APPROVED NO FURTHER REDACTION

THE COURT OF APPEAL

Court of Appeal Record No.: 2024 163
High Court Record No. 2024 IEHC 333
Neutral Citation: [2025] IECA 29

Binchy J.
Meenan J.
Hyland J.

BETWEEN

I AND PI

APPELLANTS/APPLICANTS

- AND-

THE MINISTER FOR JUSTICE

RESPONDENT/RESPONDENT

JUDGMENT of Ms. Justice Hyland on the 17th day of February 2025

Summary of Findings:

1. There are two quite separate elements to this appeal against the High Court judgment of 29 May 2024. The first element asserts that the trial judge erroneously upheld findings of the Minister that the appellants had acted fraudulently and/or in abuse of rights in seeking a residence card for the first appellant on the basis of EU Treaty rights i.e. that he was the spouse of a person entitled to reside in Ireland as an EU national. The second, and distinct, aspect of the challenge is that the trial judge erred in upholding the Minister's finding that the second appellant was not exercising Treaty rights in the State, despite her claim she was so entitled because she had sufficient resources and/or

was involuntarily unemployed, with the result that the first appellant did not have an entitlement to reside as a qualifying family member of an EU citizen.

2. For the reasons set out below, I find it unnecessary to adjudicate on the first element as I have concluded that the appellants should succeed in respect of a discrete aspect of the second argument i.e. that the Minister failed to adequately consider the claim of the second appellant that she had sufficient resources within the meaning of European Communities (Free Movement of Persons) Regulations 2015 S.I. No. 548 of 2015 ("S.I. 548/15") to entitle her to reside in the State, and to give the first appellant a right to reside as a qualifying family member.

Legislative context:

3. Before considering the particular facts of this case it is necessary to set out the legislative context in which the decision of the Minister was made. S.I. No. 548/2015 was made, *inter alia,* to give further effect to Directive 2004/38/EC of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely with the territory of the Member States. Regulation 6(1) of S.I. 548/15 addresses the right of Union citizens and family members of Union citizens to reside in the State for up to three months. Regulation 6(2) deals with the entitlement of the Union citizen and his or her family members to reside for longer for three months if they are seeking employment. Regulation 6(3), provides, *inter alia*, as follows:

> "*(a) A Union citizen to whom Regulation 3(1)(a) applies 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,*
>
> *(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 ...

(iii) *....*

(iv) *subject to paragraph (4), is a family member of a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii).*

(b) Subject to paragraph (4), a family member who is not a national of a Member State may reside in the State for a period longer than three months where the Union citizen concerned satisfies one or more of the conditions referred to in clause (i), (ii) or (iii) of subparagraph (a).”

4. In relation to involuntary employment, subparagraph (c) identifies as follows: -

“*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 jobseeker with a relevant office of the Department of Social Protection.”

Subparagraph (d) limits that entitlement to six months after the cessation of the employment concerned.

Summary of Facts:

5. The relevant chronology of events is as follows. The first appellant is a male Nigerian national, and the second is a female UK national i.e. an EU national for the purposes of her application. They were married on 9 February 2012. In or around May 2018 they came to live in Ireland. On 15 October 2018, the first appellant applied for an EU residence card with the assistance of Trayers and Co. solicitors (“Trayers”), and

included supporting documentation. At that point, the application was made on the basis that the second appellant was employed in Ireland. On 19 November 2018, further information was sought from the first appellant. On 27 May 2019, the Minister requested further information. On 5 June 2019, Trayers submitted further documentation in support of the application.

6. By letter of 15 July 2019 (variously referred to as the "*Regulation 27(1) letter*" and the "*minded to refuse letter*"), the Minister wrote to the first appellant highlighting that she was proposing to refuse the application. On 29 August 2019, the Minister made a first instance decision refusing the application for a residence card (the "2019 first instance decision").

7. By letter of 16 September 2019 the appellants submitted a request for a review through Trayers. This request included various documents including the form EU4, being a request for review of a decision. In that form, under the heading "*Current activity of the EU citizen of the State*" the following boxes were ticked: "*involuntary unemployment*" and "*residing with sufficient resources*". The box referable to "*employment*" was not ticked. In other words, the second appellant was changing the basis upon which she claimed to be entitled to reside in Ireland.

8. On 3 February 2021 the Minister wrote to the first appellant, asking that up to date information be provided in respect of his own and his EU/UK citizen family members activities in the State. That letter requested the following information: -

> "*If the EU/UK citizen is involuntary unemployed, (including the COVID payment) the following documents should be provided:*
>
> - *Current letter from Department of Social Protection with details of current benefit claims*

- *Current letter from Employment Services Office acknowledging registration as a jobseeker*
- *Letter from previous employer outlining circumstances of redundancy*
- *P60s for last 2 years of employment (P60s not issued after 2018).*
- *P45 for last employment (if employment ceased on or before 31/12/2018)*
- *Copy of Employment Detail Summary from the Revenue Commissioners (Income Tax) from the EU/UK Citizen (from 2019 onwards)*

If the EU/UK citizen is residing in the State with sufficient resources, the following documents should be provided:

- *Evidence of financial resources*
- *Bank statements*
- *Letter from private medical insurance provider for EU/UK citizen and any dependants".*

9. On 16 February 2021, various documents were provided on behalf of the appellants, including bank statements, health insurance and tax credit certificates for the first appellant. On 24 August 2022, the Minister wrote asking for evidence of current residence in the State for the appellants, and evidence of current activities of the second appellant in the State in order to update the file for consideration. On 7 September 2022, additional supporting documentation was provided. I describe the nature of that material below.
10. On 5 December 2022 the decision the subject of this appeal was issued (the "2022 final decision") refusing the first appellant's application for a residence card.

Decision to Refuse:

11. The 2019 first instance decision refused the applicant *inter alia* under Regulations 27(1) and 28(1) of S.I. 548/15 on the basis that the marriage was "*one of convenience contracted for the purpose of obtaining immigration permission which you would not otherwise be entitled.*" It was also refused on the basis that the second appellant had provided documentation and information which was false, fraudulent and intentionally misleading as to material fact. That followed on from findings in respect of the material supporting the claim of the second appellant that she was employed in Ireland.
12. In the 2022 final decision, it was stated that, although the Minister shared many of the concerns outlined by the deciding officer in regard to the probity of the marriage, she was not satisfied that a sufficient case had been made that the marriage was one of convenience. She found that it was appropriate to provide the second appellant with the benefit of the doubt, and accordingly that element of the decision maker's determination had been set aside.
13. The decision went on as follows: -

> "*The Minister is satisfied that you submitted and sought to rely upon documentation and/or information that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations.*
>
> *Moreover, the Minister is satisfied that you have failed to establish that [the second appellant] is exercising her Treaty Rights in the State through employment, self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources in conformity with Regulation 6(3) of the Regulations. As such, you do not have a derived entitlement to reside in the State as a qualifying family member of an EU citizen*

> *Regulation 6(3) of the Regulations and your application for a residence card has been refused (sic)*"

14. In respect of the abuse of rights aspect of the decision, the following matters were identified:

> "*You advised that the UK citizen was working with [the Hair Salon] and you submitted a letter of employment, tax credit certificate and payslips dated September 2018 in this regard. However, information provided to the Minister by the Department of Employment Affairs and Social Protection (DEASP) indicates that the UK citizen made just one Revenue return of €155 euro in 2018. She has never received any payment from [the owner of the hair salon], for whom she was alleged to have worked, and the sum set out in the payslips on file are not reflected in DEASP records. Furthermore, information provided to the Minister by the company's registration office indicates that there is no company registered in Ireland by the name [Hair Salon]."*

It was further stated that the fact that the employment was not reflected in the data provided by DEASP strongly suggested that the second appellant's alleged employment with this company was neither genuine nor effective. The decision went on as follows:

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> "*More recently the UK citizen has advised that she lost her job before the COVID 19 lockdown and has been unable to work for medical reasons. She advised that you are now supporting her. She has not, however, provided any explanation for why her purported employment with [Hair Salon] is not reflected in the State's records*.
>
> *Having considered all of the above documentation, information and submissions, the Minister is not satisfied that the UK citizen in this case was*

exercising her Treaty Rights in the State with [Hair Salon]. It follows, therefore, that the documentation and/or information that you submitted as putative evidence of the UK citizen's exercise of rights in the State at that enterprise was submitted with the intention of misleading the Minister into thinking that the UK citizen was exercising her Treaty rights in Ireland when this was not the case".

15. It is not proposed to recite the content of the 2019 decision, but counsel for the appellants notes that there was a similar paragraph therein in relation to the material provided in respect of the second appellant's employment but, in that paragraph, it was stated that the EU citizen had no Revenue returns for the year 2018. It is pointed out that in the 2022 final decision, on the other hand, that finding was not replicated. Rather it was indicated that the second appellant made just one Revenue return. It is also pointed out that the material from the Department of Employment Affairs and Social Protection referred to in the final decision was never provided to the appellants, and that the appellant had never claimed that the company she was working for was registered in Ireland. All of those points are made to challenge the Minister's findings that the first appellant was guilty of an abuse of rights under Regulation 27.

Alteration in the EU Treaty rights claim by second appellant:

16. It is not proposed to engage with the above arguments for the simple reason that I have decided there is an entirely different basis upon which the appellants are entitled to succeed i.e. that the Minister failed to adequately consider the claim made in 2019 that the second appellant was entitled to reside in Ireland under S.I. 548/15 on the basis that she had sufficient resources, and that the Minister's failure in this respect entitles the appellants to an order of certiorari quashing the 2022 decision. For the same reason, it is not proposed to address the ground of appeal focused on the error of the trial judge

in upholding the decision of the Minister that the second appellant was not involuntarily unemployed.

17. In order to understand the appellants' point in this regard, it is important to understand that the first appellant's initial application for a residence card (in October 2018) was made on the basis that he was a family member of an EU citizen who was entitled to reside in Ireland because she was in employment. As identified above, the Regulation identifies that as one of the circumstances which entitles an EU national to reside in Ireland beyond three months.

18. However, by the time a review of the 2019 first instance decision was sought, the basis for the application had fundamentally changed. At this point, instead of it being claimed that the first appellant was the husband of an EU citizen who was working in the State, it was claimed that the second appellant's current activity was "residing with sufficient resources" and/or "involuntary unemployment" in the EU4 form submitted. That application was of a fundamentally different nature to the one previously made, as it no longer relied upon the employment status of the second appellant. Despite the changed nature of the claim, at that stage no evidence was submitted as to insurance policies or sufficient resources, although evidence was submitted of the second appellant's medical condition, namely a letter of 9 August 2019 from Tallaght Hospital confirming her place on a waiting list and a medical certificate from a Dr. Power which certifies that the second appellant was suffering from abdominal pain and nausea relating to a hernia, and that the symptoms were debilitating and impacted upon her ability for work. No material was submitted that made it clear she was no longer working.

19. However, this lacuna was addressed partially in 2021, and more substantially in 2022, following the email inquiry for updated information from the Minister in August 2022. The letter from Trayers of 7 September 2022 enclosed the following documents: a one

page bank statement in respect of a joint bank account for the appellants; a personal letter from the second appellant of 6 September 2022, a GP letter in respect of the second appellant of 6 September 2022 identifying in bare terms that "*the above-named patient is/was suffering from a neurological condition and is unable to attend Work*" and a one page letter from Laya healthcare. Also enclosed was a payslip, and tax credit certificates, for the first appellant. In the letter of 6 September 2022, the second appellant indicated she had lost her job before Covid-19, she was unable to work during Covid-19 and that she could not work at that time "*as she was seeing her doctor for a medical problem she was having*". She said that her husband was still working, and that she had to rely on him to work as he financially looked after her.

20. It is surprising that in the letter accompanying these document Trayers did not emphasise the changed nature of the application: the first instance refusal had been premised on a claim of employment by the second appellant, not an entitlement to reside based on sufficient resources/involuntary employment. This ought to have been stressed by the appellants' solicitors when writing on their behalf in respect of a review by the Minister of the 2019 decision.
21. Following the receipt of this material, queries were raised by the Minister in relation to whether the appellants had children and/or grand-children and in respect of the second appellant's previous marriage, but no queries were raised in respect of the information relating to the support of the second appellant by the first appellant.
22. Before considering the decision of the High Court, I should deal with a pleading point raised by counsel for the Minister at the appeal hearing to the effect that the argument in relation to failure to consider the "sufficient resources" ground was inadequately pleaded, in particular in relation to the duty to give reasons. Given the specificity of

paragraph (iii) of the Statement of Grounds it is impossible to accept this is so. Paragraph (iii) includes the following pleas:

> "*Certiorari is sought as 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 consider, on the facts as they appeared at the time of the decision, whether the second applicant was residing in the State in exercise of her rights of free movement and/ or in compliance with the provisions of Directive 2004/38EC. The respondent failed to consider whether the EU national was resident in the State with 'sufficient resources' in circumstances where she does in fact so reside and has done so without accessing the social assistant system of the State".*

23. The Minister undoubtedly has an obligation under Regulation 6(3) to consider the position of the EU citizen family member when faced with an application for a residence card based on derived rights. The appellants have squarely pleaded a failure to consider the application, and the plea goes well beyond a simple failure to give reasons. The error that I have found on the part of the Minister is a substantive failure to consider the application, rather than a failure to give reasons.

<u>Decision of High Court</u>

24. After having dealt in some detail with the arguments in relation to abuse of rights, the trial judge notes at paragraph 75 that in the completed EU4 form of 2 September 2019, the boxes of "residing with sufficient resources" and "involuntary unemployment" were ticked. He carefully recites extracts from the letter of 3 February 2021, notes the letter of 7 September 2022 from Trayers and, at paragraph 77, makes reference to the letter

from the second appellant of 6 September 2022 and the material enclosed. He refers to extracts from the 2022 decision, including those parts of the decision set out earlier in this judgment, whereby the Minister (a) notes that the second appellant advised that she lost her job before the COVID 19 lockdown and has since been unable to work for medical reasons, that her husband is supporting her but provides no explanation for why her purported employment with the named hair salon was not reflected in the State's records and (b) pronounces herself satisfied that the first appellant had failed to establish that the second appellant was exercising her Treaty Rights in the State through employment, self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources in conformity with Regulation 6(3) of the Regulations and concludes the first appellant does not have a derived entitlement to reside in the State as a qualifying family member.

25. At paragraph 79 he reaches a conclusion in the following terms:

> "*Whilst it is suggested that the last extract quoted above is 'boiler plate' and 'pro forma' in its format in that the reference to 'self-employment' and 'the pursuit of a course of study' has no application to the Applicants' circumstances, it is clear that the reference to involuntary unemployment or the possession of sufficient resources was applicable to the First Named Applicant's application. Accordingly, I do not consider that there was an error in the Minister's decision dated 5th December 2022 in her recognition and consideration of the question of sufficiency of resources*."

<u>Discussion and decision:</u>

26. The reasoning of the trial judge appears to proceed on the basis that because there is a reference to the possession of "sufficient resources" and "involuntary unemployment", and because the appellants had identified those two headings, the Minister had

necessarily recognised and considered the question of sufficiency of resources. Certainly, the inclusion of the words "*sufficient resources*" in the decision means it cannot be said that there was no reference to this issue at all.

27. But there is a difference between simply identifying the basis upon which an EU national may justify their presence in the State beyond three months, and a substantive consideration of an application made to the Minister on that basis. Consideration of an application under S.I. 548/15 must at a minimum encompass a recognition of the fact that an application has been made, an identification of the core elements of that application, an evaluation of those elements against the stated criteria, in this case the clear criteria set out in Regulation 6(3)(a)(ii), and finally a decision as to whether, having regard to the material submitted as against the criteria set by the Regulations, the person has or has not satisfied the relevant conditions.

28. It will be recalled in this respect that Regulation 6(3)(a)(ii) is quite prescriptive: to come within its ambit, the EU citizen must show he or she 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. For the Minister to decide whether or not a person can be treated as having sufficient resources, those requirements need to be explicitly considered.

29. Unfortunately when one applies that basic test to the exercise carried out by the Minister in the decision, it is impossible to avoid the conclusion that the Minister simply did not consider the application for a residence card by the first appellant on the basis that that his spouse was residing in the State with sufficient resources. Any such consideration would likely have necessitated an analysis of the material submitted by the appellants, including an identification of their income and living expenses, the nature of the health

insurance they had taken out, and a consideration of whether they met the conditions of Regulation 6(a)(ii) in the light of that information. But no examination of same was undertaken by the Minister.

30. One can perhaps understand the failure of the Minister to carry out the necessary review given that the Minister had previously only been considering whether or not the second appellant was in fact employed in the State, and had identified in the decision of 2019 that the documentation that she had submitted in this respect was in fact designed to mislead and that she was acting in abuse of rights and/or fraudulently. That remained the focus of the Minister's consideration in the 2022 final decision, despite the fact that the second appellant was no longer relying upon her employment as the basis upon which she sought to justify her presence in the State. It is true that her employment status potentially remained relevant in the context of the involuntary unemployment ground also invoked by her: but that did not absolve the Minister of the necessity to consider the "sufficient resources" ground as well.

31. Counsel for the appellant argued that the Minister had not even recognised in the decision that the basis for the application had now changed. I am not sure if that is completely correct. As noted above, the fact that the second appellant had advised that she had lost her job, has been unable to work for medical reasons, and that the first appellant was supporting her was identified. This appears to be a recognition - at least implicitly - that she was no longer relying on the employment ground but was relying instead on the sufficient resources ground. However, rather than the Minister then going onto consider the revised basis for the application, the discussion reverts back to the issues relating to her employment status, and notes that the second appellant had not provided any explanation for why her employment with the hair salon was not reflected in the State's records.

32. The only other part of the decision that refers to sufficient resources is what is described as the '*boiler plate'* paragraph. Unfortunately, I think this is a fair description. It identifies all of the different possibilities open to a person seeking to establish a right of residence beyond three months under S.I. 548/15 without distinguishing between them, or even identifying which ones have been claimed by the second appellant. There is no consideration of whether the second appellant possesses sufficient resources or not.

33. In short, the only two references in the decision in respect of the question of sufficient resources, referred to above, do not address the core question of whether or not the appellant has satisfied the conditions of the Regulation in this respect. Accordingly, although I agree with the trial judge that the reference to the possession of sufficient resources in the 2022 decision was applicable to the first appellant's application, that ought to have represented the starting point of the Minister's inquiry. Instead, it was erroneously treated as the end point.

34. In this respect there is a curiosity about the averment evidence of the Minister. In the affidavit of Ms. Grace, Assistant Principal of the Department of Justice, sworn 19 May 2023, she says that the Minister was aware that the appellants changed the basis of the application from the second appellant being in employment at first instance, to being in involuntary unemployment and residing with sufficient resources on review, but that in circumstances where there is very strong evidence to suggest that a person is relying on information which they know to be false or misleading, such as the present case, the respondent is entitled to refuse the application on that basis and not proceed further in assessing same. That averment suggests that the Minister did not take the view that she was obliged to consider the substance of the sufficient resources/involuntary unemployment application.

35. However, that position was revised in the supplemental affidavit of Ms. Grace sworn 29 February 2024, where she averred at paragraph 4 that her comments at paragraph 16 should not interpreted as a suggestion that the respondent did not in fact consider the review application in full, but rather was a general statement that where there was strong evidence to suggest a person is relying on false or misleading information, the respondent is otherwise entitled to refuse the application on that basis and not proceed further, albeit that in this case, as is clear from the terms of the decision, she did. That rather nuanced position is repeated in the legal submissions of the respondent, where at paragraph 57 it is stated that Ms. Grace is not stating that the respondent did not consider the sufficient resources and involuntary employment aspects of the application and that it was clear from the terms of the review decision that they were so considered.
36. In all the circumstances, I conclude that the Minister failed to consider the claim by the second appellant under Regulation 6(3)(a)(ii) that she was entitled to reside in the State on the basis that she had sufficient resources for herself and her family members.

Conclusion:

37. For the reasons set out in this judgment, I will allow the appeal, set aside the Order of the High Court and make an Order of certiorari quashing the Minister's decision of 5 December 2022. The parties should seek to agree whether the Order should include a remittal back to the Minister. In the absence of agreement, submissions should be made on remittal.
38. The appellants having been successful on the appeal are presumptively entitled to an order for the costs of the appeal. If the Minister wishes to contend for any other order, she may within 14 days of the electronic delivery of this judgment file and serve a short written submission, limited to 1,500 words setting out what other order she contends

should be made and why; in which event the appellants will have 14 days to file and serve a reply, similarly so limited.

39. As this judgment is being delivered electronically, Binchy and Meenan JJ. have authorised me to say that they agree with it and with the orders proposed.