

THE HIGH COURT**2010 1398 JR****BETWEEN/****RADU RADUCAN AND AURELIA RADUCAN****APPLICANTS****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,****IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Mr. Justice Hogan delivered on the 3rd June, 2011**

1. The applicants are a couple who were married on 20th March, 2007, in Purcari, Moldova. Ms. Raducan is Moldovan and Mr. Raducan is Romanian. They originally travelled to Ireland in April, 2007. At that time, Ms. Raducan, who holds a Moldovan passport, stood possessed of an Irish visa. It is common case that Ms. Raducan overstayed her visa at that time, but nothing greatly turns on this, since it is also accepted that, as the spouse of an EU citizen, she has a perfect entitlement in principle to enter this State.

2. The couple left Ireland in July, 2010 and returned to Romania. It would appear that when they were there they went to some trouble to ensure that their married status - and, hence, Ms. Raducan's entitlement to accompany her spouse - would be vouchsafed. To that end, the applicants obtained a formal marriage certificate which was issued by the Romanian Embassy in Chisnau, Moldova on 1st October, 2009. The certificate was in three languages, Romanian, French and English. A Hague Convention apostille - which is effectively the equivalent in international law of the notarisation of a document for domestic law purposes - was issued in respect of that marriage certificate in April, 2010.

3. In addition to the marriage certificate (and the apostille attached to it), the applicants were also in possession of a plastic identity card in the style of a credit card which was entitled "residence card for family members." The card had been issued on 28th September, 2010. It displayed Ms. Raducan's photograph and gave other relevant details in Romanian, French and English. It is not in dispute but that this card was a valid "Residence card of a family member of a Union citizen" for the purposes of Article 10(1) of Directive 2004/38/EC ("the 2004 Directive").

4. The applicants arrived at Dublin airport on Friday, 29th October, 2010, on a flight from Bucharest with a one-way ticket. While there is a conflict of fact as to what exactly happened following the presentation of their passports to the immigration authorities, there are other key facts which are not in dispute. It is agreed that Moldova is not visa exempt and that Ms. Raducan did not have an Irish visa which she was otherwise required to possess. It is equally agreed, however, that Ms. Raducan would have been entitled to admission into the State as of right on presentation of the family residence card in accordance with Article 5(2) of the 2004 Directive. This provides:-

"For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement."

5. What is in dispute is not only whether Ms. Raducan actually produced the card (or, for that matter, the marriage certificate) to the immigration authorities, but also whether the State duly complied with its obligations under Article 5(2) and Article 5(4) of the Directive. This latter provision is in the following terms:-

"Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence."

6. Before examining this point further, it may be convenient here to summarise the oral evidence given by the three witnesses.

The evidence

7. Ms. Raducan gave evidence with the benefit of an interpreter. She said that when she approached the immigration booth, she presented her Moldovan passport, her husband's Romanian passport and the family residence card to Garda McCormack, who was the immigration officer on duty. Ms. Raducan maintained that Garda McCormack took the two passports and put the card to one side. According to her, Garda McCormack insisted that she needed a visa and stated that the family residence card was not valid in Ireland. Ms. Raducan insisted that at that point she then produced her marriage certificate from her purse in order to show that she was married, but that Garda McCormack was only interested in the production of a visa.

8. It is not in dispute but that shortly afterwards Ms. Raducan was arrested by Garda McCormack pursuant to s. 5(2) of the Immigration Act 2003, and brought to the Dóchas Centre where she was to be detained pending her removal from the State to Bucharest on Tuesday, 2nd November, 2010. Mr. Raducan was permitted to enter the State. As it happens, an application was made to this Court on Saturday 30th October for an inquiry into the legality of Ms. Raducan's detention pursuant to Article 40.4.2 of the Constitution. Kelly J. directed such an inquiry and the applicant was released on Monday, 2nd November, 2010.

9. Returning now to the oral evidence, Garda McCormack agreed that there were communications difficulties with the applicants. When she asked Ms. Raducan why she did not have an Irish visa, the latter claimed that she was married. Garda McCormack said that she then asked Ms. Raducan to produce her marriage certificate, but it was never produced. She also noted that the couple had only one way tickets, that Ms. Raducan had previously overstayed her visa and that vague and contradictory explanations were given in

respect of the anticipated length of their stay. Garda McCormack was emphatic that neither the marriage certificate nor the family residence card had not been produced to her. While the immigration authorities had a contact in the Romanian Embassy whom they could ring with regard to problem cases, she did not think that it was necessary to do so in the present case. Garda McCormack then made an order under s. 5(2)(a) of the Immigration Act 2003 providing for the detention of the applicant pending the making of arrangements for her removal from the State.

10. Under cross-examination Garda McCormack agreed that she had not asked Ms. Raducan whether she was married, but stressed that no marriage certificate or family residence card had been produced. She was not familiar with the family residence card and had never encountered such a card before it was produced in evidence. She had checked the status of the applicants on the Garda information system and she noted that Ms. Raducan had previously overstayed in Ireland once her visa had expired. While she agreed that interpreters were often used over the phone, she had not used this facility in the present case.

11. Garda McCormack's immediate supervisor, Sergeant Biggins, also gave evidence. He said that he had only seen the passports and that no other documents had been produced. He had not seen any marriage certificate which he maintained was the standard document to be produced in such cases. He had not seen any family residence cards and, indeed, he was not even aware of the existence of such cards prior to this litigation. He confirmed that there was no procedure to grant a visa to third country nationals at the airport.

12. Under cross-examination Sergeant Biggins emphasised that following Ms. Raducan's detention it was up to the applicant's legal advisers to produce the necessary documentation and that it was not for him to be proactive in this matter. He again emphasised that he had not seen the marriage certificate or the residence card. He further suggested that if the applicant had genuinely been in possession of such documentation at the time, he would have expected that such documentation would have been produced at some stage over the weekend by her solicitor during the course of the latter's discussion with him during the course of Saturday, 30th October. When I drew his attention to the fact that the marriage certificate had in fact been exhibited by the applicant's solicitor in his affidavit grounding the Article 40 application which had been made to Kelly J. in the course of the late afternoon of that Saturday (i.e., some 24 hours after the original arrest), Sergeant Biggins stated that he had never read that affidavit. He did acknowledge, however, that he himself had sworn an affidavit in these proceedings.

13. The applicants then called Mr. Gavin Cheevers, a legal executive in the applicant's solicitor's law firm, James M. Sweeney & Co.. He confirmed that he had been contacted late on the Friday evening by a friend of Mr. Raducan who had endeavoured to summarise what had happened to Ms. Raducan earlier that afternoon. Mr. Cheevers managed to arrange a visit to the Dóchas Centre on the Saturday morning where he obtained a copy of the marriage certificate from the prison officials. He then explained the steps which led to the Article 40 application being put in train.

14. At the conclusion of Mr. Cheevers' evidence, the respondents agreed to make further inquiries. On the second day of the hearing, a copy of an entry from the prison reception book for the Dóchas Centre was produced by the respondents. This document plainly showed that Ms. Raducan was in possession of the family residence card and the marriage certificate on her arrival at the prison on that Friday afternoon. In effect, therefore, the only question which then remained was whether these documents had been produced earlier that afternoon to the immigration officers.

15. Faced with this conflict of fact, it falls to me to resolve the question of whether these documents were produced. It is only fair and proper to record that I am absolutely satisfied that both Garda McCormack and Sergeant Biggins are conscientious and dedicated immigration officers who perform a difficult job under demanding circumstances. There is also no question but that both gave absolutely honest evidence regarding their recollection of events. Their bona fides and sincerity are absolutely not in doubt.

16. Nevertheless, in approaching this question, one may again stress that Ms. Raducan had an unquestioned right under both national and EU law to enter the State if either of these documents had been produced. It is in that vein that we may thus heed the advice of fiction's greatest analyst of factual conflict, namely, that "when you have eliminated the impossible, whatever remains, however improbable, must be the truth": see Conan Doyle, *The Sign of Four* (1890)(Penguin Books, 1982)(at 51).

17. To my mind, it is impossible to believe that Ms. Raducan would not have endeavoured to produce either or both documents at some stage during the course of the immigration process. It must be recalled that the Raducans had evidently gone to some trouble to obtain these documents in the course of their trip to Romania. They also clearly appreciated the significance for Ms. Raducan of both the family residence card and the notarised marriage certificate so far as landing in Ireland was concerned. Why, then, would Ms. Raducan not wish to present these documents to immigration officers? Short of the fanciful suggestion that Ms. Raducan had some covert desire to experience at first hand conditions in the Dóchas Centre, one cannot posit any rational explanation as to why she would not attempt to produce documents which we know were in her possession at the time and of whose importance she was clearly aware.

18. It follows, therefore, that the alternative explanation – however otherwise improbable in itself – must be the truth. But quite independently of Holmes' aphorism, there are several factors which also tend to support the conclusion that Ms. Raducan did, in fact, produce one or other of these documents. Neither Garda McCormack nor Sergeant Biggins had ever previously seen a family residence card, nor were they aware of its significance. In that context, Ms. Raducan's evidence to the effect that Garda McCormack put the card to one side while at the same time focusing on the absence of an Irish visa seems distinctly plausible.

19. It must also be further recalled that Garda McCormack's suspicions were not unnaturally been aroused by reason of the fact that Ms. Raducan had no visa; that the couple had given somewhat contradictory accounts of the length of their proposed trip; that they had only a one way ticket from Bucharest and that the Garda immigration records showed that Ms. Raducan had previously overstayed in 2007. Perhaps in these circumstances Garda McCormack was – understandably enough – inclined to doubt Ms. Raducan's *bona fides*. To this must be added factors such as confusion and uncertainty arising from a mutual misunderstanding, along with the absence of an interpreter.

20. In these circumstances, I am coerced to the conclusion that Ms. Raducan must have produced (or, at least, endeavoured to produce) one or other document such as would have entitled her to enter the State and that in the general confusion arising from a mutual misunderstanding neither Garda McCormack nor Sergeant Biggins fully appreciated this fact.

Compliance by the State with Article 5(2) and Article 5(4) of the 2004 Directive

21. But over and above this factual question, it is clear from the evidence in this case that the procedures employed at Dublin Airport with regard to the procedures to be followed in the case of the admission of the spouses of EU nationals are seriously wanting. In Case C-459/99 *MRAX v. État belge* [2002] ECR I – 6591 the Court of Justice was quite emphatic (at pars. 60-62 of the judgment) as to what the corresponding provisions of earlier free movement Directives (which were ultimately replaced by Directive 2004/58/EC)

required in this regard:-

"However, Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 state that the Member States are to accord to such persons every facility for obtaining any necessary visas. *This means that, if those provisions of Directives 68/360 and 73/148 are not to be denied their full effect, a visa must be issued without delay and, as far as possible, at the place of entry into national territory.*

In view of the importance which the Community legislature has attached to the protection of family life....., it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148." (Emphasis supplied)

22. It is plain from this judgment that Member States were required under the old free movement Directives to have in place a facility whereby visas could be issued immediately at a major airport such as Dublin Airport. If anything, however, the Union legislator went further with Article 5(2) of the subsequent 2004 Directive which provides:-

"2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States *shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.*" (emphasis supplied)

23. It is clear from the evidence of Sergeant Biggins – indeed, he swore an affidavit to this effect – that such visas cannot be obtained at Dublin Airport and that any third country spouse can only apply on line from abroad for such a visa. This is clearly a manifest breach of Article 5(2), since it could hardly be said that the State has afforded "such persons every facility to obtain the necessary visas." One need hardly add that the absence of such a facility means that the State is also plainly failing in its obligation to issue such visas "as soon as possible and on the basis of an accelerated procedure." There was thus a clear breach of the Directive in that Ms. Raducan was not offered the possibility of securing a visa on her arrival at Dublin Airport.

24. Nor can it be said in the present case that the State has complied with its duty with regard to Article 5(4) which was, before turning the applicant back, to give her "every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence." In this context it was striking that the State had plainly not given its immigration officers appropriate training regarding the family residence card, since neither Garda McCormack nor Sergeant Biggins had ever encountered such a card prior to the present litigation and nor were they aware of same.

25. Nor was the obligation to provide Ms. Raducan every reasonable possibility of regularising her position complied with in the present case. No interpreter was made available and nor was contact made with the Romanian Embassy with regard to the identity card. The State authorities rather insisted on the necessity for a visa and, moreover, reflecting what would appear to be official policy, would not entertain the possibility of issuing the visa either at the airport or at some convenient location within the State.

Conclusions regarding the detention

26. It is a matter of profound regret that a perfectly innocent person who had every right to enter the State was instead refused entry and found herself obliged to spend the equivalent of almost three full days in custody. This must have been a humiliating and degrading experience for her.

27. While I am convinced that no personal blame should attach to either Garda McCormack and Sergeant Biggins – both of whom, it is plain, are conscientious and highly dedicated immigration officers – the same, unfortunately, cannot be said of the State and its policy with regard to the admission of the spouses of EU nationals who are third country citizens. It all too obvious that there have been significant and very serious breaches of EU law which, on the evidence, may well be continuing: the failure, for example, to have a visa processing service for such applicants, either at Dublin Airport or elsewhere within the State is openly at variance with the express language of Article 5(2) of the 2004 Directive. Nor have appropriate steps been taken to inform immigration personnel of the nature and importance of family residence cards.

28. In these circumstances, I propose to grant declarations to the effect that:

- Ms. Raducan's detention was unlawful and represented a deprivation of her constitutional right to liberty, contrary to Article 40.4.1 of the Constitution;
- By refusing to admit Ms. Raducan, and, in particular, by failing to offer her a visa processing facility within the State, the State failed in its obligations to comply with Article 5(2) and Article 5(4) of the 2004 Directive.

29. In the wake of those declarations, I should record that I invited Mr. Collins SC to apply to amend his pleadings to include a claim for damages for breach of constitutional rights and of Union law. Mr. Barron SC for the State very fairly acknowledged that the respondents would not oppose this application and, indeed, would submit to judgment without further argument on the point.

30. It is only appropriate that I should also record that Ms. Raducan informed the court through her counsel that she had been well treated while in prison. While her generosity of spirit and general lack of rancour with regard to her experience are most commendable, I cannot overlook the fact that what occurred represented a very serious breach of her constitutional right to liberty (Article 40.4.1) and, indeed, her constitutional right to a good name (Article 40.3.2). This, furthermore, was also a direct consequence of the State's failure to comply with its obligations under Article 5(2) and Article 5(4) of the 2004 Directive.

31. It is against this background that there is a clear obligation imposed by Article 40.3.1 of the Constitution on this Court, as the judicial arm of government, to vindicate her constitutional rights. In these circumstances, I propose to award Ms. Raducan damages equivalent to €2,500 for each full day in custody. Since she was unlawfully detained for the equivalent of almost three full days, I will therefore award Ms. Raducan the sum of €7,500 in damages for breaches of her constitutional rights.

