

THE HIGH COURT

2019 No. 28 JR

SAMYUKTA CHITTAJALLU and NIVEDITHA CHITTAJALLU VENKATA

Applicants

– and –

MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2019.

I. Introduction.

1. On 22.04.2016, the applicants submitted a visa application based on the first-named applicant being a “qualifying family member” of an EU citizen (the second applicant, a UK national, who was then residing in the United Kingdom). The first-named applicant and the second-named applicant are mother and daughter. At the time of the visa application, the applicants had intended to move to Ireland in July 2016 or as soon as possible thereafter. In the end, it took until August 2017 before the second-named applicant was registered with the Irish Medical Council. The following year, she took up employment with a Dublin hospital and remains employed there today.

2. To be a “qualifying family member” for the purposes of the EC (Free Movement of Persons) Regulations 2015, the first-named applicant must be “a dependent direct relative in the ascending line of the Union citizen” (reg.3(5)). In his review decision of 31.10.2018 (the ‘Impugned Decision’), the Minister concluded, for the reasons stated therein, that “I am not satisfied that you are dependent on your sponsor”. The within proceedings have ensued.

II. Some Law

3. What does it mean to be “dependent” within the meaning of reg.3(5)? There is no definition of the word in the 2015 Regulations or in the Citizens’ Rights Directive (Directive 2004/38), the directive that the regulations seek to transpose. However, some (limited) guidance is to be found in the case-law of the Court of Justice. So, for example:

□ in Case 316/85 Lebon, a case in which the Court of Justice considered the notion of dependency in legislation since replaced by the Citizens’ Rights Directive, the Court (at para.22) refers to the status of dependency being “the result of a factual situation”, moving on to observe that “The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker’s support or to raise the question whether the person concerned is able to support himself by taking up paid employment”.

□ in Case C-1/05 Jia, the Court of Justice further elaborated on the issue of dependency in the following terms, at para.37: “In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community standard”.

□ in Case C-423/12 Reyes, the Court of Justice (at paras.21-22) essentially reiterated the foregoing points, adding, at para.24: “The fact that...a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.”

III. The Impugned Decision*i. Social Dependence.*

4. The first-named applicant claims to be financially and socially dependent on the second-named applicant. This is acknowledged in the Impugned Decision where it is stated that “Berkeley Solicitors [for the applicants]...have stated that you are dependent on your sponsor on [1] medical (physical and mental) and [2] financial grounds”. Unfortunately, when it comes to [1], the Impugned Decision states that only “one medical receipt is for Mrs Samyukta [Chittajallu]”. In fact, multiple such receipts have been received. So the Minister has proceeded on a mistaken basis as to fact and clearly not appreciated the nature of certain of the evidence presented to him in this regard. Beyond the just-mentioned mistake, the Minister does not really consider the issue of social dependence, presumably because his (mistaken) sense is that with only one medical receipt provided, this is a ground of dependency that is going nowhere. However, it is possible that he would have arrived at a different decision in this regard had he realised that he was confronted with multiple medical receipts.

*ii. Financial Dependence.**a. Absence of Assets.*

5. In the initial decision, the first-named applicant’s application was criticised, *inter alia*, because “no documentary evidence was submitted in relation to your own means”. In the appeal documentation the applicants’ solicitors advised that they had been instructed in this regard that the first-named applicant “does not...have any personal finances, including no savings, no pension, no welfare support etc”. In the Impugned Decision it is stated that “[I]t would be expected that a letter from the Pensions authority and/or Social Welfare authority in India would have been submitted stating that you have no claims with them”. It has not been established on the evidence before the court that the Minister has in this regard crossed the threshold of impermissibility identified by the Court of Justice in Reyes (paras. 25-26) in seeking documentation that “is not easy to provide in practice...[thereby making] it excessively difficult for that descendant [here a direct relative in the ascending line of the Union citizen]...to obtain the right of residence in the host Member State”. However, although (a) the Minister is not required to advise applicants throughout the application process as to the evidence they need to provide (they apply, lawyers advise, and the Minister decides), (b) as a matter of basic fairness of procedures, the Minister, with respect, does need to be specific in an initial decision as to his specific

expectations, if he expects that particular documentation will be produced. There is something profoundly unfair about an initial decision that says *"no documentary evidence was submitted in relation to your own means"*, with no mention being made that the Minister *"expected that a letter from the Pensions authority and/or Social Welfare authority in India would have been submitted stating that you have no claims with them"*. If that specific expectation presented, then it should have been expressly articulated so that the applicants could procure that particular (or like) documentation as part of their appeal, instead of being left unfairly in the blind about a specific expectation of the Minister.

b. Investments and Assets.

6. As to the queried INR amount which the second applicant has indicated to come from investments and assets in India, it was clear from the initial decision that evidence was being sought as to where this came from, it is clearly a matter of relevance to the issue of dependency and it was open properly to the Minister to conclude that as no documentary evidence of the sale of the assets had been provided, he could not confirm whether the assertion that it came from such investments/assets. The court does not accept the contention made in the written submissions that *"it is unclear what relevance this issue had to the respondent's ultimate determination"*. It patently goes to the Minister's ultimate conclusion that *"I am not satisfied that you are dependent on your sponsor"*.

c. Joint Account.

7. The Minister states, in respect of a joint account held between the applicants in India, that "[a]s you have a joint account with your sponsor [1] *it is not evident which debits or credits from the account are yours*. [2] *This along with the lack of verifiable financial transfers from your sponsor to you, questions the level of financial dependency as claimed...*". Both [1] and [2] are conclusions that could be and were properly reached on the evidence before the Minister. Without a complete and fulsome narrative, it is very difficult to discern from the truncated details in the bank statements who was doing what.

iii. Living in Ireland?

8. In the Impugned Decision, the Minister in effect queries whether the second-named applicant is living at a particular address in Co. Louth. He also mentions that at one point in the application documentation the first-named applicant has referred to her daughter as living in the United Kingdom. The court does not understand it to be contended by the Minister that the second-named applicant has not been exercising free movement rights. What counsel for the Minister contended in this regard is that the Impugned Decision does not make a finding that the second-named applicant is not so doing. However, the Minister in making the just-mentioned remarks is clearly seeking somehow to justify his decision; the court does not accept that, in a decision imbued with the seriousness that the Impugned Decision clearly possesses, the Minister was simply making passing observation. To the extent that any level of reliance is placed by the Minister on the notion that the second-named applicant has not been exercising her free movement rights, this is, with respect, erroneous.

IV. Grounds Upon Which Relief is Sought

9. The Statement of Grounds states as follows:

"i. In refusing the first applicant's visa appeal, the respondent failed to have regard to all representations submitted by the applicants in support of the appeal..."

☐ The court does not see that there was a failure to have regard to such representations as were made. However, as indicated in Part III.i above, it is unfortunately clear that the Minister has proceeded (in the context there considered) on a mistaken basis as to fact and clearly not appreciated the nature of certain of the evidence presented to him in the said regard.

"ii. In concluding that the first applicant had not established her dependency upon the second applicant, the respondent relied upon the absence of specific documentation that had not been sought by the respondent in advance of making the decision..."

☐ The Minister is not required to advise applicants throughout the application process as to the evidence they need to provide (they apply, lawyers advise and the Minister decides). However, although (a) the Minister is not required to advise applicants throughout the application process as to the evidence they need to provide (they apply, lawyers advise, and the Minister decides), (b) as a matter of basic fairness of procedures, the Minister, with respect, does need to be specific in an initial decision as to his specific expectations, if he expects that particular documentation will be produced. There is something profoundly unfair about an initial decision that says *"no documentary evidence was submitted in relation to your own means"*, with no mention being made that the Minister *"expected that a letter from the Pensions authority and/or Social Welfare authority in India would have been submitted stating that you have no claims with them"*. If that specific expectation presented, then it should have been expressly articulated so that the applicants could procure that particular (or like) documentation as part of their appeal, instead of being left unfairly in the blind about a specific expectation of the Minister.

"iii. In concluding that...insufficient evidence had been submitted to prove that the first applicant was dependent upon the second applicant but failing to specify or otherwise inform the applicants in advance of the evidence required to maintain the application, the respondent's decision is not based on a sufficiently factual basis".

☐ The court respectfully does not accept that the conclusion in the foregoing follows logically from the preceding text. To the extent that Ground iii seeks to suggest that there is a duty on the Minister to advise applicants throughout the application process as to the evidence they need to provide, the court refers to its observations re. Ground ii.

"iv. By failing to consider specific documentation supplied by the applicants such as documentation establishing that the second applicant was in full-time employment in the State and Bank statements that established the transaction in September 2015 was a self-lodgment, the Minister acted irrationally and/or disproportionately and/or ultra vires and/or in breach of the [European Communities (Free Movement of Persons) Regulations 2015 and/or the Citizens' Rights Directive (Directive 2004/38)] and/or in breach of the principle of effectiveness...in concluding that there was insufficient evidence on file to support a conclusion that the first applicant was dependent upon the second applicant".

☐ Save as regards the fact that there were multiple medical invoices (a point in respect of which the court has made observation previously above), there is nothing to indicate that the Minister has not considered any of the

documentation provided.

"v. By failing to address the entirety of the detailed evidence submitted on behalf of the second applicant in support of their claim to be dependent...the respondent acted in breach of the [Citizens' Rights Directive and/or the 2015 Regulations and/or the Charter of Fundamental Rights] and/or in breach of fair procedures, natural and constitutional justice".

☐ The court refers to its observations re. Ground i.

"vi. In determining whether the first applicant was dependent on the second applicant, the respondent failed to assess whether the second applicant provided material support for the first applicant and/or whether regular payments for a significant period were met".

☐ This contention is not borne out by the evidence before the court.

"vii. The Respondent failed to provide any or any proper reasons for the conclusion that the first applicant was not dependent...".

☐ Such deficiencies as present in the Impugned Decision have already been identified.

"viii. In circumstances where the respondent has imposed evidentiary requirements upon the applicants that make it impossible in practice or excessively difficult to establish that the first applicant was dependent upon the second applicant, the respondent has acted [unlawfully]".

☐ The court does not see that the Minister has so proceeded.

V. Conclusion

10. Given the deficiencies identified above, the court will grant the order of *certiorari* sought and remit the within matter to the Minister for further consideration.