THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 455 J.R.]

BETWEEN

B.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 30th day of January, 2017

Issues

1. On the 27th June, 2016 by order of MacEochaidh J. the applicant was afforded leave to apply for judicial review by way of securing an order of *mandamus* compelling the respondent to issue a decision on the applicant's application for a residence card within the meaning of Council Directive 2004/38/EC and/or the European Communities (Free Movement of Persons) Regulations, 2015.

2. The statement required to ground the application for judicial review is dated the 22nd June, 2016 and complains that the applicant's right to fair procedure and natural and constitutional justice under Article. 6 of the European Convention on Human Rights is not being honoured by the respondent in that the applicant claims to be entitled to a decision on his application for a residence card within a reasonable time and the respondent has delayed processing the application in an egregious and unjustified manner. The applicant also claims that the respondent has no later than 6 months from the date on which the application was submitted to make a decision and therefore it is claimed that the failure is in breach of Article 10(1) of Council Directive 2004/38/EC.

3. Under para. 20 of the statement of opposition bearing date 11th October, 2016 the respondent pleads that this is a particularly suitable case to exercise the Court's inherent discretion in judicial review not to grant an order of *mandamus* in light of the behaviour of the applicant and/or in all of the circumstances of the case.

Background

4. The applicant is a Nigerian National born in 1985. His application is based upon his assertion that he met and commenced a relationship with JP in the month of December, 2014 and subsequently arrived in Ireland in April, 2015. He asserts that he was married on the 5th November, 2015 and on the 16th November, 2015 he applied to the respondent for a residence card which application was received on the 18th November, 2015 by the respondent.

5. Following the receipt of the application as aforesaid information was sought of the applicant by the respondent on the 26th January, 2016 and a response was furnished by the applicant on the 9th February, 2016. On the 25th February, 2016 further clarification was sought on the basis of the respondent asserting that the applicant had made a number of omissions in his application, namely that:—

> (a) He was convicted in the Central Criminal Court in the UK on the 10th September, 2013 of computer fraud for which he was sentenced to 15 months in prison — in this regard in the applicant's application he denied any criminal conviction in this state or abroad.
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> (b) The applicant stated that his civil status at the time of his marriage to JP on the 5th November, 2015 was that of single whereas on the 23rd November, 2009 the applicant was issued with an EEA residence card in the UK as the spouse a Belgian national. In this regard a statement was included to the effect that the applicant should inform the GRO of the discrepancy contained in his current marriage certificate and seek to have it amended.
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> (c) The applicant advised the UK Home Office on the 16th December, 2015 that he had returned to Nigeria.
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> (d) In addition to the foregoing the respondent sought evidence of his divorce from his Belgian national wife and clarification of the above omissions.

6. By way of response on the 4th March, 2016 the applicant's solicitors indicated that the applicant would contact the GRO to have the discrepancy of his marriage certificate amended and they also enclosed a copy of the applicant's divorce papers from his first wife together with a letter in which the applicant states that he indicated that he did not have a criminal record as he honestly thought that as he was living in Ireland he had no criminal record even though the application did ask whether he had a criminal record abroad. He further indicated that he advised the UK Home Office that he had returned to Nigeria because he did not want the UK to know he was now in Ireland.

7. Notwithstanding the representations made by the applicant's solicitor as to securing an amendment to the discrepancy on the applicant's marriage certificate it is the case that the amended marriage certificate was not at any time provided to the respondent.

8. Prior to the institution of the within proceedings by letter dated the 16th June, 2016 the applicant's solicitors indicated that the applicant had been waiting for a considerable period of time for a decision in the matter and called upon the respondent to make a decision within 10 days of the date of the letter failing which necessary steps would be taken to protect the applicant's interests, including the making of an application to the Court. In a response letter dated the 24th June, 2016 but not available to the applicant at the time of processing of the leave application the respondent required 3 items of documentation within 7 days in order to finalise

the application and it was indicated that the decision in respect of the applicant would issue on receipt of such documents. These documents were:—

(a) An amended marriage certificate.

(b) P60 for 2015 in respect of the EU citizen.

(c) Further invoices and bank statements in respect of the EU citizen.

9. The applicant's solicitors in a letter dated the 1st July, 2016 furnished tax credit certificates, an AIB bank statement and a pay slip for the applicant's wife together with untitled receipts. It was indicated that the applicant did not have an amended marriage certificate. The issue of a P60 for Ms. P was not addressed.

Legislative background
10. Directive 2004/38/EC contains the relevant provisions for an EU citizen and their family members moving and residing freely within the territory of the member states. Under Article 10(1) thereof it is provided:—

"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."

11. The respondent has also made reference to Article 35 which provides:—

"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."

12. Notwithstanding reference to Article 35 aforesaid on behalf of the respondent, nevertheless the respondent does not refer to any measures taken by the State in accordance with the entitlement provided in Article 35.

Net issue before the Court
13. The respondent in fact made a decision on the 12th October, 2016. Therefore the issue of *mandamus* was rendered moot. The respondent sought, notwithstanding that the issue of *mandamus* was rendered moot, that the Court would nevertheless deal with the issue of *mandamus* as same would be relevant to other cases in which *Mandamus* has been sought. In this regard the parties accepted the Supreme Court decision of 16th October, 2012 in *Okunade v. Minister for Justice Equality & Law Reform* [2012] I.R. 152 as being relevant and establishing the principle that notwithstanding that although the application before the Supreme Court on appeal had become moot, that the issues might nevertheless be dealt with if the appeal was relevant to a significant number of other cases. Reference was also made to the Supreme Court judgment of Lofinmakin v Minister for Justice, Equality and Law Reform [2013] 4 I.R. 274 to the effect that exceptional circumstances are required before a Court will deal with a moot case. The parties also referred to the judgment of Humphreys J. of 29th July, 2016 in *I.R.M. & Ors. v. the Minister for Justice and Equality* [2016] IEHC 478 where at para. 101 of the judgment the Court summarised the principles including that a court can proceed to determine an issue that is strictly moot if the interests of justice so require.

14. The matter proceeded therefore before the Court on the 17th January, 2017 notwithstanding the decision of the 12th October, 2016.

15. Issues such as when the 6 month time limit might commence in circumstances where an applicant furnished false information and the strict application of the time limits contained in the EU Directive aforesaid were raised. However I indicated that these matters could not be dealt with by the High Court but rather, if they had to be dealt with, would have to be by reference to the European Court of Justice. The respondent was anxious that the issue of the availability of an order of *mandamus* would be of assistance to the respondent in respect of several other cases notwithstanding that the domestic court could not deal with the absolute nature of the time limits and the potential for varying the date of commencement of the time limits as provided for by the EU Directive. The matter proceeded therefore on the issue of the availability of an order of *mandamus* in circumstances where the application was made by the applicant in November, 2015 and the 6 month time limit expired in May, 2016. The decision was made on the 12th October, 2016. The respondent argues that the decision would have been made in July, 2016 but for the judicial review proceedings instituted by the applicant and in the belief that it was understood that a decision should not be made so as to avoid rendering the within judicial review proceedings moot. Once the Court confirmed that a decision could be made notwithstanding the listing of the within matter such a decision (12th October, 2016) issued immediately. It was accepted therefore by the respondent without prejudice to any other argument the respondent might make in any other proceedings, that in the instant proceedings the time limit provided by Article 10(1) of the EU Directive was not adhered to.

Authorities
16. The applicant's position commences with the wording of Article 10 that there is no exception to the 6 month time limit provided and the Minister must make a decision within the 6 months to either grant or refuse the requested permission.

17. The applicant also refers to *Commission v. France* (Case C – 144/97) [1998] ECR I-00613 where the Court of Justice held that the provisions, practices or circumstances in the internal legal system of a Member State cannot justify a failure to respect the time limits provided in a directive. The applicant refers to the text book of De Smith's "*Judicial Review*" (7th Ed.) at para. 18 - 047 which deals with presumptions in favour of relief. The textbook does appear to acknowledge that the Court does have discretion in the sense of assessing "what is fair and just to do in the particular case." However, as pointed out by the author, the discretion of the Court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow and the discretion is narrower still or in some circumstances non-existent where the claimant has succeeded in demonstrating a directly effective right under European law — the author in the footnote refers to cases following *Berkley v. Secretary of State* [2001] 2 AC 603 to the effect that later cases made clear that the mere existence of a European Community right is not necessarily a bar to the existence of the Court's discretion.

18. The respondent points out that the rights sought to be exercised by the within applicant is not in fact a directly effective right but rather a derivative right. It further points out that the discretion might be narrow but it still exists. Further, the respondent refers to the fact that De Smith is dealing with presumptions and therefore the matter is not absolute but rather presumptive.

19. The applicant refers to *Saleem and Sprysznska v. Minister for Justice Equality & Law Reform* [2011] IEHC 49 being a judgment of

Cooke J. delivered on the 16th February, 2011. The case concerned a review of a decision not to grant a residence card and the Court indicated it would grant an order for *mandamus* on the basis that at the time of review the only issue outstanding was relative to belatedly received documents and the Court was of the view that the assessment would have been capable of being made within a very short period of time. In that case the Minister took the stance that once the initial refusal had been decided he was under no duty to deal with the review within any particular time. At para. 17 the Court went on to find that while the Minister may be justified in withholding on the card when he has genuine reasons to question whether the condition is fulfilled, the consequence of the expiry of the 6 month period is not to afford the Minister an indefinite time within which to decide the review where one is requested. The Court noted that *mandamus* will not issue to require a public authority to make an administrative decision unless there had been an unlawful refusal to do so or such egregious delay in so doing as to be tantamount to a refusal. At para. 19 the Court noted that where there is a duty to issue a residence card within a defined period and where that period expires without a definitive decision being taken and the Minister maintains that there is no duty to make the required decision within any particular time, the Court considers that the applicants are entitled to treat the delay as unreasonable and as justifying an application for *mandamus*.

20. The respondent counters that in the instant set of circumstances although the time limits were not adhered to, there is no question of the Minister maintaining that there is no duty to make the required decision within a particular time and therefore there is no question of finding that the delay might amount to a refusal. The respondent points to the letter dated the 24th June, 2016 to the effect that the Minister indicated that once the requested documents were to hand the Minister would make a decision immediately. Furthermore the respondent lays emphasis on the content of para. 17 of the judgment to the effect that it clearly envisages that although the 6 month time period might not be adhered to, this does not however afford the Minister an indefinite time within which to afford the review — in the instant circumstances the Minister is not suggesting the availability of an indefinite time.

21. The applicant refers to *M & Anor. v. Minister for Justice Equality & Law Reform & Ors* [2007] IEHC 234 being a judgment of Edwards J. delivered on the 17th July, 2007 where an argument was made based on scarce sources being available to the respondent. The Court indicated that this resource based argument was not justiciable. The applicant pointed out that the Court in that case was dealing with a review where no time limit was specified.

22. The respondent counters that the Court in that case indicated that regard must be had to the reality that it is in the nature of things that any administrative engine will be to some extent variable in its efficiency. The Court believed that there had to be a margin of appreciation although once the delay becomes gross and unconscionable an argument based upon scarce resources cannot be advanced to justify it. Ultimately, in that matter Edwards J. did not find that the respondent had been guilty of unreasonable and unconscionable delay to date and a decision was imminent and therefore the Court was satisfied to dismiss the application.

23. The applicant refers to *El Menkeri & Anor v. Minister for Justice Equality & Law Reform* [2011] IEHC 29 being a judgment of Cooke J. delivered on the 28th January, 2011 which also dealt with a review decision. The Court was satisfied that once a review was applied for a duty arose on the part of the Minister to make whatever enquiries were considered necessary in order to resolve that issue so as to give a decision upon review within a reasonable time. In that case the review application was made either in August or September, 2009 the applicant and the respondent differed as to dates. At para. 12 of the order it was indicated that as no decision on the review application had been made at the hearing of the proceedings, being a period of 8 months since the request, the Court granted an order of *mandamus* directing the Minister to make the decision within 28 days of the perfection of the order in the proceedings.

24. The respondent refers to this additional 28 day period following the perfection of the order.

25. I do note that in para. 11 of the judgment the Court indicated that the decision on review did not involve any new information requiring verification or proof not previously considered by the Minister.

26. The applicant suggests that in both cases of Cooke J. aforesaid issues as to the applicant's credibility were raised.

27. The applicant refers to *the Commission v. Ireland* (Case C-39/88) [1990] ECR I-04271 where Ireland had submitted that it has scarce resources vis-à-vis fisheries inspectors however the Court held that the submission could not be accepted and it was well established in case law of the Court that a member state may not plead internal circumstances in order to justify a failure to comply with obligations of time limits resulting from Community law.

28. The applicant refers to *Mahmood & Anor v. Minister for Justice and Equality* [2016] IEHC 600 being a judgment of Faherty J. delivered on the 14th October, 2016. The Court granted an order as there was no decision and there appeared to be an open-ended delay. The Court rejected the resource argument. Faherty J. quoted from the decision of *Nearing v. Minister for Justice* [2010] 4 I.R. 211 being a judgment of Cooke J. when he considered what might give rise to a finding of egregious and unjustified delay. Cooke J. indicated that what is reasonable depends on the circumstances of each case including the nature of the decision, the particularities of the applicant's position, and the impact of the delay and conduct of the administrative decision maker in dealing with the applications together with any explanation given for the time taken. The Court indicated that *mandamus* does not issue against an administrative decision simply because there is a duty to make a decision. The Court stated that once it is clear from the evidence that there is place an orderly, rational and fair system for dealing with applications, the Court has no reason to infer any illegality in the conduct of the Minister unless some specific wrong doing or default is demonstrated in a given case. At para. 136 of Faherty J.'s judgment it is noted that the Directive provides for the issue of a residence card in an outside time span of 6 months from the date of the application. The respondent refers to para. 140 of that decision identifying that there was no time span for the commencement of the examination of the application forthcoming from the respondent. No indication was forthcoming as to when the decision might be expected and in those circumstances the Court considered the delay to be unreasonable and egregious resulting in a justified application for *mandamus*. The respondent also refers to para. 142 of the judgment of Faherty J. where she stated that if the delay in that case had been a matter of only a couple of months and if there was a stated time frame provided some margin of appreciation might have been afforded. However, in the absence of any projected time frame the question of resources was not sufficient to outweigh the provisions of the Free Movement Directive.

29. It is noted that, in the *Mahmood* case, the adverse conduct complained of on the part of the applicant included hearsay evidence, inconsistencies in the applicant's evidence and the studied avoidance by the applicants to provide details of their plans upon arrival in the State. The respondent lays particular emphasis on these limited adverse issues as against the applicant in comparison to the adverse issues against the applicant in the instant circumstances.

30. The respondent refers to the judgment of Edwards J. in *Tangi v. Minister for Justice Equality & Law Reform* [2010] IEHC 85 where the Court held that even with a suspicion of fraud decisions must still be made within 6 months. The respondent argues that there is more than just a suspicion in the instant circumstances. Edwards J. indicated in that case that much would depend on the concerns of the Minister and the evidence available. The respondent further suggests that in view of the case of the Court of Justice in

McCarthy & Ors v. Secretary of State for the Home Department (Case C-202/13) [2014] OJC 189/6 where a generalised policy of refusal was considered unacceptable and not in accordance with an individual assessment, the judgment of Edwards J. in *Tangi* must be revisited.

31. The respondent refers to the judgment of Humphreys J. in *Mahmood v. RAT* [2016] IEHC 469 where it was held that regulations must be given a purposeful interpretation and it would undermine the purpose if modest delays rendered a decision invalid.

32. Finally, the respondent relies on the judgment of Humphreys in *Mirga v. Garda National Immigration Bureau* [2016] IEHC 545 where the grant of *mandamus* was sought however the Court indicated that judicial review was a discretionary remedy and the Court is not required to ignore the appellant's own conduct or the extent to which he is the author of his own misfortunes.

Conclusion
33. I am satisfied that:—

(a) In or about the application of *mandamus* the courts must have regard to need to give effect to the EU Directive.

(b) An individual assessment is required and this, therefore, by definition involves the concept of a margin of appreciation.

(c) The conduct of the applicant is relevant in making the individual assessment.

(d) The Directive time limits are to be respected and the respondent must show some significant basis for the delay in order to resist the affording of an order of *mandamus*.

(e) In the instant circumstances there is no question of the respondent refusing to afford the relief and this is demonstrated by the letter dated 24th June, 2016 to the applicant.

(f) I accept the respondents explanation as to why the decision issued in October as opposed to July, namely that there was a misunderstanding on the part of the respondent in believing that it was important not to issue a decision so as not to render the within test case moot prior to a consideration thereof.

(g) In this particular matter there has been a lack of co-operation on the part of the applicant in that he has based his application on knowing falsehoods and he has demonstrated an ability to lie if same is convenient to him, for example by indicating to the UK Home Office that he had returned to Nigeria as opposed to moving to Ireland simply based upon the fact that he did not want the UK authorities to know he was in Ireland. Furthermore, notwithstanding an effective commitment on his part during the currency of the initial 6 month period that he would attend to securing an amended marriage certificate, subsequently, in the letter of 1st July, 2016 it is implicit that he is not attending to this matter.

(h) The applicant secured leave to bring the within application for *mandamus* on the 27th June, 2016 on the basis of non-compliance with the EU time frame provided by Article 10 notwithstanding that on this basis he was effectively relying upon his own misleading statement to secure such leave and in my view it could not be argued that it would be fair and just to facilitate the applicant in this regard.

(i) The case law relied upon by the applicant deal with review decisions and I accept the respondent's argument to the effect that this would mean there is little investigation left to undertake.

(j) In the instant matter the difficulty with the applicant's application went beyond mere suspicion — there was evidence of a criminal conviction for fraud and the applicant did not dispute that incorrect details as to his marital status were afforded to the General Registrar to secure the licence to marry.

(k) I am satisfied that the case law relied upon does not support the proposition that discretion in an application for *mandamus* dealing with the EU law implementation is eliminated.

(l) I am satisfied that my views expressed herein are in fact consistent with the judgment of Edwards J. in *Tangi* in that the within matter does not fall within the matters contemplated by him insofar as he deals with suspicions of fraud, whereas in the instant circumstances the details of the applicant's behaviour complained of go beyond a suspicion of fraud. Furthermore, Edwards J. did indicate in that case that much would depend upon the concerns of the Minister and the evidence available and in that regard in the instant circumstances the concerns of the Minister and the evidence available are such as were not considered generally by Edwards J. in *Tangi*.

(m) The delay in the within matter does not amount to an unlawful refusal to make a decision nor in all of the circumstances could it be considered an egregious delay.

34. In the circumstances of the instant case therefore it does appear to me that in order to achieve a fair and just outcome and furthermore bearing in mind that the EU time limits must be respected the within applicant can not rely upon his own misleading statements to secure an order of *mandamus*. On this basis therefore it does appear to me that the period between November, 2015 when the application was made and March, 2016 when the applicant afforded a response, whether the same can be considered to be satisfactory or not, to the queries raised by the respondent following investigations, should be excluded from consideration when dealing with whether or not to exercise the discretion to grant a *mandamus*. This therefore would suggest that the respondent should have made a decision by September, 2016 whereas as aforesaid the decision was made on the 12th October, 2016. I do accept however the respondent's explanation for this delay as between July and October, 2016. In these circumstances the delay in affording the decision herein would not result in an order for *mandamus* being made against the respondent on the 29th June, 2016 when the notice of motion issued following the granting of leave.