Neutral Citation Number: [2010] IEHC 84

THE HIGH COURT

JUDICIAL REVIEW

2009 1110 JR

BETWEEN

SERGEJS DRUZININS AND NADZEYA DRUZININA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 16th day of March, 2010.

1. By order of 3rd November, 2009 leave was granted to the applicants to seek relief by way of judicial review including, in particular, an order of *mandamus*, requiring the respondent to issue to the second named applicant a family member residence card under regulation 6 of the European Communities (Free Movement of Persons) Regulations 2006 ("the 2006 Regulations") for which an application had been made to the Minister on 28th January 2009 and which had been initially refused by him on 10th June, 2009.

2. Following the filing of the statement of opposition and replying affidavit, the matter was listed for hearing first on 15th February, 2010 and then on 2nd March, 2010. When the matter was called on for hearing on the latter date, the Court was informed that the substantive issue had become moot because the requested card had been issued to the second named applicant on 17th February, 2010, that is two days after the first hearing date. As a result, the only issue before the Court was the issue as to liability for the costs of the proceeding. Each of the parties claims to be entitled to an order for costs against the other.

3. As this Court pointed out in the analogous circumstances considered in its judgment in the case of *Russell Nearing v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 30th October, 2009,) there is no automatic entitlement on the part of an applicant to costs in a judicial review proceeding by reason of the sole fact that the result sought to be achieved at the outset has become moot since the proceeding was brought because the respondent has done what was demanded in the interim. If reliance is sought to be placed upon the primary rule that costs will follow the event, the 'event' is not the issue of the demanded decision but the acknowledgment or concession that the proceeding was well founded when commenced and thus that the decision had been wrongfully refused or unlawfully delayed at that point. Once again, that is the disputed issue between the parties now before the Court.

4. The first named applicant says that he moved to Ireland in July, 2004 shortly after his country of origin, Latvia, acceded to the European Union. He claims to have been living and working in the country since that date although, so far as the evidence given to the Minister goes, his employment appears to date from September, 2007.

5. The second named applicant is a native of Belarus. The applicants married in Latvia on 2nd August, 2008. The second named applicant has a daughter from a previous relationship whom the first named applicant regards as his stepdaughter. Mother and daughter came to Ireland in December, 2008 to join the first named applicant.

6. On 29th January, 2009 the second named applicant applied on form EU1 to the respondent for a residence card as the spouse of the first named applicant under the 2006 Regulations. Amongst the items submitted with that form to show compliance with the conditions laid down in Regulation 6(2)(b) of the 2006 Regulations, was confirmation that the first named applicant had been employed since 3rd September, 2007 with an undertaking called "Airport Autocare".

7. By letter of 10th June, 2009 the application for the residence card was refused. The letter referred to the items purporting to show the basis upon which the first named applicant was exercising his Treaty right to work in Ireland and then gave the reason for refusal as follows:

> "… On contacting the above named employer it has come to the attention of this department that Mr. Druzinins is no longer employed with Airport Autocare. The Department was not informed of this change in circumstances and therefore there is no evidence on file that Mr. Druzinins is currently exercising EU Treaty Rights in the State. The documentation provided therefore does not satisfy the Minister that the EU citizen spouse is exercising his rights in accordance with the requirements of Regulation 6(2)(a) of the Regulations or Article 7 of the Directive. Hence you are not entitled to reside in the State in accordance with Regulation 6(2)(b) of the Regulations or Article 7(2) of the Directive."

The letter also informed the second named applicant that her current permission to remain in the State would expire on 28th July, 2009. The permission had been granted on the basis of the EU Treaty Rights application and she was informed that it would not then be renewed.

8. By letter of 25th June, 2009 the applicant's solicitors wrote to the EU Treaty Rights section of the Department to contest the refusal decision and, *inter alia*, drew the attention of the respondent to the fact that the first named applicant had been made redundant by his employer in February, 2009 but that he had since registered as a jobseeker with the Department of Social & Family Affairs and with Fás. The case was made that although that employment had

ceased, the first named applicant still fell to be treated as exercising Treaty rights on the basis of Article 7(3)(b) and Regulation 6(2)(a) because he retained his status of worker as someone in duly recorded involuntary unemployment after having been employed for more than one year. On the basis of these submissions made in the letter the solicitors requested that a review be carried out of the refusal decision by the Department. Documentation in support of that request was submitted with the letter.

9. By letter of 10th August, 2009 the EU Treaty Rights section wrote to the solicitors in question seeking further information for the purpose of the review including a schedule of particulars to be completed. Information was sought in relation to the first named applicant's position as regards his employment, self-employment or if he was following courses of studies or was unemployed. By letter of 21st August, 2009 the applicant's solicitors replied furnishing answers to the request and enclosing the documents sought.

10. In the letter of 21st August, 2009 the applicant's solicitors had said they would allow the respondent a "further period of 21 days in which to confirm our clients right to continued residency in the State based on the submissions made failing which you will leave us with no option but to proceed as set out earlier". By letter of 4th September, 2009, they again pressed for a decision and asked the Department to confirm a "Stamp 4" for the second named applicant and her daughter emphasising their client's genuine concern and desire to remain in the State as a family unit.

11. On 1st October, 2009 the solicitors again wrote and having referred to the deadline set in the earlier correspondence once more stated that they would allow "one final period of fourteen days … in which to revoke your earlier decision of 10th June, 2009 last refusing our clients EU residence card for the reasons set out therein and acknowledge our client's right to reside in this jurisdiction based on the submissions already furnished".

12. That period having expired, the present judicial review proceedings were commenced and on 3rd November, 2009 leave was granted *ex parte* by the Court. The application was made returnable before the Court on 23rd November, 2009 when time was extended to 11th December, 2009 for a statement of opposition and no objection was raised to the applicant's request for priority in fixing a date for the hearing. On 14th December, 2009 the case was fixed on a priority basis for 26th February, 2010 and, as already mentioned, opposition papers were eventually lodged indicating a full contest to all of the reliefs claimed.

13. It is, accordingly, necessary to consider whether in those circumstances the applicants were entitled in law to the reliefs claimed when the judicial review proceeding was commenced on 3rd November, 2009.

14. The relief claimed in relation to the refusal decision of 10th June, 2009 can be dealt with briefly. Based on the information supplied to him when the application was made, the Minister's refusal was clearly justified. The application had been made on the basis that the second named applicant was the spouse of a Union citizen who was resident in the State on foot of Regulation 6(2)(b) namely, that he was a worker who was in employment with an undertaking called Airport Autocare. When that fact was checked with the employer the Minister was informed that the applicant was no longer employed there. Because neither applicant had taken the precaution of informing the Minister at any time between February and June of that change of circumstance, the Minister had no information as to whether the first named applicant had changed to another employer, had perhaps gone abroad or decided to commence a course of study or had registered as unemployed.

15. Contrary to the suggestion made on behalf of the applicants, the Court does not accept that there was any obligation on the Minister to conduct any inquiry as to the applicant's changed circumstances since being made redundant with a view to seeing whether they entitled him to qualify under any other condition of Regulation 6(2). The application had been made on a specific basis which was found to be no longer sustained. Had that change of circumstance been brought to the attention of the Minister the appropriate amendment to the application might have been made and a different decision might have been reached but upon the basis of the only information before the Minister on 10th June, 2009, the refusal of the residence card was clearly correct.

16. It was only in the letter of 25th June, 2009 that the revised basis of the application was put before the Minister and in the letter of 21st August, 2009 that the additional information and documentation requested by him was furnished.

17. Contrary to the submission made, the Court does not accept that the period of six months from the date of the application as mentioned in Regulation 7(2) continued to run in those circumstances as from 28th January, 2009 such that the Minister was in default in issuing the residence card as from 28th July, 2009. As already pointed out, the application made in January was made on the specific basis that the first named applicant was employed and therefore relying on the condition at Regulation 6(2)(a)(i). Although the letter of 25th June, 2009 asked for a review of the refusal, it in fact amounted to a new application based on the new circumstance of his being unemployed and registered as a jobseeker with Fás thus relying upon Regulation 6(2)(c)(ii). Accordingly the Court is satisfied that if it is appropriate to assess the justification in seeking relief by way of *mandamus* by reference to the period of six months stipulated in Regulation 7(2) it is by reference to the period from the receipt of the letter of 21st August, 2009 that any delay must be judged.

18. In the present case the residence card was in fact issued within six months from that date. It should be noted however, that Regulation 7(2) applies to the issue of a card within six months from the receipt of the original application where the Minister is satisfied that it is appropriate to do so. When the Minister is not satisfied and so indicates within that period, nothing in the Regulation or in the Directive requires that a review of the decision be taken within a further period of six months. Indeed, if the review is directed only at correcting an error made by the deciding officer on the original application without altering its basis or requiring new facts or documentation to be considered, it would be consistent with the time limit imposed by Regulation 7(2) that the decision should be taken well within a further six month period.

19. As already noted, that was not the position in the present case. It should not be taken, therefore, that the six month period applies also to the review process. Whether or not there is delay in deciding upon a review as such will depend upon the nature and terms of the review requested, the error alleged, the submissions made and the other circumstances of the individual case. For present purposes it is sufficient to point out that there is no obvious reason why the period of ten weeks from 21st August, 2009 to the commencement of this proceeding at the beginning of November, 2009 should be considered so excessive as to amount to a wrongful refusal on the part of the Minister to decide the review.

20. If there were no more to the present issue the Minister would be entitled to recover an order of costs against the

applicants. It is clear, however, that the initiation of the judicial review application was precipitated not by the delay in deciding the review as such but by the dilemma in which the second named applicant was placed by the terms of the refusal letter of 10th June, 2009. That letter stated in peremptory terms:

> "Your current permission to remain in the State will expire on 28th July, 2009. This permission was granted on the basis of your EU Treaty Rights application. This permission will not be renewed. On the expiry of the above permission you must report to your local Immigration Registration Office to discuss your immigration status. Your EU Treaty Rights application is now closed."

21. The lodgement of the original application had been acknowledged by letter of 17th February, 2009 in which the second named applicant was informed that her local immigration officer would provide her with a temporary permission to remain in the State known as a "Stamp 4" by way of endorsement of the visa on her passport provided she produced the documentation referred to in that letter.

22. In letters of 4th September 2009 and 1st October 2009 the applicants' solicitors referred to the difficulty created by the expiry of the Stamp 4 visa when calling for an early decision on the review.

23. Regulation 7(1)(c) provides that when an application for a family member residence card is made: "the Minister shall immediately cause to be issues a notice acknowledging receipt of an application…". This is clearly designed to legitimise the presence of the family member within the State pending the making of a decision on the application. In the judgment of the Court, where a negative decision has been made but a review has been requested and accepted, the Minister is under an obligation to continue the effect of that acknowledgment until the review has been determined. If the Stamp 4 visa is the mechanism chosen to fulfil the obligation of that provision, it is not unreasonable to expect that the Stamp 4 visa should be temporarily extended until the conclusion of the review. That was not done in this case. That being so it was not unreasonable for the applicants to commence proceedings in order to safeguard the legitimacy of the second named applicant's presence within the State, at least temporarily. To the extent, accordingly, that the reliefs sought when the proceeding was initiated included an interlocutory injunction requiring the Minister to issue a further temporary Stamp 4 permission pending the outcome of the proceeding, it can be said that the initiation of the judicial review was not unreasonable or premature.

24. Taking into account all of these factors including, in particular, the absence of any culpable delay on the part of the Minister in deciding the review on the one hand, and the dilemma in which the second named applicant was placed by the expiry of the Stamp 4 visa and the failure to extend it, on the other, the Court is satisfied that there was a justification for the commencement of the proceeding, at least in part.

25. The Court is satisfied that the balance of justice between the parties would therefore be served by awarding the applicants an order entitling them to recover 50% of the costs of the proceeding including reserve costs, the same to be taxed in default of agreement.