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THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 321 J.R.]

BETWEEN

K M AND D G

APPLICANTS

AND

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

RESPONDENTS

Judgment of Mr. Justice John Edwards delivered on the 17th day of July, 2007

Facts

1. The first named applicant is a ------- national. He is married to the second named applicant who is an Irish citizen.

2. The first named applicant arrived in the State on the 5th January, 2004 as a student of computer studies at a College, in the City of Cork. He entered the State on a student visa. This visa permitted him to remain in Ireland to pursue a course of studies on condition that he did not engage in any business or profession other than casual employment (defined as employment for up to 20 hours per week during school term and up to 40 hours per week during school holidays) and did not remain beyond the stated date. The court has not been given the first visa expiry date but in any event it is not material to the issues that I have to decide. The first visa was endorsed on a ------- passport held by the first named applicant which is no longer current. His current passport was issued out of the embassy of ------- in Dublin on the 4th July, 2005 and gives his then current address as an address in Cork. This passport is endorsed with two permissions within the meaning of s. 4 of the Immigration Act, 2004. The first was endorsed on the 20th July, 2005 and gave the applicant permission to remain in the State for the purpose of pursuing a course of studies on condition that he did not engage in any business or profession other than casual employment (as previously defined) and did not remain in the State later than the 30th September, 2005. The second permission was in similar terms covering the period from the 6th October, 2005 to the 30th June, 2006. The first named applicant's permission to remain in the State expired on the 30th June, 2006 and was not renewed. However, the first named applicant did not leave the State on the expiry of his permission to be here and he has remained here since that time. The respondents contend, and it is not disputed by the applicants, that the provisions of subs. 1 and 2 of the s. 5 of the Immigration Act, 2004 apply to the first named applicant. These are as follows:-

> "(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 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 subs. (1) is for all purposes unlawfully present in the State."

3. According to the affidavit of the first named applicant he met the second named applicant after his arrival in Ireland and they became married on the 17th July, 2006. The first named applicant, by letter dated the 5th September, 2006, applied to the first named respondent for permission to remain in the State on the basis of his marriage to an Irish citizen. That application was acknowledged by a letter dated the 3rd October, 2006 from the first named respondent which stated *inter alia*:-

> "Your client's application was received by this office in September, 2006. Please be advised applications for residency in the State on the basis of marriage to an Irish national take approximately 12 to 14 months minimum to process.
>
> Please note your client has no entitlement to work during this application process."

4. In the course of a subsequent exchange of correspondence between the applicant's solicitors and the first named respondent, the first named respondent was pressed to process the first named applicant's application for residency as soon as possible and it was urged on the first named respondent that delay in processing the said application was causing undue and unnecessary hardship to the applicants as the first named applicant was not permitted to work. By a letter of the 10th January, 2007 the first named respondent wrote to the solicitor for the first named applicant stating that, at that point, applications were taking 11 months minimum to finalise and that it would be a number of months before the first named applicant's application was examined. This undoubtedly represented some improvement, though the applicants would say an inadequate improvement, on the initial estimate given.

5. On the 26th March, 2007 the applicants applied for, and were successful in obtaining, an order from this Honourable Court granting them leave to apply for the following reliefs (listed in paragraph D of the applicants' statement of grounds) by way of judicial review:

> 1. An order of mandamus ordering the first named respondent to determine the first named applicant's application for permission to remain in the State on foot of his marriage to the second named applicant within 21 days of the date of such order.
>
> 2. An interim or interlocutory injunction ordering the respondent to determine the first named applicant's application for permission to remain in the State on foot of his marriage to the second named applicant within 21 days of the date of such order.
>
> 3. A declaration that the applicants are entitled to have the first named respondent determine the first named applicant's application for permission to remain in the State on foot of his marriage to the second named applicant promptly but it any case within six months of the date of the application or within such other reasonable time as maybe determined by the court.
>
> 4. Damages for breach of constitutional rights and/or breach of the European Convention on Human Rights and fundamental freedoms.
>
> 5. Such further and other orders as to the court seem just.
>
> 6. The costs of the application.

6. The grounds upon which the applicants obtained the said leave were those set forth at paragraph E of the statement of grounds filed in support of the application.

7. They may be summarised as follows:

> The first named respondent is obliged to render a decision on the first named applicant's application for permission to remain in the State promptly or at any rate within a reasonable time.
>
> The principles of constitutional and natural justice apply to the making of that decision.
>
> The principles of constitutional and natural justice include a right to have a decision made on the first named applicant's said application within a reasonable time. A period of 12 to 14 months, or even the reduced period of 11 months, is an excessive length of time within which to make such a decision. The delay in making a decision on the first named applicant's application is unreasonable and irrational. A person in the position of the first named applicant who is married to an non Irish citizen of a European Union Member State is entitled under European Law to have an application for permission to remain in the State determined by the first named respondent within six months. The failure by the first named respondent to determine applications in respect of Irish citizens as quickly as those in respect of non Irish citizens of EU member states is irrational, disproportionate and *ultra vires.* Because the first named applicant is not entitled to work until a positive decision is made on his application the second named applicant is obliged by economic necessity to engage in labour to the neglect of her duties in the home. That state of affairs is in contravention of Article 41 of the Constitution of Ireland and of Articles 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms, so say the applicants. The applicants have suffered loss and damage as a result of the excessive delay in making a decision on the first named applicant's application and are therefore entitled to damages for breach of their constitutional rights or pursuant to s. 3(2) of the European Convention on Human Rights Act, 2003.

The Applicant's Case

8. The matter comes before me for a decision on the substantive issues by virtue of a notice of motion dated the 3rd April, 2007. It was suggested before me by counsel for the applicants, Mr. Patrick Horgan, S.C., that the putative time limit of 21 days from the making of any order that this court might make, prayed for in paragraphs D1 and D2 of the applicant's statement of grounds was perhaps inappropriate and that the words "within 21 days of the date of such order" in both of those paragraphs should be substituted by the words "within a reasonable time". Moreover, counsel for the applicants indicated that he was not pressing for an injunction at this stage and that the primary relief that he was now seeking was an order of mandamus ordering the first named respondent to determine the first named applicant's application for permission to remain in the State on foot of his marriage to the second named applicant within a reasonable time. The applicants are also persisting with their claim for declaratory relief and damages, although if an award in damages is considered by the court to be appropriate the assessment of those damages will almost certainly require a further hearing and the adjournment of that issue to another day.

9. I should mention that in granting leave in this matter Peart J. directed the addition of the second and third named respondents and directed the service of an amended statement of grounds in consequence thereof. However, the substance of the applicants' case has not changed from the outset and any reference in this judgment to their statement of grounds is to be taken as referring to the amended statement of grounds filed in accordance with the order of Peart J.

The Applicant's Submissions

10. In their written submissions to the court the applicants contend, and indeed, it is common case, that the first named applicant's application for permission to remain in the State attracts the rules of natural and constitutional justice. It is submitted, and again it is common case, that the concept of "constitutional justice" includes the right to a decision within a reasonable time. The court's attention is drawn to the judgment of Kelly J. in *O'Donoghue v. The Legal Aid Board, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, Kelly J., 21st December, 2004). It is not necessary to refer to this case in any detail at this point in my judgment because the respondents accept the proposition advanced as being a correct statement of general principle.

11. It is further argued on the behalf of the applicants that the aforementioned general principle, namely that an applicant for administrative relief is entitled to a decision within reasonable time, is applicable to administrative decisions made in the immigration context. In that regard the court's attention is drawn to *Awe v. The Minister for Justice, Equality and Law Reform* (Unreported, Finlay Geoghegan J., 24th January, 2006). In that case (which was a leave application) Finlay Geoghegan J. held:-

> "I have concluded that on the facts of this case an arguable case in law has been made out that the principles of constitutional justice and fair procedures require the respondent to determine the application for revocation of the deportation orders contained in the letter of 7th March. Further, such principles require the determination to be made within a reasonable period of time and any such reasonable period of time expired prior to the hearing of the leave application. Accordingly, it appears to me that the applicants are entitled on such facts to an order granting leave to seek the relief sought…"

12. The applicants also rely upon the case of *Iatan and Others v. Minister for Justice, Equality and Law Reform and others* (Unreported, Clarke J., 2nd February, 2006) a case in which Clarke J. granted an order of mandamus requiring the Minister for Justice, Equality and Law Reform to determine the applicants' application for relief under s. 18 of the Refugee Act, 1996 within a reasonable time. The applicants' submissions also refer to an ex tempore decision of Finlay Geoghegan J. *in Udojie v. The Minister for Justice, Equality and Law Reform* of the 6th March, 2007 as supporting the proposition contended for. However, there is no transcript of Finlay Geoghegan J.'s ex tempore judgment nor is there any approved note of the judgment. In the circumstances I cannot have regard to it.

13. The applicants submit that a reasonable time for the making of the decision was six months from the date of submission of the application. It is pointed out that were the second named applicant a citizen of any EU Member State other than Ireland the Minister would be obliged to determine her spouse's application to remain in the State within six months pursuant to Article 10.1 of Directive 2004/38/EC which is in the following terms:-

> "1. The right of residence of family members of a Union Citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called «Residence card of a family member of a Union citizen» no later than six months from the date on which they submit the application."

14. The applicants' case is that as the Minister can determine such applications within six months there is no good reason why the Minister could not have determined the first named applicant's application within six months of it being submitted, or at any rate at this point forthwith."

15. The applicants contend that if the court was minded to grant the order of mandamus sought it could do so without breaching the doctrine of separation of powers. It is submitted by the applicants that all they are seeking to do is to have a decision made on the first named applicant's application within a reasonable time and they say that this represents a clear example of commutative justice and that in no sense could it be considered as being distributive justice. The court's attention is drawn to the decision of the Supreme Court in the case of *T.D. and Others v. The Minister for Education, Ireland The Attorney General and Others* [2001] 4 I.R. 259 and to the decision of the Supreme Court in *O'Reilly v. Dublin Corporation* [1989] I.L.R.M. 181.

16. The argument that the second named applicant is obliged by economic necessity to engage in labour to the neglect of her duties in the home contrary to Article 41 of the Constitution is not specifically addressed in the applicants' submissions. However, in supplemental submissions of the applicants filed in court the argument that the applicants' rights to private and family life under Article 8 of the European Convention on Human Rights are breached by the delay in this case is addressed. Further, the supplemental submissions elaborate on the contention that the inability of the first named applicant to work until a decision is made on his application constitutes degrading treatment in breach of Article 3 of the Convention. The court's attention is drawn to Kilkelly (ed) *E.C.H.R. and Irish Law* at paragraph 4.56 wherein the following is stated in respect of asylum seekers:-

> "The conditions and circumstances in which asylum seekers are required to live while awaiting a decision on their applications for refugee status may also raise issues under the Convention. In Ireland the most contentious issues arising in this respect include…the refusal of the State to allow asylum seekers to work pending the determination of their claims to refugee status. None of these issues has been addressed squarely by Convention Institutions. Nevertheless it is worth considering whether any of them might be raised effectively under Article 3 of the Convention as constituting degrading treatment, or under Article 8 as a possible violation of the right to respect for private life. In a separate opinion in the case of *H.L.R. v. France* (Dissenting opinion of Mr. Barreto [1998] 26 E.C.H.R. 29, 42) one member of the former European Commission on Human Rights argued that the refusal to accord the means of subsistence to a person whose expulsion had been ruled to be in violation of Article 8 fails to meet the requirements of that Article."

17. The applicants submit that the principles identified in this paragraph apply at least as strongly in their case, though they are at pains to point out that they are not challenging the prohibition on the first named applicant working pending the making of the decision on his application. However, they argue that the fact of that prohibition goes to the reasonableness and proportionality of the delay in making that decision. In all the circumstances they contend that the delay involved in making a decision on the first named applicant's application is unreasonable and disproportionate.

The Respondent's Case

18. The evidence on behalf of the respondents is contained in the replying affidavit of Lisa O'Connor who is a High Executive Officer in the Department of Justice, Equality and Law Reform. She deposes to the fact that there is a dedicated section of the Department of Justice, Equality and Law Reform known as the Married to Irish National Section, which deals with applications of this kind. She states that in the interests of equality of treatment of all applicants, and in interests of fair procedures, applications are dealt with in a strictly chronological order. She goes on to state that in examining each application the first named respondent will establish certain matters, so as to avoid abuses of the immigration system. These include the validity and bona fides of the marriage and whether and for how long the couple are residing together as a family unit. Generally speaking, permission to remain is not granted to the non EU national spouse of an Irish national unless they are residing in the same household as a family unit. She states that the resources allocated to process such applications are dependent on the work requirements of the Immigration division of the first named respondent's department at any one time. This department is operating against a background of significant increases in demands for its services over a wide range of areas, including significant increases in applications for leave to remain from non EU national spouses of Irish nationals. 335 applications for permission to remain in the State on the basis of marriage to an Irish national were made during 2006. Up to 31st May, 2007, 143 such applications had been made.

19. Ms. O'Connor states that on the date on which the applicants' married, the first named applicant had no permission to remain in the State. Nationals of ------- require a visa to enter the State. The first named applicant, in order to be fully compliant with the Immigration Acts 1999 to 2004, should return to ------- and his application should in fact be processed from outside the State. She avers that the applicants were aware of the first named applicant's precarious immigration status when they married and they have not asserted that the applicants could not return to -------.

20. Ms. O'Connor further states that since the 3rd October, 2006, when the first named respondent informed the first named applicant that his application would take 12 to 14 months to process, there has been some easing off in the number of applications received, such that it was possible to indicate to the first named applicant by letter dated the 10th January, 2007 that these applications were now taking approximately 11 months to process. She states that it is hoped to deal with the first named applicant's application in or about August, 2007 and to issue a decision as soon as possible. That of course is subject to the applicants submitting, within a specified timeframe, all documentation and information that the Minister may require in order to make his decision.

21. By way of legal argument the respondents have made the following submissions to the court. Firstly, it is submitted that neither of the applicants have any entitlement to require the Minister to grant to the first named applicant any permission to remain in the State and the court is referred to the decision in *R. (Mahmood) v. The Home Secretary* [2001] 1 W.L.R. 840 which was approved in *T.C. v. The Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 109. In fairness to the applicants, I do not believe that they are making that case. All they want is a prompt decision one way or the other. However, the respondents go on to argue that the principles in Mahmood have established that there is no general obligation on a State to respect the choice of residence of a married couple. It is only in circumstances where the entire family is lawfully resident in a State that Article 8 of the European Convention on Human Rights is even engaged. Furthermore, knowledge on the part of one spouse at the time of marriage that the rights of residence of the other are precarious militates against a finding that exclusion of the latter spouse violates Article 8. It is further submitted that these principles were applied in the case of *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 as giving a guide to the effect of Article 41 of the Constitution. The respondents submit that there is no material difference between the case law of the European Court of Human Rights in relation to Article 8 and the case law of the Irish Courts in relation to Article 41 and other provisions of the Constitution as they relate to the rights of family members, save that additional protections are afforded pursuant to the European Convention to non married couples, a circumstance which does not apply in the facts of this case.

22. The respondents accept that the first named applicant is entitled to fair procedures but they pose the question to what extent the right to fair procedures gives an entitlement to the relief sought by the applicants in these proceedings. In that regard the respondents submit that the requirements of fair procedures cannot render lawful what is clearly unlawful. They say that it is quite

clear that the first named applicant has no entitlement to remain in the State even during the currency of the application, notwithstanding that the Minister has shown a degree of forbearance towards him and has not taken any steps thus far to deport him. The respondents contend that the situation with regard to applicants for residency pursuant to Article 10.1 of the Directive 2004/38/EC is not analogous. According to the respondents such applications are not within the Minister's discretion and a favourable outcome is required by the law, provided the family members in question are eligible, for example provided the applicant is the bona fide spouse of an EU national. According to the respondents, persons in the position of the first named applicant are not entitled to a favourable outcome as of right, and the Minister has full and unfettered discretion in such a case, though of course such discretion must be exercised lawfully.

23. The respondents also make the point that the Supreme Court has confirmed that the Minister is entitled to operate a system of pre-clearance which would require applicants to return to their country of origin before they make an application to reside in the State for a purpose other than that for which they were originally admitted. Generally speaking these cases arise where a person was admitted for the purposes of pursuing an asylum application but the respondents submit there is no difference in principle where the initial entry is for a limited purpose such as study or indeed holidays or other visits. I believe this to be correct. The Court's attention has been drawn to *G.A.G. v. The Minister for Justice, Equality and Law Reform, and Others* [2003] 3 I.R. 442. In particular the respondents point to the following passage in the judgment of Murray J. at p. 467:-

> "The administrative procedures applied by the first respondent for the examination of applicants for a business permit who wish to engage in self employment within the State is a system of prior control whereby such applicants are require to submit their applications from outside the State, usually their home country, before they are granted any leave to enter and stay in this country for the purposes of establishment. Exceptionally, immigrants who are already authorised to reside in the State and who require a business permit may have their applications examined while they are so resident in the State but this is an aspect of the matter which I will address later. The purpose of a system of prior control is clear and indeed self evident. It permits the relevant State authorities to verify the genuine nature of the application, ensure that the establishment provisions of the relevant agreement are not invoked by persons who actually intend to gain access to the labour market by that route as employed workers or have recourse to or become dependant on public funds after entry for that ostensible purpose. It also permits the State to verify the efficacy of an applicant's business plan and clarify any aspect of the application before permission to enter and reside is granted."

24. It is urged upon me by the respondents that the Supreme Court has clearly recognised that is open to the Minister to operate and enforce a system of pre-clearance whereby non-nationals are obliged to make applications for entry and residence to the State from outside the State, when they change the basis on which they seek to reside in the State, as has happened here. The respondents contend that the fact that the first named applicant is unlawfully in the State is not irrelevant to an analysis of the first named applicant's claim that his application has not been dealt within a reasonable period of time. The court is again referred to the judgment of Keane J. in *A.O. and D.L. v. The Minister for Justice, Equality & Law Reform* wherein he stated:

> "The Executive is entitled to take the view, it being entirely a matter for it, that in the public interest, immigrants seeking to make their home in this country should not be allowed to bring about a situation in which their applications are dealt with in priority to other applications (to the possible detriment of later applicants), by entering the State illegally and instituting what prove to be unfounded applications for refugee status. In particular, they are entitled to take the view that the orderly system in place for dealing with immigration and asylum applications should not be undermined by persons seeking to take advantage of the period of time which necessarily elapses between their arrival in the State and the complete processing of their applications for asylum by relying on the birth of a child to one of them during that period as a reason for permitting them to reside in the State indefinitely."

25. The respondents say that while the factual matrix in that case was somewhat different it is clear that the Supreme Court acknowledged the entitlement of the Minister to put in place systems which did not allow illegal immigrants to the country to seek priority to those applications which had been made by persons who complied with the procedures which are in place for the regulation of entry and stay in the State. Now in fairness to the applicants they have been at pains to point out to the court that they are not seeking to jump the queue. Their position is that every applicant from a non EU Member State seeking residence on the basis of their marriage to an Irish citizen should have their applications adjudicated upon and decided promptly. However, they can only fight their own corner. *Prima facie* that seems to me to be a reasonable position.

26. In relation to the case of *Iatan v. The Minister for Justice, Equality and Law Reform* and others relied upon by the applicants, the respondents contend that it is of little assistance to the court in as much as the case depended upon its own very unusual facts. Moreover, while it is acknowledged by the respondents that the court made reference to the fact that the Minister could not, by reason of his delay, prevent the applicant in that case from residing or working in the State pending the making of the decision, Clarke J. made it abundantly clear that delay in and of itself could not give rise to substantive rights. The respondents seek to distinguish that case on the basis that the applicant in *Iatan* had a prima facie right to remain in the State as a spouse of a declared refugee and the Minister's discretion was limited. In the present case, however, the Minister is at large in the exercise of his discretion and the applicants' position cannot be improved solely by reason of the alleged delay involved.

27. In relation to the case of *Awe v. The Minister for Justice, Equality and Law Reform* relied upon by the applicants the respondents make the point that this was an application for leave only and it was not the substantive hearing. Accordingly, all the applicants in that case had to show was an arguable case (Section 5 of the Illegal Immigrants (Trafficking) Act, 2000 did not apply in the circumstances of that case). Finally, the respondents contend that the Minister has regulated his procedures in a fair and proper manner, which respects the rights of all applicants for permission to enter and/or to remain in the State. Those procedures have been determined in accordance with the resources available to the Minister. It is submitted that if the court were to grant the applicants the relief that they seek that that would, in effect, constitute an order to the Minister as to how he is to deploy his resources and that that would constitute an unwarranted interference by the judicial arm of Government into the affairs of a branch of the Executive.

Decision

28. I am satisfied that the entitlement to a prompt decision is an aspect of constitutional justice. Moreover, quite aside from constitutional justice it is clear from the authorities that the idea of substantive fairness includes a duty not to delay in the making of a decision to the prejudice of fundamental rights. See De Smith, Woolf and Jowell (5th Edition, 1995), p. 584.

29. It seems to me that the substantive questions that I have to address are twofold. Firstly, has there been a delay in rendering the administrative decision at issue in this case? Secondly, if there has been a delay, is the degree of delay so unreasonable or unconscionable as to constitute a breach of the applicants' fundamental rights, particularly the first named applicant's right to constitutional justice, and his right not to be subjected to degrading treatment under Article 3 of the European Convention on Human

Rights and Fundamental Freedoms, and the rights of both applicants under Article 41 of the Constitution, and under Article 8 of the aforementioned Convention.

30. In considering these issues the following considerations would seem to me to be relevant.

1. The period in question
2. The complexity of the issues to be considered
3. The amount of information to be gathered and the extent of enquiries to be made.
4. The reasons advanced for the time taken and
5. The likely prejudice to the applicant of account of delay.

31. On the evidence before me the period with which I am concerned is expressed to be 11 months minimum from the date of application to the date of decision. On the basis of the affidavit of Lisa O'Connor I am prepared to interpret this as meaning 11 months providing an applicant submits, within a specified time frame, all documentation and information that the Department may require in order to make its decision. Obviously, a decision may take longer than anticipated if information is sought by the decision maker from the applicant and the applicant is dilatory in supplying it. There is no suggestion of any such circumstances here, however. At the time at which the first named applicant made his application the likely waiting period was expressed to be in the order of 12 to 14 months minimum. However, there has been an improvement in that situation due to a reduction in the number of applications and for the purposes of this decision I am no longer concerned with a 12 to 14 month minimum period. I am only concerned with the present situation, namely, an 11 month minimum period.

32. The point is very strongly made by the respondents that this is a matter in respect of which the Minister is at large in the exercise of his discretion. There are numerous policy issues to be considered and, unlike the situation in the case of an application for a residents card by a family member of an EU national who is not him/herself an Irish national, no favourable outcome is required by law. In the case of the applicant for a residents card under Directive 2004/38/EC, once the application is determined to be a *bona fide* application, the Minister has no discretion but to grant such an applicant a residents card. The respondents argue compellingly that the first named respondent is in a completely different situation with respect to the first named applicant's application. Even if the Minister is satisfied that the first named applicant's application is bona fide, and of course that has to be determined, it is not then a matter of rubber stamping the application. The applicant is not entitled as of right to a favourable outcome. It is a matter for the Minister's discretion and the Minister is entitled to a reasonable period of time to reflect on the issues, to weigh up competing policy considerations and in that way to give a considered decision. Furthermore, this is not a case where a Minister can make a swift decision based upon an application form submitted by the applicant. Information does require to be gathered and enquiries have to be made if only to establish the bona fides of the applicant. Ms. Lisa O'Connor, at para. 6 of her affidavit, explains that in examining each application the first named respondent will attempt to establish certain matters so as to avoid abuses of the immigration system. These include the validity and bona fides of the marriage and whether and for how long the couple are residing together as a family unit. These seem to me to be absolutely reasonable and appropriate enquiries in the circumstances and one can well imagine how they might take a number of months. It has been urged upon me by Mr. Horgan S.C. on behalf of the applicants that of course the same type of enquiries have to be made in the case of a person applying for a residents card under the aforementioned EU directive and I take his point in that regard.

33. Turning now to the reasons advanced for the time taken. These are multiple. As already alluded to information has to be gathered and enquires have to be made. In that regard, the respondents put a resources argument before me. It is specifically urged upon me that the resources allocated to process these applications are dependent on the work requirements of the Immigration Division of the first named respondent's Department at any one time. Further this Department is operating against a background of significant increases in demands for its services over a wide range of areas, including significant increases in applications for leave to remain from non EU national spouses of Irish nationals.

34. Now in general it can be stated that arguments based upon scarce resources are not justiciable and will not be entertained if proffered to excuse a failure to vindicate the constitutional rights of an individual or to afford him fair procedures in a matter in respect of which he is entitled to constitutional justice. However, I think that this statement of general principle, while sound as far as it goes, can only apply in a situation where the delay based upon scarce resources is unreasonable and unconscionable. In other words, the principle undoubtedly must apply where the delay is gross and significantly prejudicial. That said, regard must also be had to the reality that it is in the nature of things that any administrative engine will be to some extent variable in its efficiency. I believe that there has to be a margin of appreciation and I think that the question of demands on the system and the availability of resources is relevant within the bounds of the margin of appreciation. However, once the delay becomes gross and unconscionable an argument based upon scarce resources cannot be advanced to justify it.

35. The point is also made that once he has the necessary information to enable him to address the application the Minister is entitled to a reasonable time to consider all of the matters that he must take into account in the exercise of his discretion. I think it is also an important point that while information gathering and the making of enquiries are matters that can be delegated by the Minister to his officials, at the end of the day the decision in any case is personal to him. He has to consider the assembled information and decide in each case, and the evidence before me is that there are a large number of cases in the system at present. I have to have regard to that.

36. The next matter for consideration is the question of possible prejudice to the applicants. The applicants acknowledge that the first named applicant is not entitled to demand a particular result in the process. It is argued that all the applicants are seeking is a decision, one way or the other, for the first named applicant within a reasonable time. However, they go further and contend that by reason of the first named applicant's inability to work while awaiting the outcome of the process they are in straitened financial circumstances. They advance the submission that the applicant has a strong desire to work and because he is not allowed to do so he is effectively in a kind of limbo. Moreover, the applicants acknowledge that the first named applicant is illegally in the State but they contend that remaining here on that basis was the only reasonable option open to him. The contention is that it would be disruptive at the very least, and possibly destructive, of their family unit if the second named applicant were to remain in Ireland while the first named applicant returned to ------- for a protracted period. Further, the possibility that they would both go to ------- is equally unrealistic in circumstances where the second named applicant has put down roots in Ireland, has employment in Ireland and has a social network here. As against that the respondents say that the second and third options mentioned are the only choices legally open to the applicants and that, hard choices though they be, these are choices for the applicants to make. In rejoinder the applicants contend that precisely because they are hard choices it is incumbent on the first named respondent to render them a

speedy decision. The difficulty with that, however, is that the applicants have not made a legally tenable choice which causes them hardship. They are not in fact separated. They are not in fact together in -------. Rather, they are together in Ireland enjoying the society of each other as a married couple. Of course the first named applicant is in a precarious position in as much as the forbearance which the respondents have shown could end at any time and he could in theory be deported from the State at any time. However, that is a situation that the first named applicant has brought about by himself. It seems to me that in a situation where the State operates a legitimate system of pre-clearance the applicants cannot validly complain of hardship on account of the first named applicant's inability to work while illegally in the State. I appreciate that the applicants contend that their argument is more subtle than that, that they are not disputing that the State is entitled to forbid the first named applicant to work but rather that the very existence of that circumstance creates the imperative that a decision should be rendered promptly. I cannot agree. I think that the applicants' case cannot be viewed in any different light from the case of a couple in the applicants' position where the non citizen spouse has complied with the law and returned to his or her country of origin with or without the other spouse. That said, I will readily accept that compliance with a system of pre-clearance will, of itself, in most cases, make onerous demands on an applicant couple and that any undue delay in the decision making process may indeed add to their burden and thereby prejudice them.

37. The applicants have asserted, through their counsel, that a period of six months would be a reasonable period within which the first named respondent ought to render his decision. That argument is put forward on the basis that a six month period is provided for in respect of applications pursuant to Article 10.1 of Directive 2004/38/EC. I do not accept the applicants' contention that the processes are analogous. Rather, I think the respondents are correct in contending that a greater period of time is required in a situation where the Minister has full discretion. However, the comparison that has been made is useful in as much as it provides me with guidance as to what is reasonable in terms of the period that must be allowed for the gathering of information and the making of enquiries. I am happy to adopt the applicants' suggestion that six months is an appropriate period for that aspect of the process. In an ideal world three months might be enough but having regard to the margin of appreciation that I have spoken about, and which I feel must be allowed, I think that up to six months would be reasonable in the circumstances.

38. In relation to the actual decision making process itself once the information has been gathered, I think that the Minister must be afforded some further time. The question is how much further time is to be allowed within the bounds of what is reasonable. In this regard I note that in the case of *Philips v. The Medical Council* [1991] 2 I.R. 115 Costello J. said that the Council was under a "statutory duty to determine the plaintiff's application [for registration] within a reasonable time. It has failed to do so … and it has no lawful excuse which justifies this failure. I think a reasonable time for the consideration of the application was three months". It should be noted that in the *Philips* case there was no information to be gathered or enquiries to be made. Costello J. regarded the period of three months as being a reasonable period in a situation where the deciders had all of the necessary information and simply had to consider it and make a decision. The *Philips* decision is of somewhat limited assistance because while both cases share certain features in common, the issues under consideration and the decision making processes are significantly different in each case. I think a particularly important difference is the personal nature of the Minister's discretion in the present case and the burden of his present caseload. Having regard to the complexity of the issues to be considered by the Minister in the present case, and his duty to consider the first named applicant's case judicially, and with due regard to the imperative of promptitude in order to minimise prejudice to applicants, I think that to allow him a further period of three to six months beyond the information gathering and enquiries stage would be reasonable in all the circumstances. Again, in an ideal world three months might be enough but a period of up to six months could be tolerated within the bounds of what is reasonable. Accordingly, taking into account the six month period allowed for the gathering of information and the making of appropriate enquiries we are talking about a total period of between 9 months and 12 months as being a reasonable time for the making of a decision by the first named respondent in the first named applicant's case.

39. The respondents have contended that the first named applicant will have to wait a period of 11 months minimum from the date of his application to receive a decision from the first named respondent. This is certainly sub optimal and close to the limits of what is reasonable. There is undoubtedly a degree of delay. However, as I have indicated, I do not believe that the degree of delay is presently such that it could be characterised as being unreasonable and/or unconscionable. If the applicant were kept waiting for a decision longer than 12 months I would have no hesitation in finding the delay to be unreasonable and, being unjustifiable notwithstanding any scarcity of resources, unconscionable. However, it is not necessary for me to make any such finding as I am assured that it is likely that the first named applicant will have his decision shortly.

40. In conclusion I find that, to date, the first named respondent has not acted in breach of constitutional justice. Neither has the first named applicant been subjected to degrading treatment under Article 3 of the European Convention on Human Rights and Fundamental Freedoms. Further, I do not consider that the degree of delay in the case to date, such as it is, has so prejudiced the applicants as to breach their rights under Article 41 of the Constitution, and under Article 8 of the aforementioned Convention.

41. As I have not found that the first named respondent has been guilty of unreasonable and unconscionable delay to date, and as a decision is imminent and is likely to be given within the bounds of what is reasonable, it is not necessary for me to consider the separation of powers issue or indeed the question as to whether or not mandamus would have been an appropriate remedy in this case. For the reasons outlined I will dismiss the application. I will hear arguments with respect to costs.