Neutral Citation Number: [2009] IEHC 333

THE HIGH COURT

2009 151 JR

BETWEEN/

B. B. AND A. K. R. (A MINOR SUING BY HER FATHER

AND NEXT FRIEND B. B.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

RESERVED JUDGMENT of Mr. Justice Cooke delivered on the 16th day of July, 2009

1. By order made *ex parte* on the 16th February, 2009, Edwards J. granted the applicants leave to bring the present application for an order of *mandamus* directing the respondent to make a decision on an application made by the first named applicant for residence in the State. (As the presence of the second named applicant, who is the natural daughter of the first named applicant, but not in his custody or care, appears to be unnecessary, it is ignored in this judgment, and the first named applicant is referred to as "the applicant".)

2. The background to the application is straightforward; the applicant, who is a Romanian national, entered the State in October 1996 and claimed asylum. On the 17th March, 1998, his above daughter was born to his then Irish citizen partner and he withdrew his application for refugee status and applied for residence as the father of an Irish citizen child.

3. On 10th November, 2003, the respondent Minister notified the applicant of a proposal to make a deportation order in respect of him and representations were made to the Minister on his behalf, together with an application for leave to remain. These were considered and on 23rd May, 2006, the applicant was served with a deportation order dated 12th May, 2006.

4. Judicial review proceedings to quash that order were instituted, and on the 12th December, 2006, these were compromised on terms recorded in a letter from the Office of the Chief State Solicitor of that date, as follows:

> "1. The Minister revokes the deportation orders made in respect of the applicants. The applicants may make fresh representation under s. 3 (3)(b) of the Immigration Act, within 15 working days. That the Minister will issue a decision within 21 days of the date of receipt of the submissions. This revocation is without prejudice to the Minister's right to make a fresh proposal to deport the applicant, pursuant to section 3 of the Immigration Act, at any time in the future;
>
> 2. The respondent agrees to pay a contribution of €25,500, plus VAT, to the applicant's costs."

5. On foot of that agreement, the deportation order was duly revoked and the agreed costs were paid. The applicant submitted fresh representations. Nothing further appears to have been heard from the Minister one way or another until, on 23rd June, 2008, the Minister wrote the letter which gives rise to the present application and which reads as follows:

> "Since 1 January 2007, on the accession of Bulgaria and Romania to the EU, citizens in those countries are, in terms of immigration controls, covered by the provisions of the European Communities, (Free Movement of Persons), (No. 2), Regulations 2006. They have the same rights of access to the Republic of Ireland as a citizen of an existing European Union, (EU) Member State, with the exception of access to the labour market. There will, therefore, be no decision made on your client's application, for Humanitarian Leave to remain in the State, as such applications in respect of Romanian nationals are no longer valid."

6. On 29th October, 2008, the applicant's solicitors wrote to the Department, explaining the applicant's dilemma and requesting:

> "That you review this matter and issue a decision in relation to our client's application for unrestricted permission to remain in Ireland, without the requirement of an Employment Permit, as soon as possible."

The letter also pointed out that by refusing to consider the fresh representations under s. 3 of the Immigration Act the Minister was in breach of the settlement agreement. It also claimed that the applicant was prejudiced by this failure on the Minister's part, because, as an unskilled worker, he would be ineligible for an employment permit from the Department of Trade and Enterprise.

7. The applicant submits that what is called his "application for humanitarian leave to remain" is still outstanding and that the Minister is compellable in law to make a decision on that application, as he has stated in the letter of 23rd June, 2008, that he will not do so. It is further argued that he agreed to do so in the settlement.

8. The use of the expression "humanitarian leave to remain" could give the impression that the relevant legislation provides for a specific category of non-national residence permission which can be applied for and granted as such, upon

humanitarian grounds, much as a person might apply for a tourist visa, or for temporary residence to pursue a course of study. That, however, does not appear to the case.

9. A non-national who is not an EU citizen and who enters the State and claims asylum, is entitled to remain in the State until the application is refused or withdrawn as provided for in ss. 8 and 9 of the Refugee Act 1996, and s. 5 of the Immigration Act 2004. Such a person is illegally in the State from the date of withdrawal or rejection of the application and may be deported in accordance with s. 3 of the Immigration Act 1999. Where the Minister proposes to make a deportation order, s. 3 requires him to notify the person of the proposal, and invite him or her to make representations, that is, representations as to why the order ought not to be made.

10. In practice, the proposal letter sent by the Minister usually indicates that the addressee has three options, namely; 1) to leave voluntarily, before an order is made; 2) to consent to the making of the order; and 3): to make representations to remain temporarily in the State.

11. The expression "humanitarian leave" appears to derive from the fact that under subs. 3, para. (b) of s. 3, one of the matters which the Minister must have regard to when deciding whether or not to make an order, in addition to any representations, is "humanitarian considerations" (see subpara. (h) of the subsection). In effect therefore, what is described as "humanitarian leave" is a decision by the Minister to postpone, or to temporarily refrain from making a deportation order on the basis of humanitarian considerations. Furthermore, it is clear that where a non-national is illegally in the State following the rejection or withdrawal of an asylum application, there is no entitlement to such temporary leave or postponement of deportation. It is entirely a matter at the discretion of the Minister, even if, being based on the statutory power to make or delay the making of a deportation order, it is a discretion which must be exercised in accordance with the terms of the Act and in a reasonable and fair manner. (See, by analogy, the law relating to the grant of a certificate of naturalisation, and in particular the judgment of Costello J. in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593.)

12. The difficulty that has arisen for the applicant in these circumstances is attributable to the fact that on 1st January, 2007, Romania, together with Bulgaria, acceded to the European Union and the applicant became a citizen of the Union with the benefit of the various rights and freedoms conferred by the treaties but subject also to the exceptions and derogations agreed as transitional arrangements with those to new Member States.

13. As a result, the regime of the asylum process in the 1996 and 1999 Acts ceased to apply to the applicant. The State cannot deport an EU citizen. Instead the arrangements governing the entry, residence and removal of nationals of other Member States are those contained primarily in the European Communities' (Free movement of Persons), (No. 2), Regulations 2006, which gives effect to Directive 2004,/ 38/EC (OJL 229 of the 29/6/04 p.35).

14. By virtue of those regulations (and Community law) a Union citizen in possession of a valid national identity card or passport may not be refused entry to the State, (save for two reasons relating to health and personal conduct), and may reside here for 3 months; (see Regulation 4.) Subject to certain conditions, including having employment or other means of self-support, a Union citizen may reside for longer than three months and, subject to complying with the prescribed conditions, may apply for a permanent residence certificate.

15. Under the Employment Permit Acts 2003 to 2006, a non-national seeking to enter employment of an employer in the State must obtain a work permit from the Minister for Enterprise, Trade and Employment. However, under the transitional arrangements for the accession of Romania to the Union it was agreed that the existing measures on freedom of movement of workers within the Union and particularly Regulation (EEC), No. 1612/68 of the Council of 15th October, 1968, (as amended), would not apply to Romanian nationals, during the transitional period of two years, which was extendable and has in fact been extended now to a full period of five years. (see annex Vll to the Protocol of the Accession Treaty, concerning conditions and arrangements for the admission of the Republics of Bulgaria and Romania to the European Union, (OJ/L 157 of 21.5.2005, p. 138.)

16. In practical terms, since 1st January, 2007, nationals of Romania, while entitled to exercise the freedom of interstate movement within the Union, do not have access to labour market in other Member States. Thus, the applicant does not have an entitlement to a work permit under the Employment Permits Acts 2003 to 2006 in the State. As a consequence, he could, as he points out in his affidavit, be denied permission to continued residence in the State as an EU citizen beyond three months, a period which, in his case, has of course long since passed.

17. When the present application was brought it was commenced in the apparent belief on the applicant's part that if granted "temporary leave to remain" on humanitarian grounds under s. 3 of the 1999 Act, instead of being deported, he could look for employment without needing an employment permit. Formerly, all asylum seekers denied refugee status, but granted temporary leave to remain here, were in that position. However, as the Minister has pointed out, that position was altered when s. 2(10) of the Employment Permits Act 2003, was amended by s. 3 of the 2006 Act, which has the effect of requiring any Romanian national in that position, that is to say, a person in employment in the State while a beneficiary of such temporary leave, to obtain a permit.

18. An order of *mandamus* can only issue to compel a decision maker to take a decision which he or she has power to take and then only when the decision maker has either wrongfully refused to take the decision, or has delayed unreasonably long in so doing as to have failed unlawfully to discharge the statutory duty concerned.

19. The court is satisfied that in the particular regulatory circumstances set out above the Minister has no power, since the 1st January, 2007, to make the decision the applicant requires him to make. Since that date, s. 3 of the 1999 Act has no application to a Romanian national. He cannot be deported as a failed asylum seeker, nor can he be the beneficiary of any "temporary leave to remain", based on the 1999 Act. If the applicant is to be required to leave the State it can only be done by means of the procedure prescribed for removal of Union citizens in Regulation 20 of the 2006 regulations.

20. That position is not altered by the fact of the settlement agreement of December, 2006. In effect, the Minister's competence to perform that agreement, insofar as it involved making a decision for the purposes of s. 3 of the 1999 Act, ceased on the 1st January, 2007.

21. It follows that *mandamus* does not lie against the Minister to compel him to make the decision identified in the relief sought.

22. The application must therefore be refused.