Neutral Citation Number [2010] IEHC 85

THE HIGH COURT

JUDICIAL REVIEW

2009 598 JR

Between

JOHN MBENG TAGNI

Applicant

-AND-

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent

JUDGMENT of Mr Justice John Edwards delivered on the 12th day of March, 2010.

1. Introduction

1.1 In this case the applicant successfully applied for and obtained the leave of the High Court (Peart J), on the 15th of June 2009 to apply by way of judicial review for the reliefs now claimed in paragraph D of his Statement of Grounds (as amended). The reliefs so claimed are:

> 1. An Order of Mandamus or an Injunction compelling the Respondent, his servants or agents, to reach a lawful decision on the applicant's residence card application and/or the reconsideration of application.
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> 2. Interim and/or Interlocutory relief granting the applicant temporary residency pending the decision on his application for a residence card and/or the reconsideration of the application.
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> 3. If necessary, an Order of Certiorari, quashing the decisions of the Respondent, his servants or agents, herein, dated 13 September 2006, and dated 10 November 2007/8, and extensions of time.
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> 4. Such further or other Order has to this Honourable Court shall consider appropriate.
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> 5. An Order for costs.
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> 6. A Declaration that the Respondent, his servants or agents, has acted *ultra vires* and reached EC (Freedom of Movement and Persons) Regulations 2006 -- 2008 and/or Directive 2004/38/EC and/or article 10 of the EC Treaty by failing and/or refusing to decide the Applicant's residence card application within six months of the application being made and/or within a reasonable time in all the circumstances of the case.

1.2 The applicant was out of time before making his leave application but the Court extended the time up to and including the date on which the ex parte application was made, i.e., the 15th of June 2009.

2. Background facts

2.1 The background to this matter is to be gleaned from a grounding affidavit of the applicant, John Mbeng Tagni, sworn on the 9th of June 2009; two affidavits of his Solicitor, Mikayla Sherlock, also sworn on the 9th of June 2009; an affidavit of John Warren, Higher Executive Officer in the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform, sworn on the 31st of July 2009 on behalf of the respondent and, finally, an affidavit sworn on the 2nd of October 2009 by Margaret White, Higher Executive Officer in the Department of Justice, Equality and Law Reform, also on behalf of the respondent. Both Mr Warren's and Ms White's respective affidavits are expressed to have been sworn in verification of the respondent's Statement of Opposition.

2.2 The position may be summarized as follows. The applicant, Mr Tagni, is a Cameroon National and a failed asylum seeker. He married a Ms. Malgorzata Prymus, a Polish national, who was exercising her EC right to work in this State, on the 6th of December 2005.

2.3 In or about the month of February 2006, Mr Tagni and Ms Prymus applied to the Minister for Justice, Equality and Law Reform for residency for Mr Tagni. The application was made pursuant to EU regulation 1612/68 but was dealt with under directive 2004/38/EC, as transposed into Irish law by the EC (Freedom of Movement of Persons) Regulations 2006, SI No 226 of 2006 and was treated as being an application for a five year residence card. Various documents including, inter-alia, a marriage certificate, a letter from Ms Prymus's employer at "The Rising Tide" Restaurant stating that she was employed there on a full time basis, payslips and a letter from the couple's landlord, were submitted in support of the application. The EU Treaty Rights Section of the Department of Justice, Equality & Law Reform , by letter dated the 28th of March 2006, acknowledged receipt of the application on the 22nd of February 2006, and stated that:

> "A decision will be taken on the application based on the documentation provided by you no later than <u>six</u> months from the date of receipt of this application."

2.4 By a letter dated the 14th of September 2006 the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform wrote to the applicant indicating that his application was being refused as he did not come within the scope of section 3(2) of the EC (Freedom of Movement of Persons) Regulations 2006. This letter is not exactly a model of clarity and does not in fact state why he was regarded as not coming within the scope of the aforementioned provision. However, it is accepted by both sides that the

ostensible reason was that he had not previously lived lawfully in another E.U. member state. Having communicated the refusal, the letter then added:

> "However, the residence application has been considered on the basis that you are the spouse of an EU citizen, Malgorzata Ewa Prymus, who is currently residing and working in Ireland [,] residence has been **approved** for one year initially."(emphasis as in original document)

2.5 It appears that the approved residence was availed of and the applicant obtained the appropriate permission to remain from his local immigration registration office (i.e. the Superintendent's Office, Anglesea Street Garda Station, Cork) and was issued with a Certificate of Registration valid until 13th September 2007 in the first instance. That was then renewed for a further year and it was due to expire on the 13th of September, 2008.

2.6 However, before the renewed permission expired on the 13th of September 2008, section 3(2) of the EC (Freedom of Movement of Persons) Regulations 2006 was the subject of several court challenges (though not by this applicant) on the basis that Directive 2004/38/ EC, and in particular Article 3(1) thereof, does not permit a member state to impose a general requirement that the non-EU national spouse of a EU citizen must have been lawfully resident in another member state prior to coming to the host member state in order for him or her to be entitled to benefit from the provisions of the Directive. Section 3(2) of the EC (Freedom of Movement of Persons) Regulations 2006 was such a provision. In one of those cases, involving an applicant called Metock, the High Court (Finlay Geoghegan J) referred a question to the European Court of Justice for a preliminary ruling pursuant to Article 234 EC. On the 25th of July, 2008 the Court of Justice ruled in *Metock & Ors v Minister for Justice Equality & Law Reform*, Case C-127/08, that a member state could not restrict the applicant's right of residence in the manner in which Ireland purported to do in 3(2) of the EC (Freedom of Movement of Persons) Regulations 2006. Accordingly, that provision stood condemned as being contrary to, or inconsistent with, EU law.

2.7 Following the ruling in the Metock case the applicant did not seek to challenge by way of judicial review the respondent's decision of September 2006 to refuse him a five-year residence card. However, on the 1st of September 2008 his solicitor wrote to the Department of Justice, Equality and Law Reform referring to that decision and stating:

> "We note that all such decisions are being reconsidered on the basis of the European Court of Justice's decision in Metock …..
>
> In light of that we here by now call upon you as follows:-
>
> 1. To immediately grant our client a Stamp 4 EU Fam Residency Card for a five-year period commencing 23rd of August 2006."

2.8 A reminder was sent on the 23rd of September 2008 and both letters highlighted that the matter was urgent for the applicant as his existing residence approval was due to expire on the 13th of September, 2008. It seems that the reminder may have crossed with a letter to the applicant from the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform dated the 22nd of September 2008. This letter indicated that the respondent would reconsider the applicant's application for a residence card, and requested the applicant to furnish to the Department, within 10 working days, his passport, his EU citizen spouse's passport, his marriage certificate, proof of his EU citizen spouse's employment, and proof of residence. The letter warned that failure to provide the requested documentation "will result in the department making its decision based on the documents as received at the time of your client's original application."

2.9 On the 9th of October 2008 the applicant's solicitors wrote to the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform pointing out that as the Department was carrying out a reconsideration of their client's application they felt it should not be necessary to re-submit the required information or further information to the Department. However, in order to facilitate speedy processing they submitted a copy of the applicant's passport, a copy of Ms Prymus's passport, the original marriage certificate, and an original and up-to-date proof of address of Ms Prymus (2 x utility bills viz a Vodafone bill and an Eircom bill). The letter also stated:

> "Please note the following facts:
>
> A. At present, Mr Mbeng Tagni, and his wife are experiencing some marital difficulties. They are currently living apart in an attempt to sort these difficulties out. Mr Mbeng Tagni is living at Apartment 1, 13 Castle Street, Carlow, as previously advised by letter dated 1st September 2008.
>
> B. Ms Prymus is actually not working at present as she is on maternity leave. Clearly, Ms Prymus retains her status as a worker pursuant to the Directive."

2.10 By a letter of the 15th of October 2008 the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform sought "within the next 10 days, up-to-date documentary evidence of the current employment activities of the EU citizen." It added:

> "Please note that the onus is on your client to keep this office up-to-date at all times of any change in their circumstances."

2.11 The applicant's solicitor replied by letter of the 21st of October 2008 referring to her previous letter of the 9th of October 2008 wherein she had provided the requested information concerning Ms Prymus's employment activities and maternity leave. She added:

> "Given the marital difficulties between our client and his wife it is not possible to obtain documentary evidence of this."

She concluded by emphasising her clients undocumented status and urging that they should proceed with "all possible expedition"

2.12 When the applicant's solicitor had not heard from the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform by the 5th of November 2008 she sent a reminder stressing again the urgency of the matter.

2.13 On the 10th of November 2008 the EU Treaty Rights Section of the Department of Justice, Equality & Law Reform wrote to the applicant stating (*inter alia*):

> " …….the Minister has decided to refuse your application for a Residence Card of a family member of a Union citizen

> This is due to your failure to submit any evidence of your EU citizen spouse Malgorzata Ewa Prymus having exercised or is currently exercising (sic) her EU Treaty Rights in this State in accordance with the requirements of Directive 2004/38/EC. It is also noted that you and your EU spouse Ms Malgorzata Ewa Prymus are no longer residing together.
>
> Your EU Treaty rights application is now closed."

2.14 This letter was copied to the applicant's solicitors under cover of a letter of the 11th of November 2008 from EU Treaty Rights Section of the Department of Justice, Equality & Law Reform. By a further letter dated the 11th of November 2008, from the Irish Nationalisation and Immigration Service (INIS) to the applicant, he was informed that the respondent was notifying him that "the Minister proposes to make a deportation order in respect of you under the power given to him by section 3 of the Immigration Act 1999." The stated reason was:

> "Your most recent application for permission to remain under the provisions of the European Communities (Free Movement of Persons) Regulations 2006 has been refused. You have no current permission to be in the State and you are therefore unlawfully present in the State."

The letter further advised him as to three options open to him in that situation.

2.15 The applicant's solicitors, by letter dated the 25th of November 2008, responded on the applicant's behalf to the EU Treaty Rights Section's letter of the 10th of November 2008, indicating:

> "Our client did in fact furnish evidence that the EU citizen was exercising her EU Treaty rights and this was in fact accepted by the EU Treaty Rights Section in 2006 subsequent to our client's initial application received by you on the 22nd of February 2006. In support of this contention we enclose herewith the following:
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> 1. Copy letter from the EU Treaty Rights Section to Ms Prymus dated 28th of March 2006 acknowledging receipt of her expired Polish passport, letter from her landlord, payslips in respect of Ms Prymus and the marriage certificate.
>
> 2. In case documents had been mislaid from the file we enclose herewith a further copy of the letter from The Rising Tide Restaurant dated the 11th of January 2006 confirming Ms Prymus's employment on a full time permanent basis.
>
> 3. Letter from EU Treaty Rights Section dated the 13th of September 2006 addressed to our client in which it is confirmed in the 5th paragraph as follows: "the residence application has been considered on the basis **that you are the spouse of an EU citizen Malgorzata Ewa Prymus who is currently residing in working in Ireland**, residence has been approved for a one-year period initially." (emphasis as in original document)

The applicant's solicitor indicated that if the decision was not reopened within 14 days, judicial review proceedings would be initiated.

2.16 Two days after receiving this correspondence, the EU Treaty Rights Section, by letter dated 27 November 2008, indicated that it was prepared to review this second decision. Their letter stated:

> " This office is prepared to review our refusal decision of the 10th of November, 2008 in respect of Mr Tagni, however in order to do so a number of points as to the bona fides of his marriage to Ms Malgorzata Ewa Prymus need to be clarified.
>
> 1. Mr. Tagni married Ms. Prymus, a Polish National in Cork on 6th December 2005. However based on information received by this office it appears that Ms Prymus is the common-law partner of Mr Pawel Szybowicz, also a Polish National, with whom she has a daughter, Martyna Saidhbhin born on the 31st of July, 2007 nearly two years after Mr Tagni married Ms Prymus. This couple appeared to be residing together in Cork.
>
> 2. Ms Caliste Yango (69/1208/03B) claims to be the common-law partner of Mr John Mbeng Tagni, with whom she has a daughter, Pascale Brenda Minko, born in 2001. I refer you to your own correspondence of 22nd of September, 2005 in respect of Ms Yango (your Ref:JBKB/YAC001/001).
>
> Please forward your observations on these matters within 10 working days from the date of this letter."

2.17 By a letter of the 8th of December 2008 from the applicant's Solicitors to the EU Treaty Rights Section the respondent was called upon to withdraw his decision of the 10th of November, 2008 and consequent letter pursuant to S.3 of the Immigration Act, 1999, and he was threatened with judicial review proceedings if he failed to do so by the 10th of December, 2008.

2.18 The respondent did not respond by the 10th of December 2008 and it seems the applicant's solicitors took no immediate action to follow through on their threat. Then on the 22nd of December 2008 the EU Treaty Rights Section wrote a letter to the applicant's solicitors reiterating the queries raised in their previous letter of the 27th of November, 2008. However, it concluded:

> "In the meantime our decision of 10th November 2008 stands, however the notification under the provisions of section 3(4) of the Immigration Act, 1999 as amended is now rescinded."

2.19 Then, by a letter of the 7th of January 2009, from the applicant's Solicitors to the EU Treaty Rights Section, the applicant's solicitors sought to answer the respondent's queries in some detail. The letter stated (*inter alia*):

> "1. It is correct to say that our client married Ms Prymus, a Polish national on the 6th of December 2005. Our client instructs that he met Ms Prymus through a friend when Ms Prymus entered the State initially. We are instructed that Mr Mbeng Tagni assisted Ms Prymus on her arrival in Ireland. Assistance was in the form of securing employment, general friendship and support for Ms Prymus in a time of difficulty and transition when she immigrated to Ireland. While they married in December 2005, Mr Tagni was not granted formal residency until September 2006. Ms Prymus travelled frequently back and forth to Poland to visit her family and our client was not able to accompany her in the early stages of their marriage. We are instructed that the first year of the parties' marriage went well. Our client instructs us that he believed that he and Ms Prymus were planning a family, however subsequent events might reveal that Ms Prymus in fact was not trying to conceive with our client. We are instructed that when the couple failed to conceive, our client suggested Ms Prymus attend her GP, which she agreed to do but kept putting off. Our client became concerned that perhaps the frequency with which Ms Prymus continued to travel to Poland might be causing an adverse effect on her fertility and this began to cause stress in the relationship. Ms Prymus continued to travel to and from Poland regularly and

did in fact fall pregnant. However, to our client's shock Ms Prymus informed our client in February 2007 that the baby she was carrying was not his. It transpired that Ms Prymus's mother and family in Poland seriously objected to Ms Prymus's relationship with our client and it would appear from conversations that our client had with his wife that this was mainly based on the fact that our client is black. Ms Prymus's mother was not at all happy with the prospect that her daughter may give birth to a black baby and had influenced her daughter that this should not happen. It would further appear that while Ms Prymus was in Poland she was carrying on a relationship with a Polish National and our client was advised by Ms Prymus that the Polish National is the father of her child. We are unaware of the exact name of this individual but the Department is correct to say that this Prymus has a child with another Polish National. We are instructed by our client that Ms Prymus is still living in Cork and last time he visited her, which we are instructed was in December 2008, she did not appear to be living with the father of her child. She appeared to be living alone with her baby. Our client was most shocked, disappointed and saddened that he was not the father of Ms Prymus's child however notwithstanding that, prolonged and numerous attempts were made to reconcile the relationship, the most recent being in December 2008 as aforementioned when our client visited Ms Prymus in Cork. Our client even went to Poland with his wife to visit her family in May 2007 when he knew the child she was carrying was not his. Unfortunately we are instructed that there is now no possibility of reconciliation between our client and his wife. Our client has been married Ms Prymus for in excess of three years. You will appreciate the very sensitive and private nature of the information contained in this letter and we trust it will be treated accordingly.

2. Our client and Ms Caliste Yango travelled to Ireland together in March 2003. The couple were engaged in Cameroon and you are in fact correct to say that they have a daughter together. This child continues to reside in Cameroon. This information and circumstances is in no way contradictory or undermining to our client's marriage to Ms Prymus. The relationship with Ms Yango is fully and frankly set out as part of our client's asylum record. Our client and Ms Yango were engaged and lived together in Cameroon and continued to do so in Ireland while living at the North Quay Accommodation Centre/Hostel in Cork. We are instructed that, that relationship encountered difficulties and Ms Yango moved out of the Accommodation Centre before it closed. At that time the parties discontinued living together and the engagement ended. You refer to our correspondence dated 22nd of September 2005 in respect of Ms Yango and while we have concerns regarding your reference to this correspondence, given that we act for both parties, we are in a position to respond to your reference. We have examined our letter of the 22nd of September 2005 and notes that it merely confirms the parties' engagement and the fact that they lived together in Cameroon, which information is not disputed. Our correspondence of 22nd of September 2005 in respect of Ms Yango also confirms the end of the relationship and we are further a position to confirm to you that Ms Yango has married somebody else. Please also bear in mind that letter is dated September 2005 and accordingly it cannot be said that Ms Yango still claims to be the partner of Mr Mbeng Tagni.

The bona fides of our client's marriage to Ms Prymus cannot be called into question merely on the basis that our client had a previous relationship or that his wife committed adultery whether or not this is due to pressure from her family of a racist nature or otherwise.

We would also ask you to consider our client's circumstances and situation in light of his cultural and ethnic background. Our client is from Cameroon where it is not unusual (in fact it is commonplace) for a person to marry somebody that they have never met or met only once and know very little about. The culture in Cameroon relating to relationships is very different from that in Ireland. Further, legally in Cameroon men are permitted to have numerous wives leading to very short courting periods and families being started quite shortly after the parties' initial introduction. Our client is adamant that his marriage to Ms Prymus was bona fides and not a marriage of convenience.

Our client is very disappointed at the breakdown of his marriage and has instructed us to draft a Separation Agreement. Our client has been married in excess of three years and therefore relies on article 13. 2 (a) of Directive 2004/380/EEC and Regulation 10 (2) (b) (i) of the European Communities (Free Movement of Persons) (Amendment) Regulations 2008. While the parties have not initiated divorce or annulment proceedings; given the Irish legislation relating to divorce, we submit that in order to be read in compliance with the State's obligations pursuant to Article 41 (in particular 41.3.1o) of the Constitution to protect with special care the institution of marriage, the phrase "divorce or annulment proceedings" must be read and interpreted to include a separation agreement or judicial separation proceedings. To do otherwise would lead to a situation where elements of the Directive and Regulations are incompatible with the Irish Constitution."

2.20 This letter was not immediately responded to by or on behalf of the respondent, and accordingly on the 21st of January 2009 the applicant's solicitors sent a reminder emphasising the applicant's difficult circumstances, and in particular stated that he had been let go from his job due to not being able to produce the required residency card and was experiencing stress and financial hardship. They asked for an expedited review in all the circumstances and requested that a decision should be made on or before the 7th of February 2009 or, failing that, that their client should be granted Stamp 4 residency conditions for the duration of the investigation/decision making process.

2.21 On the 27 of January 2009 the EU Treaty Rights Section wrote to the applicant's solicitors enclosing a further copy of their letter of the 22nd of December 2008 and asked:

> "Can you clarify a number of points as to the bona fides of your client's marriage to Ms Malgorzata Ewa Primus as outlined in the attached letter?"

2.22 The applicant's solicitors replied by letter dated 5th of February 2009 referring to their letters of the 7th of January 2009 and 21st of January 2009 and enclosing further copies of these for the respondent's convenience. The applicant's precarious situation was again stressed and the letter reiterated previous requests that the matter should receive urgent attention.

2.23 On the 17th of February 2009 the EU Treaty Rights Section replied to the applicant's solicitors stating:

> "As you stated, your client's marriage has broken down due to difficulties. Has your client Mr John Mbeng Tagni initiated divorce proceedings, and annulment of the marriage or a separation agreement from his wife Malgorzzata Prymus. As you stated they are no longer living together, your client is now living at Apartment 1, 13 Castle Street, Carlow. He is now in a relationship with a Ms Nchungndem Lucy Ashuand who is expecting a second child.
>
> I look forward to your response"

2.24 The applicant's solicitors replied by a letter of the 6th of March 2009 stating (inter alia) that:

> "….our client's wife Ms Malgorzzata Prymus is currently considering the Separation Agreement we forwarded and we understand that same should be executed shortly".

The letter further confirmed that the other details referred to in the letter of 17th February 2009 were correct. It then went on to draw the respondent's attention to the decision of the European Court of Justice in *Alssatou Diatta v Land Berlin*, Case 267/83 wherein the Court found that 'the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.' The letter urged:

> "Our client is still in fact married and accordingly, our client is entitled to the renewal of his residency pursuant to Directive EC38/2004 notwithstanding the breakdown of his marriage relationship."

The letter then went on to threaten judicial review proceedings in the event of the respondent failing to render a decision on the applicant's application within 14 days of the date of the letter.

2.25 There was no immediate response save for a holding letter dated the 13th of March 2009 from the EU Treaty Rights Section. Then on the 28th of April 2009 the applicant's solicitors wrote to the EU Treaty Rights Section as follows:

> "It would appear that at present our client's spouse is not in a position to enter a Separation Agreement with our client and given the special protection afforded to and status of marriage in Ireland we do not see that it is ethical or in keeping with the common good for our client to pursue the matter at this time. Further, our client should not be forced to issue proceedings for immigration purposes.
>
> Our client has been refused renewal of his residency since September 2008 and has lost his job as a result not to mention the stress, embarrassment and hardship imposed on him as a consequence. He has clearly suffered loss and damage including incalculable financial loss. **If we do not hear from you on or before close of business Wednesday 20th of May 2009 we shall have no option but to issue proceedings without further notice to you and seek leave to bring Judicial Review proceedings to include an application for the following release; Mandamus, Certiorari, damages and costs**." (emphasis as in original document)

2.26 This letter was not responded to and on Monday the 15th of June 2009 the applicant applied successfully to Mr Justice Peart in the High Court for leave to apply for judicial review. The substantive hearing took place before me in November 2009 and as of the date of the hearing the respondent had still not rendered a decision on the applicant's application.

3. The Pleadings.

3.1 The grounds upon which the applicant was granted leave to apply for judicial review are set out in Part E of his amended Statement of Grounds as follows:

> "1. The applicant, because he is the spouse of an EU citizen working in the State, has a right, pursuant to EC Directive 2004/38/EC, implemented in this State by the European Communities (Free Movement of Persons) (Amendment) Regulations 2008, to reside in the State and a directly effective right to enjoy equal treatment with the nationals of this State.
>
> 2. Article 10 of EC Directive 2004/38/EC provides in respect of a family member of a Union citizen, who is not a national of a Member State, that he must be issued with a residence card no later than six months from the date on which his application was submitted.
>
> 3. Regulation 7 of the EC (Freedom of Movement of Persons) (No.2) Regulations 2006 provided and Regulation 7 of the EC(Freedom of Movement of Persons) Regulations 2006 and 2008 provides in respect of a family member of a Union citizen, who is not a national of a Member State, that the Minister, if he is satisfied that it is appropriate to do so, must issue a residence card within six months of receiving the application.
>
> 4. The preamble to Directive 2004/38/EC, recital 31, provides that the Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights. The European Community principle of good administration, which includes having one's affairs dealt with within a reasonable time, forms part of Article 41 of the Charter of Fundamental Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, also provides for the right to have a civil right determined within a reasonable time.
>
> 5. Article 10 of the EC Treaty provides that Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
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> 6. The respondent, his servants or agents, have acted *ultra vires*, and/or breached Article 10 of the EC Treaty and/or Regulation 7 of EC (Freedom of Movement of Persons) (Amendment)Regulations 2008, interpreted in accordance with EC Directive 2004/38/EC, the principles of good administration, and/or Article 41 of the Charter of Fundamental Rights and/or Article 6 of the European Convention for the Protection of Human Rights, by failing to reach a lawful decision on the applicant's residence card application and/or on the reconsideration of that application within six months from the date of the application and/or the notification of the reconsideration, respectively, and/or within a reasonable time in all the circumstances herein.
>
> 7. The respondent, his servants or agents have acted *ultra vires*, and/or breached Directive 2004/38/EC and the Community principles of good administration, and/or proportionality, and/or fairness, and/or legitimate expectation, by failing to reach a lawful decision on the applicant's residence card application and/or on the reconsideration of that application within six months and/or within a reasonable time, in all the circumstances herein.
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> 8. The respondent, his servants or agents, have acted *ultra vires*, and/or breached the principles of natural and constitutional justice and/or the principle of fairness, by not reaching a lawful decision on applicant's residence card application and/or on the reconsideration of this application, within a reasonable period, in all the circumstances herein.
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> 9 The respondent, his servants or agents have acted in breach of Directive 2004/38/EC and the Community principles of good administration, and/or proportionality, and/or legitimate expectation, and/or breached the principles of natural and

constitutional justice and/or the principle of fairness by failing to grant the applicant temporary residency for the duration of the reconsideration process, in all the circumstances herein which has caused the applicant to lose his job.

10. The respondent, his servants or agents, acted *ultra vires*, and/or failed to respect and/or have regard to the applicant's legitimate expectation that the respondent, his servants or agents, would reach a lawful decision on the reconsideration of his residence card application within six months from the date of the notification and/or within a reasonable period in the circumstances herein."

3.2 The respondent has filed a Notice of Opposition in which there is a general traverse of the applicant's claims and in which the following substantive pleas are also made:

"1. It is denied that the respondent has failed and/or refused to decide the applicant's residence card application within six months of the application being made. Following an agreement to re-consider the applicant's application, the respondent made a decision on the applicant's application for a residence card on the 10th of November 2008. It is denied there has been no lawful decision in respect of the applicant's residence card application.

2. The respondent agreed on the 22nd of December 2008 to review the decision dated the 10th of November 2008. The respondent is entitled to a reasonable period of time within which to carry out that review.

3. (Traverse)

4. In so far as it is alleged that the respondent has failed to reached a decision on the reconsideration of the applicant's application within six months from the date of the notification of the reconsideration, the respondent agreed to review the decision and is entitled to require all or any additional information from the applicant to facilitate a review of its decision and is entitled to a reasonable period of time within which to carry out that review. The applicant did not act promptly in furnishing the requested information to facilitate the review.

5. (Traverse)

6 (Traverse)

7. (Traverse)"

3.3 It is not specifically pleaded that the applicant should be denied relief on the grounds of delay. Nevertheless the respondent seeks to make the case that, even if the Court were to be with the applicant on some or all of the substantive issues in the case, the applicant should be denied relief on the grounds of delay. Counsel for the respondent has argued forcibly that in judicial review proceedings it is not necessary for a respondent to specifically plead delay because the plaintiff bears the positive burden of proving that he applied for relief promptly and in any case within the relevant time limit(s) provided in Order 84, Rule 21(1) of the Rules of the Superior Courts. Moreover, Counsel for the respondent urges that the fact that the Court was disposed to grant an extension of time at the leave application stage of the proceedings, which was of course heard on an *ex parte* basis, does not preclude the issue being revisited at the substantive hearing. The Court is satisfied that both of these submissions are legally correct.

4. Relevant Legislation

4.1 Article 39 TEU (the acronym stands for the Treaty establishing the European Union, otherwise known as the Maastrict Treaty, which was later modified by the Amsterdam, Nice and Lisbon Treaties respectively) which was formerly Article 48 of the EEC Treaty is the basic provision guaranteeing that freedom of movement of workers shall be secured within the Community. It entails the right, subject to limitations justified on grounds of public policy, public security or public health

(a) to accept offers of employment actually made;

(b) to move freely within the territories of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4.2 Article 39 TEU represents an application, in the specific context of workers, of the general principle set out in Article 6 TEU (formerly Article 12 EEC) that "within the scope of application of this Treaty …. any discrimination on grounds of nationality shall be prohibited." (see EU Law - Text, Cases & Materials, 2nd Ed, Oxford, 1998, by Craig & De Búrca, p666.)

4.3 Article 40 TEU (formerly Article 49 EEC) provides for the making of secondary legislation by the Council to bring about the freedoms set out in Article 39. Several Directives and Regulations have been passed to this effect, governing the conditions of entry, residence, and treatment of EC workers and their families. They include Directive 64/221/EEC which governed the main derogations or exceptions to the rules on free movement; Directive 68/360/EEC regulating the formalities and conditions of entry and residence of workers and the self–employed; and Regulation (EEC) 1612/68 which elaborates on the equal treatment principle and sets out many of the substantive rights and entitlements of workers and their families. This is by no means an exhaustive list. Other relevant instruments in the period up until 2004 include Directives 72/194/EEC; 73/148/EEC; 75/34/EEC; 75/35/EEC; 90/364/EEC; 90/365/EEC and 93/96/EEC.

4.4 The major piece of European legislation with which the Court is concerned in this case is 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 Members States. This Directive repealed and replaced all of the earlier and above mentioned Directives and amended Regulation (EEC) 1612/68. Since 2004 there have been other instruments amending Directive 2004/38/EC but none of the amendments that have been effected are relevant to the issues that this Court has to decide.

4.5 It is necessary for the purposes of this judgment to consider the general scheme of Directive 2004/38/EC and to consider some of its provisions in detail.

4.6 Directive 2004/38/EC commences with thirty one recitals setting out the background to and the objectives of the Directive. The

substantive part of it is divided into six chapters and consists of forty two articles altogether. Chapter I is entitled "General Provisions" and comprises articles 1 to 3 inclusive. Chapter II is entitled "Right of Entry and Exit" and comprises articles 4 and 5. Chapter III is entitled "Right of Residence" and comprises articles 6 to 15 inclusive. Chapter IV is entitled "Right of Permanent Residence" and comprises articles 16 to 21 inclusive. Chapter V is entitled "Provisions common to the right of residence and the right of permanent residence" and comprises articles 22 to 26 inclusive; Chapter VI is entitled "Restrictions on the right of entry and the right of residence on grounds of Public Policy, Public Security or Public Health" and comprises articles 27 to 33 inclusive, and Chapter VII is entitled "Final Provisions" and comprises articles 34 to 42 inclusive.

4.7 It seems to the Court that the following recitals are of importance in the context of the matters at issue in this case

> "(5). The right of all Union citizens to move and reside freely within the territory the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
>
> (7). The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.
>
> (10). Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.
>
> (11). The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.
>
> (12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.
>
> (13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.
>
> (14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.
>
> (15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.
>
> (17). 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.
>
> (23). Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.
>
> (25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.
>
> (26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.
>
> (28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

4.8 Article 2 of the Directive contains the following relevant definitions. It states (*inter alia*):

> "For the purposes of this Directive:
>
> 1. 'Union citizen' means any person having the nationality of a Member State;
>
> 2. 'family member' means:
>
> (a) the spouse;"

4.9 Article 7 of the Directive deals with the right of residence for more than three months. It states (*inter alia*):

> 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;

(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)."

4.10 Article 9 of the Directive deals with administrative formalities for family members who are not nationals of a Member. It states (*inter alia*):

"1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions."

4.11 Article 10 of the Directive deals with the issuing of residence cards. It states (*inter alia*):

"1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2),documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen."

4.12 Article 11 of the Directive deals with the validity of residence cards. It states (*inter alia*):

"1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years."

4.13 Article 13 of the Directive deals with the retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership. It states (*inter alia*):

"1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a),(b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to

in point 2(b) of Article 2, the marriage or registered partner-ship has lasted at least three years, including one year in the host Member State; or

(b) ……; or

(c) ……; or

(d) ……. .

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. 'Sufficient resources' shall be as defined in Article 8(4).Such family members shall retain their right of residence exclusively on personal basis."

4.14 Article 14 of the Directive deals with the retention of the right of residence generally. It states (*inter alia*):

"1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. ……

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) ….. ."

4.15 Article 25 of the Directive deals with general provisions concerning residence documents. It states (*inter alia*):

"1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof."

4.16 Article 27 of the Directive deals with the general principles to be applied where a Member State seeks to the right of entry and the right of residence on grounds of public policy, public security or public health. It states (*inter alia*):

"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

4.17 Article 31 of the Directive deals with procedural safeguards. It states (*inter alia*):

"1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health."

be attested by any other means of proof."

4.18 Article 35 of the Directive deals with abuse of rights. It states:

"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

4.19 Directive 2004/38/EC has been transposed into Irish Law by means of the European Communities (Free Movement of Persons)(No 2) Regulations 2006, S.I. No 656 of 2006, as amended by the European Communities (Free Movement of Persons) (Amendment) Regulations 2008, S.I. No 310 of 2008. They are to be collectively cited as the European Communities (Free Movement of Persons) Regulations 2006 – 2008. It is necessary to refer to certain of their provisions.

4.20 In the European Communities (Free Movement of Persons) Regulations 2006 – 2008 the expression;-

" 'qualifying family member', in relation to a Union citizen, means -

(a) the Union citizen's spouse,

(b)……. .

(c)…….

(d)…….

(e)……."

4.21 Regulation 6(2) of S.I. No 656 of 2006, as amended (The Principal Regulations) provides (*inter alia*):

"6. (1) ……..

(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).

(c) Subject to Regulation 20, a person to whom subparagraph (a)(i) applies may remain in the State on cessation of the activity referred to in that subparagraph if -

(i) he or she is temporarily unable to work as the result of an illness or accident,

(ii) he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS,

(iii) subject to subparagraph (d), he or she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first year and has registered as a job-seeker with a relevant office of the Department of Social and Family Affairs and FÁS, or

(iv) except where he or she is involuntarily unemployed, he or she takes up vocational training related to the previous employment.

(d) In a case to which subparagraph (c)(iii) applies, the right to remain referred to in paragraph (c) shall expire 6 months after the cessation of the activity concerned unless the person concerned enters into employment within that period.

4.22 Regulation 7 of S.I. No 656 of 2006, as amended (the principal regulations) provides:

"7.(1)(a) A family member of a Union citizen who is not a national of a Member State and who has been resident in the State for not less than 3 months shall apply to the Minister for a residence card.

(b) An application made under subparagraph (a) shall contain the particulars set out in Schedule 2 and be accompanied by such documentary evidence as may be necessary to support the application.

(c) The Minister shall immediately cause to be issued a notice acknowledging receipt of an application made under subparagraph (a).

(2) Where the Minister is satisfied that it is appropriate to do so, he or she shall, within 6 months of the date of receiving an application made under paragraph (1)(a), cause to be issued a residence card containing the particulars set out in Schedule 3 in respect of the family member concerned.

(3) Subject to Regulation 20, a person the subject of an application made under paragraph (1)(a) may remain in the State pending a decision on the application."

4.23 Regulation 10 of S.I. No 656 of 2006, as amended (the principal regulations) provides:

"10(1)(a) Subject to subparagraph (b), a family member of a Union citizen who is a national of a Member State may retain a right of residence in the State on an individual and personal basis in the event of the Union citizen's divorce or annulment of his or her marriage.

(b) Before acquiring an entitlement to permanent residence under Regulation 12, a family member referred to in subparagraph (a) must satisfy one or more of the conditions referred to in Regulation 6(2)(a)(i) to (iv).

(2) (a) Subject to subparagraph (b), a family member of a Union citizen who is not a national of a Member State may retain a right of residence in the State on an individual and personal basis in the event of the Union citizen's divorce or annulment of his or her marriage.

(b) Subject to subparagraph (c), a right of residence referred to in subparagraph (a) shall only be retained where the Minister is satisfied that -

(i) prior to initiation of the divorce or annulment proceedings, the marriage had lasted at least 3 years, including one year in the State,

(ii) not relevant.

(iii) not relevant.

(iv) not relevant.

(c) Before acquiring an entitlement to permanent residence under Regulation 12, a family member referred to in subparagraph (a) must satisfy the Minister that he or she -

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

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

(iii) is a member of the family, constituted in the State, of a person who satisfies the conditions referred to in clause (i) or (ii).

4.24 Regulation 11 of S.I. No 656 of 2006, as amended (the principal regulations) provides (inter alia):

"11.(1) A person residing in the State under Regulation 6(2), 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies that Regulation.

(2) It shall be for the person referred to in paragraph (1) to satisfy the Minister that he or she satisfies Regulation 6(2), 9 or 10."

4.25 Regulation 21 of S.I. No 656 of 2006, as amended (the principal regulations) provides (inter alia):

"21.(1) A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to be allowed to enter or reside in the State."

4.26 Regulation 24 of S.I. No 656 of 2006, as amended (the principal regulations) provides (inter alia):

"24.(1) Where it is established that a person to whom these Regulations apply has acquired any rights or entitlements under these Regulations by fraudulent means then that person shall immediately cease to enjoy such rights or entitlements.

(2) In these Regulations, "fraudulent means" includes marriages of convenience."

5. Submissions on behalf of the Applicant on the Substantive Issues

5.1 It has been submitted on behalf of the applicant that the objective of the 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 Member States is to simplify and strengthen the right of free movement and residence of all Union citizens and their family members. A Union citizen working on the territory of another Member State has a right of residence on the territory of that Member State. This right of residence extends to family members, including those who are not nationals of a Member State, accompanying or joining the Union citizen. A spouse is a family member.

5.2 It was further submitted that in the case of a family member, who is not a national of a Member State, his right of residence is evidenced by a residence card, which is valid for five years. There are very limited grounds upon which a Member State may restrict or deny this right of residence, namely, public policy, public security or public health. Procedural safeguards must be available to applicants to appeal or review any decision taken against them on these grounds, and, also, in respect of any other decision to refuse, withdraw or terminate such rights.

5.3 It was further submitted that in order to get a residence card, the non-EU national spouse of a Union citizen working in another Member State, must present the documents specified in the Directive. This list is exhaustive. Member States may not make the issue of a residence card dependant on any other conditions other than the presentation of these documents.

5.4 It was submitted that the time limit for providing a residence card set out in Article 10 of Directive 2004/38/EC is mandatory and that the provision should be read in conjunction with recital 14. Moreover, although Article 10 has been purportedly transposed by means of Regulation 7(2) of S.I. No 656 of 2006 the wording of the two provisions is different. The wording of Regulation 7(2) does not reflect the unqualified mandatory language used in Article 10 and in particular the use in Regulation 7(2) of the phrase "*where the Minister is satisfied to do so, he or she shall*," is suggestive of the existence of an element of discretion on the part of the Minister. In reality the Minister has no such discretion unless the application is manifestly fraudulent or the case comes within the very limited class of applications that may be refused on grounds of public policy, public security or public health.

5.5 It was submitted that the Court of Justice when interpreting Community law looks not only at the wording of the provision, but also at the spirit and general scheme of the instrument of which it forms part. The Court of Justice in the case of *Merck Sharp & Dohme BV v. Belgian State* C - 245/03 [2005] ECR 100652, at paragraphs 21 -24, and also in the case of *Housieaux v. Dèlèguès du*

conseil de la Règion de Bruxelles-Capital C-186/04 [2005] ECR 1-03299, at paragraphs 26-29, relied both on the wording of a Directive and the fact that an interpretation contended for was supported by the objective of the Directive, to find a time limit mandatory. The applicant has submitted that in Article 10 the phrase "*no later than six months*" clearly intends Member States to comply with the time limit, and this interpretation is in keeping with the objective of the Directive to simplify and strengthen the right of free movement for Union citizens and their family members. The applicant points out that there is no provision in this Directive for requests for further information, nor is there any provision that such requests would interrupt the time limit prescribed in Article 10. He also points out that where EU Regulations make specific provision for requests for information or investigations to interrupt a limitation period, the Court of First Instance and the Court of Justice have repeatedly found that the those provisions must be interpreted narrowly and are conditional on the information being necessary for the investigation or process. The following instruments and authorities are relied upon by the applicant in support of this proposition: Regulation 2988/74; Case T - 276/04, *Compagnie Maritime Belge SA v. Commission* para 18; Case T - 213/00 *CMA CGM and Others v. Commission* [2003] ECR 11- 913, para 484; Case C - *2i8/02 Handlbauer* [2004] ECR 1 - 6171, para. 40. Also, for an Irish case on point, see *Illium Properties Ltd v. Dublin City Council* [2004] IEHC 327.

5.6 The applicant submits that it is also an aspect of the principle of good or sound administration that a decision in an administrative matter should be rendered within a reasonable time. He has submitted that the principle of good or sound administration derives from the case-law of the Court of Justice and has been enshrined as a fundamental right in Article 41 of the Charter of Fundamental Rights of the European Union (proclaimed in Nice, 7 Dec 2000, OJ 2000 c-364 p.l). Recently, in case C 428/05 Laub, [2007] ECR 1-5069, para 25. it was held that the principle of good administration applies when Community law is applied by Member States. Recital 31 of the Preamble to Directive 2004/38/EC provides that *"This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union."*

5.7 The applicant contends that essential to the principle of good administration is the requirement that an administrative decision must be taken within a reasonable time. This requirement has been incorporated into Article 41 of the Charter. The factors to be taken into account in determining a "reasonable time" are set out in *Nederlandse Fedeative Vereniging de Groothandei v. Commission* joined cases T - 5/00 and T -6/00 [2003] ECR II 576, at para 82 of the judgment which states:

> "The reasonableness of this stage of the procedure must be assessed by reference to the specific circumstances of each case and, in particular, the context thereof, the conduct of the parties in the course of the procedure, the importance of the case for the various undertakings and associations of undertakings involved and its degree of complexity. "

He submits that this is also an Irish law principle and refers among other cases to my decision in *M & G v The Minister for Justice, Equality & Law Reform* [2007] IEHC 234.

5.8 The applicant contends that the Community law principles of legitimate expectation and legal certainty are also engaged, by the failure to decide the applicant's application and grant a residence card within a reasonable time or within the time limit.

5.9 In seeking to apply the law as he has outlined it to the facts of this case Counsel for the applicant has submitted that as a non-EU national spouse of a Union citizen working here or with worker status here, the applicant has a right of residence. Thus, when Mr Tagni submitted an application for a residence card accompanied by the required documents, the Minister, his servants or agents, was required by law to provide the applicant with a residence card within 6 months from that date. The Minister had no discretion in the matter, in the absence of significant public policy, public health, or public security grounds. Equally, in respect of the reconsideration, as the applicant was still living here and still married to a Union citizen with worker status, and the relevant documents were submitted, the Minister had no discretion in issuing a residence card within the time limit or a lesser period. However, the Minister has been reconsidering the application now for over 12 months.

5.10 It was strongly urged upon the Court at the hearing in this case that if, in the course of conducting his reconsideration of the initial (wrongful) decision to refuse the applicant's application (on *Metock* grounds), or at any stage in the course of the subsequent review, the Minister suspected that the applicant's application was based upon a marriage of convenience (which the applicant vehemently denies) and was fraudulent on that account, he was still not relieved of his obligation to render a decision within six months. He was still obliged to make a decision one way or another. If there was clear evidence that the marriage was a marriage of convenience then his duty was to refuse the application. However, if he merely had suspicion that the marriage might be a marriage of convenience but had no clear evidence to enable him to so conclude, he was obliged to grant the application within the six month period. Having done so, the Minister would be perfectly entitled to continue with his investigations and if, subsequently, clear evidence emerged sufficient to enable him to conclude with reasonable certainty that the application had been fraudulent he could then cancel or withdraw the residence card forthwith in accordance with Regulation 24 of S.I. No 656 of 2006 and Article 35 of Directive 2004/38/EC. The Directive does not envisage that an applicant who has prima facie complied with the requirements for obtaining a residence card should be held in "limbo" for a lengthy period, or possibly indefinitely, on the grounds of a mere suspicion, unsupported by clear evidence, that his marriage may not be a bona fide marriage but rather a marriage of convenience. The applicant says that EU law requires that absent clear evidence of fraud he should be granted the card, but on the understanding that if clear evidence of fraud subsequently emerges the card will be immediately revoked.

5.11 The applicant submits that in all the circumstances of the case the respondent's inordinate delay is an egregious breach of Article 10 of Directive 2004/38/EC and Regulation 7(2) of EC (Freedom of Movement) Regulations 2006-2008, and a breach of the requirement of good administration that administrative decisions should be made within a reasonable time. In this regard, it is urged upon the Court that the following factors are relevant:

- 6 months is the time limit laid down in the Directive and the Regulation;
- This was a reconsideration, where documents were already submitted;
- The Applicant had already waited 8 months after the original application to get temporary residence;
- The Department of Justice, Equality and Law Reform indicated that the reconsideration would take 2 to 3 months;
- The Applicant was prejudiced by the delay as the temporary residence had expired and he lost his job;
- The Minister, his servants or agents, refused to renew/grant the Applicant temporary residence pending the reconsideration;
- The Minister, his servants or agents, are on notice of the prejudice to the Applicant since 1 September 2008;

• Almost all of the correspondence from the Applicant's solicitors requests that the matter should receive urgent attention;

• There is no legislative provision for requesting further information or for interrupting the time limit in the Directive to await the provision of further information;

• The further information sought on two occasions had already been provided, and therefore these requests were unnecessary;

• No reasons have been given for the delay.

6. Submissions on behalf of the Respondent on the Substantive Issues
6.1 According to counsel for the respondent, the applicant has presented the case in these proceedings as being one where once an application is submitted, regardless of its substance and validity, permanent residency must be granted within six months. The error in this approach is to assume that any application is sufficient and/or adequate in order to make a decision and that the respondent has no right to verify the application. Secondly, it fails to distinguish between an *application* and a *review* of a rejected application.

6.2 Regulation 21 (1) of European Communities (Free Movement of Persons) Regulations of 2006 (SI 656 of 2006) as amended by SI No. 310 of 2008 provides for an appeal, but does delimit a time within which this is to be done. The respondent says that the applicant is currently awaiting a review of a review. He did not seek to challenge the first decision to refuse him residency, which was dated 13 September 2006. He is now out of time to do so and provides no reason for extending the time in which to challenge it.

6.3 The respondent has submitted that, although Article 10 of the Directive deals with the requirement on a Member State to *issue* a residence card to evidence the right of residence of a family member of a Union citizen, if the *right* of that family member has not been established due to his failure to submit the necessary documentation in a timely fashion, then it cannot be evidenced within six months of the application. The respondent argues that fact that he does not have discretion in the relation to the granting of such residency does not mean that he can shirk his responsibility to endeavour to verify the circumstances that are said to establish the claimed right. Once this has been done, the respondent has no option but to evidence the right of residence.

6.4 Referring to Recital 28 and Article 14 of Directive 2004/38/EC, respectively, (both quoted above) the respondent urges "It seems reasonable that if this is what has been envisaged by the Directive, then only when that is done can the application be said to have been made. The applicant is essentially claiming to be a 'qualifying family member', i.e. a spouse of a national of a Member State. According to the definitions within the Regulations, "spouse" does not include a party to a marriage of convenience."

6.5 The respondent submits that an application is only complete when the respondent is able to ascertain all of the necessary facts. He says that it is incumbent on him to be vigilant in such situations, particularly having regard to the terms of Recital 28 of Directive 2004/38/EC. He points out that while the applicant states that he is the spouse of a national of a Member State, he also states that his marriage has irretrievably broken down. The respondent says that applicant does not say when this happened. (The Court would remark that the latter assertion is manifestly not correct because the applicant's solicitors have clearly indicated in their letter of the 7th of January 2009 the circumstances in which the applicant became estranged from his wife and the precipitating event, namely when Ms Prymus informed Mr Tagni that the child she was expecting was not his, is clearly localised in that letter and it is stated as having occurred in February 2007.)

6.6 The respondent further relies upon Recital 25 of Directive 2004/38/EC which states, *inter alia*, "any action taken by the authorities must be properly justified". The respondent contends that in this instance, the desire to acquire accurate and reliable information led to a delay in him being able to make a decision. However, he urges that that delay was contributed to by the applicant and that in the circumstances it is a permissible delay under the Directive which certainly does not state that the applicant is entitled to permanent residency by default if not granted it or refused it within six months of first applying.

6.7 The respondent has further submitted that the relief sought by the applicant at D(6) of his amended Statement of Grounds shows that he too accepts that the six months is not the only time frame to be considered. Ground D(6) claims that a decision was not made *"within six months of the application being made and/or the date of the reconsideration and/or within a reasonable time in all the circumstances of the case."*

6.8 The respondent urges that contrary to the case made by the applicant, the Minister is not under a statutory duty to make a decision within six months. Rather, if he is satisfied that he should do so, then the Minister shall do so within six months of the application. The Regulations are silent as to the time within which the Minister shall refuse an application if not so satisfied.

6.9 The respondent points to what he characterises as "a further misapprehension on the part of the applicant" which is, he says, apparent from the relief sought i.e. that a valid decision be taken within six months of the application. The respondent maintains there is no such requirement in the Directive. He has submitted that it is wrong to assume that the Directive or indeed the implementing Regulations require that a valid decision be made within the six months. In the course of his written submissions he states:

> "It might be helpful to consider the provisions of planning legislation. Where no decision is made within eight weeks of an application for planning permission, default planning permission is granted by operation of law (see section 34(8)(f) Planning and Development Act 2000). However, if within the eight weeks a decision is made which ultimately turns out to be invalid, there would be no question of default planning permission being granted as a decision had been taken. The invalid decision would be overturned by this Honourable Court on an application for judicial review or by An Bord Pleanála on appeal to that expert body, but it would nonetheless be a decision within the time allowed."

6.10 Referring to Article 27 of Directive 2004/38/EC the respondent argues a justifiable restriction on the freedom of movement of a family member of a Union citizen "could take the form of the necessary and unavoidable failure to grant the residency card within the required time if in fact to do so would be reckless in light on real concerns about the nature of the relationship between the national of the Member State and the non-national who is not a European citizen. Similarly, the Respondent cannot be expected to rapidly make a decision on a review of the application when the situation is complex to say the least."

6.11 It is urged that whereas the applicant makes the point that there is no discretion reserved to the respondent in relation to such applications, there is a requirement that the respondent be satisfied that the applicant actually fulfils the criterion required under the Directive. It is his *right* which he is seeking to have evidenced. The onus is on him, however, to provide a document attesting to how that right arises.

6.12 The respondent argues that Article 31.3 of the Directive illustrates that theoretically an invalid decision could be reached as it provides for the need to have a mechanism for "an examination of the legality of the decision". It took a decision of the European Court of Justice in *Metock* to illuminate the invalidity of the original decision in this case. Thereafter, a new decision issued.

7. Decision on the Substantive Issues

7.1 At paragraph 5.3 above it is argued that a person in the applicant's position has merely to "present the documents specified in the Directive. This list is exhaustive. Member States may not make the issue of a residence card dependant on any other conditions other than the presentation of these documents." While this statement may be true as far as it goes, the Court profoundly disagrees any suggestion that the Minister is not entitled to verify that the circumstances to which the supporting documents ostensibly attest actually exist. In my view any such suggestion is quite simply wrong.

7.2 The requirements of Article 10 are addressed to the Member States. The Article sets out a mandatory check list "comprehensively specifying" (in the words of Recital 14) the documents that must be presented, but it does not follow that in cases of doubt that further proof may not be sought. On the contrary, recital 28 of the Directive expressly affords to the Member States the facility of adopting necessary measures.

7.3 It is entirely reasonable, proper and appropriate that where a residence card is being applied for in order to "evidence" an asserted right of residence the Minister should be entitled to seek to verify the circumstances that are said to give rise to the right being asserted. To do so is not to impose additional conditions. So, for example, there is nothing to inhibit the Minister from ringing up an employer to verify if an applicant or his spouse is in employment. Equally, and in the circumstances of the present case, the Minister was perfectly entitled to look for explanations concerning aspects of the applicant's ostensibly unusual or unorthodox (at least by Irish standards) marital circumstances, and in the new circumstances of a claimed estrangement in which both parties are now living with new partners, and have children by other people, to seek evidence of the genuineness of both the original marriage and of the estrangement, for example evidence of the taking of steps towards a separation agreement, or towards the obtaining of a decree of judicial separation or divorce.

7.2 Having said all of that it does seem to me that the six month time limit in Article 10 is mandatory and requires to be respected in every case. The Directive clearly requires the Minister to render a decision "no later than six months" from the date on which an application is submitted. If he fails to do so he is in breach of the Directive.

7.3 In most cases the time limit will not present the Minister with a problem. It is to be expected that in the majority of cases the appropriate documents will be submitted providing prima facie evidence of the right of residence. The Minister will then engage in a process of either random or systematic verification and, having done so, will be satisfied or not satisfied as the case may be that it is appropriate to issue a residence card, and will be able to render a decision one way or the other, within the six months allowed.

7.4 In other cases the Minister may have difficulty in reaching a conclusion as to the genuineness of the claim within the six months period. This may arise where the applicant fails to submit all of the specified documentation in a timely manner or, more typically, where the applicant fails to submit supplementary information sought as part of the verification process in a timely manner. However, while the Minister may have difficulty in these circumstances in reaching a conclusion as to the genuineness of the claim within the six months period, he will not have a difficulty in rendering a decision. The onus is on the applicant to co-operate with the verification process and if the Minister has not been provided with the information that he requires in a timely manner such as to enable him to verify the claim within the required six month period he would be entitled render a decision refusing the application on the basis that the claim has not been verified. However, and in that event, there does not appear to be any impediment in the Directive to an applicant making a fresh application when the required material is to hand, alternatively requesting a review of the decision based upon the existing evidence. I think that as a matter of logic and common sense any fresh application would again be subject to the six months limit specified in Article 10, to run from the date on which the fresh application is made. There is no time limit in respect of a review but since it is in the nature of any review that it is conducted on the basis of the same evidence as was used to ground the original decision, it is to be expected that the rendering of a decision upon review is unlikely to require as much time as it did to render the original decision. In any case a decision upon review must be rendered within a reasonable time.

7.5 There will also be cases from time to time, where the applicant has submitted the required documentation in a timely fashion, and has also submitted in timely fashion any further information sought by Minister as part of the verification process, and yet the Minister, at the end of the six months, finds himself with a suspicion, unsupported by clear evidence, that the claim may be fraudulent, and which suspicion requires further investigation. What is the Minister to do in those circumstances? It seems to the Court that the Minister is still obliged to render a decision at that point. Moreover, his decision must be reasonable, rational and evidence based. While it is impossible to legislate for every situation in the abstract, and much will depend upon the exact nature of the Minister's concern, and such evidence as is in fact available, the Minister may in such circumstances have no choice but to grant the residence card on the basis that he has the power to immediately revoke it if clear evidence of fraud should subsequently emerge.

7.6 I consider that the applicant is correct in principle in saying that the Directive does not envisage that an applicant who has prima facie complied with the requirements for obtaining a residence card should be held in "limbo" for a lengthy period, or possibly indefinitely, on the grounds of a mere suspicion, unsupported by clear evidence, that some aspect of the claim may not be genuine.

7.7 An examination of the evidence in this case reveals that the original application for a residence card was made by the applicant on or about the 22nd of February 2006. The respondent was therefore obliged to render a decision on this application, one way or the other, not later than the 22nd of August 2006. No decision was in fact made within the six months. However a decision (albeit a legally flawed one) was in fact rendered on the 13th of September 2006 and the application was refused. In the Court's view the Minister was clearly in breach of the Directive on that occasion in failing to render his decision within the six months.

7.8 The fact that the decision was not rendered within the time limit would not, in the Court's view, have any implications for the legal validity of the decision itself. However, theoretically the applicant might have been entitled to take an action claiming damages against the State for any prejudice caused to him on account of the unlawful delay, assuming he could prove loss and damage on account of such prejudice. Be all of that as it may, to date the applicant has not brought any such claim. Neither has he sought to quash the decision of the 13th of September 2006 by way of judicial review.

7.9 What happened next was that nearly two years later the applicant's solicitors got wind of the fact that the respondent was on his own initiative reconsidering a large number of his decisions to refuse residence cards in the light of the *Metock* decision. On the 22nd of September 2000 the respondent, in response to the letter of the 1st of September 2008 from the applicant's solicitors, wrote indicating that the respondent would reconsider the applicant's application for a residence card, and requested the applicant to furnish to the Department, within 10 working days, his passport, his EU citizen spouse's passport, his marriage certificate, proof of his EU citizen spouse's employment, and proof of residence. As previously stated at para 2.8 above, the letter warned that failure to

provide the requested documentation "will result in the department making its decision based on the documents as received at the time of your client's original application." This is interesting because the respondent was effectively approaching the matter on the basis that "reconsideration" = "entertainment of a fresh application". However, as *Metock* had turned on a net legal point the applicant's case, and probably most of the other cases, could in theory have been made the subject of a review i.e., a reappraisal of the evidence on which the original decision was based in the light of the new legal order post *Metock.* A fresh application would require the evidence to be re-submitted, verified afresh and a new decision to be rendered within six months of the submission of the fresh application. On the other hand a review would have been based on the original evidence and the outcome of the original verification process, with a decision on the review to be rendered within a reasonable time. That the respondent would prefer to have a fresh application in the applicant's case is perhaps understandable given that almost two years had elapsed since the original decision. However, this was never expressly stated.

7.10 It is not clear whether the subtleties of this distinction were apparent to the applicant's solicitors, but in any case they urged on the respondent in correspondence that it was not necessary to resubmit the evidence because the respondent had all of it already. However, they then proceeded, presumably on an *ex abundante cautela* basis and "in order to facilitate speedy processing", to resubmit everything anyway! Moreover, the letter of the 9th of October doing so contained the crucial addendum that clearly raised a red flag in the face of the respondent, namely:

> "Please note the following facts:
>
> A. At present, Mr Mbeng Tagni, and his wife are experiencing some marital difficulties. They are currently living apart in an attempt to sort these difficulties out. Mr Mbeng Tagni is living at Apartment 1, 13 Castle Street, Carlow, as previously advised by letter dated 1st September 2008.
>
> B. Ms Prymus is actually not working at present as she is on maternity leave. Clearly,Ms Prymus retains her status as a worker pursuant to the Directive."

7.11 Accordingly, although the applicant might have been entitled to press for a review of the decision of 13th of September 2006, he did not do so but rather accepted the respondent's proposal that he should, in effect, make a fresh application. That fresh application was submitted on the 9th of October 2008 and pursuant to the Directive the applicant was entitled to a decision one way or the other not later than the 9th of April 2009. Just a little over one month after the fresh application was submitted, namely on the 10th of November 2008, a decision on it was rendered by the respondent and the application was refused for the reasons stated in the respondent's letter of that date.

7.12 This refusal was responded to by letter of the 25th of November 2008 from the applicant's solicitors to the respondent pointing out that:

> "Our client did in fact furnish evidence that the EU citizen was exercising her EU Treaty rights and this was in fact accepted by the EU Treaty Rights Section in 2006 ……"

and threatening judicial review proceedings if the decision was not "reopened" within 14 days. The respondent appears to have interpreted this as a demand for a review of his decision of the 10th of November 2008 and by letter from the EU Treaty Rights Section of his department to the applicant's solicitors dated the 27th of November 2008 he agreed to a review. Since it was a review the applicant was entitled to insist, if he so wished, that it should be conducted solely with reference to the evidence and information that had been before the Minister at the time when the decision the subject under review was being made. However, consistent with his obligations under the rules of natural justice, the respondent invited the applicant's solicitors to make observations on a number of matters that had come to his attention in the course of the verification process and that he had taken account of. This opportunity was in fact availed of and the respondent's ostensible concerns, namely that the applicant's marriage might have been a marriage of convenience, were responded to by means of the lengthy letter from the applicant's solicitors to the EU Treaty Rights section of the respondent's department dated the 7th of January 2009.

7.13 Because this was a review the Minister was not subject to a specific time limit but rather was obliged to render a decision within a reasonable time. He had not done so by the 15th of June 2009 when the proceedings herein were commenced, almost seven months after the commencement of the review. Neither had he done so by the 15th of October 2009 when the substantive hearing opened before me, almost 11 months, after the commencement of the review. The applicant says that the respondent has failed to render his decision on the review within a reasonable time. The Court agrees with this submission.

7.12 Accordingly, the Court would not be disposed to grant any relief to the applicant in respect of the delay in rendering the decision of the 13th of September 2006, because the applicant does not claim to have been prejudiced on account of it.

Moreover, as regards the substantive error, i.e. the error of law, in the rendering of that decision revealed on account of the *Metock* decision, the applicant acquiesced in the respondent reconsidering the matter as a fresh application. Further, as the decision on the fresh application was rendered within time on the 10th of November 2008, and because in the Court's view no other criticisms of it have been sustained as legitimate, the Court has no jurisdiction to grant any relief in respect of that decision. The applicant was of course unhappy with the decision of the 10th of November 2008 and sought a review of it as was his entitlement. As of the date of the hearing no decision had been rendered. The Court has criticised this and has expressed the view that the respondent has been guilty of a failure to render his decision on the review within a reasonable time. Last week Counsel attended before the Court to advise it as a matter of courtesy that in recent days a decision upholding the decision of the 10th of November 2008 has been rendered by the respondent. Accordingly, the only potential relief to which the applicant might be entitled at this stage is an order declaring that the respondent was guilty of a failure to render his decision on the review commenced on the 27th of November 2008 within a reasonable time. As a decision has recently been rendered, albeit belatedly, no question of mandamus or of interlocutory relief pending the rendering of a decision now arises. The applicant has not claimed damages in these proceedings. If he has in fact suffered loss and damage it remains open to him to do so in separate proceedings. However, in circumstances where the decision on review was ultimately a refusal he might well have difficulty in establishing loss or damage.

8. The issue of delay on the part of the applicant.

8.1 The respondent has submitted from the outset that even if the Court were to find in favour of the applicant on some or all of the substantive issues in the case, the applicant should be denied relief in any event on the grounds of delay and the Court should set aside the Order made at the leave application extending time.

8.2 Both parties, with the leave of the Court, were granted leave to file supplemental affidavits dealing with the issue of the applicant's alleged delay. The applicant has filed a supplemental affidavit of Mikayla Sherlock sworn on the 11th of February 2010, and

the respondent has filed a replying affidavit of Aengus Casey in response thereto.

8.3 Paragraphs 1 to 15 inclusive of Ms Sherlock's supplemental affidavit consist of a reprise of the chronology of the case and summarize the course of the relevant correspondence concluding with the letters of the 6th and 13th of March, 2009, respectively. Then at paragraphs 16 to 18 inclusive she states:

> 16. I say that over a month passed with no further response from the Respondent, his servants or agents. I say that at this point, I felt that we were getting nowhere with the Respondent, his servants or agents. I felt that I had exhausted review process commenced at the instigation of the Respondent, his servants or agents. I say that given the urgency of the matter for the Applicant, I felt that he had no option but to resort to judicial review proceedings. I discussed the matter with the Applicant and he agreed with this approach. I say that I wrote again threatening judicial review proceedings by letter dated 28 April 2009. I say that in May 2009, I instructed counsel to give an opinion in respect of judicial review proceedings, and subsequently to draft those proceedings. On 11 June 2009, an application for leave to seek judicial review was made on behalf of the Applicant before Mr Justice Peart. I beg to refer to a copy of the correspondence on behalf of the Applicant dated 28 April 2009, upon which marked with the letters "MS10" I signed my name prior to the swearing hereof.
>
> 17. I say that the Respondent, his servants or agents, are not prejudiced by any delay in bringing these proceedings, I say that any delay in bringing these proceedings was because the Applicant and his legal advisors were led to believe that the Respondent, his servants or agents, were actively dealing with the Applicant's application. I say that any delay on the part of the Applicant, in bringing these proceedings, facilitated the Respondent, his servants or agents, in giving them time to deal with the application and comply with their duty. I say that an Order of this Honourable Court compelling the Respondent, his servants or agents, to grant a residence card to the Applicant, will not prejudice the Respondent, his servants or agents, as it will simply cause the Respondent to comply with its ongoing duty under Irish and EC law. I further say that if Respondent, its servants or agents, by unilaterally instigating a review process which never terminated, were able to cause the Applicant, who fully engaged with the Respondent in good faith, not to bring judicial review proceedings, and then profit from the Applicant's delay in bringing judicial review proceedings to prevent this Honourable Court from granting the reliefs sought herein, it would be unjust and would facilitate an interference with the European Community law rights and would fail to protect those rights.
>
> 18. I say that if the Applicant were disentitled to the reliefs sought because of the delay in initiating these proceedings, he would be significantly prejudiced, as he would not be able to work without a residence card, and would have no alternative redress against the Respondent, his servants or agents.

8.4 Much of the supplemental affidavit sworn by Aengus Casey on behalf of the respondent is concerned with advancing extenuating or mitigating circumstances for the respondent's own delay. This may be due to a partial misunderstanding of a request by the Court for further submissions, and if necessary further evidence, on the question of delay. The Court was referring to the respondent's contention that the applicant should be denied relief in any event on account of his (the applicant's) delay and that the Court should set aside the order made at the leave application extending time. However, Mr Casey's affidavit does not deal specifically with the applicant's delay, if any, in instituting judicial review proceedings specifically in respect of the respondent's delay in rendering a decision upon the review commenced on the 27th of November 2008.

8.5 While both sides have also furnished submissions on this question of possible delay by the applicant, and extensive books of authorities, the Court has ultimately arrived at the conclusion that with respect to the single issue of the applicant's entitlement to insist on the respondent rendering a decision upon the review commenced on the 27th of November 2008 within a reasonable time, there was in fact no delay. The Court has already expressed the view that ordinarily a party could expect a review of a decision to be completed in less time than it took to render the original decision. However, in exceptional cases it might take at least as long as in the case of the original decision or perhaps longer depending on the circumstances of the case. The decision of the 10th of November was rendered just over a month after the application was submitted. However, in circumstances where the respondent saw fit to invite further observations from the applicant it would not be reasonable to expect a decision to be rendered on the review until those observations had been furnished and a reasonable time for their consideration had elapsed. In the circumstances of the present case where very extensive observations were furnished on the 7th of January 2009 the Court is satisfied that the respondent could have legitimately insisted on a period of up to three further months within which to render his decision. That means that it would, in the view of the Court, have been reasonable for the respondent to render his decision at any time up to and including the 7th of April 2009. The respondent was required to act promptly and in any case not later than three months after the 7th of April 2009. The three month period would not have expired until the 7th of July 2009. The applicant made his *ex parte* application on the 15th of June 2009. In all the circumstances the Court is satisfied that he did act promptly with regard to the one discreet aspect of his claim on which he has been successful. Accordingly the Court finds that the respondent's objection based upon alleged delay by the applicant is not made out.

9. Conclusion

9.1 The Court is disposed to grant the applicant a Declaration that the respondent was guilty of a failing to render his decision on the review commenced on the 27th of November 2008 within a reasonable time.

9.2 The Court dismisses all other aspects of the applicant's claim.

9.3 I will hear submissions from the parties on the question of costs.