

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 85

RECORD NUMBER: 2019/249JR

BETWEEN:

AA

APPLICANT

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

Judgment of Ms Justice Tara Burns delivered on 1st February, 2021.

General

1. The Applicant is a national of Pakistan who entered the State in January 2005 on a student visa which remained valid, on renewal, until 17 January 2012. On 11 October 2010, he married a Hungarian national (hereinafter referred to as "JB"). He applied to the Respondent for a residence card as the spouse of an EU national exercising her EU Treaty Rights. On 18 December 2012, this application was deemed successful and a residence card issued.
2. On 22 June 2016, the Applicant issued divorce proceedings against JB. On 11 October 2016, he applied to the Respondent for retention of his residence card.
3. On 26 September 2017, the Respondent notified the Applicant that she was proposing to refuse the application for retention of the residence card on the basis of information available to her, as she was not satisfied that the EU citizen was exercising her Treaty rights through employment/self-employment, the pursuit of a course of study, involuntary unemployment or the possession of sufficient resources in accordance with Regulation 6(3), at the time of the initiation of the divorce proceedings. The Applicant's solicitor responded by letter dated 12 October 2017 indicating that JB was employed by Kiwisun Ltd when the divorce proceedings were initiated and that she was recorded as a director and company secretary of this company. The Applicant's solicitor suggested that this information be checked against the records of employment held by the State.
4. On 22 December 2017, the Respondent refused the Applicant's retention application on the basis of his failure to submit up to date evidence of JB's activities in the State at the time of the divorce proceedings were instituted. The letter stated:-

"[I]t is noted that you have not submitted any evidence of the Union citizen's activity in the State at that time. In addition, information available to the Minister indicates that the EU citizen was not exercising their rights through employment, self-employment, the pursuit of a course of study, involuntary unemployment or the possession of sufficient resources in accordance with Regulation 6(3) of the Regulations between 2014 and 2017.

On the basis of the information available the Minister is satisfied that as the Union citizen was not residing in the State in conformity with the Regulations at the time

of initiation of divorce proceedings, you do not qualify for retention of residence card under Regulation 10(2) of the Regulations.”

5. The Applicant’s solicitor requested a review of this decision on 10 January 2018 and enclosed additional documentation including a letter from the EU citizen confirming she was employed in the State in 2016, pay slips for 2016 and P60s for 2016 and 2017. The Applicant’s solicitor requested that the information referred to by the Respondent be provided to him.
6. On 1 November 2018, the Respondent notified the Applicant that she was proposing to refuse his review application. Difficulties which arose in relation to the documentation submitted by the Applicant’s solicitor when submitting the application for review were referred to. The letter also set out:-

“Furthermore, information available to the Minister indicates that no returns were made to Revenue for [JB] for 2016. Checks made in relation to the company where she was supposedly employed show that she was not one of the four employees registered with the company during that tax year. The claim that she was employed there at that time is further undermined by the fact that she does appear in their records for work undertaken in 2017. Given the evidence to the contrary, it is not reasonable to believe that [JB] was employed at Kiwisun Ireland Limited during the years 2015 and 2016 as you have claimed. The discrepancies outlined and the absence of any returns made to Revenue show on the balance of probability the information provided by you is an attempt to mislead the Minister to an end which benefits your immigration status in the State. By this same reasoning it is probable that the documents you have provided to evidence the employment of [JB] (P60 certificates and pay slips) are fraudulent and therefore false and misleading as to a material fact

7. The Applicant’s solicitor responded on 21 November 2018 setting out various representations to the Respondent. It was also stated:-

“We are concerned that information available to your office indicates that the EU citizen was not exercising her EU Treaty Rights in the State between 2014 and 2017 given that the EU citizen has instructed this office that she was in fact employed in the State during this period of time and has provided evidence in relation to same, which we have already submitted to your office.

We therefore request that you provide this office with the information/documentation you refer to as we believe that it has had a negative effect on our client’s application for retention of his right of residence in the State.”

8. The Respondent refused the review of the refusal of retention of the Applicant’s residence card on 28 January 2019. The decision stated:-

"You were granted permission to remain under EU Treaty Rights on the basis of your marriage to Hungarian national JB on 18/12/2012 for a period of 5 years. On 13/10/2016 an application for Retention of this permission in your own right was received on the basis that divorce proceedings had initiated on 22/06/2016 in accordance with Regulation 10(2) of the Regulations. This retention application was refused on 20/12/2017 as you failed to submit evidence that the EU citizen was exercising her EU Treaty Rights in the State at the time of initiation of divorce proceedings. Evidence available to the Minister showed that the EU citizen had not exercised her EU Treaty Rights between 2014 and 2017.

On 12/01/2018 you requested a review of the decision to refuse you retention of PTR in your own right. The reason given for initiating this request for a review was founded on your belief the Minister had erred in fact when considering your application. You contended that the EU citizen was at all times employed in the State between 2014 and 2017 contrary to the Ministers finding of 18/12/2012. In support of this claim you submitted P60 certificates for 2016 and 2017 relating to the EU citizen, along with pay slips dated between 12/06/2016 and 26/06/2016, which bookended the given date on initiation of divorce proceedings.

During processing of your review request several concerns came to the attention of the Minister. On re-examining the provided evidence in conjunction with information that was made available to the Minister it was found that the marriage between you and the EU citizen may have been out of convenience and the documentation submitted to evidence the employment of the EU citizen may have been false and misleading as to a material fact. These concerns were put to you in the form of Intention to Refuse letter which afforded 21 days within which to make representations which would allay the concerns of the Minister as outlined.

The first concern which was raised were discrepancies surrounding the pay slips and P60 certificates relating to the EU citizen's stated employment. It was noted that the EU citizen is shown to have worked 53 insurable weeks in 2016. Should the income indicated on the provided P60 for that year be accurate, the EU citizen's average weekly income would equate to approximately €75.00. An issue arises in that this sum is not reflected in the provided pay slips, which show a weekly income of €166.03 which is the equivalent of 19 hours on the national minimum wage at the time of €9.15. There is a clear discrepancy in the documentation but despite this being put to you, you have not offered any explanation for the anomaly despite making submissions in response to the Ministers Intention to Refuse letter which were received by this office on 22/11/2018.

Information available to the Minister indicates that the EU citizen made no tax returns for 2016, furthermore, she was not recorded as one of the four employees of the company which were listed on official records. The EU citizen was however recorded as an employee in 2017. This anomaly raises the question of whether she was present and actually working in 2016. As such it was put to you that the

documents submitted were possibly false and misleading as to a material fact. In response to this concern you maintained that she was employed there at that time and the documentation provided serves to prove this contention. If this was indeed the case Revenue would have a record of that employment and there would be no discrepancies surrounding the documentation. As you have sought to rely on the provided documents without offering an explanation to issues outlined, you did not allay the Ministers concerns surrounding the employment of the EU citizen, and by extension her exercise of EU Treaty rights during the time of your marriage and subsequent divorce.

It was further put to you that there was concerns surrounding the bone fides of the relationship between you and the EU citizen. It was noted that, from inception your relationship was of a very accelerated nature which was not typical of a genuine relationship. It was noted that you could only possibly have known the EU citizen for five or six months prior to your engagement. This pattern of relationship development is more akin to the typical marriage of convenience, than it is to the typical trajectory of a genuine relationship. It was also noted that the EU citizen now has a child with another man, who is also involved with the business at which the EU citizen supposedly worked. This individual was also a witness at your wedding ceremony and is the same nationality as the EU citizen. Further, they are registered as living together on documentation from the Companies Registers Office which you submitted for consideration. Given that the EU citizen and this individual are the same nationality, have a child together, have been living together since at least 2014 in conjunction with the fact that you did not inform the Minister of the breakup of your relationship until December of 2016, the Minister has concerns that the relationship between you and the EU citizen was contrived for the purposes of manufacturing an immigration benefit on your behalf.

You have stated that the marriage between you and the EU citizen broke down in February of 2013 just two months after you were granted permission to remain in the State for 5 years. This material change in circumstances was not notified to the Minister despite the onus being on you to update this office of such developments. It was stated in you correspondence of 22/11/2018 that you believed that the personal circumstances of the EU citizen after the divorce should not influence the prospects of success for your application, however given that the divorce proceedings were not initiated until 2016, and the fact that [JB] and her current partner have been known to each other since before your marriage, it seems likely on the balance of probability that your marriage was contrived to mislead the Minister for the purposes of an immigration advantage, and was never genuine in nature. You have not allayed the Ministers concerns in relation to your marriage being one of convenience.

Having considered all available evidence, the original decision to refuse your retention of your Permission to remain in your own right was correct as the EU citizen was not employed at the time. Furthermore, after considering all testimony,

submissions and documentation submitted by you and your legal representatives in support of your application, it has been decided that the decision should be amended to include a refusal in accordance with Regulation 27 and 28 of the Regulations as well as Article 35 of the Directive. Please note that this decision invalidates your original permission which was granted on 18/12/2012.

Having considered your appeal and the documents on file, the decision to refuse your EU1 – Residence Card application is confirmed and amended to include a refusal in accordance with Regulations 27 and 28 of the Regulations as well as Article 35 of the Directive.”

9. Leave to apply by way of Judicial Review for an order of Certiorari of the review decision of the Respondent was granted by the High Court on a number of grounds. However, in the hearing before the Court, the sole ground which was relied upon by the Applicant was the claim that there had been a breach of fair procedures in so far as the Respondent relied on evidence available to her, without disclosing the totality of the evidence, such that the Applicant was deprived of the ability to address that evidence.
10. An affidavit sworn on behalf of the Respondent revealed that information regarding JB had been obtained from the Department of Employment Affairs and Social Protection and the Revenue Commissioners. Discovery was sought of this documentation. Without the necessity of a Court Order, this material was discovered to the Applicant. The information contained in that documentation had already been disclosed to the Applicant in the Respondent’s letter of 1 November 2018. Nothing has arisen in relation to the material discovered which has resulted in the Applicant taking issue with anything stated therein or indicating that there were submissions of substance which he could have made which he was deprived of the opportunity of making.
11. The Applicant argues that the principle of *audi alteram partem* requires that the actual documentation be provided to him rather than the information contained therein. It is further argued that as discovery of the documentation was made to the Applicant, without the necessity of a court order, there was nothing preventing the Respondent producing the documentation to the Applicant prior to the impugned decision being taken.
12. The Respondent accepts that the information it relied on was required to be provided to the Applicant, which was done in this case. However, she argues that the principle of *audi alteram partem* does not require that the actual documentation be provided.
13. In a recent decision of this Court, *Singh v. Minister for Justice* (Unreported, High Court, Burns J. 28th January 2021), where a similar argument was made, I stated at paragraph 22 of my judgment:-

“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.”

14. The information comprised in the documents was provided to the Applicant as far back as 1 November 2018; the Applicant was given every opportunity to address the issues concerned. Through the process of discovery, the Applicant has now had discovered to him the documents underlying that information. As it transpired, these documents had also been provided under a Freedom of Information Request made to the Respondent. It has thereby been confirmed that all of the relevant information was disclosed to the Applicant so that he could make his submissions on it at the relevant time. Nothing additional is included in the underlying documentation which is of relevance. There was no obligation on the Respondent to disclose the underlying documents prior to the decision being taken once all relevant information had been provided to the Applicant, which clearly occurred in this case. There has not been any breach of the *audi alteram partem* principle by the Respondent in this case.
15. I therefore refuse the Applicant the relief sought and make an order for the Respondent’s costs, to include the costs of the discovery motion which were ordered to be costs in the cause, as against the Applicant to be adjudicated upon in default of agreement.