THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 402 J.R.]

BETWEEN

MENSHAWY ABOUHEIKAL

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2019

1. The applicant is a national of Egypt, born in 1981, who has resided in the State since 2007. He was present without lawful permission between 2007 and 2013. He began a relationship with a Ms. K.S. who is a national of Lithuania born in 1986, and who he claims to have been residing in Ireland since 2005, although this does not seem to have been demonstrated in any documentary or satisfactory manner. The couple had what are described in the papers as two miscarriages, but what in fact seem to be stillbirths, one on 22nd February, 2011 and one on 29th April, 2012. On 16th May, 2012, the applicant married Ms. S. Her marital status on the marriage certificate was "divorced". As appears from the chronology I have just referred to, the second stillbirth was just a matter of weeks before the marriage.

2. On or about 20th June, 2013 the applicant was granted a residence card as a family member of his spouse, pursuant to Council directive 2004/38/EC. Information available to the Minister indicated that the EU citizen ceased exercising the EU Treaty rights in 2013, when she worked for 26 weeks, and that she was in receipt of State benefits since 26th May, 2014. She obtained supplementary welfare allowance, job-seekers allowance and rent supplement. No payment was made under the heading of illness benefit. She was not working in 2014 or 2015 and had only eight weeks of recorded employment in 2016.

3. In or around June, 2014, the couple separated. The applicant was allegedly stabbed at one point by his wife, and counsel for the applicant indicates that some question of her capacity or mental health arose. The applicant did not inform the respondent of the separation, contrary to reg. 11(2) of the European Communities (Free Movement of Persons) Regulations 2015. The applicant has been self-employed in the State and says he has continued to provide financial support to his wife after the separation. No divorce proceedings were instituted. As of 23rd February, 2016, the wife was cohabiting with a Mr. R.K., according to records in the Department of Social Protection.

4. The applicant travelled outside the State for a period to Abu Dhabi and was questioned on re-entry on 10th July, 2017, in the course of which he acknowledged to the Minister for the first time that he had separated. By letter dated 14th July, 2017 the Minister wrote to the applicant seeking a schedule of documents relating to the continued exercise of EU Treaty rights in his case. These were not provided. On 25th July, 2017 the applicant's solicitors wrote to the Minister stating that while the applicant was in communication with his wife, she would not facilitate him with documentation. The Minister wrote on 28th July, 2017 indicating that the required documents had not been furnished. On 12th October, 2017 the Minister proposed to revoke the residence card on the basis that the wife was no longer exercising her EU Treaty rights. Fifteen days were allowed for submissions, which were made on 2nd November, 2017. On 15th January, 2018 the residence card was revoked.

5. On 14th February, 2018 the applicant applied for a review of that decision. The review decision was issued on 11th April, 2018 and upheld the original revocation. The dates of the wife's benefit claims are somewhat finessed in the review decision as against the original proposal. A proposal to deport the applicant was made on 11th April, 2018.

6. In previous proceedings, *Menshawy Abouheikal v. Minister for Justice and Equality* [2018 No. 269 J.R.] the applicant sought *inter alia* an order of *mandamus* compelling the Minister to issue him with a permission to reside in the State pending the determination of his application for a review. I granted leave on 9th April, 2018 but those proceedings were overtaken by the review decision on 11th April, 2018, and the first judicial review was struck out as moot with no order as to costs.

7. I granted leave in the present proceedings on 17th May, 2018, and on 21st January, 2019 allowed an amendment to the statement of grounds to reflect the correct social welfare benefits which were being claimed by the wife. I have received helpful submissions from Mr. Ian Whelan B.L. for the applicant and from Ms. Emily Farrell B.L. for the respondent.

The right to reside of EU nationals

8. The case contains the implementation of directive 2004/38/EC and the European Communities (Free Movement of Persons) Regulations 2015. Any rights of the applicant as a separated spouse are derivative on those of his estranged wife. Directive 2004/38/EC provides certain conditions for rights of residence in excess of three months including that the EU citizen is a worker or self-employed or a student or alternatively that they "*have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence*" (art. 7(1)(b) and "*have comprehensive sickness insurance cover in the host Member State"* (art. 7(1)(c)). A person moving for the sole purpose of claiming benefits does not have the right to reside (see Case C-333/13 *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig* (11th November, 2014)). A member state may impose a right to reside condition on eligibility for social welfare benefits (see Case C-140/12 *Pensionsversicherungsanstalt v. Peter Brey* (19th September, 2013)). A person genuinely seeking work after the end of the employment relationship may be a worker (see Case C-379/11 *Caves Krier Frères Sàrl v. Directeur de l'Administration de l'emploi* (13th December, 2012)), although such a person is not necessarily entitled to social assistance beyond a limited period (see Case C-67/14 *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others* (15th September, 2015)). A person may retain their status as a worker if unable to work due to illness (see art. 7(3)(a) of the directive).

9. The relevant provisions of the directive are given effect to in the 2015 regulations, in particular reg. 6(3)(a) which provides that an EU citizen "*to whom [the relevant regulations apply] may reside in the State for a period that is longer than 3 months if he or she (i) is in employment or in self-employment in the State, or (ii) has sufficient resources for himself or herself and his or her family members not to become an unreasonable burden on the social assistance system of the State, and has comprehensive sickness*

insurance in respect of himself or herself and his or her family members", as well as other conditions that do not apply here. Paragraph (c) provides that: "*Where a person to whom subparagraph (a)(i) applies ceases to be in the employment or self-employment concerned, that subparagraph shall be deemed to continue to apply to him or her, where -…(ii) he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social Protection, (iii) subject to subparagraph (d), he or she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year, or after having become involuntarily unemployed during the first year, and has registered as a job-seeker with a relevant office of the Department of Social Protection …*". Sub-paragraph (d) provides that: "*In a case to which subparagraph (c)(iii) applies, subparagraph (a)(i) shall be deemed to apply to the person concerned for 6 months after the cessation of the employment concerned only, unless the person enters into employment or self-employment within that period.*"

Ground 1 - lack of reasons
10. Ground 1 of the statement of grounds alleges that "*the Respondent erred in fact and in law, acted unreasonably and irrationally, acted disproportionately and breached the principles of fair procedures and natural and constitutional justice and EU law in failing to provide reasons for the decision arrived at. In particular the Respondent failed to provide any lawful reason for the finding that the Applicant had failed to demonstrate the fact that his EU citizen spouse had resided in the State in exercise of her rights of free movement pursuant to EU law in circumstances where she is in receipt of jobseekers allowance/ unemployment benefit … and is thus unavailable for employment and in circumstances where her ability to reside in the State with sufficient resources to so do is facilitated by payments made to her by the Applicant.*"

11. Insofar as the allegation of a lack of reasons is concerned, the punchline of the covering minute for the impugned decision is that "*no further evidence has been submitted to indicate that the EU citizen is exercising her EU Treaty rights in the State*" (Minute of 11th April, 2018). The recommendation submission provides considerably more detail, noting that the EU citizen was not employed, apart from a brief period since 2013, and noted that "*the Minister was of the opinion that the EU citizen was no longer residing in the State in exercise of her EU Treaty rights*". The decision noted the onus on the applicant and the applicant's failure to provide documentation. Thus, the decision here involves two reasons:

(i). a rejection due to the applicant's failure to provide documents, both in relation to himself and also from his spouse; and

(ii). the decision contains a positive statement that the Minister's view is that the wife is not exercising EU Treaty rights.

12. I do not therefore accept that there is a lack of reasons. Reasons are stated. They may be valid or not, but that arises under ground 2.

Ground 2- irrationality or unlawfulness
13. Ground 2 pleads that "*the respondent erred in fact and in law, acted unreasonably and irrationally, acted disproportionately and breached the principles of fair procedures and national and constitutional justice and EU law in determining that the EU citizen had not resided in the State in exercise of her rights of free movement. This finding was not open to the respondent to reach on the facts of the case as presented and in particular where the applicant spouse is in receipt of job seekers allowance/unemployment benefit and has not at any time been faced with any proceedings to remove her from the State. The respondent was charged with the assessment of the lawfulness of the applicant's residence in the State the finding that the applicant was unlawfully resident in the State is one which is not open to the respondent to arrive at on the basis of the case before him and is entirely inconsistent with the respondent's positon as regards the applicant's spouse's position in the State where no steps have been taken to remove the applicant's spouse from the State and where she is in receipt of jobseeker's allowance/unemployment benefit which would not be payable to her in the event that she was not lawfully resident in the State and the decision is invalid.*"

14. While the ground is phrased in general terms, a fair reading of it in the light of the submissions made is that only three specific illegalities are identified, namely:

(i). failure to remove the wife from the State,

(ii). inconsistency with the Department of Social Protection having granted the wife benefits and

(iii). failure to make a positive determination as to what the wife's actual status is.

Minister's failure to remove the wife from the State
15. As far as the issue of there being no steps having been taken to remove the wife from the State, that does not render her situation one of exercising EU Treaty rights if she is not otherwise exercising them. I would therefore uphold the point made in para. 13 of the statement of opposition that the fact that the Minister has not made a proposal to remove the wife is not evidence that she is exercising EU Treaty rights.

Alleged inconsistency with the Department of Social Protection approach
16. As far as receiving benefits is concerned, to obtain social welfare benefits one has to be habitually resident in the State (see s. 141(9) of the Social Welfare Consolidation Act 2005 regarding jobseeker's allowance). To be habitually resident, one has to be lawfully resident (see s. 246(1) and (5)). Similar conditions apply to other benefits. It is clear from the review decision that the wife wasn't claiming social welfare benefits as of the date of that decision. The applicant certainly has not proved otherwise. An application of the conditions in reg. 6(3) of the 2015 regulations to the facts as found by the Minister shows that the wife does not qualify for social welfare benefits. Insofar as the material before the Minister was concerned, she was not in employment for one year and did not re-enter employment within six months of the end of the previous employment. The logic of that is that she ceased to exercise her EU Treaty rights six months from the end of the initial period of employment. The exact date she ended work in 2013 is not stated, but the loss of rights would have been mid-2014 at the latest. She entered into employment again in 2016. That restarted the clock, so she would have ceased to exercise such rights again by mid-2017 at the latest. The proposal to revoke was not issued until October, 2017.

17. Turning to the social welfare aspect, it is accepted that it would appear as a corollary of the Minister's positon as to the wife's entitlements here, that the Department of Social Protection was making payments to which the wife was not entitled. One wonders if there is any way to avoid such situations in future, either by greater consultation with the Department of Justice and Equality or perhaps preferably by the Department of Social Protection more systematically and correctly applying the requirements of the 2015

regulations.

Failure to specify the exact status of the wife
18. It was argued that the Minister did not make a finding as to the exact legal status of the wife, so he could not lawfully make a finding in respect of the derived right. However, I would uphold the Minister's position that he is not obliged to articulate a concluded view of her status. His position is that he is not aware of lawful status but there may be other factors he is not aware of, nor is he obliged to seek to remove her even if she is there unlawfully. The Minister's broad discretion in immigration terms means he is allowed to tolerate ambiguous situations if he is so minded.

19. Mr. Whelan suggested that I should make a reference to the Court of Justice of the EU on the question of whether the principle of effectiveness would impose a requirement on the Minister to make a finding on the EU spouse's status in the absence of a system of registration as envisaged by art. 8 of the directive, before terminating the derived right of a non-EU national. Given the discretionary nature of the art. 8 system and the fact that the State is entitled either to put in place such a system or not to do so, there seems to be minimal basis for any suggestion that there could therefore be an EU law obligation to make a positive finding as to the wife's status, which is not something envisaged by the directive. In any event, as Ms. Farrell pointed out under this heading, a registration system, even if it existed, would only be evidence of the state of affairs as of the date on which the registration occurred and would not be decisive or necessarily even helpful in answering a question of the kind that has occurred here, namely whether the EU citizen was still exercising EU Treaty rights on the basis of different facts at a remote period in time subsequent to commencing their presence in the State.

Minister's alleged lack of entitlement to require the applicant to seek documents from an estranged spouse
20. A further point was made that was not pleaded, namely a lack of entitlement on the part of the Minister to require the applicant to obtain documents from an estranged spouse. I will deal with that for completeness, albeit that as it was not properly pleaded the applicant cannot succeed on that point anyway.

21. On these facts, the applicant has not demonstrated a great deal in way of effort to provide such documentation, albeit that he did very recently write to the wife in that regard. If he had provided more than the rather sketchy information he has done, and shown more tangible efforts, he might have standing to make this point even if he had pleaded it. The Minister is entitled to decide the application on the basis of the material before him (see by analogy *A.M.Y. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 306 (Unreported, Hedigan J., 9th October, 2008)). Insofar as the Minister wrote requesting documents from the applicant, he did not even provide those relating to himself. Much important documentation was not exhibited, for example the marriage certificate. Likewise, failure by the Minister to disclose relevant information within the power, possession or procurement of the Minister is not specifically pleaded in the statement of grounds. At the same time, there may be an element of difficulty in obtaining information from a spouse post-relationship breakdown, but that issue can best be left to a case where it properly arises. However, there is nothing to suggest that such documents would have made a fundamental difference on the facts of this particular case because the social welfare information clearly indicated that the wife was not currently exercising EU Treaty rights. For good measure, reg. 16 of the 2015 regulations entitles the Minister to require a person to provide evidence that the person satisfies the requirements of these regulations. That power is not confined to requiring such evidence from an EU national.

Conclusion and order
22. The impugned decision, as with any administrative decision in normal circumstances, attracts a presumption of validity: see Mark de Blacam, *Judicial Review, 3rd ed.* (Dublin, 2017) p. 113, referring to *In Re Comhaltas Ceoltoirí Éireann* (Unreported, High Court, Finlay P., 5th December, 1977), *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 and *The State (Divito) v. Arklow Urban District Council* [1986] I.L.R.M. 123. While the applicant's evidence supports the view that there was reality to the marital relationship, and that the couple suffered two stillbirths, and while the evidence also indicates some inconsistency between the approach of the Department of Justice and Equality and the Department of Social Protection, with the latter as a matter of probability failing to properly apply the 2015 regulations, nonetheless the law is clear that there are conditions for exercising EU Treaty rights which the applicant has not demonstrated are complied with here, so the decision has therefore not been shown to be unlawful.

23. Consequently, and albeit without much enthusiasm, I will dismiss the application.