Neutral Citation Number: [2010] IEHC 86

THE HIGH COURT

JUDICIAL REVIEW

2010 151 JR

BETWEEN

INDERJIT SINGH AND LUDMILA SLEDEVSKA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 17th day of February, 2010

1. The applicants apply to the Court *ex-parte* for leave to seek judicial review of decisions which the respondent has taken or failed to take in relation to an application made by them for a residence card for the first named applicant under the European Communities (Free Movement of Persons) Regulations, 2006 ("the 2006 Regulations"). In particular, it is proposed to seek an order of *certiorari* to quash the Minister's initial refusal of that application dated 25th June 2009, together with an order of *mandamus* to compel the Minister to issue a decision on a review of that refusal, requested by them on 15th July 2009.

2. The first named applicant is a native of India who came to this country in 2007 and claimed asylum. The second named applicant ("Ms. Sledevska") is, it is said in the grounding affidavit of the first named applicant, to be a citizen of Latvia, although in a letter written to the Irish Naturalisation and Immigration Service (INIS) by her solicitor on their behalf, she is described as being a national of Lithuania. Counsel says that this is simply a mistake on the part of the solicitor in question. The first named applicant said he met Ms. Sledevska in Athlone in 2008 and they formed a relationship. They married in January 2009 and a daughter was born to them in June 2009.

3. On 19th January 2009, the first named applicant applied to the respondent for a residence card as the spouse of a Union citizen on the basis that Ms. Sledevska was a worker resident in the State who complied with the conditions specified in Regulation 6(2)(a) of the 2006 Regulations and was exercising her rights in that regard under the Treaty. It is said that in 2008, Ms. Sledevska worked for an unspecified period of time as a part-time house cleaner for a private employer in Athlone. She was paid cash and was not registered for tax purposes as her earnings were below the tax threshold. It is said she also worked part-time in a restaurant called "Mother India". No details of that employment are given.

4. When she became pregnant she ceased work in September 2008, but resumed part-time work as a kitchen assistant in a restaurant in August 2009, following the birth. On 29th September 2009, payslips and a tax clearance certificate in respect of Ms. Sledevska's new employment were forwarded to the INIS Treaty Rights Section.

5. Although the matter has not been deposed to on affidavit, counsel for the applicants informed the Court that following the applicants' marriage and the receipt of an acknowledgement of the residence card application, the first named applicant withdrew his application for asylum. Once again, while no detailed information on the point has been sworn to in the grounding affidavit of the first named applicant, it is said that he has since been in some unspecified employment but since the expiry of his temporary residence card, his situation has been precarious and he is anxious to stay in employment and support his wife and child.

6. By virtue of Directive 2004/38/EC of the European Parliament and 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, as implemented in Irish law by the 2006 Regulations (as amended), a citizen of a Member State of the Union who has a passport or a valid national identity card is entitled to enter and reside in the State for up to three months. The Union citizen is entitled to continue residing for more than three months provided he or she complies with one of the conditions set out in Regulation 6(2)(a), including that of being in employment in the State or being self-employed. That right of residence of the Union citizen may be extended to a family member who is not a Union citizen where the "Minister is satisfied that the Union citizen satisfies one of those conditions". (See Regulation 6(2)(b). This is the basis upon which the first named applicant applied to reside and now seeks to be declared by the Court to be entitled to reside in the State.

7. This is an application for leave to seek judicial review which is not covered by the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 and is thus made to the Court in the absence of the representation of the proposed respondent.

8. That being so, the Court must examine the application for leave upon the basis that it represents the full case to be made and that all necessary proofs are established which entitle the applicant to receive judgment for the relief claimed against the respondent. In effect, the Court must proceed upon the assumption that if, for any reason, there is subsequently no appearance by the respondent to oppose it, the Court would be in position to order the grant of the relief now proposed to be sought on the basis of the case as now made.

9. As already mentioned, those reliefs are primarily:-

(a) A declaration that the first named applicant is entitled to a residence card under Regulation 6(2) of the 2006 Regulations;

(b) An order of *mandamus* to compel the Minister to issue the residence card.

(c) An order quashing the refusal of the application for the card dated 25th June 2009, as unlawful.

10. It must immediately be pointed out that leave cannot be granted to seek the order of *certiorari* and that is so for two reasons. The first, the application is out of time and no sufficient explanation has been given or reason offered as to why time might be extended. The refusal was dated 25th June 2009, and it is clear that it was received by the applicants shortly afterwards. The six month time limit of O. 84 of the Rules of the Superior Courts had expired well before the application was initiated on the 11th February 2010. Clearly, no intention to seek judicial review of the refusal had been formed within the six month period because the perfectly reasonable alternative course of seeking a review of the decision was adopted.

11. Secondly and in any event, no arguable case could be made out as to the existence of any legal defect in the refusal decision of 25th June 2006. Under the 2006 Regulations and the Directive, the right of residence is that of the Union citizen. It "extends" to the non-Union family member (see Article 7(2) of the Directive,) provided the Union citizen complies with the condition of Regulation 6(2)(a). The Minister is not obliged therefore to grant a residence card to a family member unless he is satisfied that the Union citizen does so comply. This is particularly important in the case of this Member State because Ireland has not exercised the option provided by Article 8 of the Directive to require an in-coming Union citizen to register with a relevant authority. That being so, the Minister does not have available any immediate source of information in relation to the Union citizen and, in particular, where or when he or she arrived in the State; whether he or she is here less or more than three months and whether he or she is employed, self employed, or relying upon one of the other conditions stipulated in Regulation 6(2)(a).

12. These considerations are material to the present application because, although the Union citizen Ms. Sledevska is a party to this application, she has not chosen to swear an affidavit in order to give direct evidence of her own entitlement to exercise the facility accorded to her by the 2006 Regulations in respect of a family member or as to the facts relating to her exercise of those rights.

13. The reason why there is no case made out for a defect in the refusal decision, therefore, is that on the basis of the information available to the Minister on 25th June 2009, he had no option but to question whether Ms. Sledevska was a Union citizen who was residing in the State in exercise of her rights under the 2006 Regulations. So far as the Court can tell from the limited evidence offered to it, the Minister had been given no information as to the date on which or the circumstances in which Ms. Sledevska arrived in the State. Was she resident here for less or more than three months; was she entitled to indefinite residence as someone here for more than five years? Had she followed a course of study here or was she relying on her own sufficient resources for the purposes of Regulation 6(2)(a)?

14. In the Form E.U. 1 on which the application had been made on 19th January 2009, Ms. Sledevska's "occupation" was given as "Mother India (resturent)" (*sic*) but it does not appear than any documentation was furnished to indicate that this reference was the basis of a claim to be an employee in compliance with the condition of Regulation 6(2)(a). Moreover, no reference was made to her extra-fiscal occupation as a house cleaner. Furthermore, according the first named applicant's affidavit, the information to be inferred as to that employment in the restaurant was in any event incorrect as of January 2009 because she had apparently ceased all employment in September 2008. The refusal decision of 25th June 2009, gives as its reason: "You failed to submit evidence of the EU citizen exercising their EU Treaty rights in this State". Given the absence of any direct proof of Ms. Sledevska being, or even having been, employed at any point prior to the date of the application, the Minister's reason for refusal was clearly justified and even inevitable.

15. The remaining reliefs for which leave is now sought are the declaration that the first named applicant is entitled to a residence card on the basis outlined above and an order of *mandamus* to compel its issue. As already indicated, leave to seek such relief can only be granted if an arguable is case made that the proofs of that entitlement have been presented. In particular, *mandamus* can only issue if it is established that there has been a wrongful refusal to discharge a public duty which the applicant is entitled to have performed or that there has been such a grievous and unexplained delay in performing it, that it must be regarded as effective refusal. (See the judgment of this Court in *Nearing v MJELR* (Unreported, Cooke J., 30th October 2009, at point 20 and the case there cited.)

16. In this case, as already indicated above, it is clear that the Minister was justified in refusing the initial application on 25th June, 2009 and he did so within the six months stipulated in Regulation 7(2) of the 2006 Regulations. The applicants have requested a review of that refusal on the basis of information which was effectively new, being based upon the claim that Ms. Sledevska had again taken up employment in August 2009, following the application for the review of 15th July 2009. (The Court notes in passing, that the application for the review refers on this point only to the unregistered part-time cash work as a house cleaner and no reliance appears to be placed on the reference to the Mother India Restaurant mentioned in the Form E.U. 1 application.)

17. The Court is therefore satisfied that no stateable case has been made out for the grant of leave to seek the reliefs intended to be claimed. The decision on the application for review is still pending and there is no basis for asserting that it has been wrongfully refused. Having regard to the fact that material ingredients for that review were still being submitted on 29th September 2009, it cannot be said in the Courts judgment that the decision on the review has been so extensively delayed as to warrant it being treated as an unlawful refusal.

18. Leave must therefore be refused but the Court would emphasise that it is being refused primarily for the reason that this application is inadequately constituted. This is because of the absence of direct evidence from the Union citizen which establishes the basis of her entitlement to and her exercise of the right of residence as outlined above. The Court is not now ruling on the arguments which are attempted to be raised as to the Minister having refused the residence card because Ms. Sledevska is not a "worker" for the purpose of the directive. These arguments are effectively hypothetical in the circumstances of this case. When the letter of 25th June 2009 refers to the failure "to submit evidence of the Union citizen exercising her EU Treaty rights", it is literally true. No evidence that she was ever employed by anyone in the State was actually produced at that point, so far as the proofs now before this Court are concerned.

19. This application has been brought upon an apparent supposition that the Minister has refused the residence card because he has adopted a mistaken interpretation of the term "worker" in the directive. Thus, much of the affidavit and the statement of grounds is taken up with hypothetical legal arguments against assumptions imputed to the Minister as to, for example, Ms. Sledevska being discriminated against because she was treated as having ceased work on becoming pregnant. These assumptions have no basis in the actual reason given for the refusal and the Court makes no comment as to whether the assumptions or the counter arguments would be valid should the issues ever arise.

20. The Court reads the refusal as a simple statement of an obvious fact namely, the absence of any direct evidence from Ms. Sledevska as to her having moved to the State in exercise of the EU Treaty rights and as to her actual exercise of those rights. By letter 22nd January 2009, the INIS invited submissions of evidence of the exercise by Ms. Sledevska of those rights. In reply, a letter from her doctor was furnished confirming that she was unfit to work. That is all.

21. Emphasis is placed on the proposition that there is a clearly arguable case that in these circumstances Ms. Sledvska is and was a "worker" for the purpose of the directive and that leave must therefore be granted. The fallacy in that proposition, however, is that this is an argument that has been conjured up and attributed to the Minister, while having no basis in anything emanating from the respondent. As such, it is irrelevant to the application of the criteria for the grant of leave for the reliefs now sought.

22. As already indicated, it is a material proof in an application to compel the Minister to issue a family member residence card, that it be demonstrated that the Minister has been furnished with evidence that the person sought to be accompanied or joined is a Union citizen who complies with one of the conditions in Regulation 6(2)(a). In this case there is no actual evidence that Ms. Sledvska did so comply when the residence card was first sought. All that has been furnished is the reference to a restaurant under the heading "occupation" in the EU 1 form and the assertions now made by the first named applicant that she once did some part-time work for a family in Athlone.

Accordingly, this application for leave must be refused; not because the legal issues as to the meaning of the term "worker" is unarguable but because that issue is irrelevant to the circumstances of the case and because the proceeding is devoid of the evidential basis which is essential to the reliefs claimed.