obliged to take up in September 2010. Having ceased to be a student she would be unable to take up this employment in advance of the issue of the residence card if her permission to be in the State was on the basis of the Stamp 3 condition outlined in the letter of 16th June, 2010.

4. In the second case, Ms. Levalda is a national of Latvia and the second named applicant, Mr. Syed, is a native of Pakistan. The first named applicant says that she first came to Ireland in September 2007 to visit her sister who had settled in Cork some years earlier and was married to a Pakistani national. On that occasion she met the second named applicant who was a friend of her brother-in-law. They stayed in contact when she returned to Latvia. The second named applicant arrived in the State in 2004 and has been present in the State on a student visa since then. As a student, he too was entitled to work for 20 hours per week during term time and did so. The first named applicant returned to Ireland in October 2009 and the applicants were married on 30th March 2010 in Kerry. On 2nd June, 2010, an application was made for a residence card under the Regulations on behalf of the second named applicant. This was acknowledged by a letter dated 17/06/2010 in terms identical to that already quoted in the first case. The second named applicant is concerned that if his continuing permission to be in the State is on the basis of a Stamp 3 permission only, he will have no entitlement to continue his part time employment pending a determination of the application for a residence card.

#### **Legislative context**

5. The statutory background to these issues can be briefly described as follows. Section 5 of the Immigration Act 2004 contains, *inter alia*, the following provisions:

“(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.”

6. Section 4 of that Act contains the following provisions:

“(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as ‘a permission’).

(6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national, or by an inscription placed on his or her passport or other equivalent document, attach to a permission under this section such conditions as to the duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.”

7. The “Stamp 2” student visas held by the second named applicants in each case and the “Stamp 3” endorsement referred to in the letters of 16th and 17th June, 2010, above are accordingly, such permissions to be present in the State subject to the conditions attached. They take the form of endorsements in the passport of the individuals concerned which indicate the duration and conditions of the permission.

8. The European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) came into operation on 1st January, 2007 and were adopted pursuant to s. 3 of the European Communities Act 1972 for the purposes of giving effect to and transposing into national law Directive 2004/38/EC of the European Parliament and of the Council of 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 (“the Directive”). The scope of application of the Regulations as provided for in Regulation 3 (1) and (2) was amended by S.I. No. 310 of 2008 effectively in order to accommodate the ruling of the European Court of Justice in Case C-127/08 *Metock v. Minister for Justice* [2008] ECR I-6241. The amendment has the effect of deleting the limitation previously imposed by paragraph (2) of Regulation 3 to the effect that the Regulations would not apply to a family member unless that family member had been lawfully resident in another Member State and was seeking to arrive in the State in the company of or in order to join a Union citizen lawfully present in the State. One of the effects of that judgment is to make it clear that it is immaterial to the valid exercise of the rights of entry to and residence in a Member State by the spouse of a Union citizen whether the marriage takes place before or after the arrival of the spouse in the host Member State.

9. The scheme of the Directive as implemented in the Regulations can be summarised as follows. A citizen of any Member State of the Union has a right to move to and reside in another Member State (including the State) and to reside there for up to three months subject to no condition or formality other than that of holding a valid national identity card or passport. (See Article 6 of the Directive and Regulation 4). A Union citizen has the right to reside in another Member State for more than three months if he or she:

(1) Is in employment or is self-employed in the State;

(2) Has sufficient resources to support himself or herself, his or her spouse and any accompanying dependents, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants;

(3) Is enrolled in an educational establishment in the State for the principal purpose of following a course of study there including a vocational training course and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants; or

(4) Is a family member accompanying or joining a Union citizen who satisfies one or more of the above conditions. (See Article 7 and Regulation 6 (2)).

10. Regulation 6 (2) (b) provides:

“Subject to paragraph (3), a family member of a Union citizen who is not a national of a Member State shall be entitled to reside in the State for more than three months where the Minister is satisfied that the Union citizen concerned satisfies

one or more of the conditions referred to in subparagraph (a) (1) (2) or (3)."

11. Family members of a Union citizen who are not nationals of a Member State are required to register. In that regard Regulation 7 provides as follows:

"(1) (a) A family member of a Union citizen who is not a national of a Member State and who has been resident in the State for not less than three months shall apply to the Minister for a residence card.

(b) An application made under subparagraph (a) shall contain the particulars set out in Schedule 2 and shall be accompanied by such documentary evidence as may be necessary to support the application.

(c) The Minister shall immediately cause to be issued a notice acknowledging receipt of an application made under subparagraph (a).

(2) Where the Minister is satisfied that it is appropriate to do so, he or she shall, within six months of the date of receiving an application made under paragraph (1) (a), cause to be issued a residence card containing the particulars set out in Schedule 3 in respect of the family concerned.

(3) Subject to Regulation 20, a person the subject of an application made under para. (1) (a) may remain in the State pending a decision on the application."

(Regulation 7 gives effect to Article 10 of the Directive.)

12. Under the third phase of the scheme of the Directive, a Union citizen who has resided legally for a continuous period of five years in a host Member State acquires a right of permanent residence there. This right also accrues to family members who are not nationals of a Member State if they have legally resided with the Union citizen in the host Member State for a continuous period of five years. (See Article 16 of the Directive and Regulations 12 and 14).

13. Article 23 of the Directive provides as follows:

#### **"Related Rights**

Irrespective of nationality, the family members of a union citizen who have a right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self employment there."

14. That provision is given effect by Regulation 18 (1) which is as follows:

"Subject to the other provisions of these Regulations, a person to whom these Regulations apply shall be entitled –

(a) to the same rights of travel in or to or from the State as those to which Irish citizens are entitled,

(b) without prejudice to any restriction on that entitlement contained in the Employment Permits Acts 2003 and 2006, to seek and enter employment in the State in the like manner and to the like extent in all respects as Irish citizens,

(c) to carry on any business, trade or profession and to have access to education and training in the State in the like manner and to the like extent in all respects as Irish citizens,

(d) to receive, upon and subject to the terms and conditions applicable to Irish citizens, the same medical care and services and the same entitlements as those to which Irish citizens are entitled."

15. It is to be noted that the expression "a person to whom these Regulations apply" is defined in Regulation 3 (as amended) as follows:

(1) These Regulations shall apply to –

(a) Union citizens,

(b) qualifying family members of Union citizens who are not themselves Union citizens, and –

(i) who seek to enter the State in the company of those Union citizens in respect of whom they are family members, or

(ii) who seek to join those Union citizens in respect of whom they are family members, who are lawfully resident in the State ..."

The expression "qualifying family member" is defined in Regulation 2 (1) as including "the Union citizen's spouse". Thus, the non-national spouse of a Union citizen is "a person to whom these Regulations apply" for the purposes of Regulation 18 (1) above.

#### **Grant of leave**

16. It is, accordingly, in that legislative context that the present applications for judicial review have been brought. Leave was granted by order in each case made on 28th June, 2010 (Clark J.) to apply for certain declaratory reliefs and for orders of *certiorari* to quash the two above letters of 16th and 17th June, 2010. In effect, the orders of *certiorari* directed against those letters are sought on the basis that they contain a decision on the part of the respondent to grant the second named applicant in each case a "Stamp 3 permission" pending the determination of the application for a residence card thereby, in effect, altering the basis of and conditions attached to the existing permissions which they hold including, in particular, the termination of the entitlements those applicants have hitherto enjoyed to take up employment.

#### **Certiorari**

17. Insofar as these applications seek relief by way of orders of *certiorari*, the Court is satisfied that they are misconceived in that it

is unnecessary to quash any decision which might be said to be reflected or communicated in those two letters. There are two reasons for this. First, it is clear from the terms of the letters themselves that the availability of a Stamp 3 permission is indicated on a purely optional basis. As already indicated, (see para. 2 supra,) the letters say:

"Your local immigration office may provide you with a stamp 3 endorsement in your passport ... Should you currently hold an alternative existing permission to reside in the State, please note that in the event that you **opt to avail** of this temporary stamp 3 for the duration of your application, **it may** have implications for your current permission. The onus is on the applicant to ensure that they are in possession of a valid permission to remain in the State at all times." (Emphasis added)

Clearly, therefore, the letters acknowledge that the addressee may currently hold an alternative permission which is not subject to such a restriction on taking up employment and do not purport to interfere with the continuing entitlement to rely upon that permission.

18. The second reason is that this interpretation of the letters is explicitly confirmed by the affidavit sworn on behalf of the respondent in these proceedings Aengus Casey, Higher Executive Officer in the Department has sworn:

"It is to be noted that there is no obligation imposed on the person asserting rights as a family member under the 2006 and 2008 Regulations to obtain a Stamp 3 endorsement from their local Immigration Office or from the Garda National Immigration Bureau in Dublin. Therefore, for those persons who are currently lawfully resident in the State pursuant to an alternative permission to remain such as a Stamp 2 permission such persons may, if they so choose, delay obtaining the Stamp 3 endorsement and benefit from the entitlement to work casually until the expiry of the relevant stamp 2 endorsement."

### **Declaratory relief**

19. Although, for these reasons, the Court considers that relief by way of *certiorari* in respect of the letters of 16th and 17th June, 2010 is inappropriate and unnecessary, the substantive issue raised by the applicants remains to be decided because the clear implication of both the letters and of Mr. Casey's explanation is that the Stamp 3 permission with its denial of an entitlement to take up employment is the only permission that will be available to an applicant for a residence card in the event that the pre-existing Stamp 2 permission should expire before a decision has been given on the application for a residence card. This dilemma is illustrated, for example, by the position of the second named applicant in the first case, Huan Zhao. Her permission to be in the State has been based upon a Stamp 2 student permission renewed annually since her arrival and currently valid from 29th September, 2009 until 10th September, 2010. Thus, if the decision on her application for a residence card is not taken until the expiry of the full six month period available to the Minister under Regulation 7 (2) and Article 10 of the Directive, (see para 11 above,) she will not only forfeit the prospect of taking up the full-time post which has been offered to her in September but would also lose the entitlement to continue part time employment if her Stamp 2 student visa cannot be renewed.

20. The issue remains, accordingly, whether the entitlement to take up employment conferred by Article 23 of the Directive and implemented in Regulation 18 (1) (b) accrues to the spouse of the Union citizen upon arrival in the State (if already married to the Union citizen) or as from the date of marriage (where both are already present in the State) or only from the issue of the residence card? This issue turns primarily upon the construction of the Regulations with recourse, if necessary, to the terms of the Directive in the event of any discrepancy between the two instruments or any ambiguity or difficulty in the interpretation of the Regulations.

21. In the first place, it is clear that insofar as the spouse has an entitlement to take up employment it is an entitlement which derives from the Directive as implemented by the Regulations and is not dependent upon the issue by the respondent of any employment permit or documentary permission for the purpose. The only obligation of the Minister prior to the making of a determination on the application for a residence card is that imposed by Regulation 7 (1) (c) namely, to immediately issue a notice of acknowledgment of receipt of the application for the residence card. He is not, in the judgment of the Court, compellable either under the Directive or the Regulations to supply any other evidentiary instrument in relation to entitlements arising from the application.

22. In the judgment of the Court the entitlement of the spouse of a Union citizen to take up employment is not dependent upon and delayed until the issue of the residence card but is exercisable at least as from the receipt of the acknowledgment of the application under Regulation 7 (1) (c).

23. In the first place, this follows clearly from the manner in which the entitlement in question has been implemented in the Regulations. As pointed out above (see paras. 14 and 15) the entitlement to seek and enter employment in the State conferred by Regulation 18 (1) (b) is accorded to any "person to whom these Regulations apply" and the latter expression includes the spouse of a Union citizen who is lawfully present in the State. In effect, no distinction is made in the Regulations between the entitlement of the Union citizen to seek and take up employment and the entitlement of the spouse as a qualifying family member to do so. The entitlement of the latter is not subjected to any precondition of having either applied for or obtained a residence card.

24. Secondly, this construction of the Regulations is entirely compatible with the terms of the Directive and particularly so when regard is had to the case law of the European Court of Justice relating to the exercise by Union citizens and members of their families of the rights of free movement and residence within the territory of the Member States. In that regard it is important to bear in mind that the right to move and reside freely within the territory of the Member States derives for every citizen of the Union directly from the Treaties and is not dependent upon or conferred by any enabling legislation such as the Directive. Thus recital (11) of the Directive recognises that:

"The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures."

Furthermore, as recital (5) to the Directive declares:

"The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members irrespective of nationality."

25. Thus, a Union citizen has a right of residence in another Member State for a period longer than three months where one of the conditions stipulated in Article 7.1 of the Directive is met and it is that right of residence of the Union citizen which "extends to family members who are not nationals of a Member State" in accordance with paragraph 2 of Article 7. Accordingly, the entitlement to

residence which accrues to the family member of a Union citizen is based upon the same Treaty-derived right of the Union citizen and that is why Article 10.1 of the Directive when prescribing the issue of residence cards to family members speaks of their right of residence being “**evidenced** by the issuing of a document called ‘residence card of a family member of a Union citizen’”. (Emphasis added) The residence card does not confer the right to reside but is merely evidence of the exercise of the right. Thus, in its judgment of 5th February 1999, in Case C-363/89 *Roux v. Belgium* [1991] ECR I-273, the Court of Justice confirmed that the issue of a residence permit merely records the existence of a right conferred and guaranteed by the Treaty and is of a declaratory nature only such that it cannot be subjected to conditions other than those expressly provided for by applicable Community (now Union,) rules. On that basis the Member State was declared in that case not entitled to refuse to issue a residence permit to a Community national upon the ground that he was not carrying on his activity in conformity with national social legislation in force.

26. It should also be noted that so far as concerns the exercise by a family member (including spouse) of a Union citizen of the rights of entry and residence in another Member State, non-compliance with administrative formalities applicable to the non-national cannot operate so as to defeat the exercise of the right. Thus, in its judgment of 25th July 2002 in Case C-459/99 *M.R.A.X. v. Belgium* [2002] ECR I-6591, the Court of Justice ruled that non-possession of a valid identity card or passport by the family member could not be relied on to refuse entry and residence where the person concerned could prove identity and conjugal ties by other means. The rationale of this approach is that the entitlement of the family member to join or accompany the Union citizen is an intrinsic facet of the Treaty right exercised by the Union citizen and cannot therefore be defeated or obstructed by obstacles based on administrative formalities provided the substantive conditions can be proved to be fulfilled by other means.

27. This case law and the other cases which were opened to the Court in argument were concerned, of course, with the exercise of the rights of entry and residence on the part of family members of the European citizen and related to the legislation which preceded the Directive. That legislation has, with some modifications, been consolidated in the Directive. As its recital (3) explains:

“It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.”

28. Nevertheless, so far as concerns the concept of the right of residence as a fundamental right derived by the Treaties and the lack of competence on the part of national legislation to impose preconditions on the exercise of those rights, it is clear that the case law is equally applicable to the provisions of the Directive. It follows, in the judgment of the Court, that had it not been for the fact that the references to the “Stamp 3” option in the letters of 16th and 17th June, 2010, imposed no obligation, it would be unlawful as incompatible with Union law for the respondent to attempt to impose upon a family member of a Union citizen lawfully present in the State, any removal or reduction of existing entitlements by reason only of having lodged an application in exercise of the right of residence enjoyed by the Union citizen’s spouse.

29. It is not, however, the right of residence as such which is in issue in these cases. What is at issue is the entitlement of the family member to seek and take up employment and the point in time at which that entitlement is exercisable. Unlike the right of residence, an entitlement on the part of a non-national of a Member State to seek and take up employment cannot be said to derive from the Treaty. The right of a family member of a Union citizen and particularly the spouse, to participate in the right of residence of the Union citizen is based upon the fundamental importance attached by the Union to respect for family life and upon the recognition as indicated in recital (5) (see above para 24,) to the Directive of the need to facilitate the Union citizen’s exercise of the right by removing any possible disincentive or disadvantage from having to leave immediate family members behind in another Member State. Clearly, the achievement of such objectives does not necessarily require that such family members also be accorded a right to seek and take up employment. Thus, the entitlement to take up employment does not similarly derive from the Treaty but is introduced and conferred by the Directive as a “related right” in Article 23. As already mentioned, this provides:

“Irrespective of nationality, the family members of a Union citizen who have a right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.”

30. It will be noted that once the family member “has the right of residence” he or she has also the entitlement to take up employment. As the right of residence is not dependent upon the issue of the residence card as evidence of its having been exercised, it must follow that the Directive is placing the entitlement to take up employment on the same basis. In other words, the entitlement to take up employment operates in parallel to or as an adjunct of the right of residence. Secondly, it is to be noted that the Article operates “irrespective of nationality”. Thus a non-national of the Member States is placed upon the same footing as nationals of a Member State so far as the entitlement to take up employment is concerned. Thus the Chinese wife of a Hungarian citizen is to be treated in this regard in the same manner as, for example, the American wife of a British citizen or the Spanish wife of a German citizen residing in the State. It follows, accordingly, in the judgment of the Court, that the entitlement to take up employment on the part of a family member of a Union citizen is not dependent upon or postponed to the issue of the residence card.

31. As already explained, the issue of an order of *certiorari* in these cases is unnecessary. The difficulty faced by the applicants in each case can, in the view of the Court, be adequately remedied in these circumstances by declaratory relief. The Court will therefore grant a declaration in each case in the following terms:

“The right of the second named applicant to reside in the State pursuant to Regulation 6 (2) (b) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 and the entitlement of the second named applicant under Regulation 18 (1) (b) to take up employment are exercisable as and from the date of receipt of the acknowledgment notice issued by the respondent pursuant to Regulation 7 (1) (c) of receipt of a valid application for a residence card made under paragraphs (a) and (b) of that paragraph, but remain liable to revocation with retroactive effect in the event that the respondent lawfully refuses to issue the residence card within the period of six months thereby prescribed.”

32. The other reliefs sought are, accordingly, refused.