Neutral Citation Number: [2011] IEHC 50

THE HIGH COURT

JUDICIAL REVIEW

2010 82 JR

BETWEEN

ANNA MARIA LAMASZ AND ORHAN GURBUZ

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 16th day of February 2011

1. By order of the 1st February, 2010, the Court (Cooke J.) granted leave to the applicants to bring the present application for judicial review seeking, amongst a number of reliefs, an order of *certiorari* quashing the respondent's decision of the 28th September, 2009, to refuse a "Residence Card" to the second named applicant pursuant to the European Communities (Free Movement of Persons) No. 2 Regulations 2006 (the "Regulations") together with an order of mandamus requiring him to issue such a card. The Regulations implement in Irish law the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, ("the Directive".)

2. The background to that refusal decision is as follows. The first named applicant is a national of Poland who has been living in the State since December 2006. The second named applicant is a national of Turkey. They say that they met in December 2006 in Limerick, became engaged to marry in October, 2008 and married in March 2009 in Clonmel, Co. Tipperary.

3. The first named applicant had worked with Dell Products Manufacturing Limited in Limerick from 2007 until August 2008 when she was made redundant. She says that she subsequently obtained work in a Turkish restaurant in Sligo.

4. On the 20th April, 2009 an application was made on behalf of the second named applicant pursuant to Regulation 7(1) of the Regulations for a Residence Card upon the basis that he was a family member of a Union citizen, the first named applicant, who satisfied the condition prescribed in Regulation 6(2)(a)(i) namely that of being in employment in the State. Receipt of that application was acknowledged and the second named applicant was given a "Stamp 4 permission" to reside in the State on that basis until the 21st October, 2009.

5. With the application there had been submitted the documentary evidence identified in the Checklist on the Form EU1 application including passport, marriage certificate, evidence of residence and so forth being the items prescribed in Schedule 2 of the Regulations. Additional material was also furnished including a tenancy agreement in respect of their accommodation in Sligo, various utility bills and bank statements. As evidence of the employment of the first named applicant a P60 form for 2007, a P45 from Dell Products Manufacturing Limited, some current pay slips and a letter from her current employer were also forwarded. In response to a subsequent request from the Department, a certificate of registration of the above tenancy together with a PAYE balancing statement (P21) for the tax year 2008, in respect of the first named applicant was furnished.

6. By letter of the 28th September, 2009, the EU Treaty Rights Section of the Department refused the application and gave as its reason the following:

> "Unsatisfactory evidence of exercise of rights
>
> This office was unable to verify that the EU citizen is exercising their treaty rights in this State. (and) This does not satisfy the Minister that the EU citizen spouse/partner is exercising his/her 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 further stated that as a consequence of the decision, the second named applicant's permission to remain in the State would expire on 21st October, 2009.

7. By letter of the 16th October, 2009, the applicant's solicitors requested a review of that decision in accordance with Regulation 21, which provides: "A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to be allowed to enter or reside in the State".

8. With that letter the particulars required by Schedule 11 to the Regulations were furnished. In setting out the applicants' case for the grant of the card, it was pointed out that at no stage prior to the refusal had any indication been given that the documentary proofs submitted were "unsatisfactory".

9. The review application was acknowledged by letter of the 5th November, 2009, stating: "This office will be in contact with you shortly regarding same". By letter of the 16th November, 2009, the EU Treaty Rights Section wrote to say that it was not "in a position to give Orhan Gurbuz temporary permission to remain while this review is pending".

10. Having heard nothing further, on the 8th January, 2010, the applicant's solicitors made an application under the Freedom of Information Acts for access to the Departmental file relating to the application. This application was successful and amongst the material furnished was an internal memorandum signed by two officials on the 24th and 28th September 2009 respectively. This

contained, under the heading "Provide details of checks on exercise of rights carried out," the statement "Tried on a number of occasions, could not make contact with the employers". According to the first named applicant her employer confirmed that he had received no communication or contact from the Department. Although this has been testified to in the affidavit of the first named applicant, no affidavit by either of the officials named in the memorandum has been filed, nor is issue taken with the evidence in the replying affidavit of the respondent.

11. In this case as in the other cases with which it was jointly heard, extensive legal submissions have been made to the Court on either side as to the entitlements of the applicants and the duties of the Minister under the Directive. Much stress has been laid on the absence of an entitlement on the part of the Minister to conduct systematic checks and much attention paid to the limitations upon demands for particular documentary proofs. In the statement of opposition the respondent declines to admit that the first named applicant is exercising EU Treaty rights in the State and denies that she is entitled to have the second named applicant as her husband reside with her here. The Minister asserts that he was entitled to require evidence to support the contention that the first named applicant was working in the State and maintains that the host Member State is entitled and/or required to be satisfied that the conditions of Article 7(1) of the Directive had been satisfied and to verify the accuracy of the information and documents submitted. It is also pointed out that the review application had yet to be determined and it is submitted that the applicant has no entitlement to relief by way of judicial review until that procedure has been completed.

12. In the judgment of the Court the position which obtains in this case is straightforward so far as the legal issue is concerned. It is not disputed that a valid application has been made on Form EU1 in accordance with the Regulations and that appropriate documentary proofs both as required under Schedule 2 of the Regulation and additionally requested by the EU Treaty Rights Section have been submitted.

13. It is undoubtedly true, as the Minister correctly claims, that a host Member State is entitled to verify the authenticity of an application and its grounding documentation. In the judgment of the Court the Minister is entitled, indeed obliged, to satisfy himself that applicants are who they say they are; and that one is a national of a Member State who, if relying on Regulation 6 (2) to reside for longer than 6 months, holds valid national identity and satisfies one of the conditions in sub-paragraph (a). It is also true that the case law of the Court of Justice in relation to the Directive and the earlier legislation which it consolidates and replaces, indicates that the Member States may not require compliance by that Union citizen with additional administrative formalities or conditions which obstruct the exercise of the Treaty-derived right to enter and reside. Thus in Case C-215/03 Oulane [2005] RCR I-000, the Court confirmed that "…a Member State may require recipients of services who are nationals of other Member States and who wish to reside in their territory to provide evidence of their identity and nationality." (par 21). This requirement is explained as "… aimed, first, at simplifying the resolution of problems relating to evidence of the right of residence not only for citizens but also for national authorities and, secondly, at establishing the maximum that Member States may require of persons with a view to recognising their right of residence." (par 22.)

14. The court also reaffirmed the principle stated in earlier cases in relation to the possibility for a Union citizen to adduce alternative proof of identity: "If the person is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents." (par. 25.) The rationale of the principle is that in the case of nationals of the Member States, the proof of identity does not create the right to enter and reside but is an administrative formality which evidences the pre-existing status.

15. While this and the other cases referred to by the applicants do establish the general proposition that a Member State may not subject the exercise by a Union citizen of the right to enter and reside to additional pre-conditions or administrative formalities, they do not support the proposition at issue here namely, whether a Member State is entitled to verify fulfilment of the basic conditions and the authenticity of the documentation prescribed for the issue to a non-national family member of a Residence Card. No issue arises in this case as to the entitlement of the first named applicant to enter and to reside in the State and to seek and take up employment.

16. What is in issue is the entitlement of the Union citizen to be accompanied or joined by a family member in circumstances where the Union citizen has exercised the right to enter and reside for three months but has not yet become entitled to permanent residence free from the need to comply with one of the conditions for residence in excess of three months. (Regulation 12 and Article 16 of the Directive.) It must be borne in mind that Ireland has not availed of the option under Article 8.1 of the Directive to require Union citizens to register with a relevant authority when seeking to reside for more than 3 months. Thus, an application for a Residence Card for a family member may well be the first occasion on which the presence of the Union citizen in the State comes to official attention.

17. In the judgment of the Court the Minister is therefore entitled to be satisfied that the conditions for the issue of the card are met including those relating to the basis of the Union citizen's residence as prescribed in Regulation 6(2) (a). This view of the Regulations is confirmed by Article 14.2 of the Directive which provides:

> *"Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfy the condition set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically."* (Emphasis added.)

18. As mentioned, this last sentence of the Article is relied upon by the applicants to argue that the refusal in this case is unlawful because the demand for proof of the employment is such a systematic verification. That argument is, in the view of the Court, mistaken. Article 14 of the Directive is concerned with the retention of the right of residence following its exercise and it confirms that retention is dependent (subject to the matters covered by Articles 12 and 13,) upon continuing compliance with the condition upon which it was exercised at least until the entitlement to permanent residence accrues. Where the right is being exercised, Member States are entitled to verify such continuing compliance but only in specific cases, that is to say, case by case, where some cause for reasonable doubt has arisen and not on a systematic, in the sense of routine, basis. It follows, in the judgment of the Court, that the Minister is entitled to be satisfied when the right is first exercised and the circumstances of the Union citizen and the family member are first brought to his attention, that the conditions are met and to make the checks and inquiries necessary for that purpose.

19. The reason given for the refusal decision in this case relates only to the issue as to whether the Union citizen, the first named applicant, is in employment and thus whether the condition stipulated in Regulation 6(2) (b) by reference to paragraph (2)(a) (i) of that paragraph is satisfied. It is not suggested that the applicants are not married, or that a marriage took place but was a sham or that any of the payslips, revenue forms or other documents are false. All that is said is that the office was "unable to verify" that the first named applicant was exercising EU Treaty rights, namely, that she was in employment. According to the internal memorandum

this was based exclusively upon a number of unspecified attempts to make contact "with employers" although the form of the contact attempted is not described.

20. In the judgment of the Court this is an inadequate ground upon which to refuse an application which is otherwise accepted as validly made under the Regulations. Where is it not questioned that a couple are married; nor that one of them is an EU citizen and that they both have the necessary three month period of established residence, the onus passes to the Minister to state clearly which condition of the application remains unsatisfied; which documentary proof is missing or questioned and to state plainly why this is so. In a case such as the present one, where it is employment condition which is under scrutiny but in which apparently authentic documentation from third parties such as Dell Manufacturing and the Revenue Commissioners has been submitted, it is not a valid ground for rejection of such documentation that officials have merely been "unable to make contact". The position might be different had inquiries disclosed that a particular company/employer did not appear to exist; or not to be at the address given or to have no telephone at the number given on its documents. The occurrence of such events in the course of verification attempts could put the Minister on inquiry or call for an explanation. When, however, the reason for refusing to accord the entitlement conferred on the second named applicant by the Regulation lies simply in the Department officials' own inability to carry out any verification there is no valid reason for refusing the application upon that ground.

21. The Court therefore accepts that the Minister is entitled to take reasonable steps to verify the basic conditions for the grant of the residence card so long as they do not involve the imposition of administrative obstacles on the Union citizen's exercise of the Treaty-derived right outside those allowed by the Directive. He is entitled to check that the named employer does actually exist and that the Union citizen does actually work there. But if it is considered necessary to make such checks they must be done competently and seriously: the mere fact that casual phone calls (if that was the form of attempted contact,) may be unanswered does not constitute an adequate basis for a refusal which effectively implies a suspicion on the part of the Minister that the employment claimed does not exist. There may well be a perfectly valid reason why a phone went unanswered at a given time. Without knowing at what times or in what circumstances the phone calls had been made, it is impossible to speculate as to whether the lack of contact gave the officials any rational basis for considering the employment incapable of verification.

22. In these circumstances the Court will grant an order of *certiorari* to quash the refusal decision contained in the letter of the 28th September, 2009.

23. The Court recognises that in the normal course the exercise of its jurisdiction in judicial review would not extend to a first instance decision of this kind when the error or defect is capable of being remedied by completion of the available administrative review procedure. That is especially so in cases where the reason for refusal is based on a lack of documentation or a failure to provide an explanation sought so that the administrative review is particularly apt to resolve the issue. In the circumstances of this case, however, where the initial refusal was not based upon any alleged inadequacy or defect in the application or its supporting documentation but merely on the Department's own (and largely unexplained,) ability to carry out inquiries it thought appropriate, it is clear to the Court that this refusal decision ought not to have been made and, unless or until the respondent can adduce some valid reason for its refusal, the applicants ought not to be put to the delay of an administrative review.

24. In these circumstances it is sufficient to quash that refusal decision and the other reliefs included in the application are not appropriate or necessary. In particular, an order of mandamus is inappropriate because the Minister has not failed or refused to make a decision but has made one for a wrong reason. The Minister accordingly remains under the duty imposed by the Regulations to determine the application and to do so promptly having regard to the fact that the period of six months allowed by Regulation 7(2) has long since expired.

25. In this regard the Court would draw attention to the fact that neither Regulation 7 (2) nor Article 10.1 of the Directive envisages the Minister as having 6 months in which to make the initial administrative decision on the application for a Residence Card and an unlimited period thereafter in which to decide the administrative review. Regulation 7(2) requires the Minister to "cause the card to be issued" within 6 months of receipt of the application and Article 10.1 speaks of the right of residence being evidenced by "the issuing" of the card "no later than six months from the date…" of the application. In the judgment of the Court the Minister remains under an obligation to make the definitive decision on the application and where the application is initially refused, the certificate or notice issued under Regulation 7(1) (c) in compliance with Article 10.1 of the Directive remains valid until the expiry of the 15 days allowed to apply for the review and thereafter until the review decision has been communicated. The statement in the letter of 28 September 2009 to the effect that the initial refusal had the consequence of abrogating the second named applicant's permission to remain in the State as from 21/10/2009 was therefore incorrect if it was the Minister's belief that the resources at his disposal to process review applications would render it impossible to give a decision on a review in the case until after that date.

26. The Court will therefore order that the refusal decision communicated in the letter of 28th September 2009 be quashed.

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