THE HIGH COURT

JUDICIAL REVIEW

[2020 No. 195 JR]

BETWEEN

N.K. AND A.R.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 13th day of May, 2022

Background

1. The first named applicant is a citizen of Hungary and the EU. The second named applicant, a Pakistani national, is her husband. The first named applicant states that she entered the State in February 2012 and met the second named applicant in Cork city shortly thereafter. The applicants entered into a relationship and in November 2012 they were married.

2. The applicants maintain that, whilst in the State, they were self-employed as owners of fast-food stores. Further, the first named applicant maintains that she also worked remotely as a *"java developer"* for a Hungarian-based company in the State.

3. In 2013 the second named applicant applied for and was granted a residence card as a qualifying family member, the husband, of the first named applicant. In April 2018 the second named applicant applied for a permanent residence card. This application was refused and was unsuccessfully challenged by review as per the decision of the respondent of 14 January 2020. This application challenges that decision.

The challenged decision

4. In the following paragraphs I will set out the relevant contents of the correspondence that passed between the second named applicant's then Solicitor and the respondent that led up to the challenged decision.

5. The second named applicant applied for a permanent residence card. By letter, dated 27 March 2019, the respondent stated that he proposed to refuse the application. This letter referred to the supporting documentation furnished by the second named respondent to evidence the business activity in the State of the applicants. The letter stated that the documentary evidence had been examined and: -

> "I wish to advise with respect to the business activity [K.R.P.], that information available to the Minister from social media and flight details indicates the EU citizen [N.K.] has not resided in the State since 2017 and therefore, the EU citizen has not exercised her EU Treaty Rights in this State since at least mid 2017."

The letter concluded by inviting the second named applicant to make further representations to the respondent as to why the application should not be refused.

6. The then Solicitors for the second named applicant responded by letter, dated 15 April 2019. This letter gave certain details of the travel of the first named applicant between the State and Hungary in the period of 2017 – 2019. It was also stated that the applicants do have Facebook accounts, but they were not active members and do not regularly update their activities online. Documentation, being correspondence from the applicants' accountants, taxation documents, utility bills and bank statements, was also furnished.

7. Notwithstanding the provision of this documentation and further information, the respondent, by letter dated 24 May 2019, refused the application. This letter also stated: -

> "It should be noted that this office has recently received information, from An Garda Síochána, that the EU citizen, [N.K.], has been living and working in Hungary since

2012. This indicates that the EU citizen was not residing and in exercise of her EU Treaty Rights in this State as claimed, at the time of the application for residence in December 2012. This information further indicates that the EU citizen had in fact been living and working in Hungary since before your notification of intention to marry in this State. …"

8. This letter was responded to by the then Solicitors for the applicants on 7 June 2019. The letter stated that the first named applicant was also a java programmer and works online for a company called "B.", which is based in Budapest, Hungary. It was stated that the first named applicant worked online from her home in the State. Enclosed with the letter was a letter from "B.", dated 3 June 2019, which stated: -

"… I am writing to you about our employee, [N.K.]. She is a Java programmer and works online with us. She's not physically present in our office, working from home in Ireland, where she resides full time with her husband [A.R.].

…"

This letter was on company headed notepaper.

9. By letter, dated 25 July 2019, the respondent refused the application. The letter stated that the evidence provided by the applicants *"has failed to allay the concerns of the Minister … that the EU citizen has not resided and exercised EU Treaty Rights in this State since 2012 and that you knowingly submitted documentary evidence that was false and misleading as to a material fact"*. The letter continued: -

"I am to inform you, the Minister considers the marriage contracted between you [A.R.] and the EU citizen [N.K.], was one of convenience contracted for the purpose of obtaining a derived right of residence in the State under EU law which you otherwise would not enjoy."

The letter concluded by stating that the second named applicant could request a review of this decision. The second named applicant did request such a review.

10. By letter, of 1 August 2019, the then Solicitors for the applicants denied that they had knowingly submitted false and misleading documentary evidence, and stated: -

> "We requested that you confirm in writing exactly what documentary evidence you suggest is false and misleading. This is a very serious allegation which our clients again strongly dispute."

The letter also stated that the applicants were *"happy to invite Immigration officers to attend at their home in […], County Tipperary should they wish to do so"*.

11. By letter, dated 2 September 2019, the respondent stated that the respondent was proposing to uphold the decision to refuse the application. Again, it was stated that the documentation submitted in support of the application was false and misleading. The letter further stated: -

> "During the processing of your application, information has come to the Minister's attention that raises a number of concerns. ..."

The respondent then set out the circumstances of the applicants' marriage, the documentation concerning the applicants' business activities and also referred to, again, the information received from An Garda Síochána that the first named applicant had been living and working in Hungary since 2012.

12. By letter, dated 20 September 2019, the applicants' then Solicitors set out, again, the circumstances which led up to the applicants' marriage, the travel of the first named applicant between the State and Budapest and repeated the willingness of the applicants to attend for interviews with immigration officers. The letter further stated: -

"We are instructed that our clients have no dependent children. We are instructed that Mrs. [K.] sadly suffered a miscarriage in September 2015 when she was 6 weeks pregnant."

13. The application for a review of the respondent's earlier decision was unsuccessful. This was communicated in a letter from the respondent of 14 January 2020. The letter once again stated that, on the information available to the respondent, the first named applicant had, in fact, been living and working in Hungary since 2012. As for the documentation provided concerning the first named applicant's work in the State, the respondent stated: -

"It is considered, however, that the documentation provided in respect of this remote working arrangement is scant and insufficient."

The letter also stated that the first named applicant had no involvement in the K.R.P. and that the information furnished by the applicants in this respect was done so *"in order to make it appear that she is exercising her EU Treaty Rights in the State"*. This was based on *"information received from the Hungarian authorities and from DEASP …"*. The letter also repeated the view of the respondent that the applicants' marriage was one of convenience.

Application for judicial review

14. By Order of Court, dated 29 May 2020 (Humphreys J.), the applicants were granted leave to seek: -

"An order of *certiorari* quashing the decision of the respondent […] under Regulation 25 of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) as notified by letter of 14 January 2020 refusing the second named applicant's review of the decision refusing his permanent residence-card application and revoking his residence card."

Issues

15. The applicants have identified certain issues for this Court to consider: -

(i) Did the respondent breach constitutional justice and fail to comply with the procedural guarantees required by Article 31 of Directive 2004/38/EC and EU law in failing in her obligation to examine carefully and impartially all the relevant elements of the situation in question and in failing to take appropriate steps to verify the contents of the letter from "B.", referred to above;

(ii) Was the respondent in breach of constitutional justice in failing to give any or any adequate reasons for preferring the undisclosed information from the GNIB and/or the Hungarian authorities over the evidence presented by the applicants without giving any reason for doing so save for the assertion that *"the documentation provided in respect of the first applicant's remote working arrangement is scant and insufficient"*; and

(iii) Did the respondent act in breach of constitutional justice by relying on undisclosed and/or particularised information provided by the GNIB and/or the Hungarian authorities in reaching the impugned decision.

Submissions

16. The respondent in her submissions sought to put the application in the context of wider issues. I refer to para. 4 of the replying affidavit of Stacy Morris, Higher Executive Officer in the Investigations Unit of the EU Treaty Rights Division in the respondent's department. She states that the instant case *"demonstrates the increasingly familiar way in which many non-EEA nationals enter into marriages of convenience with nationals from eastern European countries in particular, in order to obtain a derived right of free movement and residence under EU law, with the ultimate aim to secure permanent residency. …"*.

17. In their written submissions, the respondent placed considerable emphasis on the difference between two versions of the letter from "B." (referred to at para. 8 above). Reference was also made to flight details of the first named applicant's travel between Dublin and

Budapest in 2013 coinciding with both applicants being able to attend together at Kilkenny Garda Station where the second named applicant's passport was endorsed with Stamp 4 EUFam permission, valid until 11 June 2018. The respondent also relied on the decision of Burns J. in *V. S. v. Minister for Justice* [2021] IEHC 63 in answer to the applicants' submission that they were entitled to details of the information which the respondent had concerning the first named applicant from An Garda Síochána and Hungarian authorities. The respondent also rejected the submission that there was a failure to give reasons for the decision or that there was any breach of Articles 47 and 48 of the Charter for Fundamental Rights of the European Union or Article 31 of Directive 2004/38/EC.

18. In their submissions, the applicants concentrated on the fact that they were furnished with no detail of the said information available to the respondent and that, without giving reason, the truth of that information was preferred over the contents of the letter from "B.", referred to above.

Consideration of issues

19. It should be said that neither of the different versions of the letter from "B.", nor the first named applicant's flights in 2013, featured in the impugned decision. In a replying affidavit the first named applicant referred to the fact that she had suffered a miscarriage in January 2015 and that the exhibited medical records relating to her treatment during pregnancy named the second named applicant as next of kin. Surprisingly, these medical notes were not furnished to the respondent to rebut the claim that theirs was a marriage of convenience.

20. The matters set out in the last paragraph are clearly relevant evidence. However, this evidence appears only to have emerged in the course of these judicial review proceedings and were not before the respondent when the impugned decision was being made. To my mind, this is unsatisfactory.

21. The central submission of the applicants is that the respondent took no steps to verify the letter from "B.", referred to unspecified information from An Garda Síochána and Hungarian authorities and failed to give reasons for this. Both parties referred to the decision of Burns J. (Tara) in *V. S. v. Minister for Justice* [2021] IEHC 63. The facts of this case bear a remarkable similarity to the facts of the instant case. In *V. S.* the applicant was an Indian national married to a Hungarian national and applied for a residence card on the basis of his marriage to an EU national. This application was refused as the respondent had available: -

> "… Information was furnished by the Hungarian authorities to the State which indicated that the Applicant's wife is recorded as residing in Hungary since 2012 and has been working and receiving State benefits there. She has a child, which is accepted not to be the Applicant's, and is registered as a single mother with the Hungarian Authorities." (para. 5).

22. In *V.S.* the applicant submitted that he was not furnished details of the information provided by the Hungarian authorities to the respondent who was thus in breach of natural and constitutional justice and the principle of *audi alteram partem*. In giving judgment Burns J. considered the extent of the duty on the respondent to give details of the information. At para. 22 she stated: -

> "The principle of *audi alteram partem* requires that a person in respect of whom a decision is to be made be given an opportunity to make his case about any relevant matter. If such a person is unaware of a relevant issue, then he should be made so aware, so that he can make submissions thereon. Providing information to such a person does not require that the underlying documentation be provided unless that, in itself, is of relevance. In the instant case, the information which the Minister was in receipt of, which was of relevance to the Applicant, was made known to him. He was given an opportunity to make representations regarding the information which he did

extensively. It transpired that the only portion of the information which the Applicant controverted was with respect to AN having 'children' rather than 'a child' which he was not the father of. The remainder of the information was accepted by AN to be the case, although it was asserted that there were reasons why this information was erroneously recorded, the fault for which lay with AN and her mother."

23. In my view, the instant case can be distinguished from *V.S. v. The Minister for Justice* in two respects. Firstly, the information from Hungary was more detailed in that it stated that the EU citizen had children in Hungary and that she was claiming state benefits there. Secondly, unlike the instant case, the Minister does not appear to have been furnished with a letter from the employer of the EU citizen to the effect that she was working remotely in Ireland and, thus, exercising her Treaty Rights.

24. In the instant case, it may be that the respondent had no further detail on the information from An Garda Síochána and the Hungarian authorities than that stated in her letter. However, the respondent did have a letter purportedly from the first named applicant's employer. To reach the decision the respondent had to weigh one piece of information against the other. This would have involved taking some steps to verify the authenticity of the said letter. Apparently, no such step was taken.

25. The second submission of the applicants is that the respondent failed to give reasons for the decision. There are a number of authorities on the duty, and the extent of that duty, to give reasons. See *Connolly v. An Bord Pleanála* [2018] IESC 31 where Clarke C.J. stated at para. 6.15: -

"… it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to

individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

In this case, the reason given by the respondent was: -

"… It is considered, however, that the documentation provided in respect of this remote working arrangement is scant and insufficient."

26. Without carrying out a basic step of attempting to verify the authenticity of this letter, I do not see how the respondent could validly give such a reason. This is all the more so as the respondent was clearly in contact with Hungarian authorities. I am not suggesting that it was incumbent on the respondent to initiate a Garda-style inquiry. All that was required was a few basic queries.

27. In conclusion, on this submission, I find that the respondent failed in her duty to give reasons as, without basic inquiries, she was not in a position to do so.

28. Finally, I do not accept the applicants' submissions that the respondent was in breach of either Articles 47 and 48 of the Charter of Fundamental Rights of the European Union or Article 31 of Directive 2004/38/EC. These provisions are directed towards ensuring that persons, such as the applicants, have access to redress procedures, such as judicial review. These are judicial review proceedings which, for the reasons stated above, the applicants have been successful.

Conclusion

29. By reason of the foregoing, I will grant the applicants an order in terms of para. d (i) of the Statement of Grounds and remit the matter to the Minister for reconsideration by a different official.

30. I will adjourn this matter for mention to the 27th day of May 2022. Any submissions, either on the orders to be made or costs, should be in writing and filed not later than seven days prior to the aforesaid date.