

THE HIGH COURT
JUDICIAL REVIEW

[2013 No. 169 J.R.]

BETWEEN**PRINCE EDOS****APPLICANT****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENT****JUDGMENT of Mr. Justice Barr delivered the 6th day of March 2014****Background**

1. This is an application by way of judicial review for an order of *certiorari* quashing the Minister's decision of 30th January, 2013, refusing the applicant's application for residence under the European Communities (Free Movement of Persons) Regulations 2006 and 2008 and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

2. The applicant in this case is a Nigerian national. He was born on 24th March 1993 and is the son of Vivian Wilhelm, who holds citizenship of both Austria and Nigeria. The applicant resides with his mother in Phibsboro, Dublin 7. On 25th February, 2011, the applicant's mother applied for a residence card on behalf of the applicant. The applicant's mother, being an Austrian national, applied for the residence card under the provisions of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 and pursuant to Directive 2004/38/EC.

3. At the time of making that application, the applicant's mother was working for a company called Cyber Academy based in Drogheda. Following the submission of the application there followed a series of correspondence where the Minister required various documents to be submitted in support of the application. By letter dated 23rd February, 2011, the applicant's solicitors furnished the following documents: EU Form 1; passport photographs; original Nigerian and Austrian passports; original birth certificate in respect of Vivian Wilhelm (nee Obasuyi); the original birth certificate in respect of Prince Edos; contract of employment of Vivian Wilhelm; payslips (x 4); amended tax credit certificate 2011; letting agreement for 46 Munster Street, Phibsboro, Dublin 7; a letter from the landlord confirming the tenancy of Vivian Wilhelm and her son; an Eircom utility bill; and an AIB bank statement in respect of Vivian Wilhelm. By letter dated 7th March, 2011, the applicant's solicitor submitted a letter of employment of Vivian Wilhelm at Cyber Academy. By letter dated 7th March, 2011, the Minister returned the original documents submitted and requested a written consent from the absent parent/legal guardian permitting the child to reside in the State; the Minister also sought a letter of registration of the tenancy with the Private Residential Tenancies Board. By letter dated 15th July, 2011, the applicant's solicitor submitted the following documentation: rent book in joint names; Eircom utility bills; AIB bank statements in respect of Vivian Wilhelm; AIB bank statements in respect of Prince Edos; contract of employment in respect of Vivian Wilhelm; amended tax credit certificate 2011 in respect of Vivian Wilhelm; four recent payslips; and an affidavit of consent of Austin Edos.

4. By letter dated 9th July, 2011, the Minister returned the original documents submitted and again requested a letter of registration of the tenancy with the Private Residential Tenancies Board. There was a delay in submitting this letter which was ultimately submitted by letter dated 11th August, 2011.

5. By letter dated 7th August, 2011, the Minister informed the applicant that his application for a residence card was being refused due to the fact that his mother had left her position of employment with Cyber Academy at the beginning of August, 2011. The applicant's mother had left that position to set up her own business, Vivi. G & Sons Enterprises as a retail shop, premises at 127A – 130A Parnell Street, Dublin 1. By letter dated 28th October, 2011, the applicant through his solicitor submitted a fresh application for residency based on the self-employed status of the applicant's mother in the State. An amount of further documentation was submitted with that application.

6. By letter dated 17th November, 2011, the Minister acknowledged receipt of the documents which had been submitted and requested further documentation in the following terms:

"If the EU citizen is self-employed, the following supporting documents should be submitted to show that the business is a viable trading concern and provides the EU citizen with sufficient income to maintain and accommodate themselves and any dependants without resorting to social assistance.

(i) Copies of receipts issued for sales or services for each month – as they become available.

(ii) Bank statements of the business each month – as they become available."

7. On 21st November, 2011, the applicant's solicitor provided an affidavit from the applicant's father in Nigeria consenting to his son's residence in the State. By letter dated 20th April, 2012, the Minister refused the applicant's application for a residence card. The grounds for the refusal included the following:

"You submitted the following as evidence of the EU citizen exercising their EU Treaty Rights in this State through self-employment: business bank statement for seven days in October 2011, business accounts for two months, sales receipts for two months, registration for income tax. This does not satisfy the Minister that the EU citizen is exercising their rights through employment, self-employment, the pursuit of a course of study, involuntary unemployment or the

possession of sufficient resources in accordance with the requirements of Regulation 6(2)(a) of the Regulations. Therefore you are not entitled to reside in this State in accordance with Regulation 6(2)(b) of the Regulations."

8. The applicant submitted a Form EU 4 request for review of decision by letter dated 25th April, 2011. There followed further correspondence in relation to the details of his mother's financial statements for the business and supporting documentation. By letter dated 2nd May, 2012, the Minister wrote to the applicant as follows concerning the documentation which was required:

"If the EU citizen is self-employed, the following supporting documents should be submitted to show that the business is a viable trading concern and provides the EU citizen with sufficient income to maintain and accommodate themselves and any dependants without resorting to social assistance.

- Copies of receipt issued for sales or services in the last six months.

- Bank statements for the business for the last six months."

9. By letter dated 15th May, 2012, the applicant's solicitor submitted details of the applicant's mother's bank account, and sales/purchase receipts for the period January 2012 to April 2012. The Minister was not satisfied that the applicant was resident within the State. To establish this, the applicant provided copies of his bank account and a telephone bill. They also furnished statements of the business start up current account maintained by Mrs. Wilhelm. By letter dated 28th June, 2012, the Minister indicated that if it was claimed that the EU citizen was self employed, supporting documentation should be submitted to show that the business is a viable trading concern and provides the EU citizen with sufficient income to maintain and accommodate themselves and any dependents without resorting to social assistance.

10. By letter dated 28th August, 2012, the applicant's solicitor furnished further documentation, namely: a marriage certificate in respect of the applicant's mother, an affidavit of spinsterhood, a non-certificate of marriage, and a primary school testimonial. By letter dated 10th January, 2013, the Minister sought further documentation in relation to the EU citizen's self-employment within this State. In particular, it sought a copy of the agreed tax assessment from the Revenue Commissioners for the last financial year (if applicable) or a letter of registration for self-assessment (income tax) from the Revenue Commissioners, copies of receipts issued for sales or services in the last six months and bank statements of the business for the last six months. By letter dated 30th January, 2013, the Minister refused the applicant's application for residence. The relevant part of the Minister's letter states:

"I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and Directive. Your application is refused for the following reasons:

It is noted that you have stated that the EU citizen is operating a business in this State. You are requested to provide evidence that the EU citizen's business is a viable trading concern which provides the EU citizen with sufficient income to maintain herself and any dependants in this State. You submitted a summary sheet of purchases and sales from January to April 2012 and bank statements from November 2011 to June 2012 in respect of the EU citizen's business. It is noted that the bank statements for the EU citizen's business do not show a level of transactions or funds which would be indicative of a viable business being in operation. You are requested to submit up to date evidence of the exercise of rights on the part of the EU citizen by letter dated 10th January, 2013. However you have not provided this information to date.

The evidence you have provided in relation to the EU citizen's activities in this State does not satisfy the Minister that the EU citizen is exercising their rights through self employment in accordance with the requirements of Regulation 6(2) (a) of the Regulations. Therefore you are not entitled to reside in this State in accordance with Regulation 6(2)(b) of the Regulations."

11. The applicant has brought these proceedings seeking to quash the decision contained in this letter.

The Relevant Legal Provisions

12. Article 7 of 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 provides:

"Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

13. The Directive was transposed into Irish Law by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. 656 of 2006). A "qualifying family member" is defined in the Regulations as including a direct descendent of the Union citizen who is (i) under the age of 21; or (ii) a dependent of the Union citizen. The salient parts of Regulation 6 are in the following terms:

"6(2)(a) Subject to Regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she

—

(i) is in employment or is self-employed in the State,

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

(iii) 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

(iv) subject to paragraph (3), is a family member accompanying or joining a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii).

(b) 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 3 months where the Minister is satisfied that the Union citizen concerned satisfies one or more of the conditions referred to in subparagraph (a)(i), (ii) or (iii)."

14. It is clear from the documentation before the Court that the applicant's application for residency in the State was refused because the applicant had not established that the business run by his mother was a viable business, which provided her with sufficient income to maintain herself and any dependants within the State. Counsel for the applicant maintains that in reaching this decision the Minister adopted the wrong test. They argue that it is not the viability of the business which is the determining factor, but whether the business set up by the applicant's mother is genuine and effective and not such as to be regarded as purely marginal and ancillary. The applicant argues that as long as there is a close connection between the worker and the work performed that the viability of the business is not the determining factor.

15. The applicant cited in support of his argument the decision of the Court of Justice of the European Union in *Kempf v. Staatssecretaris Van Justitie* (Case 139/85). In that case Mr. Kempf, who was a German national, resided in Holland where he worked part-time as a music teacher for 12 hours per week. He supported his income by drawing social assistance in the host country. The Dutch national court had expressly found that Mr. Kempf's work was not on such a small scale as to be purely a marginal and ancillary activity. The CJEU went on to hold as follows:

*"It follows that the rules on this topic must be interpreted as meaning that a person in effective and genuine part-time employment cannot be excluded from their sphere of application merely because the remuneration he derives from it is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. In that regard it is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his family, as was the case in *Levin*, or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the member state in which he resides, provided that the effective and genuine nature of his work is established.*

*That conclusion is, indeed, corroborated by the fact that, as the court held most recently in *Levin*, the terms 'worker' and 'activity as an employed person' for the purposes of community law may not be defined by reference to the national laws of the member states but have a meaning specific to community law. Their effect would be jeopardized if the enjoyment of rights conferred under the principle of freedom of movement for workers could be precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host state*

For those reasons, it must be stated in answer to the question submitted for a preliminary ruling that where a national of a member state pursues within the territory of another member state by way of employment activities which may in themselves be regarded as effective and genuine work, the fact that he claims financial assistance payable out of the public funds of the latter member state in order to supplement the income he receives from those activities does not exclude him from the provisions of community law relating to freedom of movement for workers."

16. In *Levin v. Staatssecretaris Van Justitie* (Case 53/81) (1982 ECR 1035), the CJEU held that a person who was performing work that was "genuine and effective" would be deemed to be a "worker" and as such could rely on the right to free movement of workers. In the court's opinion it did not matter that the work being undertaken only yielded a remuneration that was less than the minimum wage. In relation to the term "worker" and "activity as an employed person" the court held:

"It follows that the concepts of 'worker' and 'activity as an employed person' must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration. In this regard no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from the employment of a member of their family who accompanies them.

It should however be stated that whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. It follows both from the statement of the principle of freedom of movement for workers and from the place occupied by the rules relating to that principle in the system of the treaty as a whole that those rules guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity."

17. In *Steymann v. Staatssecretaris Van Justitie* (Case 196/87) (1988 ECR 6159), the court had to look at the position which applied where a person in a religious community provided work as a plumber, in return for his board and lodging within the community. The court held that the provision of services by the applicant for the religious community could be work such as to make the person

providing such work a "worker" within the meaning of the Treaty. The court stated at paras. 12 – 14 of the judgment:

"12. In a case such as the one before the national court it is impossible to rule out a priori the possibility that work carried out by members of the community in question constitutes an economic activity within the meaning of Article 2 of the Treaty. In so far as the work, which aims to ensure a measure of self-sufficiency for the Bhagwan Community, constitutes an essential part of participation in that community, the services which the latter provides to its members may be regarded as being an indirect quid pro quo for their work .

13. However, it must be observed, as the Court held in its judgment of 23 March 1982 in Case 53/81 Levin v Staatssecretaris van Justitie (1982) ECR 1035, that the work must be genuine and effective and not such as to be regarded as purely marginal and ancillary . In this case the national court has held that the work was genuine and effective.

14. Accordingly, the answer given to the first question must be that Article 2 of the EEC Treaty must be interpreted as meaning that activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work."

18. In *Deliege v. Ligue Francophone de Judo et Disciplines Associees ASBL* (Case 51/96) (2006) ECR I-2549, the court stated in relation to the concept of economic activities:

"As regards, next, the concepts of economic activities and the provision of services within the meaning of Articles 2 and 59 of the Treaty respectively, it must be pointed out that those concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively (see, to that effect, Case 53/81 Levin v Staatssecretaris van Justitie [1982] ECR 1035, paragraph 13).

As regards more particularly the first of those concepts, according to settled case-law (Donà, cited above, paragraph 12, and Case 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159, paragraph 10), the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty.

However, as the Court held in particular in Levin (paragraph 17) and Steymann (paragraph 13), the work performed must be genuine and effective and not such as to be regarded as purely marginal and ancillary."

19. In *Aldona Malgorzata Jani & Ors v. Staatssecretaris van Justitie* (Case 268/99), the court held that the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the EC Treaty provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary.

20. In *Gebhard v. Consigilio Dell'Ordine Degli Avvocati E Procuratori di Milano* (Case C-55/94) (13th December, 1995) Times Law Reports. The court looked at what was involved in the right of establishment within a Member State and held as follows:

"It follows that a person may be established, within the meaning of the Treaty, in more than one Member State, in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries (Article 52) and, as the Court has held, in the case of members of the professions, by establishing a second professional base.

The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.

The temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question."

21. In *Vatsouras & Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900* (Cases C-22/08 and 23/08), the court considered the proper definition of a "worker" under European law and held as follows:

"It must be pointed out in that regard that, according to settled case-law, the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, and Case C-228/07 Petersen [2008] ECR I-0000, paragraph 45).

Neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a 'worker' for the purposes of Community law (see Case 344/87 Bettray [1989] ECR 1621, paragraph 15, and Case C-10/05 Mattern and Cikotic [2006] ECR I-3145, paragraph 22)....

It follows that, independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC."

Conclusions

22. From a review of the relevant case law, and having regard to the terms of the Directive and the implementing Regulations, it would appear that the respondent applied the wrong test in assessing applicant's application for residence within the State. In holding that the applicant had to provide evidence that his mother's business was a "*viable trading concern*" which provided the applicant's mother with "*sufficient income*" to maintain herself and her dependants in this State, the respondent was setting the bar too high. The test which ought to have been applied was whether Mrs. Wilhelm was engaged in a self-employed activity that was effective and genuine. The fact that she had registered her business name and had registered with the Revenue authorities, together with the evidence of her start up bank accounts, together with her records of purchases and sales would have to be considered by the Minister when reviewing the applicant's application for residence within the State. If Mrs. Wilhelm's work was held to be effective and genuine, it did not matter that the remuneration for that work was less than the minimum industrial wage, or less than the minimum amount of social welfare payments under Irish national law or that Mrs. Wilhelm may have to rely on social assistance or other support to survive. If the Minister came to the conclusion that the work carried on by Mrs. Wilhelm was effective and genuine then Mrs. Wilhelm would be exercising her right of establishment within the State and her son, the applicant, would have the right to reside here as well.

23. In the circumstances, I will quash the decision of the Minister as set out in his letter to the applicant, dated 30th January, 2013. I will direct that the matter be referred back to the respondent for reconsideration of the applicant's application for residence within the State.