

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 94 J.R.]

BETWEEN

SE

FK

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 13th day of February, 2017

1. The applicants are seeking an order of mandamus compelling the respondent to determine the application made on behalf of the second named applicant for a visa as a family member of the first named applicant who is an EU citizen exercising her right of free movement.

2. Submissions have been filed on behalf of the applicants, further to Court direction of the 6th February, 2017.

3. The first named applicant is a British national and the statement of grounds state that she has been living and working in Ireland since June, 2016. She is entitled to do so as a citizen of the European Union, exercising her right of free movement. An application was made, according to the statement of grounds, in or about the month of June, 2016 for a visa for the second named applicant to enable him to travel to the State to reside with the first named applicant. It is complained that there has been no adjudication and the applicants are prejudiced by the delay.

4. From a perusal of the file it is clear that the application on behalf of the second named applicant was made in Bangalore on 20th June, 2016 – this statement of fact is recorded in a letter of Williams Solicitors on behalf of the applicants to the respondent of 11th January, 2017. The first named applicant has sworn an affidavit bearing date 2nd February, 2017 and, at para. 3 thereof she asserts that she is a citizen of the UK and arrived in Ireland on or about 22nd June, 2016 and is currently employed as a software developer and asserts that she has lived and worked in Ireland since her arrival in June, 2016. The foregoing timeline demonstrates that the application on behalf of the second named applicant was made in advance of the first named applicant either living or working in Ireland. In the European Court of Justice case *McCarthy & Ors. v. Secretary of State for the Home Department* (Case C – 202/13) [2014] OJC 189/6 the Court held:—

"34. Whilst the provisions of Directive 2004/38 do not confer any autonomous right on family members of a Union citizen who are not nationals of a Member State, any rights conferred on them by provisions of EU law on Union citizenship are rights derived from the exercise by a Union citizen of his freedom of movement...

[...]

36. Thus, the Court has held that not all family members of a Union citizen who are not nationals of a Member State derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national."

5. I am satisfied that by reason of the foregoing at the date upon which the second named applicant made his application for a visa as a derivative right of the assertion that the first named applicant had exercised her right of freedom of movement by becoming established in a member state other than *inter alia* the UK was erroneous as the first named applicant had not yet even moved to Ireland, let alone become established here. In the circumstances there is no question of 'accompany or join' as per Article 2.2.

6. The applicant relies on the judgment of Faherty J. in *Mahmood & Anor v. Minister for Justice and Equality* [2016] IEHC 600 which was handed down on the 14th October, 2016 to the effect that there is no requirement on an EU national to be 'established' in Ireland. This in my view ignores the ECJ decision in the McCarthy case C-202/13 aforesaid.

7. Applying *David Hughes v. Worldport Communications Inc.* [2009] 1 I.R. 398 I find I cannot follow the judgment of Faherty J. in *Mahmood* in so far as it is suggested the derivative right of the spouse of the Union citizen can arise in anticipation of or prior to the Union citizen exercising his/her right of entry/residence in a Member State, for the reasons set out in the next preceding paragraph.

8. In my view it is not arguable that the second named applicant at the date he submitted his visa application had any derivative right.

9. The application is refused.