[2020] IEHC 61

**THE HIGH COURT**

**[2018 No. 821 JR]**

**BETWEEN**

**FARIDOUN KHDIR AZIZ, SRWA HAMA MAJEED AND FRINY FARIDOUN KHDIR (A MINOR SUING BY HER FATHER AND NEXT FRIEND FARIDOUN KHDIR AZIZ)**

**APPLICANTS**

**– AND –**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Max Barrett delivered on 18th February 2020.**

1. This application concerns a failed EU Treaty Rights ("EUTR") application made under the European Communities (Free Movement of Persons) Regulations 2015. The first-named applicant claims to be a British national who is the husband of the second applicant (with the first and second applicants being the parents, it is claimed, of the third-named applicant). Unfortunately, some difficulty has come in establishing the nature of the relationship between the trio. Though a variety of observations are made in the decision-letters of 20 July 2018, it would be fair to say that a key focus of the Minister has been the inability of the applicants to demonstrate that they have the relationships necessary for EU Treaty Rights to come into play. In this regard, the Minister had the following concerns:

    (1) a United Kingdom deed poll certificate shows that on 20 January 2016, a person by the name of 'Faridoun Salehi' changed his name to 'Faridoun Khdir Aziz';

    (2) in an exhibited marriage certificate of 25 October 2012 (so at a time when the first named applicant's name would appear to have been 'Faridoun Salehi') a person by the name of 'Faridoun Khdir Aziz' was married. The Minister stated in the letter of 20 July 2018 'We have received no explanation for this discrepancy'; and

    (3) the birth certificate for Ms Friny Khidr, dated 29 September 2014, names her father as 'Faridoun Khdir' (so at a time when the first named applicant's name would appear to have been 'Faridoun Salehi').

2. The decision letter of 20 July also contains statements that all pages of the birth and marriage certificates and accompanying translations are not attested. There was no need for the Minister to revert to the first-named applicant before reaching this conclusion; the Minister is entitled to arrive at a decision by reference to the application documentation placed before him (*Khan & Anor. v. The Minister for Justice, Equality and Law Reform* [2017] IEHC 800, paras. 84-85; *Badshah & Anor. v. The Minister for Justice and Equality* [2018] IEHC 759, para. 4(III)).

3. For some reason, the Minister also saw fit, in his correspondence, to query why, if the first-named applicant is a British national, he has not simply sought a British passport for his daughter. With every respect, this is none of the Minister's business in the context presenting: the applicants sought to make EUTR applications and those are the applications that fell to be decided; if they met the EUTR criteria, their applications fell to

succeed; if they did not the applications fell to fail. Whether the applicants might have sought to bring some other application in respect of some perceived eligibility for a passport is neither here nor there.

4. In any event, the decision letters go on to state as follows:

> "[Your solicitor]…[i]*n a letter dated…15 July 2018…stated that your sponsor's name change was due to his father's and grandfather's names being used, as is the tradition in many Arab states and indeed, Iraqi officials insisted that his father's and grandfather's names be used. It further states that Mr Khdir's name as per his UK passport 'Salehi' is his family name. It is also stated that Mr Khdir apparently felt that this may cause issues in both the United Kingdom and Ireland and thus changed his name by deed poll in 2016.*
>
> *However, your solicitor submitted no documentary evidence of your EU Citizen in support of the above claims. For example, evidence of your stated sponsor's and grandfather's names e.g. their birth certificates duly attested. We have received no birth certificate for Mr Khdir displaying these names, We have received no documentary evidence of his using the same 'Salehi' before his arrival in the United Kingdom."*

5. Consequently, the decision-letter concludes, the Minister cannot validate the solicitor's claims or confirm that the first-named applicant is the Faridoun Khdir Aziz named on the submitted marriage certificate or the father of the child on the submitted birth certificate.

6. The decision-letter also goes on to state that, based on the information supplied, the Minister has concerns about the validity and veracity of the first-named applicant's presence in Ireland: specifically contact had been made with the first-named applicant's purported landlord who appeared unaware that the first-named applicant was a tenant on his premises.

7. Before proceeding to consider the substance of this application, the court should note that it accepts the contention of the Minister that the challenge here is to the two central findings in the decisions of 20 July, viz. that the applicants had failed to prove (1) the requisite family relationship for their EUTR application to succeed, and (2) that the second-named applicant is genuinely exercising free movement rights in the State. The pleadings do not plead the issues of adequate transposition of Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("Citizens' Rights Directive") [2004] OJ L 158/77 or the point concerning having regard to irrelevant considerations/failure to have regard to relevant considerations.

8. The court turns below to the two questions properly arising.

**(1) Was the respondent entitled to refuse the visa appeal on the basis of a failure to prove that the applicants were beneficiaries within the meaning of the Directive?**

9. 'Yes' for the reasons that follow: -

(a) the burden of proof rests on the applicants to establish the requisite family relationship (*Khan and Badshah, supra);*

(b) the Minister, notwithstanding the observations in the just-referenced case-law, went beyond what is strictly required of him at law and gave the applicants a further opportunity to clarify matters, but they failed to do so to the Minister's satisfaction. If anything (and the court obviously makes no criticism of this), the Minister has been fairer than fair in how he approached matters in this regard; he seems to have taken the view that, whereas he could lawfully have taken a stricter approach, he was prepared to show some leniency;

(c) there is nothing unreasonable, unlawful or irrational in the Minister's decision to refuse the appeal by reference to the evidence that was placed before him; and

(d) although the court is satisfied to rest its affirmative answer to Question (1) on points (a)-(c), it notes in passing the unusual fact – unexplained in the pleadings or in the submissions before the court – that in the evidence tendered in these proceedings, the first-named applicant offers two mutually inconsistent explanations for the name-change that presents. Thus in an affidavit of 25 July 2019, the first-named applicant avers that *"Prior to my name being changed by deed poll in the UK I was using my previous surname 'Salehi' as used in Iraq in accordance with the customs and laws there which require you to use your father and/or paternal grandfather's name as a surname". Yet in the grounding affidavit, the first-named applicant avers, inter alia, that "It was explained to the Respondent that I was compelled by the Iraqi authorities to use the names 'Faridoun Khdir Aziz as in Iraq one's father's and grandfather's names is used in place of one's surname*".

**(2) Was the respondent entitled to find that he was not satisfied that the first-named applicant is not engaged in the genuine exercise of free movement rights?**

10. The first-named applicant provided the Minister with a letter, ostensibly from his landlord, which letter indicated that the respondent could make direct contact with the landlord. The first-named applicant knew or ought to have known therefore (it is difficult to see how he could not have anticipated) that further enquiries might be made with the landlord. These enquiries were made, at which point the landlord indicated that someone other than the first-named applicant was his sole tenant at the named property. The weight to be placed on the results of the inquiry made was a matter for the Minister: no breach of fair procedures or other illegality presents in this regard.

**Conclusion**

11. Having regard to the foregoing, the court must respectfully decline all the reliefs sought.

12. In passing, had it been necessary for the court to address,

(i) the 'consideration/non-consideration of the irrelevant/relevant' point which was raised in submission but which does not arise from the pleadings, and had the court concluded that an irrelevant consideration was factored into the decision-making (the 'why not get a British passport for your ostensible daughter?' point), it would nonetheless have exercised its discretion, in all the circumstances presenting, not to grant any of the reliefs sought,

(ii) whether pursuant to Arts. 3(2)(b) and 5(2) of the Citizens' Rights Directive and under reg.4(3)(b) of the European Communities (Free Movement of Persons) Regulations 2015, there has been a failure to grant "*every facility*" to the applicants to avail of their contended-for EUTR because of a contended-for failure by the Minister to keep reverting to the applicants in the course of considering the application before him, the court notes (a) again, the above-referenced segments of the decisions in *Khan* and *Badshah*, (b) that notwithstanding those decisions the Minister did in fact revert to the applicants here and afford them a chance to clarify matters, which they failed to do to the Minister's satisfaction, and (c) as touched upon in para. 10(d) above, even in his affidavit evidence in the within proceedings, evidence that is doubtless carefully drafted and vetted, the first-named applicant cannot consistently explain what his surname was in Iraq and why; the applicants, with respect, do not have a legal right whereby the Minister must keep reverting to them until the first-named applicant can work out when and why he has used different surnames over his lifetime,

but again, neither points (i) nor (ii) arise for consideration when one has due regard to the pleadings.