Neutral Citation Number [2009] IEHC 447

THE HIGH COURT

JUDICIAL REVIEW

2008 1079 JR

BETWEEN/

I. B.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 15th day of October, 2009.

1. By order of Finlay Geoghegan J. of 6th October, 2008, the applicant was granted leave to apply for an order of *certiorari* by way of judicial review to quash a decision ("the Contested Decision") of the respondent, communicated to him by letter of 13th March, 2008 in which the Minister refused the applicant's application for a certificate of permanent residence in the State pursuant to the European Communities (Freedom of Movement of Persons) No. 2, Regulations 2006 ("the 2006 Regulations").

2. The applicant is a national of Romania who came to this country in August, 1999. He applied unsuccessfully for asylum but since the month of October 2000 has had permission to reside here and has held a work permit which has enabled him to obtain employment. In 2002 he was joined here by his wife and children.

3. On 20th November 2007, having resided here for over five years, through his solicitor, he applied under the 2006 Regulations for a permanent residence certificate. The Department sought and was then sent further documentation in support of the application.

4. In a letter of 13th March 2008, the Minister gave the following reason for refusing that application:

> "After an examination of your application it has been established that you are not a person who qualifies for a permanent residence certificate as it appears from the documentation provided in support of your application that you have not resided in Ireland continuously for a five year period. Your application for a permanent residence certificate has been refused for the reasons stated above. It is open to you to reapply for the permanent residence certificate when you have completed five years continuous residence in Ireland."

5. By letter of 1st May, 2008, the applicant's solicitors queried the refusal and pointed out that since Romania had become a Member State of the European Union on 1st January, 2007, the applicant no longer required the permission of the Minister as he had in excess of five years lawful residence in the State where he continued to be gainfully employed. The solicitor asked the Minister to reconsider his refusal but by letter of 9th June, 2008, the refusal was confirmed. This letter said:

> "In order to make an application on the basis of form EU 2 the form must be completed by a person who has been resident in this State for more than five years as a European citizen. Romania became a member of the EU on 1st January, 2007. Your client is therefore not eligible to make an application on form EU 2 until 1st January, 2012."

6. The legality of the Contested Decision is thus challenged on a net ground which turns on the interpretation of Regulation 12 (1) of the 2006 Regulations. In simple terms, the question raised by the application is whether, in the applicant's case, a period of five years continuous residence in the State required by the Regulations can be calculated so as to include the years of the applicant's residence here prior to 1st January, 2007 or does it, as the Minister contends, require that the full five years continuous residence in the State be subsequent to the accession of Romania to the EU on 1st January, 2007?

7. The 2006 Regulations were adopted by the respondent pursuant to s. 3 of the European Communities Act 1972 for the purpose of giving effect to 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

8. The 2006 Regulations came into force on 1st January, 2007 and it was on that basis that the applicant applied for the certificate of permanent residence in November, 2007.

9. The 2006 Regulations apply to Union citizens and, subject to certain exceptions, also to family members of a European Union citizen who are not themselves Union citizens (see Regulation 3 (1)).

10. Leaving aside for the moment the provisions dealing with the permitted and qualifying family members, the scheme of

the 2006 Regulations can be effectively described as follows:

> (a) A Union citizen with valid proof of nationality and identity can be refused entry into the State only on one of the grounds set out in Regulation 4 (1).
>
> (b) A Union citizen may apply to reside in the State for up to three months if he or she holds a valid passport or national identity and does not become an unreasonable burden on the social welfare system of the State (Regulation 6 (1)).
>
> (c) Subject to the grounds for removal from the State contained in Regulation 20, a Union citizen may reside in the State for longer than three months if in employment in the State or is self-employed; or if he or she has sufficient resources for support of self and of any dependents and has sickness insurance; or is enrolled in an educational establishment. (Regulation 6 (2)).
>
> (d) So long as the conditions of Regulation 6 (2) continue to be satisfied, the Union citizen is entitled to continue to reside in the State (Regulation 11 (1)).

11. Regulation 12 then provides for permanent residence in the State in these terms:

> "(1) Subject to paragraph (3) and Regulation 13, a person to whom these regulations apply who has resided in the State in conformity with these regulations for a continuous period of five years may remain permanently in the State.
>
> (2) For the purposes of paragraph (1) continuity of residence in the State shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory and military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State of a third country.
>
> (3) The entitlement to remain permanently in the State pursuant to paragraph (1) shall cease to exist where the person concerned has been absent from the State for a period exceeding two consecutive years."

12. Regulation 15 provides for the issue on application to the Minister of a permanent residence certificate to a Union citizen who becomes entitled to permanent residence under the Regulations.

13. The provision of Regulation 12 in respect of an entitlement to permanent residence corresponds to and implements Article 16 (1) of the 2004 Directive which reads as follows:

> "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in chapter III."

14. The "conditions provided for in Chapter III" are, clearly, those attached to the rights of residence for up to and for more than three months such as, for example, being in employment or being self-employed, having sufficient resources not to become a burden on the social assistance system or being enrolled for a course of study. In other words, the scheme of the Directive appears to be that a Union citizen who has resided legally in a host Member State for upwards of five years acquires a right to a permanent residence there without having to comply further with such conditions.

15. In the principal argument advanced as to the illegality of the Contested Decision, the applicant contends that the Minister erred in considering that the applicant had not resided in the State "in conformity with" the 2006 Regulations for a continuous period of five years. The Minister is claimed to have erred by taking into account only the years of the applicant's residence since the accession of Romania on 1st January, 2007 thus disregarding and failing to include his years of lawful residence in the State since he was granted leave and a work permit in 2000. In particular, the applicant relies on the provision of Article 16 of the 2004 Directive as the provision which specifies the manner in which lawful residence is to be established. It is argued that Article 16 is unconditional and sufficiently precise such that it has "direct effect" and can therefore be relied upon as against the respondent. In effect, the applicant argues that he is thus entitled to go behind any argument made by the Minister in reliance on the 2006 Regulations as the basis for the contention that the applicant must reside in this State "in conformity with" the 2006 Regulations in the sense that his residence must be pursuant to, or on the exclusive basis, of an entitlement under the Regulations.

16. The Court considers that this invocation of the doctrine of direct effect is misplaced. At the date of making of the application for the certificate, the 2004 Directive had been fully transposed into Irish law so that reliance on the Directive as conferring rights missing from national law is unnecessary. The explicit purpose of S.I. No. 656 of 2006 is to give effect to the 2004 Directive so that the rights created by the Directive must be taken as implemented in those Regulations. A directive which has been transposed into national law can, however, have indirect effect. Thus, to the extent that the 2006 Regulations may be ambiguous or lacking in clarity, it is clear that they must be construed by reference to the provisions of the Directive. It is only where a regulation cannot be so construed such that the available interpretation fails to give effect, or gives inadequate or incorrect effect, to a relevant provision of the directive that it is necessary or appropriate to have recourse to the objective and intended effect of the directive. (See the judgment of the Court of Justice in case 14/83 *Von Colson & Anor. V. Land Nordhrein –Westfalen* [1984] ECR 1891 at 26-28.)

17. As mentioned, Regulation 12 (1) implements Article 16 (1) of the 2004 Directive. The applicant seeks to dispute an alleged gloss put on the latter provision in the Regulation by the use of the words "in conformity with these Regulations". The applicant contends that he has been residing in the State legally since October 2000 and thus fulfils the only requirement of Article 16 (1) namely, that of having "resided legally" in this host Member State for the necessary five year period.

18. The Court considers that this argument on the part of the applicant is unsound. In the Court's judgment, Regulation

12 (1) correctly reflects and implements Article 16 (1) when it is read in conjunction with the explanatory motivation at recital 17 of the Directive which is as follows:-

> "Enjoyment of permanent residence by Union citizens who have chosen to settle long-term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure."

19. Thus, the expression "in conformity with these Regulations" correctly reflects the phrase "in compliance with the conditions of this Directive" as it appears in the above recital. Prior to 1st January 2007, the applicant was not a Union citizen and his presence in the State, while lawful under national law, was not residence "in compliance with the conditions" of the Directive or of Community law as such. His presence was lawful by virtue of a purely domestic authorisation granted to a non-EU national.

20. That the Directive clearly contemplates a period of five years during which Community rules and conditions apply to an applicant is further evident in the fact that the recital uses the expression "without becoming subject to an expulsion measure". That phrase derives its meaning from the provisions in Chapter VI of the Directive particularly Article 28 which limits the grounds upon which a Union citizen can be expelled from a host Member State. Prior to 1st January, 2007 that restriction had no relevance to the applicant. The Minister's entitlement to revoke his permission to remain in the State and to order his deportation was not so restricted but was governed exclusively by the relevant provisions of national law.

21. The applicant argues that the wording "in compliance with the conditions laid down in this Directive" and "without becoming subject to an expulsion measure" is simply a description of the basis on which a Union citizen may lawfully reside in a Member State other than his or her own. The Court cannot agree. The recital is a substantive statement of the motivation for laying down the right to permanent residence. In effect, the wording confirms the coherent scheme of the Directive in giving effect to the Treaty rights of free movement and residence within the Member States. Subject only to proving nationality and identity, a Union citizen can enter a host Member State and remain for up to three months pursuant to Article 6 of the Directive. Subject to complying with the conditions as to employment, adequate resources, a course of study, etc. set out in Article 7, a Union citizen can then apply to reside for more than three months in the host Member State. A Union citizen who has then resided on the basis of complying with those conditions for a period of five years, is entitled to reside permanently and, from that point onwards, conditions such as those set out in Article 7 no longer require to be complied with. In effect, once the host Member State has become the place of permanent residence, the Union citizen is placed on the same footing as nationals of that state so far as the risks, consequences and welfare entitlements relating to loss of employment, illness and so on are concerned.

22. It follows that the Court cannot accept as correct the applicant's submission that the term "have resided legally" in a host Member State requires only that the residence be lawful by reference to applicable national laws and conditions. That expression must, in the Court's judgment, be given a Community law meaning. Article 16 (1) is laying down a right for "Union citizens" and doing so in respect of "the host Member State". Prior to 1st January, 2007 the applicant was not a Union citizen and his presence in the State was not "residence in a host Member State". Ireland was, of course, already a Member State when the applicant arrived here but it did not receive him as a "host" Member State in the sense of the Directive provision. When read in the light of recital 17 to the Directive, it is clear that the continuous period of five years residence required is a period during which an applicant has resided in the host Member State pursuant to and on the basis of the Directive and in compliance with its conditions. In this regard, the Court agrees with the construction given to Article 16 by the United Kingdom courts. (See, for example, *McCarthy v. Secretary of State for the Home Department* [2008] EWCA Civ. 641).

23. To construe the provision in the sense contended for by the applicant would be inconsistent with ensuring the uniform application of the Directive by rendering its effect susceptible to the divergent conditions of national rules of "legal residence" for non-nationals of Member States.

24. In the course of argument reference has been made to a letter apparently written by the European Commission to a firm of English solicitors Messrs. Kingsley Napley (presumably in connection with some similar case,) in which the view is expressed:

> "Since the Directive does not provide for the condition that the five year residence has to be 'on the basis of the Directive' this notion (*i.e.* the continuous residence period,) should cover also those persons who have recently become Union citizens and have legally resided in the UK for five years."

A similar letter was also apparently referred to in a case before the UK Asylum and Immigration Tribunal but not accepted as sufficient to alter that body's view of the correct interpretation.

25. The precise status of the letter has not been indicated to this court but it does not seem to be a considered opinion by the college of the Commission but rather a reply to a query issued by one of the Commission services. The views of the relevant service may always be of interest as the Commission is, of course, the proposer of the legislation. Once enacted however, the proposer's views, however interesting, do not relieve the Community and national judicial authorities of the need to construe the Directive as it now appears. In that connection it is relevant to point out that the Commission's proposal (OJ C270E, 25.9.2001 p.150) underwent changes during its deliberation by the Parliament and the Council. The Commission had originally proposed a four year continuous residence period and the reference now in recital 17 to "without becoming subject to an expulsion measure" did not appear in the corresponding recital of the proposal.

26. In a supplementary argument the applicant relies upon Article 38 (1) of the Europe Agreement concluded between the European Communities and Romania and which, it is not disputed, was in force during the years in which the applicant was resident in the State prior to January, 2007. That article provides:

> "Subject to the conditions and modalities applicable in each Member State, the treatment accorded to workers of Romanian nationality, legally employed in the territory of a Member State should be free from any discrimination based on nationality as regards working conditions, remuneration, or dismissal as compared with its own nationals."

27. As the applicant has correctly pointed out in the written submissions, it is well established in the case law of the Court of Justice that such a provision is sufficiently clear and precise in creating obligations that it must be regarded as being directly applicable and capable of being relied upon by an individual litigant. (See for example Case C-162/00 *Land Nordhrein-Westfalen v. Pokrzeptowicz-Meyer* [2002] E.C.R. 1-1049).

28. The Court does not, however, accept that the provision of Article 38 (1) of the Europe Agreement alters the position of the applicant so far as concerns the interpretation and application of the 2004 Directive or the 2006 Regulations. It is undoubtedly the case that the applicant, as a Romanian national legally employed in the State in the years prior to January 2007, was protected by that provision from discrimination by reference to his Romanian nationality, as compared with Irish nationals employed in the State. However, the scope of that protection was limited to employment as such and to working conditions, remuneration and terms of dismissal in particular. Thus, to take a simple example, if workers in a particular industry were entitled by national law to a certain number of weeks paid leave per annum, an employment contract with a Romanian national which purported to grant a lesser number of weeks paid leave, could be declared unlawful by reference to that provision.

29. No issue of discrimination against the applicant in his terms of employment arises, however, in the circumstance of this case. Neither the terms nor the continuation of the applicant's existing employment are in question. What is at issue is the applicant's entitlement to permanent residence in the State on the basis of Regulation 12 (1) and Article 16 (1) of the Directive.

30. The issue here is not whether the provisions of the Europe Agreement have direct effect such that they can be relied upon by the applicant against the Minister. It is clear from the case law of the European Court of Justice extensively set out in the applicant's written submissions, that this may well be so. Prior to 1st January, 2007 the applicant would have been entitled to invoke Article 38 of the Europe Agreement had he, as a Romanian working here, been threatened with some discriminatory treatment of the kind which it prohibits. The issue is whether under the Europe Agreement the applicant, by virtue of his presence and employment in the State had, in effect, accrued rights of residence under the Europe Agreement or otherwise, which must be translated by virtue of the Accession Treaty into an entitlement which counts towards fulfilling the residence conditions of the 2006 Regulations and of the Directive.

31. The provisions of title IV of the Europe Agreement covering movement of workers did not require the existing Member States to open their labour markets to Romanian workers nor did they dictate or affect the residence entitlements or conditions which might be applied under national laws to Romanian workers employed on their territories. This is clear from Article 42.1 of the Agreement which is as follows:

> "Taking into account the labour market situation in the Member States, subject to its legislation and to the respect of rules in force in that Member State in the area of mobility of workers:-
>
> - The existing facilities for access to employment for Romanian workers accorded by Member States under bilateral agreements ought to be preserved and if possible improved;
>
> - The other Member States shall consider favourably the possibility of concluding similar agreements."

32. Thus, prior to 1st January, 2007, under the European Agreement access by Romanian workers to the labour market in a Member State was dependent on the terms of bilateral agreements at national level and the conditions attaching to any residence rights associated with such access were determined by the national laws of the individual Member States' as parties to such bilateral agreements.

33. It must also be noted that even on the accession of Romania to the Community the labour markets of the existing Member States were not immediately opened up to Romanian workers so as to permit them full freedom of movement throughout the Union.

34. In the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, Annex VII contains the list of adjustments referred to in Article 23 of the Act in respect of the implementation for Romania of the Treaty provisions on Freedom of Movement for Persons.

35. Paragraph 2 of that list provides for a derogation for two years (extendable to five years) from Articles 1-6 of Regulation (EEC) No. 1612/68. That derogation is mitigated in the case of Romanian nationals already working in a Member State at the date of accession by the following provision of that paragraph:

> "Romanian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of twelve months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures."

36. It is to be noted however that paragraph 9 of that list also contains the following particular adjustment in respect of the right of freedom of movement of persons:

> "Insofar as the provisions of Directive 2004/38/EEC which take over provisions of Directive 68/360/EEC may not be dissociated from those of Regulation (EEC) No. 1612/68 whose application is deferred pursuant to paragraphs 2-5 and 7 and 8, Romania and the present Member States may derogate from those provisions to the extent necessary for the application of paragraphs 2-5 and 7 and 8."

37. The applicant submits that because a provision such as Article 38(1) of the Europe Agreement is sufficiently unconditional and precise as to have a direct effect such that the entry into force of the agreement can alone alter the nature of legal relationships existing at that point, it must follow from the cited case law that, *a fortiori* the act of

accession of a new Member State to the Union must also be capable of producing that result. Even if that proposition of law is correct, the result is still dependent upon the actual provisions of the relevant parts of the Accession Act. Quite apart from the reasons already outlined above based upon the interpretation of the Regulations and the Directive, the Court considers that there is a further reason for rejecting the applicant's arguments in this case based the analogy made between the Accession Treaty and the Europe Agreement as applied in the case law, because of the explicit margin of discretion reserved to the Member States in applying the derogation agreed in relation to the opening of the labour markets and, as a result, in applying the associated rights of entry and residence which had been consolidated in Directive 2004/38/EEC prior to 1st January 2007.

38. Thus, the application of the provisions of the Regulations (and of the Directive,) in the manner contended for by the applicant by reference to the suggested analogous effect of the Accession Act, would necessarily lead to a discriminatory implementation of the Directive for Romanian nationals. It would mean, for example, that Romanian nationals in circumstances similar to those of the applicant but who had taken up employment prior to January 2007 in France, Germany or any other existing Member State, would be treated differently in the application of the Directive after that date by virtue of the different national rules agreed bilaterally by those Member States with Romania in earlier years. Such a result would clearly be incompatible with the Directive's objective of introducing uniform rules and standards.

39. As is apparent from para. 9 of the Annex VII list cited at para. 36 above, in Community law the freedom of movement of workers under the Treaty is closely associated, of necessity, with the harmonisation of national laws governing the rights to enter, remain and reside in the territories of Member States. In the case of Romanian nationals however the uniformity of these parallel arrangements remain at this point subject, at least in part, to the derogations in favour of national rules as outlined above. For that reason, the analogy based on the direct effect of the European Agreements does not, in the Court's judgment, apply to the 2006 Regulations and the 2004 Directive.

40. For all of these reasons the Court considers that the ground of illegality asserted against the Minister's decision to refuse the certificate of permanent residence has not been made out and the application must therefore be rejected.

e J.