THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2019] IECA 294

Record No. 2017/538

Whelan J.
McGovern J.
Donnelly J.

BETWEEN/

KELECHI CHRISTIAN UKA

APPELLANT

- AND–

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND, ATTORNEY GENERAL AND THE MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr. Justice McGovern delivered on the 28th day of November, 2019

1. This is an appeal from an order of Keane J. made on 13 October 2017 following delivery of a written judgment, *Uka v Minister for Justice and Equality & ors* [2017] IEHC 590, in which he ruled that the proceedings against the fourth named respondent be struck out and he dismissed the appellant's application for an order of certiorari quashing the decision of the first named respondent dated 22 January 2016 refusing the appellant a right to permanent residence in this State under Directive 2004/38/EC On the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, O.J. L158/77 30.4.2004 ("the Citizens Directive").

Background

2. The appellant is a Nigerian national who accepts that he entered the State unlawfully in February 2003. In July 2004 he applied unsuccessfully for asylum.

3. On 9 March 2005 the appellant married a citizen of the European Union (a Polish national) who was then working and residing in the State having taken up employment here on 21 August 2004. The appellant stated on affidavit that he began residing with the Union citizen on 24 July 2004 although he gave other dates on various occasions.

4. On 19 January 2006 the first named respondent granted the appellant permission to reside in the State for five years as the spouse of a Union citizen exercising E.U. Treaty Rights under Article 10 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community, OJ L257/2, 19.10.1968. On 29 July 2009 the Union citizen spouse left the State.

5. On 6 January 2011 the appellant's solicitors wrote to the E.U. Treaty Rights Section of the Department of Justice and Law Reform (first respondent) stating that the appellant and his spouse had consistently exercised their E.U. Treaty Rights in the State on foot of the existing permission granted to him. The letter also stated:-

> "They have both become involuntarily unemployed as per attached P45 dated 18 August 2010. We are instructed that our client's spouse has temporarily travelled to her home country, Poland, due to the current economic situation."

The letter requested a renewal of the appellant's permission. The attached P45 form only related to the appellant. By letter of 7 February 2011 the first named respondent replied and the appellant was informed that it had come to the attention of the first named respondent that his Union citizen spouse had left the State and accordingly it was proposed to revoke the appellant's permission to remain. He was informed that he could make representations as to why his permission should not be revoked.

6. The appellant made representations through his solicitors on 2 March 2011 and also submitted a letter himself on 25 March 2011 in which he made further representations. On 17 October 2011 the appellant was informed that there was no basis for further permission being granted to him to remain as his Union citizen spouse had departed the State in July 2009 and under E.U. law he had no legal immigration status in the State. A notification under the provisions of s.3(4) of the Immigration Act 1999 (proposal to deport) was enclosed.

7. On 7 November 2011 solicitors acting on behalf of the appellant submitted representations pursuant to s.3 of the Immigration Act 1999 and/or Regulation 20 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656/2006), as amended, ("the 2006 Regulations") as to why the appellant should not be removed from the State. The representations included the information that the Union citizen spouse had left the State in July 2009. It was also stated that the marriage between the appellant and the Union citizen had broken down although they were not yet divorced.

8. By letter dated 22 May 2014 the first respondent replied stating that the appellant's application was refused on 17 October 2011 on the grounds that the Union citizen spouse had left the State in 2009. The appellant was informed that a review of that decision would not be accepted since a period of two years and six months had passed since the decision was made. He was told that if he wished to make a further application for retention of rights he could do so by submitting a form EU5.

9. Meanwhile the appellant was granted leave to remain on a Stamp 4 basis for three years until 13 June 2017. The appellant claims to be the father of a child born in the State on 11 January 2012 arising from a different relationship.

10. On 19 October 2015 the appellant made an application for permanent residence under Article 16 of the Citizens Directive and submitted a form EU5 "Application for Retention of a Residence Card". This is a form to be completed by non-EEA nationals applying to retain a residence card, under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) ("the 2015 Regulations"), after the divorce or annulment of a marriage to a Union citizen, the death of the Union citizen or the departure of the Union citizen from the State. In his application the appellant claimed that

his wife had continued to exercise E.U. Treaty Rights in the State since 24 July 2004. In the form EU5 he stated that he was applying for retention of residence rights in circumstances where his Union citizen spouse had departed the State on 29 July 2009 although he noted that she "promised to come back after our son school (sic) certificate examination". It seems that the reference to "our son" may be to his step-child. There was no evidence that the Union citizen spouse had actually come back to the State after her departure on 29 July 2009.

11. On 22 January 2016 the appellant was informed that his application for a retention of the residence card submitted on form EU5 could not be accepted on the ground, inter alia, that his Union citizen spouse had left the State in July 2009. That decision has been challenged in these proceedings.

12. Although the appellant had stated at para. 9 of the affidavit grounding the application for judicial review that the separated Union citizen spouse "continued to reside and exercise her E.U. Treaty rights in Ireland as at 2012", he subsequently conceded that his Union citizen spouse did not come back to the State in 2012.

Some inconsistencies in the evidence

13. The appellant has given various dates on which his Union citizen spouse returned to Poland and left the jurisdiction. In a letter of 19 October 2015 making an application for permanent residence under Article 16 of the Citizens Directive he claimed that his Union citizen spouse had "…moved to Poland in July 2009". In the form EU5 he was more specific and stated the date of departure of his Union citizen spouse as being 29 July 2009. In para. 9 of his affidavit sworn on 4 April 2016 in support of his judicial review application he said that she moved back to Poland on 7 July 2009. In a letter dated 23 February 2011 he stated his wife returned to Poland in August 2009.

14. In his grounding affidavit he stated at para. 3 that he came into Ireland in February 2003 and sought asylum in July 2004. In a handwritten letter to the first named respondent on 23 February 2011 he states that he came to the State in July 2004 but in the questionnaire for the purpose of application for refugee status he stated he left Nigeria on 8 July 2004. As will appear later in this judgment the actual dates of certain events have a significance in the context of the appellant's entitlement to permanent residence in the State under Article 16(2) of the Citizens Directive.

Applicable legal principles

15. The starting point in the court's consideration of this application has to be the Citizens Directive which was transposed into Irish law by the 2006 Regulations. The purpose of the Directive was to facilitate the free movement and residence of E.U. nationals - and qualifying family members who accompanied or joined them - who move to another Member State for the purpose of exercising a qualifying economic activity protected by E.U. law and in particular by Article 7 of the Directive.

16. Recital (17) of the Directive states:-

> "Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should thereby be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure".

17. Rights of residence for certain categories of family members of a Union citizen who are third country nationals are conferred in some circumstances by the Citizens Directive where the family member concerned joins or accompanies the Union citizen who must at all relevant times be exercising one of the activities specified in Article 7(1) of the Directive. Article 7(1) provides:-

> "All Union citizens shall have the right of residence on the territory of another Member State for a period longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or
> (b) 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 the period of residence and have comprehensive sickness insurance cover in the host Member State; or
> (c) - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
> - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, 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; or
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

18. Article 7(2) provides:-

> "The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c)."

19. Family members of the Union citizen derive their right to enter and reside from the Union citizen. Such rights are intended to promote the fundamental right of integration in the host Member State enjoyed by the Union citizen who is exercising activities under the

Directive so that no disadvantage will accrue to the Union citizen by virtue of the exercise of the right of free movement and residence in the first place. This is not the same as the right of a Union citizen recognised by the Treaties and the implementing measures provided for by the Directive to facilitate the exercise of the right of free movement. The purpose of the Citizens Directive is to benefit Union citizens and not third country nationals. Its purpose is to ensure that Union citizens can lead a normal family life in the host Member State. In *Metock v. The Minister for Justice* (Case C-127/08) ECLI:EU:C:2008:449, the CJEU held at para. 89:-

> "That interpretation is consistent with the purpose of Directive 2004/38 which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national. Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country."

20. It is clear, therefore, that the right of third country family members to reside in the host Member State is also a right derived from the Union citizen.

21. The Citizens Directive differentiates between three separate phases of integration in the host Member State: the right of residence for less than three months (Article 6), the right of residence for more than three months and up to five years (Articles 7 to 15) and the right to permanent residence (Articles 16 to 21). Article 6 provides for a right of residence for Union citizens and their family members (whether third country nationals or not) without any pre-conditions other than the requirement to hold a valid identity card or passport. Article 7(1) provides for the rights of residence for more than three months for Union citizens so long as they meet the criteria set out in that section. Such Union citizens may be accompanied by their family members so long as they are eligible family members within the meaning of Article 2(2). Article 7(2) provides for the right of residence for family members who are third country nationals who accompany or join the Union citizen in the host Member State provided the Union citizen satisfies the conditions in Article 7(1).

22. The appellant's application for permanent residence was based on Article 16 and in particular Article 16(2).

23. I now move to the heart of the legal issue in this appeal which concerns Article 16 which provides that:-

> "1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."

24. As will be seen from the text above it is necessary for the Union citizen and his/her family members to have resided continuously in the State for a period of five years in order to obtain permanent residence. Article 16(2) provides:

> "Paragraph 1 shall apply also to family members who are not nationals of a Member State *and have legally resided with the Union citizen in the host Member State for a continuous period of five years.*" [emphasis added].

It follows therefore that if the Union citizen has not resided in the Member State for a continuous period of five years the third country family member cannot be entitled to permanent residence.

25. The legal issues which arise in this appeal have been clarified by the CJEU in a number of cases. In *Ogieriakhi v. Minister for Justice and Equality, Ireland and the Attorney General* (Case C-244/13), ECLI:EU:C:2014:2068, the court held at para. 47:-

> "…Article 16(2) of the Directive 2004/38 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in the Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship."

In the light of that decision it is not relevant that the appellant and his spouse are now separated.

26. At para. 34 of the same judgment the CJEU said:-

> "…in considering Article 16(2) of Directive 2004/38, the Court has held that the acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State is dependant, in any event, on the fact that, first, the Union citizen himself satisfies the conditions laid down in Article

16(1) of that directive and, secondly, those family members have resided with him for the period in question (*Alarape and Tijani*, EU:C:2013:290, para. 34)."

27. In joint cases *Ziolkowski* (Case C-424/10) and *Szeia* (Case C-425/10), ECLI:EU:C:2011:866, the court set out the first question of the reference in the following terms:-

> "28. By its first question, the referring court asks whether Article 16(1) of Directive 2004/38 must be interpreted as meaning that a Union citizen who has been resident in the territory of the host Member State for more than five years on the sole basis of the national law of that Member State must be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not fulfil the conditions laid down in Article 7(1) of the directive."

28. At paras. 46 and 47 of its judgment the Grand Chamber answered the questions as follows:-

> "46. It follows that the concept of legal residence implied by the terms 'have resided legally' in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1).
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> 47. Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1)."

29. In *Alarape and Tijani v. Secretary of State for the Home Department* (Case C-529/11), ECLI:EU:C2013:290, the CJEU stated in its judgment at paras. 36 to 37:-

> "36. As regards the acquisition of a right of permanent residence by the family members of a Union citizen who are not nationals of a Member State, the requirement, described in paragraph 34 of this judgment, of residence with that citizen in the host Member State for the period concerned implies that those family members necessarily and concurrently have a right of residence under Article 7(2) of Directive 2004/38, as family members accompanying or joining that citizen.
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> 37. It follows that, for the purposes of acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State under Article 16(2) of Directive 2004/38, only the periods of residence of those family members which satisfy the condition laid down in Article 7(2) of that directive may be taken into consideration."

30. In *Singh and others* (Case C-218/14), ECLI:EU:C:2015:476, the CJEU stated:-

"57. Finally, under Article 14(2) of Directive 2004/38, the right of the family members of a Union citizen to reside in the host Member State on the basis of Article 7(2) of the directive continues only as long as they meet the conditions laid down in that provision.

58. It follows that, where a Union citizen in a situation such as that of the spouses of the applicants in the main proceedings leaves the host Member State and settles in another Member State or in a third country, the spouse of that Union citizen who is a third-country national no longer meets the conditions for enjoying a right of residence in the host Member State under Article 7(2) of Directive 2004/38. It must, however, be examined whether, and under what conditions, that spouse can claim a right of residence on the basis of Article 13(2)(a) of Directive 2004/38 where the departure of the Union citizen is followed by a divorce."

31. Later the court made the following observations:-

"64. However, in the three cases in the main proceedings, the spouses who are Union citizens of the third-country nationals concerned left the host Member State and settled in another Member State even before the divorce proceedings had been commenced.

65. As stated in paragraph 58 above, after the departure of the spouse who is a Union citizen, the spouse who is a third-country national no longer meets the conditions for enjoying a right of residence in the host Member State under Article 7(2) of Directive 2004/38."

Discussion

32. The appellant's spouse took up employment in the State on 21 August 2004. The appellant married his Union citizen spouse on 9 March 2005. Whether she left the State on 7 July 2009 or 29 July 2009 does not matter because in either case she had not satisfied the requirement for five years' continuous residence in the host Member State in compliance with the conditions laid down in the Citizens Directive. The High Court judge held at para. 19 that:-

> "…according to the best evidence available to the Minister at the material time and to the Court now, [the appellant's] Union citizen spouse did not become a worker in the State until 21 August 2004, his marriage to her did not occur until 9 March 2005, and she left the State on 7 July 2009."

33. There is no basis for this court to set aside those findings of fact as there was evidence to support them. He also held at paras. 20 and 21:-

"20. Thus, it would appear that, for the purposes of Article 16(1) of the Citizens Directive, the applicant's Union citizen spouse fell over a month short of residing legally in the State for a continuous period of five years between taking up employment on 21 August 2004 and leaving the State on 7 July 2009.

21. Moreover, it would appear that, for the purposes of Article 16(2) of the Citizens Directive the applicant fell almost four months short of residing legally with his Union Citizen spouse in the State for five continuous years between when she became his spouse on 9 March 2005 and when she left the State on 7 July 2009."

34. It is accepted by both parties to the appeal that the figure of "four months" should be "eight months". But the error in the calculation of the High Court judge does not affect the finding that the appellant fell short of the requirements of Article 16(2).

35. At para. 16 of the appellant's submissions, he submits:-

> "…that the learned trial judge erred in law and in fact for not holding that the fact that the Union Citizen spouse of the Appellant left the State on 7 July 2009 does not bring to an end her status as a worker in the State until she has been absent as in the present case and in light of Article 16(3) of Directive 2004/38/EC for more than six months".

On that basis he argues that she should be considered to have maintained her status as a worker in the State until January 2010 but that still would not have given the requisite five years required to be with the Union citizen spouse.

36. In the High Court the appellant argued that the period between June 2004 when he asserts his Union citizen spouse entered the State and 21 August 2004, when she took up employment in the State, should be included for the purpose of the appropriate calculation with the result that she should be considered to have continuously resided in the State for over five years between June 2004 and 7 July 2009. However, the trial judge rejected that argument based on the decision of the CJEU in *Alarape and Tijani v. Secretary of State for the Home Department* where the court held that for the purpose of acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State under Article 16(2) of the Citizens Directive, only the periods of residence of those family members which satisfy the condition laid down in Article 7(2) of the Directive should be taken into consideration. I am satisfied that the High Court judge was correct in that finding.

37. The High Court judge also rejected the appellant's argument that since, under Article 16(3) of the Citizens Directive, continuity of residence is not affected "by temporary absences not exceeding a total of six months a year" the first six months after his Union citizen spouse's departure from the State should be treated as such a temporary absence. For the reasons expressed in para. 31 of his judgment the judge declined to accept that argument and in my view he was correct. It must be remembered that in para. 9 of his affidavit grounding the application for judicial review the appellant stated, in connection with his Union citizen spouse, "[s]he subsequently moved back to Poland on 7 July 2009 to come back in 2012 after her son's secondary school" (*sic*). The social welfare records which were before the High Court judge established that her last recorded date of employment in this State was 26 April 2009 and she then went on unemployment benefit from 30 April until 1 July 2009. The records also show that the first record of employment

in the State by the Union citizen spouse commenced on 21 August 2004. These records are consistent with the evidence given in relation to the Union citizen spouse for the purposes of the requirements of the Citizens Directive.

38. There is no evidence that the Union citizen spouse returned to the State after she left in July 2009 and the evidence clearly established that her absence was not temporary within the meaning of Article 16(3).

Conclusions

39. No leave was granted to seek any relief against the fourth named respondent and the High Court judge was entitled to strike out the proceedings against that party.

40. The trial judge considered each of the arguments made by the appellant and the relevant case law from the CJEU interpreting the provisions of the Citizens Directive which were relevant to these proceedings. He correctly distinguished the facts in the *Ogieriakhi* case from the facts of this case since in the *Ogieriakhi* case the plaintiff had resided legally with his Union citizen spouse for a period of more than five and a half years.

41. While the appellant's Notice of Appeal sought a reference to the CJEU the matter was not pursued to any significant extent in the appeal and no question was posed for the consideration of the court. All the relevant case law was put before this court from which it can be seen that the CJEU has already determined the issues which arise on this appeal so that the matter is *acte clair*. In those circumstances a preliminary reference under Article 267 TFEU is unnecessary and would serve no useful purpose. The court declines to make a reference in this case.

42. I am satisfied that the High Court judge correctly applied the law to the facts of this case and that his conclusions were correct.

43. I would dismiss the appeal.