Neutral Citation Number: [2011] IEHC 49

THE HIGH COURT

JUDICIAL REVIEW

2010 11 JR

BETWEEN

MUHAMMAD ALI SALEEM

AND

MARTA SARA SPRYSZYNSKA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

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

1. By order of 11th January, 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* to quash a decision of the first named respondent ("the Minister"), dated 16th June, 2009, which refused the first named applicant a Residence Card, under the European Communities (Free Movement of Persons) No. 2 Regulations 2006 ("the Regulations"). The Regulations give effect in national law to 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"). Leave was also granted to apply for certain declaratory reliefs, together with an order of *mandamus*, to compel the Minister to issue a decision on an application for an administrative review of the above decision made on 24th June, 2009 pursuant to Regulation 21. This is one of a number of cases raising similar issues under the Regulations and the Directive which were heard together and in which separate judgments are now being given.

2. The background to the present proceeding is as follows. The first named applicant is a national of Pakistan, who arrived in the State in September 2005, on a student visa. The second named applicant is a national of Poland who arrived in the State in May 2006. She says that she worked with "McDonalds" between May 2006 and March 2008, and took up fulltime employment with the "Starbucks" outlet at Sandyford in County Dublin as a sales person on a fulltime basis in January 2008. The couple met while both were working in McDonalds and married on 1st December, 2008, at Naas in County Kildare.

3. An application dated 9th December, 2008, on Form EU1 for a Residence Card for the first named applicant was made and stamped as 'Received' by the Irish Naturalisation and Immigration Service on 16th December, 2008. The form was accompanied by the original documents (so far as relevant,) specified in the "Checklist" on the form, being the proofs required under Schedule 2 of the Regulations. These included passports, the marriage certificate, evidence of residence, birth certificate and so forth. By letter of 17th December, 2008, the application was acknowledged and the first named applicant was informed that he could obtain a "Stamp 4" endorsement on his passport from the local Immigration Officer which would validate his residence until 17th June, 2009.

4. By letter dated 16th June, 2009, the application was refused. The material part of the letter reads as follows:

> *"I am to inform you that the Minister has decided to refuse your application for a "Residence Card of a family member of a Union citizen. This is for the following reasons:*
>
> *You submitted the following as evidence of the EU citizen exercising their EU Treaty Rights in this State: Letter from Starbucks, dated 04 December, 2008. You were also asked to provide payslips and the most recent P60 in respect of Marta Sara Spryszynska, you failed to provide these documents. The Department has also been unable to verify the employment details of Marta Sara Spryszynska with Starbucks. This does not satisfy the Minister that the EU citizen spouse is exercising 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."*

5. The reference to the request for payslips and the P60 form relates to a letter dated 2nd June, 2009, which had been sent by the EU Treaty Rights Section to the first named applicant, requesting that he: "… submit the following original documents to this office within the next ten working days so that we can complete the processing of your application". It then asked for a letter of registration of the tenancy with the Private Residential Tenancies Board and a current Bank Statement from both applicants as well as the two recent payslips and the most recent P60 or Tax Credit Certificate.

6. This letter had been received by the first named applicant, but at that point, the applicants had not consulted solicitors and the first named applicant says that he responded by returning the letter with handwritten annotations on it and including payslips for the past two months and the P60, together with evidence of residence, on 13th June, 2009. He says however that he subsequently discovered that there had been some delay in the post. On 24th June, 2009, the applicants wrote explaining the delay and enclosing a registered postal docket confirming that the letter had been sent on 13th June, 2009.

7. In fact, according to the evidence on behalf of the respondent, the consideration of the application took place on 15th June, 2009,

and the decision was made on the following day. The applicants' additional documentation was received in the Department on 16th June, 2009, but did not, apparently, reach the officials concerned until after the decision had been taken and the letter written.

8. On 15th July, 2009, the first named applicant again wrote, explaining the delay in sending the documents and requested a review of the application. By letter of 28th July, 2009, solicitors intervened (Ceemex), also asking for a review of the decision, although giving it an incorrect date. The issue of temporary permission to remain and work, pending review of the application, was also sought.

9. On 28th July, 2009, another firm (Cullen & Co.) wrote to the Treaty Rights Section, claiming to represent the first named applicant, and requesting a timeframe for the review decision. On 12th August, 2009, the first solicitors (Cemex) again wrote, requesting a Stamp 4 visa. On 21st October, 2009, a third firm, Messrs. Trayers & Co. wrote, stating that they were now representing the first named applicant and demanding a decision on the review within twenty-one days, failing which, proceedings would be issued. On 2nd November, 2009, the Minister responded, saying that the review was being dealt with in strict chronological order and asserting "there is no set time limit within which a decision must be made".

10. In this case, as in the other cases heard jointly with it, extensive legal submissions have been made on both sides to the Court, as to the rights of the applicants, the duties of the Minister and the limitations upon the Minister's powers of verification and enquiry of applications. The Court feels it is appropriate to make one preliminary point in this regard. In these submissions, as in the statement of grounds, the points sought to be made on behalf of the applicants are formulated almost exclusively by reference to the provisions of the Directive. In the view of the Court, the issues thus raised fall to be considered at least initially by reference to the provisions of the Regulations. In accordance with what is now Article 288 TEFU (ex-Article 249TEC), a Directive is "*…binding as to the result to be achieved, upon each Member State to which it addressed, but [… leaves] to the national authorities the choice of form and methods*".

11. The directive under consideration here has been transposed in the Regulations. The obligation of the State, so far as the Union measure is concerned, has therefore been discharged. Accordingly, the law to be applied, so far as this Court is concerned, is the transposed measure namely, the Regulations. It is only where some uncertainty or alleged defect in the Regulations is said to arise, or where it is asserted that some provision of the Directive has been incorrectly transposed or not transposed at all, that it is appropriate or necessary for the Court to have recourse to the provisions of the Directive.

12. For the reasons explained in greater detail in the judgment in the case of *Lamasz & Anor v. MJELR* also delivered today the Court is satisfied that the Minister is entitled without infringing Union law or applying the Regulations inconsistently with the provisions of the Directive, to carry out reasonable checks in order to satisfy himself that the basic conditions of Regulations 6 and 7 are met in the case of the Union citizen and family member and that documentation submitted by way of proofs under Schedule 2 is authentic provided these checks do not involve or amount to the imposition of additional administrative obstacles or preconditions to the exercise of the Union citizen's right of residence and to be joined or accompanied by a family member.

13. In the present case the application was refused because additional documents had been sought in relation to the compliance with the condition in regulation 6(2)(a)(i) but when they had not been received within the 10 days stipulated, the decision was taken before it was realised that the documents had belatedly arrived. This, in the judgment of the Court is precisely the type of situation for which the administrative review of Regulation 21 is particularly apt. No issue was taken with the authenticity of the documents originally submitted, or with the nationality of the second named applicant or the fact of the marriage. In those circumstances all that remained to be decided, on the face of it, was whether the additional documents satisfied the Minister's requirements as to compliance with the condition of Regulation 6(2)(a)(i).

14. In these circumstances the application for an order of *certiorari* cannot succeed. The Minister was entitled to satisfy himself that as of the date of taking the decision the conditions for issue of the card were fulfilled. The requested documentary proofs had not in fact been received within the 10 days mentioned in the letter of 2nd June 2009 although they subsequently arrived on the day the decision was taken. The Treaty Rights Section was therefore entitled to take the decision on the basis of the information available to it at the time. Whether the decision would have been different had it been realised the documents had arrived, is a matter for the review decision.

15. Although the Court would normally decline to exercise its judicial review jurisdiction in a case where a remedy by way of administrative review has not yet been exhausted and the impugned decision is particularly apt for that remedy, the Court will grant an order of *mandamus* in this case for the following reasons. First, as indicated above, the only issue outstanding when the request for review under Regulation 21 was made was whether the belatedly received documents removed whatever doubts the Treaty Rights Section may have harboured as to compliance with the condition in Regulation 6(2)(a)(i). That was an assessment that would appear to have been capable of being made within a very short period of time. The Minister however 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. The letter of 2 November 2009 stated: "There is no set time limit within which a decision must be made."

16. While this may be literally true in the sense that the Regulations contain no defined time limit for the review stage, it is, in the judgment of the Court, a mistaken view of the obligation of the State towards Union citizens and their family members arising under the Directive. As the Court has pointed out in paragraph 25 of its judgment in the *Lamasz* case, neither Regulation 7(2) nor Article 10.1 of the Directive support the proposition that the period of 6 months there referred to applies only to the taking of an initial decision on the application and that thereafter the Minister can delay indefinitely deciding the review request. Those provisions require the issue of the card within that period so that the Minister remains under an obligation to do so notwithstanding the passing of the six month period from the receipt of the application.

17. Accordingly, while the Minister may be justified in withholding the issue of the card when he has genuine reason 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 right exercised in these cases is the Treaty-derived right of the Union citizen to move freely within the territory of the Member States and, subject to the conditions of the Regulations, to have family members participate in the exercise of that right. (See, *inter alia*, recitals 5 and 11 of the Directive.) The Residence Card is formal evidence of the fact that the right has been exercised but the exercise is not dependent upon its possession. Indeed a non-national family member who presents a valid passport and proof of the family relationship is entitled to enter the State to join the Union citizen and to reside there for three months before an application for a residence card can even be made. (Regulation 7(1)(a).)

18. *Mandamus* will not issue to require a public authority to take an administrative decision unless there has been an unlawful refusal to do so or such egregious delay in so doing as to be tantamount to a refusal. Where the authority has power to make a decision but no time is fixed by law for it to be made there is nevertheless a duty to make the decision within a reasonable time. As Geoghegan J. put it in Point Exhibition Co. Ltd v. Revenue Commissioners, [1993] 2 I.R. 551 "*The respondents have not either granted or refused*

the licence under s. 7 of the Act of 1835, but at all material times have informed the applicant the matter is still under consideration. … The questions at issue in this case are by no means capable of easy resolution. I have had considerable difficulty in answering them. Nevertheless in my view, the applicant was entitled to a decision one way or another within a reasonable time. The respondents obviously did not make such decision within any time span that could be regarded as reasonable. Accordingly, the applicant is entitled to treat the delay as a refusal and to seek an order of mandamus directing the grant of the licence."

19. Given that there is a duty under both the Regulations and the Directive to issue a residence Card within a defined period, where that period expires without the 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 delay as unreasonable and as justifying an application for *mandamus*. The refusal decision in this case was taken on the very day the 6 month period from the application expired. The review request was accepted as having been made on 25 June 2009 (see the letter of 2 November 2009,) so that a further full period of 6 months had elapsed without decision when the *ex parte* application for leave was made to the Court on 11th January 2010. Having regard to the requirements of the Directive that an immediate certificate of application for the Residence Card must be given (Article 10.1) and that the card should issue "no later than six months" thereafter, such a delay could not be excused as reasonable especially when all that was required was a decision as to whether the documents actually received on 16th June 2009 were considered sufficient.

20. There will therefore be an order directing the Minister to take a decision on the review request within 28 days of the perfection of the order.