

THE HIGH COURT

[2012 No. 677 JR]

BETWEEN

FAISAL IRSHAD

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered the 6th day of March, 2014.**Background**

1. This is an application for an order of *certiorari* by way of judicial review quashing the decision of the first named respondent to make a removal order against the applicant under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, as amended ("the 2006 Regulations").

2. The applicant is a national of Pakistan, who arrived in the State on 15th February, 2005. On 6th January, 2006, he married Ms. Maria da Cunha Pereira. In or about June 2006, the applicant applied for a resident's card within the meaning of the 2006 Regulations based on the fact that he was married to a Portuguese national, who was exercising her right of freedom of movement by living in Ireland. The applicant was granted a resident's card by the Minister for Justice, Equality and Law Reform on or about 2nd September, 2008, valid until 26th January, 2012.

3. The applicant and his wife subsequently encountered marital problems. The applicant has stated that he went to visit relatives in the United Kingdom in November, 2009 and that when he returned his wife had left the matrimonial property. It appears that the applicant's wife may have returned to Portugal in or around that time.

4. On 4th January, 2010, the applicant attended at the offices of the Garda National Immigration Bureau to obtain a new resident's card, having lost his previous one. The immigration officer who dealt with the applicant asked him to return to their offices on 10th February, 2010, with his wife. The applicant's former solicitors contacted the GNIB by letter dated 14th January, 2010, to notify the relevant immigration officer that the applicant could not present with his wife because he did not know where she was at that time and he was unable to contact her. In the course of that letter, it was stated:

"We must emphasise that our client does not regard himself to be formally separated from his spouse. However, even if this was the case and Ms. Pereira should proceed to seek a divorce against Mr. Irshad, we remind you that Mr. Irshad is a person who may retain his right of residency in the State within the meaning of s. 10(2)(a) of the Regulations and Article 7(2) of the Directive. We make this assertion on the basis that Mr. Irshad and Ms. Pereira have now been married for over three years during which time they have resided together in the State."

5. By letter dated 11th May, 2010, the respondent informed the applicant that, as his wife was no longer exercising her EU treaty rights of residence within the State, the applicant no longer qualified for a right of residence pursuant to Article 7(2) of Directive 2004/38/EC. By further letter of the same date, the Minister proposed to make a deportation order against the applicant under s. 3 of the Immigration Act 1999. By letter dated 24th June, 2010, the applicant's present solicitors sent to the Minister an amount of documentation showing that he had been employed within the State and had private medical insurance. By letter dated 11th July, 2010, the Minister informed the applicant's solicitors that he had been invited to submit representations as to why his permission should not be revoked. By letter dated 12th July, 2010, the applicant's solicitor wrote:

"We have already submitted numerous documents evincing the fact that our client is not a burden on the welfare State, including a letter from the Department of Social Welfare. We also submitted evidence that he has private medical insurance and is in employment on a part time basis with Spice N Rice takeaway. As such there is no detriment to the Irish State in permitting our client to remain here in these circumstances. We would submit that as a matter of fair procedures, the only revocation appropriate here is that of the Minister's letter dated 11th May, 2010. It is respectfully submitted that the Minister should now proceed to revoke these letters and issue a fresh letter proposing to revoke our client's residency for the reasons already stated but affording our client an opportunity to make representations in relation to same, with his rights under the treaty of the European Convention unaffected."

6. By letter dated 30th July, 2010, the respondent wrote as follows:

"It has come to the attention of this office that the EU citizen, Maria da Cunha Silva Pereira, is not exercising EU treaty rights in this State. In light of the above, I am to inform you that it is proposed to revoke your permission to remain, as you do not qualify for residency under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, as amended."

7. By letter dated 9th August, 2010, the applicant's solicitor submitted representations to the respondent as to why the applicant's permission to remain in the State should not be revoked. On 12th November, 2010, the respondent informed the applicant that as his wife was no longer exercising her EU treaty right to be in the State, the applicant did not qualify for the right of residence provided for under Article 7(2) of the Directive.

8. By letters dated 1st December, 2010, and 18th January, 2011, the applicant's solicitors wrote to the respondent seeking a temporary permission to remain in the State. By letter dated 20th January, 2011, the respondents informed the applicant that as the applicant's wife appeared to be residing in Portugal and since he was not divorced from his wife, nor had their marriage been the subject of an annulment order, he would not qualify for the retention of the right of residence pursuant to Regulation 10(2)(a). The

applicant was informed in that letter that he was entitled to make written representations to the Minister as set out in Schedule 9 of the Regulations, within fifteen working days of the sending of the letter. The representations should set out the reasons why a Removal Order, which would contain a period of exclusion from Ireland, should not be made against the applicant.

9. By letter dated 10th February, 2011, the applicant's solicitor submitted a formal request for review, pursuant to Regulation 21 of the 2006 Regulations, of the Minister's decision concerning the applicant's entitlement to remain in the State. By letter dated 31st March, 2011, the Minister wrote affirming the revocation decision on the basis that the applicant's wife was residing in Portugal. By letter dated 1st April, 2011, the applicant's solicitor wrote requesting a twelve month Stamp 4 on the basis of long-term residency in the State. On 12th October, 2011, the solicitor submitted extensive representations as to why a Removal Order should not be made against the applicant. On 16th April, 2012, the Minister wrote seeking clarification on a number of matters concerning the applicant's residency in the State. The applicant put in further representations by letter dated 14th May, 2012. This letter also sought a twelve month extension to the applicant's permission to remain in the State.

10. By letter dated 9th July, 2012, the respondent informed the applicant of his decision to make a Removal Order against the applicant with a six month exclusion period pursuant to Regulation 20(1)(a)(iii) of the Regulations. That letter also enclosed a Removal Order directed against the applicant. On 30th July, 2012, the applicant sought and obtained leave to apply for judicial review for the following reliefs:

"(i) Certiorari by way of an application for judicial review to quash the decision of the respondent to make a removal order against the applicant.

"(ii) An injunction by way of application for judicial review restraining the respondent his servants or agents from taking any further steps to remove the applicant depending the determination of the within proceedings."

The Issues

11. There are essentially two issues in this case:

(i) Did the Minister have jurisdiction to make the order pursuant to Regulation 20(1)(a)(iii)?

(ii) Is the applicant estopped by his conduct from asserting that the 2006 and 2008 Regulations do not apply to his case?

(i) Proceeding under the Regulations

12. The applicant has argued that while he had a right of residence under the 2006 Regulations, this was always a derivative right in that it only came into being due to the fact that his spouse, a Portuguese national, was exercising her EU treaty rights by moving to live in Ireland. He stated that his right to remain here was always dependent upon his wife electing to exercise her treaty rights to live in the State. He argues that once his wife ceased exercising her right to be in this State, he lost the benefit of the Regulations, at least within this State. He maintains that he was no longer a person to whom the Regulations applied. Accordingly, the applicant maintains that the Minister did not have jurisdiction to make the Removal Order, pursuant to the Regulations, directing the applicant's removal from the State.

13. The respondent argues that as the applicant entered and took up residency in the State under the Regulations, he was clearly someone to whom the Regulations applied. They argue that the provisions of the Regulations did not simply cease to exist once Ms. Pereira left the jurisdiction. They point to the fact that the Regulations themselves envisage situations where a person who entered pursuant to the derivative rights held by him due to the residence of an EU national within the State, may go on to acquire direct rights under the provisions of the Regulations themselves. Regulation 9 provides for the retention of the right of residence by a family member of an EU citizen in the event of death or departure from the State of the EU citizen. Regulation 10 provides for the retention of the right of residence by family members in the event of divorce or annulment of the marriage.

14. The respondents argue that the Regulations do apply to persons who are no longer entitled to reside in the State under the Regulations. Regulation 20(1)(a)(iii) provides:

"Removal from the State

20(1)(a) Subject to paragraph (6), the Minister may by order require a person to whom these Regulations apply to leave the State within the time specified in the order where:-

...

(iii) the person is no longer entitled to be in the State in accordance with the provisions of these Regulations..."

15. It seems to me that the Regulations clearly envisage the situation which has arisen in this case. Where a person enters the State on foot of the Regulations due to their marriage to an EU citizen who was exercising his or her right to freedom of movement, they become a "beneficiary" under the terms of the Directive. When the EU citizen leaves the State, the "beneficiary", in the position of the applicant, can no longer rely on the provisions of the Regulations and they "are no longer entitled to be in the State in accordance with the provisions of the Regulations". Accordingly, I am of the view that the Minister had jurisdiction to make the Removal Order pursuant to the Regulations in this case.

(ii) Estoppel

16. The respondents argue that the applicant cannot make the case that the Regulations do not apply in his case. They point to the fact that when the Minister sought to proceed under the deportation route provided for by national law, the applicant, through his solicitor, sought to have his case determined pursuant to the 2006 and 2008 Regulations.

17. Furthermore, when the decision was made to withdraw the residence card, the applicant sought and obtained a review of this decision pursuant to Regulation 21. The respondent points to the fact that throughout their extensive correspondence, the applicant was happy to have his claim determined pursuant to the Regulations. They say that that being the case, it is now too late to raise for the first time in these judicial review proceedings the question as to whether it is appropriate to proceed pursuant to the Regulations.

The respondents say that the applicant cannot approbate and reprobate at one and the same time. Having told the Minister that they wished to have their case determined in accordance with EU law as contained in the Directive and in the implementing Regulations, they cannot now say that that was the wrong procedure or the wrong substantive law upon which to proceed to a determination in this case.

18. In the course of argument, reference was made to *The Queen (County Council of Kildare) v. Commissioner of Valuation & Anor* [1901] 2 I.R. 215. In that case, Kerry County Council had sought a revaluation of a railway line running in Co. Kerry. The Commissioner of Valuation re-valued the entire length of the train line including in other counties. Kildare County Council was re-valued downwards. They sought a review of the valuation and had also appeared in the County Court in relation to the valuation. When the judgment in that court went against them, they sought judicial review of the decision. The court held that because Kildare County Council had appealed the valuation, then went to the County Court and, only when the judgment of the County Court was not satisfactory to them sought *certiorari* of the decision, it was then too late for them to take this course. In the course of his judgment, Holmes L.J. stated as follows:

"I concur with the Chief Baron in holding that where the right of an individual is prejudiced by an adjudication of an inferior tribunal, the writ of certiorari is not a matter of discretion but of right; but I also agree with him when he says that the right to question such an adjudication can be lost by the conduct of the party. I cannot conceive a stronger case of estoppel by conduct than the present. The appeal that was taken, so far from raising the point now relied on, asked for relief that could only be granted on the assumption that there was jurisdiction to revise the valuation; and the appellant now seeks to quash the order of the court whose assistance he invoked, because, although it was to a certain extent in his favour, it was not so favourable as he expected, or desired. Upon this ground I am of opinion that the appeal ought to be allowed, and that the order for the issue of the writ of certiorari discharged."

19. The applicant has argued that while the solicitor representing him did engage without objection to the matter being determined under the Regulations, as soon as counsel became involved they immediately objected to the Minister's jurisdiction to make a revocation order. The applicant maintains that he did not sit on his rights such as to form the basis for an estoppel against him.

20. I do not think that the applicant behaved in such a manner as would have led the respondents to think that the applicant was not going to raise any jurisdictional point, should one arise in the course of his judicial review proceedings. While it is true that the correspondence from his solicitors indicated that he wanted the application dealt with under the Regulations, I do not think that he went so far as to preclude him from raising the argument that his case did not come within the Regulations at all. However, this point is somewhat moot, as I have already come to the conclusion that the Minister did have jurisdiction to make the removal order pursuant to Regulation 20(1)(a)(iii) of the 2006 Regulations. Accordingly, the reliefs sought are refused.