THE HIGH COURT

[2024] IEHC 96

[Record No. 2022/1073 JR]

IN THE MATTER OF IRISH NATIONALITY AND CITIZENSHIP ACT 1956

AND

IN THE MATTER OF THE PASSPORT ACT

BETWEEN

T.R.I. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND L.B.)

APPLICANT

AND

THE MINISTER FOR FOREIGN AFFAIRS AND THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms Justice Bolger delivered on the 21st day of February 2024

1. This is an application to quash the first respondent's decision of 15 November 2022 refusing the applicant's application for a passport. For the reasons set out below, I am refusing this application.

Background

2. The applicant was born in the State on 12 September 2019, at which time his mother and next friend had a declaration of subsidiary protection. On 24 August 2021, the applicant's mother applied for a passport for the applicant in reliance on s. 6A(2)(d)(i) of the Irish Nationality and Citizenship Act 1956 (hereinafter referred to as "the 1956 Act") on the basis that the applicant had been born to parents, at least one of whom was, at the time of their birth, a person entitled to reside in the State without any restriction on their period of residence. By decision dated 15 November 2022 (the decision impugned here), the application was refused on the basis that s. 6A(2)(d)(i) did not apply to a person with subsidiary protection as they were not a person entitled to reside in the State without any restriction on their period of residence for the purpose of section 6A(2)(d)(i).

3. The applicant was given leave to judicially review that decision on the basis that it was contrary to s. 6A(2)(d)(i) and that the first respondent had fettered his discretion to the

second respondent. At hearing, the applicant's counsel confirmed that the case primarily concerned the interpretation of s. 6A(2)(d)(i) and that he was not pursuing the fettering discretion point, a position which seemed very sensible given that even if the decision was quashed on that ground, the utility of any such order would still depend on the court's interpretation of section 6A(2)(d)(i).

Statutory provisions

4. Section 6A(1) of the 1956 Act, as amended:-

"(1) A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years. (2) This section does not apply to—

…

(d) a person born in the island of Ireland—

(i) to parents at least one of whom was at the time of the person's birth a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004)".

5. Section 54 of the International Protection Act 2015 (hereinafter referred to as "the 2015 Act"):-

(1) A qualified person shall be given a permission to reside in the State for a specified period of not less than 3 years.

(2) A family member shall be given a permission to reside in the State for a specified period of not less than 1 year and, in case of renewal, of not less than 2 years.

(3) A permission given under subsection (1) or (2) —

(a) shall be renewable unless compelling reasons of national security or public order ("ordre public") otherwise require, and

(b) shall cease to be valid where the person to whom it was given ceases to be a qualified person or a family member, as the case may be.

6. A qualified person is defined at s. 2 of the 2015 Act as:

"a person who is either –

a) a refugee and in relation to whom a refugee declaration is in force, or

b) a person eligible for subsidiary protection and in relation to whom a subsidiary protection declaration is in force".

Submissions of the parties

7. The applicant submitted that s. 54 of the 2015 Act means that the applicant's mother is entitled to reside in the State without restriction on her period of residence and emphasises the mandatory nature of the renewal as the section says *"shall"* be renewable, subject to compelling reasons of national security or public order or her ceasing to be a qualified person. She could cease to be a qualified person by acquiring naturalised citizenship or as a result of the cessation of her subsidiary protection. The applicant says this means that the period of residence is open-ended. The applicant's case is succinctly summarised in the written submissions as follows:-

"Thus, the requirement of section 6A that at least one parent of the child be, at the time of the child's birth, "without any restriction on his or her period of residence" was met in the Applicant's case. At the time of her birth, there was no restriction on her mother's period of residence because it was renewable and not in any way curtailed by time."

8. The applicant relied heavily on the decision of the Court of Appeal in *AJK. v. The Minister for Defence* [2020] 2 IR 800 in submitting that s. 54 provides for an open-ended right of residence, described at para. 78 of Donnelly J.'s judgment as *"in effect an open-ended right of residence"*. Whilst Donnelly J. identified reasons of national security or public order as applicable restrictions, the applicant submits that these were not time restricted, as required by s. 6A(2)(d)(i), and to conflate the potential application of a cessation of subsidiary protection with a time-based restriction (as the respondents sought to do) would undermine the concept of subsidiary protection. The applicant questions who can avail of s. 6A(2)(d)(i) if the respondents' interpretation, that it excludes persons with subsidiary protection, is correct.

9. The respondents emphasise the significance of citizenship and accept that the legislature is entitled to set the conditions necessary for an entitlement to citizenship as of right, provided they are constitutional and have due regard to EU law. The right of residence on foot of subsidiary protection is provisional and contingent on the continuation of the circumstances that justified the initial grant, which are independent of the acts of the person holding it. Citizenship and non-citizenship may be treated differently if justified by that

difference in status (*N.H. v. Minister for Justice* [2018] 1 IR 246; *O'Meara v. Minister for Social Protection* (recent Supreme Court decision [2024] IESC 1). The State has lawfully chosen to treat citizens and persons with subsidiary protection differently in relation to the citizenship rights of the children of either group who were born in the State. The respondents dispute the application of *AJK* which was nothing to do with citizenship. They urge the court to take account of the applicant's right to seek naturalised citizenship by way of his own or his parents' period of reckonable residence in the State.

Discussion

10. The applicant's entitlement to apply for naturalised citizenship on the basis of his reckonable residence in the State for three years or either of his parents' period of reckonable residence in the State is not relevant to what I have to decide. Firstly, citizenship by naturalisation is a lesser right than citizenship as a right as it can be revoked and, secondly, and more significantly, this case is about the correct interpretation of section 6A(2)(d)(i). The fact that the applicant may have alternative avenues to citizenship open to him apart from the right he seeks here, does not affect the correct interpretation of the section. He is either entitled to citizenship by right pursuant to the section or he is not.

11. Citizenship is a status of enormous importance. The right to claim citizenship and all of the protections and entitlements that go with it is one of the most significant rights that a person can assert and claim from the State and the basis on which this right can be asserted must be clear. As observed by O'Donnell J. (as he then was) in the Supreme Court decision of *Sulaimon v. Minister for Justice, Equality and Law Reform* [2012] IESC 63 the control of citizenship:

> *"requires clear rules which can be administered efficiently. A person either has a passport or does not. That passport is either in force or it is not. There is no penumbra area."* (at para. 3)

More recently, O'Donnell C.J. reiterated the same sentiment in *U.M. v. Minister for Foreign Affairs* [2023] 1 ILRM 24 in stating, at para. 17, *"[i]t is difficult to conceive of a situation where a person might be treated in law as a citizen subject to a question mark."*

12. I have carefully considered the decision of the Court of Appeal in a *AJK,* which is binding on this court if applicable to the facts before it. Contrary to the applicant's submissions, I do not consider it establishes an open-ended right of residence for a person with subsidiary protection. The observations of Donnelly J., at para. 78, on which the

applicant relies, must be read in the context of the entire judgment and the matters that were at issue therein. The case was nothing to do with citizenship or the rights of an Irish born child of a person with subsidiary protection thereto. It concerned the Defence Forces' treatment of an application by a person with subsidiary protection to enlist in the Reserve Forces. Section 53 of the Defence Act require such a person to commit for a period of twelve years' service which the Minister for Defence found (wrongly) could not be complied with by a person with subsidiary protection because of the limits on their right to reside in the State and the possibility that they could be required to leave the State. The Minister's view was found to be unlawful, in particular, for failing to take account of their own entitlement to discharge a person whose service was no longer required, which could include a person who represented a security risk. Donnelly J. expressly recognised (at para. 74) that the residential rights of a person with subsidiary protection are more restricted than those of a naturalised citizen, even though both could have their status of subsidiary protection and naturalised citizenship revoked as a consequence of their conduct. She went on, at para. 75, to recognise a further distinction between the person with subsidiary protection and a naturalised citizen *"because pursuant to s. 52(3) of the 2015 Act, which is also reflected in s. 54(3)(b), the Minister may revoke a subsidiary protection declaration and consequently a person's power to reside in the State, if, inter alia, they cease to be eligible for subsidiary protection."* In effect, she recognised that a person with subsidiary protection could lose their status due to circumstances not of their making and outside of their control.

13. Donnelly J. held at para. 78, that a person entitled to subsidiary protection *"has what is in effect an open-ended right of residence; see, s.54(3)(a) and (b) of the 2015 Act".* This is the *dicta* relied on by the applicant here. However, the remainder of the paragraph also merits close attention:

> *"In reality as long as the appellant has a declaration of subsidiary protection he is entitled as a matter of law to have his permission renewed save in circumstances of national security or public order. If such reasons of national security or public order arose, undoubtedly the Minister for Defence would be entitled to discharge him from the Defence Forces.* "

I extract two points from that. Firstly, Donnelly J. recognised that the right of a person with subsidiary protection to have their permission to reside in the State renewed was not automatic but was subject to them continuing to have a declaration of subsidiary protection

and to there not being relevant circumstances of national security or public order. Secondly, she recognised the context of the situation in which that applicant had been denied the right to enlist, *i.e.* that the same issues of national security or public order that might deprive a person of subsidiary protection, would also *"undoubtedly"* entitle the Minister for Defence to discharge such a person from the Defence Forces. The status of membership of the Reserved Defence Forces at issue in *AJK*, was never absolute as it could be withdrawn by the Minister. That stands in stark contrast to the entitlement claimed by this applicant, *i.e.* a right to citizenship by virtue of s. 6A(2)(d)(i) which is a status, unlike citizenship by naturalisation, that the State cannot revoke. It is as close to an absolute right as could be contemplated as existing in Irish law.

14. I am, therefore, satisfied that *AJK.* is not authority for the proposition that a right of residence of a person with subsidiary protection is open-ended, such that s. 6A(2)(d)(i) does not apply to them. Their right of residence is conferred by s. 54 of the 2015 Act and is based on "*a permission*" (and I emphasise that that is a singular permission) of not less than three years which may be followed by a further permission (again singular) of not less than three years. Whilst the section provides for what might superficially appear to be a mandatory renewal (*"shall be renewable"*), its renewal is in fact conditional as it is made subject to two express possibilities: firstly, the requirement of compelling reasons of national security or public order, or, secondly, the cessation of the person's status as a person with subsidiary protection.

15. The fact that renewal takes place relatively easily, as occurred for the applicant's mother whose renewal was administered at her local Garda station on 13 August 2022, does not reduce the legal significance, effect or basis of the right of residence conferred on her. The applicant's mother was entitled to renew her residence card, firstly, because she continued to be a person entitled to subsidiary protection and, secondly, in the absence of compelling reasons of national security or public order. Those same qualifications on the right of residence of a person with subsidiary protection were recognised by Donnelly J. at para. 78 of *AJK.*

16. The applicant, in submitting that s. 6A(2)(d)(i) does not apply to a person with subsidiary protection, poses the question as to whom does it apply? He submits an extract from the first respondent's website identifying various categories of parents of Irish-born children who can apply for passports, in support of what he seems to suggest is the Minister's

practice to allow persons with subsidiary protection to apply for a passport for their Irish-born children pursuant to section 6A(2)(d)(i). I do not accept that submission because regardless of what it says, the website cannot inform the correct interpretation of a statutory provision. In any event, I am satisfied that the wording used in the website properly recognises the entitlement of a parent with subsidiary protection to apply for a passport for their Irish-born child, by reference to either their or their child's reckonable period of residence in the State.

17. Whether or not there is currently any person with a right of residence in the State who is covered by the provisions of s. 6A(2)(d)(i) (and I have no evidence that anyone is or that anyone is not) is not at issue here as what matters is that the Oireachtas has authorised the Minister to grant a passport to a child born in the State to a parent with a non-temporal restricted right of residence in the State. Counsel for the applicant disputes that the Minister could ever confer such a right of unrestricted residence on a person (presumably a non-citizen as a citizen other than a naturalised citizen does have such a right of unrestricted residence, subject to law such as, for example, in relation to extradition) as he says that would be an unlawful exercise of executive power. The proposition is that the type of unrestricted residence enjoyed by a citizen of the State (other than a naturalised citizen) which must cover millions of people in the State, cannot be conferred on a non-citizen as the Minister must retain the right to restrict their residence rights on grounds of national security. I do not agree. Whether the power to make a decision has been authorised by the Oireachtas is wise or unwise does not render it unlawful. Section 6A(2)(d)(i) exists and whether or not there are categories of persons to whom it currently applies, *i.e.* non-citizens with an unrestricted temporal right of residence in the State, does not affect the application of the section or, as occurred here, its non-application. The section allows the Minister to take certain steps in relation to certain persons and it is a matter for the executive to determine whether or not a category of persons to which the section applies should be put in place or should be limited or expanded - subject to compliance with the Constitution and any relevant provisions of EU law. I find support for that in the decision of Charleton J. in *Burke v. Minister for Education* where he stated at para. 24:

> *"Thus cast, judicial power is defined and delimited under the Constitution in a way that would not accord with such matters as overturning an economic policy pursued by government. Is a policy proportionate; or is it unreasonable? These*

issues are no business of the Courts under the Constitution. As an example of judicial power that does not accord with our fundamental law, and whereby policy was overturned even though cast in legislation, Schechter Poultry Corporation v United States, 295 US 495 (1935), a Supreme Court response to the New Deal, contrasts strongly with the Irish principle of mutual respect of separateness. Further, as so bounded in this jurisdiction, it would only be in the clearest cases of infringing the powers delegated by the people under the Constitution that an action by a citizen could result in the restraint of governmental power."

Conclusions

18. The applicant's mother's right to renew her right to reside in the State as a result of her grant of subsidiary protection, pursuant to s. 54 of the 2015 Act, is and always was for a temporally restricted permission of a period less than three years subject to conditions. It was, therefore, open to the first respondent to deem her not to come within s. 6A(2)(d)(i) as her period of residence in the State was and is restricted in time. I refuse this application.

19. I will put the matter in before me at 10.30am on 13 March 2024 for final orders.

Counsel for the applicant: Michael Lynn SC, Cillian Bracken BL

Counsel for the respondents: Eoin Carolan SC, Aoife McMahon BL