

**THE HIGH COURT
JUDICIAL REVIEW**

2010 30 JR

BETWEEN

ADBENOUR CHIKHI AND ILZA ORECHOWSKA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 18th day of February 2011

1. By order of the Court of the 18th January, 2010, leave was granted to the applicants to bring the present application for judicial review seeking, amongst a number of reliefs, an order of *certiorari* to quash a decision of the first named respondent (the "Minister") dated the 15th September, 2009, refusing a Residence Card to the first named applicant under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (the "Regulations"). The leave thus granted covered also a number of declaratory reliefs together with, if necessary, an order of *mandamus* compelling the Minister to issue a decision on an application made by the applicants on the 23rd September, 2009, for an administrative review of the refusal.

2. The background circumstances to the case are as follows. The first named applicant says that he is a national of Algeria who entered the State illegally in May 2004, and remained on that basis until August 2006, when he applied for refugee status. His application was unsuccessful and he applied for leave to remain in humanitarian grounds. (See his statutory declaration of the 7th April, 2009).

3. The second named applicant is a Polish national, who first came to Ireland in February, 2007. The applicants met in July 2007, and married on the 16th March, 2009. She says that from April 2008, until the 15th November, 2009, she was employed on a full time basis by Dunnes Stores at Beacon Court in South Dublin. She says that since the 4th January, 2010, she has been employed by Allied Access Trading Limited in Dublin as a general operative.

4. On the 25th March, 2009, the first named applicant submitted a form EU 1 application for a Residence Card to the Minister pursuant to the Regulations on the basis that he was a "family member" of a Union citizen, namely, the second named applicant. His application was acknowledged as received by the EU Treaty Rights Section of the Irish Naturalisation and Immigration Service (INIS) on 30th March, 2009 and in a letter dated the 26th August, 2009, that Section undertook to provide a decision on the application by the 30th September, 2009, that is, "within the statutory six months time frame allowed for processing EU Treaty Rights application".

5. With the application form there had been included, the documentation required in the "Check list" including passports, evidence of residence, marriage certificate, births certificates being the items required to be submitted in accordance with Schedule 2 of the Regulations.

6. By letter dated the 15th September, 2009, the application for the card was refused. The "refusal reason" was given as follows:

"Unsatisfactory Evidence of Exercise of Rights:

We were unable to verify that the EU citizen is in employment. This does not satisfy the Minister that the EU citizen's spouse/partner is exercising his/her rights in accordance with the requirements of Regulation 6(2)(a) of the Regulations or Article 7 of the Directive. Hence you are not entitled to reside in the State in accordance with Regulation 6(2)(b) of the Regulations or Article 7(2) of the Directive."

7. By letter dated the 23rd September, 2009, solicitors for the applicants protested the refusal in the light of the documentation relating to the employment which had been submitted and asked to be told what acceptable proof of employment was required. On the 9th November, 2009, the INIS acknowledged the correspondence and stated that the request for a review of the decision of refusal had been noted. On the 10th November, 2009, the INIS responded to a further letter dated the 6th November, 2009, by saying: "a call was made from this office to Dunnes Stores, Beacon Court, where a member of staff spoke to a Margaret Mongey, who informed this office that there was nobody named Ilza Orzechowska currently employed by them".

8. On the 13th November, 2009, the applicants' solicitors responded saying: "In the absence of full replies to our queries of the 6th November, 2009, we can only assume that the telephone call you referred to was made some time ago. We understand that there was no one named Margaret Mongey employed at Dunnes Stores, Beacon Court. We are instructed that the HR Manager is Mr. Colm Reynolds, who has recently replaced Ms. Ciara Kiely".

9. It is therefore clear that the refusal decision in this case was made on the 15th September, 2009, at a point when the Union citizen was still employed with Dunnes Stores and it was the failure of the Department to verify that employment which constituted the sole reason for the refusal.

10. This case was one of a number of cases heard together because of the similarity of the circumstances and reasons relating to the refusal on the part of the Minister to issue Residence Cards to family members of Union citizens due to a failure or inability on the part of the EU Treaty Rights Section to verify that the employment condition under Regulation 6(2)(a) was satisfied. For the reasons

explained in more detail in the judgment of the Court in the case of *Lamasz and Another v. Minister for Justice, Equality and Law Reform*, given on 16th February 2011 the Court is satisfied that the Minister is entitled to carry out appropriate checks to confirm the reality and authenticity of the compliance with those conditions when the application for a Residence Card is based upon a period of residence longer than three months but shorter than the five years required in order to acquire an entitlement to a permanent residence free of the need to comply with those conditions. The checks and inquiries must be directed at satisfying the Minister that the condition is fulfilled and that the documentary proofs required to be furnished are authentic. They must not involve the imposition of additional administrative obstacles outside those allowed by the Regulations and the Directive to the exercise by the Union citizen of the right to enter, reside and be accompanied or joined in the State by a family member.

11. Unlike the position which obtained in the *Lamasz* case, however, this is not a situation in which the refusal is based upon non specific and unexplained attempts on the part of the officials concerned to make any contact with the employer. Here it is said that contact was made and that the response received denied the fact of the employment claimed by the Union citizen. The EU Treaty Rights Section had, accordingly, a reason to consider itself put upon inquiry as to the compliance with the employment condition. That being so, the Court does not consider that it is justifiable to quash the refusal decision by *certiorari* as being unlawful. The Court would, however, point out that the bare statement "we were unable to verify that the Union citizen is in employment" would appear to be an inadequate statement of reasons when, as stated in the letter of the 10th November, 2009, the refusal had a basis in a far more specific and concrete fact namely that a named member of the staff of Dunnes Stores had denied that the second named applicant was an employee.

12. However, this fact and basis of the refusal became known to the applicants' solicitors before any decision on the review application had been made and it was therefore open to the applicants to avail of the review procedure in order to adduce direct evidence to contradict the response given in the telephone call. This was in fact done by the applicant's solicitors in the letter of the 24th September, 2009, which enclosed a letter from the HR Manager of Dunnes Stores, Colm Reynolds, dated the 23rd September, 2009. Accordingly, this is an instance in which the availability of the administrative review procedure was particularly apt to resolve the issue that had arisen.

13. In this case, the letter of the 24th September, 2009, had furnished a series of "updated documents" in respect of the second named applicant's employment including the letter from Mr. Reynolds. It was, in the Court's view a relatively straightforward matter for the EU Treaty Rights Section to decide whether or not that documentation answered the doubts that had been created by the phone call. No decision upon the review had been taken by the date of commencement of this judicial review proceeding on the 20th January, 2010, nor, indeed by the date when this application was heard. This is explained, the Court assumes, by the stance that has been adopted by the Minister in all of these cases namely, that the Minister is under no obligation to give a decision on a review application within any particular time limit. For the reasons given in more detail in para. 25 of the judgment in the *Lamasz* case, and at paras 18 and 19 in the judgment of the same date in *Ali Saleem v MJLR*, the Court considers this stance to be mistaken. The Court accordingly considers that the delay in giving the review decision in this case has been shown to be unreasonable and excessive to a degree that justifies the grant of an order of *mandamus*.

14. There will therefore be an order of *mandamus* to direct the Minister to give a decision on the review application within 28 days from the date of perfection of the order.

15. In these circumstances it is unnecessary to consider a number of other issues canvassed in the hearing of this application including the claim that Regulation 21 fails to satisfy the requirement of the Directive as to the availability of an effective remedy.