Neutral Citation Number: [2011] IEHC 54

THE HIGH COURT

JUDICIAL REVIEW

2009 1282 JR

BETWEEN

LIBAN MOHAMUD AND MUNA ABDULLE ALI

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

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

1. This is one of a number of cases which were heard together as raising similar issues in relation to the refusal of applications for a Residence Card under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (the "Regulation").

2. By order of the Court (Peart J.) of the 14th December, 2009, leave was granted to the applicants to apply for a series of declaratory and other reliefs including in particular an order of *certiorari* to quash a decision of the 17th August, 2009, made by the respondent (the "Minister") refusing the issue of a Residence Card to the second named applicant as applied for on the 17th February, 2009. Leave was also granted to apply for an order of *mandamus* directing the Minister to issue the Residence Card to the second named applicant.

3. The background to the proceedings can be summarised as follows. The first named applicant is a national of the Netherlands who claims to have been living and working in the State since September 2003. At the time of making the above application he was employed by MPS Asset Management Ireland Limited.

4. The second named applicant is a national of Somalia and the mother of a child born on the 1st January, 2000. The applicants married in Ethiopia on the 8th March, 2004, and on the 21st December, 2004, the second named applicant and her son were granted permission to join the first named applicant in Ireland and they arrived here in January 2005.

5. The applicants and the child say that they lived together as a family until July 2008, when the applicants decided to live apart for a temporary period because of marital problems.

6. An application dated the 17th February, 2009, and stamped as received on the 19th February, 2009, was made to the Irish Naturalisation and Immigration Service of the Minister's Department for the issue of a Residence Card under the Regulations to the second named applicant. With the application were submitted the first named applicant's Dutch passport, an original marriage certificate with translation and a P60 tax form for the first named applicant. By letter of the 27th February, 2009, the INIS acknowledged receipt of the application and required submission of a number of original documents within the next ten working days including proof of evidence of residence in the State and bank statements. The original documents were submitted and were returned without comment by letter dated the 22nd April, 2009.

7. By letter dated the 23rd April, 2009, written to the second named applicant, the EU Treaty Rights Section of the Department, pointed out that her original passport had not been submitted with the application nor was there evidence of her residence in the State. The letter asked her to submit a valid passport together with evidence of residence (rent book, letter of registration of tenancy etc.) and a current bank statement both for her and the first named applicant. On the 28th April, 2009, the first named applicant replied stating that, so far as he was aware, the State did not recognise any Somali passports and they were not therefore in a position to produce one. Instead, he submitted e-mails received from the Travel Document Unit of the INIS and offered to forward such a travel document when received with a view to having "Stamp 4" endorsements put on it.

8. On the 19th May, 2009, the EU Treaty Rights Section wrote confirming that the second named applicant could obtain a "Stamp 4" endorsement from the local immigration officer which would be valid while a decision on the application for the Resident's Card was pending, up to the 19th August, 2009. On the 25th May, 2009, the second named applicant duly obtained an extension to her previous Stamp 4 residents permit for that period.

9. By letter of the 27th July, 2009, the EU Treaty Rights Section again wrote to the second named applicant requesting submission of a number of original documents within ten working days. These included travel documents for the second named applicant, evidence of residence and evidence of the current activities of the first named applicant including contract of employment, a current letter from employer with contact details, two recent payslips and his most recent P60 or Tax Credit Certificate.

10. By letter of the 11th August, 2009, the Section again wrote returning original documents previously submitted and asking to have forwarded "a letter from your landlord stating your address and who is living with you at that address and a letter of registration of your tenancy from the Private Residential Tenancies Board". The letter continued:

> "I would also be obliged if you would clarify the following: the documentation you provided in support of your application relating to your husband, eg. bank statements, show his address as being 39 Cloonlara Square, Phoenix Park Racecourse, Castleknock. The documentation provided relating to yourself shows an address at 6 Mount Seskin Court, Killinarden, Dublin 24, you have not provided sufficient evidence to show which address you are currently living at. Also the recent renewal of your travel document was to the address at 39 Cloonlara Square, Castleknock, while the more recent processing of your son's travel document seems to have been to the address at 6 Mount Seskin Court, Killinarden, please

clarify."

11. By letter of the 12th August, 2009, the second named applicant replied as follows:

> "Thank you for your response to my application. The reason for the discrepancy between my address and my husband's address is due to the fact that we have decided to spend some time apart. I have been living at 6 Mount Seskin Court, Killinarden, Dublin 24, whereas previously I was living with my husband at 39 Cloonlara Square, Castleknock. Please find enclosed the requested proof of current residence at 6 Mount Seskin Court, Killinarden, Dublin 24."

A copy of the PRTB form for registration of the tenancy at that address was enclosed.

12. By letter dated the 17th August, 2009, the EU Treaty Rights Section refused the application and gave the reason as follows:

> "You did not submit the required documents which were requested on the 11th August, 2009. Hence your application does not satisfy the Minister that it is in accordance with Article 10(2) of the Directive or Regulation 7(1)(b) of the Regulations as it does not contain the particulars set out in Schedule 2 of the Regulations. You have failed to provide clear evidence of your address in the State and clear evidence that you resided with your EU national spouse. Your current permission to remain in the State will expire on the 19th August, 2009. This permission was granted on the basis of your application for EU Treaty Rights. This permission will not be renewed. On the expiry of the above permission you must report to your local Immigration Registration Office to discuss your immigration status."

13. The applicants' solicitors subsequently made a successful application under the Freedom of Information Acts and obtained documentation on the file relating to the application including a note made by the author of the refusal letter which explained more fully the reasons for the refusal as follows:-

> "In order to make an application for a Residence Card of a family member of an EU national, the EU national and the applicant should reside together in the State. The applicant has stated that she and her spouse are living apart however clear evidence had not been provided as to the address the applicant is living at. When asked to clarify her address the applicant provided a photocopy of an application form for registration of tenancy with the PRTB which was not complete. The requested letter from the landlord was not provided. My letter to Ms. Ali requesting information was posted to an address in Castleknock, however, within three working days Ms. Ali had replied stating she lives at the address in Killinarden, given on her application form received on the 19th February, 2009, and her husband has moved to the address in Castleknock, given on her application form received on the 16th April, 2009, to a new address on North Circular Road. I am not satisfied as to the address of the applicant, the information provided seems to confuse rather than clarify the situation."

14. By letter of the 1st September, 2009, the applicants' solicitors requested a review of the refusal decision under Regulation 21 and set out a number of grounds in support of the request. In particular it was submitted that the deciding officer was imposing on the applicant evidential requirements which had no lawful basis in the Regulations or the Directive and that there was no requirement that the spouses provide evidence of joint residence. It was explained that the applicants had recently decided to live temporarily apart but that this did not affect the second named applicant's entitlement to continued residency under the Regulation.

15. There was no immediate response received and further letters were written and by a reply of the 28th October, 2009, the EU Treaty Rights Review Section acknowledged receipt of the review request as of the 2nd September, 2009, and stated:-

> "While there is no set time frame on the processing of these reviews, each request is dealt with in strict chronological order. Once a decision has been reached, both you and your client will be notified in writing from this office immediately."

16. In the letter of the 1st September, 2009, the applicant's solicitors had, in view of the expiry of the existing permission on the 19th August, asked for confirmation in writing "that arrangements have been put in place to enable her to register with the GNIB to have her permission to remain extended whilst the review is pending to protect her legitimate interests". No response to that request was given.

17. It was in these circumstances accordingly, that the present judicial review proceeding was commenced and leave obtained on the 14th December, 2009.

18. Unlike the other cases with which this case was jointly heard, the reason for refusal is not based upon a purported lack of proof of compliance on the part of the Union citizen with the employment condition in Regulation 6(2)(a)(i) of the Regulations. It is based first, upon the alleged failure to submit documents required on the 11th August, 2009; secondly, on the claim that the application failed to provide the particulars set out in Schedule 2 of the Regulations and, thirdly, on the failure to provide "clear evidence of your address in the State and clear evidence that you resided with your EU National spouse".

19. An application for a Residence Card under the Regulations was made on form EU 1. Insofar as these grounds concern a lack of documents or the need for explanation as to discrepancies in addresses, it could be said that this case too is one which is apt to be dealt with first by means of the administrative review under Regulation 21. However, it is also clear that in refusing the application upon the ground that there was "a failure to produce clear evidence that you resided with your EU spouse" the refusal is, in the judgment of the Court, based upon a mistake of law and involves the effective imposition of a requirement not countenanced by the Regulations or the Directive. As the Court pointed out in its judgment of the 28th January, 2011, in another of the jointly heard cases (*L. Menkari and Another v. Minister for Justice, Equality and Law Reform*) it is not an essential condition of qualification for an EU Residence Card under the Regulations that a validly married couple must reside continuously under the same roof within the State.

20. In the present case it does not appear to have been questioned that the applicants were a married couple. As the respondent's replying affidavit acknowledges, the second named applicant entered the State in January, 2005 on foot of a D-type EU Treaty Rights visa as the husband of the first named applicant, was registered with the GNIB and given a Stamp 4 permission to reside and work on that basis. The information given to the Treaty Rights Section up to and including the second named applicant's letter of the 12th August, 2009, demonstrated that the couple had lived together as husband and wife until they encountered marital difficulties and decided to live temporarily apart in July, 2008. The applicants are not divorced or judicially separated. Regulation 10(2) (b) provides that a family member of a Union citizen who is not a national of Member State may retain the right of residence on a personal basis in the event of divorce or annulment of the marriage with the Union citizen where the Minister is satisfied that "prior to the initiation of the divorce or annulment proceedings, the marriage had lasted at least three years, including one year in the State etc." Accordingly, even if in August 2009, the applicants were living apart because such proceedings had been or were about to be initiated, the second

named applicant would not necessarily have forfeited an entitlement to retain her right of residence given that the couple had been married since 2004, and had lived together in the State since January 2005.

21. The Court is accordingly satisfied that the refusal decision of the 17th August, 2009 is vitiated by error of law and the effective imposition of a condition for the issue of a Residence Card unjustified by the Regulations and incompatible with the provisions of the Directive. The Court will accordingly grant an order of *certiorari* quashing that decision insofar as it was based upon that requirement. It should be made clear however that the Minister is entitled to be satisfied as to the address at which an applicant is actually living in the State: residence in the State is the purpose of the application. In an affidavit on behalf of the Minister, reference has been made to a number of occasions in 2005, 2007 and 2008 on which the second named applicant was stopped when re-entering the State from Bristol in the United Kingdom without what was considered to be a necessary visa or travel document. She says that she did have a valid travel document (which she exhibits,) but did not have or need a re-entry visa as the wife of a Union citizen. The purpose of this reference on affidavit appears to have been to imply that the deciding officer had reason to doubt whether the second named applicant was in fact resident in the State. That case has not been formally made to the Court in defence of the impugned decision and in any event it is by no means clear that the officer who decided the refusal was aware of the events in question. The issue is not relevant to the legality of the demand for proof that the applicants resided together.

22. It is accordingly unnecessary to consider all of the other issues sought to be relied upon or discussed in argument in relation to the Regulations and the Directive. In particular, because the other matters relating to the absence of requested documents and discrepancies in addresses are matters which are capable of being addressed and dealt with in a new decision or in an administrative review under Regulation 21, it is inappropriate to consider the claim to declaratory relief in relation to the entitlement of the second named applicant to a Residence Card as such. The onus remains with the applicants to satisfy the Minister that the other conditions of the Regulations are met. The decision of 17 August 2009 having been quashed, it follows that the existing review application becomes redundant and it will fall to the EU Treaty Rights Section to take a new decision on the application for which the full information previously submitted by reference to Schedule 11 will have to be considered for that purpose.

23. For the sake of completeness and the avoidance of doubt, the Court should however make clear its response to some of the other issues mentioned in the grounds and discussed in argument but in respect of which no extensively reasoned findings are necessary given that the primary relief sought is granted:

> (a) The particulars required to be furnished under Schedule 2 do not, in the judgment of the Court, exceed what is necessary or justified by the provisions of the Directive. The items at 11 to 19 in respect of the Union citizen comprise the basic personal details that will be ascertained by the presentation of a passport or national identity document together with the essential details relating to fulfilment of the relevant conditions in article 7.1. The information in relation to the applicant family member at items 1 to 10 similarly comprise basic personal details of identity and nationality and information of potential relevance to grounds upon which the host Member State may be entitled to refuse entry in accordance with Article 26. It must be borne in mind first, that the host Member State is required to "undertake an extensive examination of the personal circumstances" of beneficiaries (Article 3.2,) and secondly, that the inclusion of items in the list does not mean that each is being imposed: several are clearly marked "if applicable".
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> (b) As indicated at paragraphs 15 to 18 of the judgment in the Lamasz case, the checks made as to compliance by the Union citizen with the conditions of Regulation 6 (1) and (2) relied upon for residence beyond six months, does not amount to "systematic verification" incompatible with Article 10.2 or Article 14.2 of the Directive.
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> (c) In the judgment of the Court, the provision in Regulation 21 of access to an administrative review of the initial refusal of an application is not incompatible with, or inadequate having regard to, Articles 15, 30 or 31 of the Directive. Article 31.1 explicitly recognises the appropriateness of having both forms of redress available to Union citizens and their family members. As the conclusions reached in these jointly heard cases illustrate, initial refusals may result from the absence of documents, the lack of an explanation for discrepancies or misunderstandings on the part of applicants as to what is being requested. Such cases are particularly apt to be dealt with by a purely administrative review without the delay or expense of judicial redress because they are matters which are essentially administrative in character and capable of being rectified as such. The fact that the review decision is taken within the same administration does not diminish the utility or appropriateness of that redress. Independent judicial redress is likely only to be relevant and appropriate against a definitive refusal decision. Further, as the judgment today in this case and the judgment of 16 February 2011 in the *Lamasz* case demonstrate, the availability of an administrative remedy against the initial decision does not preclude immediate recourse to judicial redress by means of Order 84 of the RSC in suitable cases.

Accordingly, there has not in the judgment of the Court been any failure or inadequacy in the transposition of the Directive by the Regulations in these regards.

24. So far as concerns the complaint of the second named applicant that she has been "undocumented" since the expiry of her former "Stamp 4 residence" permission on the 19th August, 2009, it is sufficient to draw attention to the view which the Court has expressed in this regard in its judgments in the cases of *Lamasz* and *Saleem* given on the 16th February, 2011. Where, as in this case, the initial refusal decision is quashed, the entitlement of the family member of the Union citizen to remain continues until the definitive decision is ultimately taken and the acknowledgement of receipt of the original application issued under Regulation 7(1)(c) of the Regulations remains valid evidence of the exercise of the right for that purpose.