Neutral Citation Number: [2011] IEHC 55

THE HIGH COURT

JUDICIAL REVIEW

2010 774 JR

BETWEEN

MUHAMMED SALEEM

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 4th day of February 2011

1. This is an application brought on behalf of the applicant for an order striking out the Statement of Opposition which has been filed in these proceedings upon the ground that it fails to set out concisely the grounds of opposition to the proceedings as required by O. 84, r. 22(4) of the Rules of the Superior Courts.

2. The principal relief sought in the proceedings is an order of *certiorari* to quash a decision of the respondent of the 12th May, 2010, refusing the applicant's application under s. 4 of the Immigration Act 2004 for what is called "Long Term Residency". The applicant is a native of Pakistan who came to the State in December 2001, on foot of a work permit issued by the respondent and which was subsequently renewed from time to time. In July 2008, the applicant made an application for Long Term Residency having at that stage been resident in the State for over five years, and in employment on foot of his work permit.

3. Having received no reply to that application, proceedings by way of judicial review (Record No. 2009 No. 1000 J.R.) were brought seeking an order of *mandamus* to compel the respondent to make a decision upon the application. While the decision on the application was still outstanding, the applicant lost his job in October 2009. His then current permission to be in the State expired on 19th October 2009 and the work permit expired on the 30th November, 2009.

4. In the letter of the 12th May, 2010, communicating the decision on the application, the position was explained as follows:-

> "At the date of application persons who have been legally resident in the State for over five years (i.e. 60 months) on the basis of work permit/work authorisation/working visa conditions may apply to this office for a five year residency extension. In that context they may also apply to be exempt from employment permit requirements. Long term residency is granted on the basis that a non-EEA national has completed five years (60 months) legal residency in the State on work permit conditions which is reflected in the corresponding stamp 1 or stamp 4 endorsements in a person's passport and not by the dates of commencement and expiry of each work permit. Information provided by the Garda National Immigration Bureau indicates that your client's permission to remain in the State expired on the 17th October, 2009. As stated in our letter to you of the 7th April, 2010, it is not possible to offer long term residency to an applicant whose permission to remain is not valid and up to date. Accordingly, as your client is no longer legally resident in the State, his application for long term residency is refused."

5. Thus, the essential grievance upon which the present application for *certiorari* is based, derives from the fact that when the application was made in July 2008, the applicant believed that he complied fully with the conditions for making such an application as thus outlined. However, because of the long and the applicant would say unlawfully excessive delay, in making a decision on the application, the respondent regarded the applicant as failing to comply with the conditions when the decision came to be made. The applicant says that when his permission to be in the State expired he could not get it renewed because he had no work permit and although he subsequently obtained an offer of new employment, he could not take it up because he by then had no permission to remain in the State.

6. The term "Long Term Residency" is not one used in the Immigration Act 2004. It is used in S.I. No. 287/2009, the Long Term Residency (Fees) Regulations 2009, but it appears to have its origin in what the respondent describes as an "administrative scheme". This appears to take the form of a notice published on the web site of the Irish Naturalisation and Immigration Service giving information as to: "Applications from persons who have been legally resident in the State for a minimum of five years (i.e. 60 months) on work permit/work authorisation/working visa conditions."

7. Section 5 of the 2004 Act, provides that no non-national may be in the State other than in accordance with the terms of a permission given under the Act by or on behalf of the Minister or given before the passing of that Act. Section 4 provides that an immigration officer may on behalf of the Minister give a non national, either by means of a document or by placing a stamp on his or her passport, an authorisation "to land or be in the State". Section 4 does not prescribe any conditions for the grant of such a permission. Subsection (3) does, however, prescribe a series of circumstances in which an immigration officer, on behalf of the Minister, may refuse to give a permission and subsection (6) provides that a permission can be given subject to such conditions as to duration of stay, engagement in employment, business or profession as may be thought fit.

8. In effect, therefore, the Minister would appear to have a statutory discretion in granting permission to land or to be in the State and the "administrative scheme" thus published amounts in practice to a statement as to the circumstances and conditions in which the Minister is prepared to entertain and consider applications for the grant of a permission to remain on the basis of a "stamp 4" endorsement which will be valid for a period of five years.

9. The essential basis of the challenge to the refusal decision in this case is that the respondent failed to act fairly and apply proper procedures in that by not deciding upon the application within a reasonable time and by dealing with applications in strict

chronological order he has unduly, (and presumably therefore unlawfully,) fettered the exercise of the statutory discretion.

10. As indicated, following the grant of leave, a Statement of Opposition was filed on behalf of the respondent dated the 26th November, 2010. It runs to some 29 paragraphs and it is fair to say that it amounts to a full denial and traverse of all elements of the grounds upon which the application is based.

11. The applicant has no quarrel with much of the pleading in that regard but brings this motion upon the basis that the pleading in paragraphs 19 et seq contains of a series of alternatives in relation to the precise legal status of the "scheme" with the result that the precise stance being adopted by the respondent as to the manner in which he proposes to stand over the lawfulness of the refusal decision is unclear and makes it difficult for the applicant to know in advance of the hearing what case he must meet.

12. Counsel for the applicant makes the case that the Minister, as a public authority, has a duty of cooperation with the Court when a decision of this kind is to be stood over in judicial review proceedings and it is not good enough, in effect, for the Minister to simply deny all elements of the grounds for which a leave has been granted and avoid stating clearly what he maintains to be the legal basis upon which the refusal decision has been made and the status in law of the "Long Term Residency" arrangement as an administrative scheme, an extra statutory scheme or whether the Minister has or has not exercised a statutory discretion.

13. In this regard counsel for the applicant relied upon a principle enunciated by Sir John Donaldson M.R. in *R. v. Lancashire County Council (ex parte Huddleston)* [1986] 2 All E.R. 941, to the effect that in judicial review of its decisions, a public authority has an obligation to make a full and fair disclosure. In the headnote to the report of that case, the principle is summarised:-

> "A local authority whose decision is challenged in judicial review proceedings should, like the judge of an inferior court, not be partisan in those proceedings and should, in the interests of high standards of public administration, assist the court by disclosing, so far as necessary, such reasons as are adequate to enable the court to ascertain whether the local authority was in error in reaching its decision by taking into account irrelevant considerations or by not taking into account relevant considerations."

14. The issue in that case arose in the context of a refusal by the respondent council to allocate a university student grant and the principle was directed at the duty of that authority to state clearly the reasons for its refusal and the particular factors that had been taken into consideration for the purpose.

15. The situation in the present case is not fully analogous therefore, because the Minister's reasons for his refusal are not in doubt and the area of alleged opacity or ambiguity relates to the issues of law rather than of fact. The present motion is thus directed at what is said to be an unsatisfactory equivocation in the way in which the grounds of opposition are pleaded in that regard.

16. This Court fully agrees with the principle that in the judicial review of decisions of a public authority, all parties to the proceedings owe a duty to the Court to cooperate in pleading so that the issues of law which the court will be required to determine are identified fully and accurately. This Court has on several occasions complained particularly about Statements of Grounds in which very large numbers of vague and unspecific assertions are pleaded and variations of repetitive and overlapping allegations of error of law are advanced. In its judgment in *O.S.J.L. & Others v. Minister for Justice, Equality and Law Reform* (Unreported, Cooke J., High Court, 1st February, 2011), the Court said:

> *"In the judgment of the Court a statement of grounds under O. 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed by such an order . . . it is inadequate and unacceptable that applications be grounded upon bald assertions that a contested measure is unreasonable, irrational, unlawful, unfair, disproportionate or otherwise flawed without identification of the specific feature, fact or omission in the measure which is alleged to constitute the basis of the proposed annulment."*

17. Equivalent considerations apply to the pleading of grounds of opposition. That is not to say that a respondent is not entitled, simply because it is a public authority, to deny all essential elements of the grounds alleged and to put the applicant on proof of all material aspects of the claim. Nevertheless, because in judicial review the High Court is exercising its constitutional and public law function of ensuring that delegated executive decision making powers have been validly exercised in accordance with law, it behoves the respondent to assist the court not only by identifying the issues of fact, if any, which it contests but also by stating frankly and clearly in its pleading, so far as this can reasonably be done, the view or stance it proposes to adopt on the questions of law or issues of interpretation which it considers to be raised by the claim and to require determination by the Court. As the master of the Rolls explained in Huddleston, modern jurisdiction in judicial *review "…has created a new relationship between courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. … The analogy is not exact but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities*." In this regard the pleading of statements of grounds and opposition could be considered to differ from pleadings in the fully adversarial forum of civil proceedings where it appears to have become accepted that parties are entitled to keep their cards as close to the chest as possible in order best to preserve the opportunity of victory by surprise at the trial.

18. Having regard to the factual background given above, the legal issue which emerges from the grounds relied upon in this case, as the Court understands the argument, appears to be capable of paraphrase as follows:-

> (a) A permission by way of "Long Term Residency" can only be granted by the Minister in exercise of his discretionary power under ss. 4 and 5 of the Act of 2004;
>
> (b) By setting out the conditions for "Long Term Residency" in his published administrative scheme, the Minister has circumscribed the terms upon which an application will be received and considered;
>
> (c) In July 2008, when this application was made, the applicant fulfilled all of those conditions;
>
> (d) The Minister has erred in law in failing to determine the application by reference to the applicant's situation and circumstances as of the date of the application;
>
> (e) By administering a scheme which then involves a protracted delay by reason of the examination of very large volumes of applications in strict chronological order, the Minister has unduly fettered the exercise of his statutory discretion in

that he has deprived himself of the ability to determine the application as of the date of its receipt.

19. In the Statement of Grounds it is clear that in paras. 1 to 18, the Minister is putting the applicant on proof of all factual matters in that regard, as well as denying the essential elements of his alleged unlawful manner of dealing with applications. What is not clear to the Court, on the other hand, is precisely what stand is being taken in the remaining paragraphs of the Statement as regards the basis upon which the Minister maintains he is making decisions on applications and whether the published "scheme" is regarded as a statutory scheme, an extra-statutory (but in some sense legally binding,) scheme, or a purely administrative scheme and whether it is set up in exercise of powers under ss. 4 and 5 or entirely independently of those sections. Thus, in para. 19, the Minister denies that he is exercising statutory discretion under the sections in deciding an application.

It is denied that a permission can only be granted pursuant to s. 4 but without explaining how it might otherwise be granted. In para. 21 it is denied that "the determination of the respondent that the scheme is an extra statutory or an administrative one is *ultra vires* s. 5" but it is not clear in what sense the Minister has "determined" the scheme as distinct from determining the application. In para. 22 it appears to be denied that the Minister has a statutory discretion although, on the face of it, this would appear inconsistent with the absence of any conditions stipulated in s. 4 itself as indicated above.

20. In these circumstances and without prejudice to the entitlement of the respondent to repeat as they stand the paragraphs dealing with the absence of *locus standi*, the absence of any cogent reason given for seeking priority and his position on the allocation of resources, the Court will direct that the Statement of Opposition in paras. 19 -28 be repleaded in order to clarify for the Court and the applicant the position taken by the Minister upon the issues identified in paragraph 19 above with particular reference to paragraphs 19 to 22 and 26 of the existing Statement.