THE HIGH COURT

[2022] IEHC 325

[2020/117JR]

BETWEEN

A.K.R.

APPLICANT

AND

MINISTER FOR JUSTICE & EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 31st day of May, 2022

1. This case raises issues on the scope and application of a scheme for certain undocumented migrants. For the reasons set out below I am refusing this application.

2. The applicant seeks *certiorari* quashing the respondent's decision to refuse the applicant's application made under the 'Special Scheme for non-EEA nationals who held a student permission in the State during the period 1 January 2005 to 31 December 2010' which was notified by letter dated 16 September 2019 and affirmed on review by letter dated 14 November 2019.

Background

3. The applicant, a citizen of South Africa, lawfully entered the State in 2009 on a student visa which expired on 7 February 2012. Thereafter the applicant remained in the State without permission, residing with and supported by his cousin who is an

Irish citizen. The applicant's only contact with the State authorities during this time was an application he made in 2017 for a Public Services card which he believed might enable him to get some form of recognised identity in the State. That application was successful.

4. In October 2018 the respondent established a special scheme for non-EEA nationals who held a student permission in the State during the period of 1 January 2005 to 31 December 2010 (hereinafter referred to as 'the Scheme'). Qualified persons were permitted to apply under this scheme until 20 January 2019. The applicant believed he qualified for the Scheme and duly applied on 1 January 2018. The respondent sought documentary evidence from him pursuant to para. 3.5 of the Scheme which required the applicant to establish that he was "living in the State continuously since your arrival in the State and can provide supporting documentary evidence of your continued presence in the State at least throughout, 2016, 2017 and 2018 to date". The applicant furnished the following documentation:

(i) Forms confirming the loss of his South African passport and his application for a new passport;

(ii) Photographs dated from 6 February 2012 to 6 December 2019 which he submitted were taken in the State;

(iii) Letters from persons resident in the State confirming that they had known and dealt with the applicant in the State from 2012 to date;

(iv) An affidavit from his cousin who is an Irish citizen residing in Ireland, confirming that the applicant had resided with and been supported by her since his arrival in the State since 2009;

(v) A letter from the applicant dated 26 May 2019 explaining that he could not produce payslips from 2014 to 2018 because he had not worked since the expiry of his student visa in 2012;

(vi) A letter from the applicant dated 6 September 2019 explaining why he had no bank account or household bills since 2012, and in which he stated he was "hiding in constant fear and therefore did not engage in anything that would expose me to the authority".

(vii) A copy of his Public Services card.

5. By a decision dated 16 September 2019 the applicant's application was refused by the respondent, citing para. 3.5 of the Scheme, referred to at para. 2 above.

6. The applicant sought a review of that decision by way of a form completed on 14 October 2019, to which he attached copies of educational records up to 2011, banking documentation up to 2013 and personal references to date as evidence of his being in the State from 2009 to date. He stated that he had not left the State since his visa expired in 2012.

7. By decision dated 14 November 2020 the respondent confirmed her consideration of all the information and documentation contained in the applicant's application, his immigration records and the additional material he provided in his application for a review. The respondent upheld the decision to refuse the applicant's permission under the Scheme as correct "in that you did not meet the relevant Scheme eligibility criteria in 3.5 that you *'are living in the State continuously since your arrival in the State and can provide supporting documentary evidence of your continued presence in the State…'"*.

The applicant's case

8. The applicant seeks to quash the decision of 14 November 2019 on the basis that the documentation he furnished was not properly considered by the respondent and that the respondent's requirement that he submit official documentation was irrational, arbitrary and/or autocratic. The applicant argues that had the respondent interpreted the Scheme properly he should have been found to have come within it and that the court should not be restrictive in interpreting the Scheme as, he contended, it was a remedial scheme designed, as his counsel described, for persons who are existing "in the shadows". The applicant submitted that the respondent had acted irrationally in disregarding the documentary evidence that he had furnished and in requiring the applicant to be able to furnish employment and tax records even though he was in the State unlawfully since the expiration of his student visa in 2012.

The respondent's case

9. The respondent challenges the applicant's interpretation of the purpose and requirement of the Scheme as one for persons "living in the shadows". Rather the respondent contended that the Scheme was for persons living openly in the State and engaging with state authorities, including the immigration authority. The respondent emphasises the administrative nature of the Scheme, which does not engage any of the applicant's rights (whether pursuant to the Constitution or the Convention for European Rights) and which therefore leaves the respondent free to determine the criterion she wishes to impose. Crucially for this applicant, the respondent submits that this includes the furnishing of particular types of documents. The respondent describes the process of the application (at para. 6 of the affidavit of Eileen O'Reilly, the civil servant who made the decision being challenged) as involving "a hierarchy of

issues considered in order to determine whether or not an application met with the conditions of the Scheme". The first matter that was looked at was whether the applicant had supplied the relevant documentation required by the Scheme. This applicant did not, and that was the reason his application was deemed ineligible without further consideration being given to other terms of the Scheme.

The Scheme

10. There is disagreement between the applicant and the respondent as to the purpose and full requirements of the Scheme. The parties were in agreement that the Scheme grew out of the decision of the Supreme Court in *Luximon v. Minister for Justice* and *Balchand v. Minister for Justice* [2018] 2 IR 542. The respondent sought to rely on the fact that both applicants in that case had lived and worked openly in the State within family units and became 'timed out' students in 2011, when the students' visa scheme was changed.

11. I do not consider that those decisions to be relevant in determining the scope and application of this Scheme. It is the terms of the Scheme that determine its scope rather than the legal challenge that motivated the respondent to introduce the Scheme.

12. It is common case that the applicant did not have any financial documentation from 2012 of the type that the respondent claims was required (identified as including bank statements, employment documentation, tax documentation, tenancy agreements and so on), but the applicant argues that had the documentation he submitted to prove his residency in the State been properly considered, he should have been found to come within the Scheme. It is therefore necessary to consider what was put before the court about the purpose and requirements of the Scheme, insofar as determining its

purpose and requirements are relevant to whether or not the applicant is entitled to the reliefs sought.

13. The following documentation was furnished as evidencing the purpose and requirements of the Scheme: -

(1) An introductory note to the Scheme.

(2) An information note which sets out the terms of the Scheme including the following

Section 2: "To be successful, the applicant will also have attempted to avoid being unlawful in the State through engaging with the immigration authorities and have contributed to the economy through their time as paying students and as workers and be able to demonstrate a certain connection in the State".

Section 3.3: "[You can apply for permission if you].. have attempted to avoid being unlawfully in the State through engaging with the immigration authorities…"

Section 3.5: "[You can apply for this permission if you]..are living in the State continuously since your arrival in the State and can provide supporting documentary evidence of your continued presence in the State at least for, 2016, 2017, 2018 to date".

Section 3.8: "[You can apply for this permission if you]..have been lawfully employed in the State while under student permission by furnishing documentary evidence. For example P60 forms, P45 forms, payslips".

(3) FAQ which reiterated the qualifying criteria of the Scheme contained at Clauses 3.5 and 3.8 of the information as set out above.

(4) A guide to completing the Scheme. Question 6 to this guide gave details of the required documentation as including, *inter alia*:

i. Copy of last 6 months' bank statements.

ii. Copy of payslips.

iii. Copy of P60s.

iv. Copy of 2 bills demonstrating address for the applicant and the spouse/partner of the applicant.

v. Evidence of the applicant's efforts to remain in the State legally.

(5) A form which stated "I understand that if I do not submit the required documents, this application will be refused."

14. A bare reading of these documents supports the respondent's case that an applicant who did not furnish documentation of the type set out therein (for example bank statements, employment documentation, tax documentation, household bills and evidence of attempts to remain in the State legally) would be disqualified. The applicant contends that whilst his documentation was not of the type preferred by the respondent, it was unlawful for the respondent to disregard it from consideration. He condemns the respondent's approach for, in effect, requiring employment and tax records from an applicant who could not legitimately have had such contemporaneous documentation and for irrationally requiring official documentation from an undocumented immigrant.

Discussion

15. The applicant challenges the respondent's requirement that an applicant must submit financial or other official documentation in order to qualify under the Scheme.

16. The applicant's approach verges on asking the court to engage in what the Scheme should have been, rather than engaging with the process by which the applicant's application was determined.

17. This is an administrative scheme pursuant to which the respondent decided to confer a benefit on certain undocumented migrants who would not otherwise have had the right to apply for residency. The Scheme does not engage any constitutional, convention or EU fundamental rights on an applicant. This means that the respondent has more scope to determine what she will or will not require from an applicant. In effect, it is the respondent's scheme and it is up to her to determine how an applicant will be deemed to qualify, subject of course to the respondent acting lawfully in making that determination.

18. The difference between this type of scheme and one that engages fundamental rights is summarised in the Supreme Court decision of *Bode v. The Minister for Justice, Equality and Law Reform & Ors.* [2008] 3 I.R. 663 wherein Denham J. (as she was then) stated, at para. 89: -

> "There is no general duty on an administrative body to give the opportunity to provide additional material after the closing date for application. The fact that the Minister may have chosen to give a second chance does not make it an obligation. The Minister's obligation was to consider the application within the requirements of the Scheme. Given the nature of the administrative scheme, the factual history presented by the second applicant, the documents provided, and the fact

> that the administrative decision does not relate to any constitutional or convention rights, but leaves the second named applicant in the same position as he was prior to making the application, there was no breach of fair procedures, and consequently the issue of an order of *certiorari* does not arise".

19. Further support for this analysis can be seen in the more recent decision of the Supreme Court in *Burke and Power v. The Minister for Education and Skills* [2020] IEHC 418 and 479 and in particular the decision of Charleton J. at para. 13 where he discusses the test for the review of administrative action and stated as follows: -

> "Schemes for administration set up by executive decision of the Government subject to those who administer it to the same restraints: to only do what they are supposed to do and to remain within the boundaries of the text which delimits what they are to administer and on what criteria"; *M v. the Parole Board* [2020] IESC 36, [76].

20. I do not accept the applicant's submission that this scheme cannot be given a narrow or restrictive interpretation or that regard must be had to what the applicant maintains was the purpose of the Scheme, i.e. to assist undocumented migrants. The respondent maintains that the Scheme was designed for persons openly engaging with the authorities and in support of that, cites the requirements of the Scheme including the requirement of financial documentation (such as bank statements, employment documentation, tax documentation and evidence of household commitments) as demonstrating the category of persons the Scheme was designed to assist.

21. As this was an administrative scheme, it was for the respondent to determine the qualifying criterion including the provision of specified documentation and

evidence of engagement with the immigration authorities. As long as the respondent did not act unlawfully, capriciously, arbitrarily or irrationally, she was entitled to require documentation of her choice and to refuse an application such as that made by this applicant who did not or could not comply with her requirements.

22. The applicant contends that the financial documentation required by the respondent had the effect of requiring him to have worked unlawfully and that this was therefore an irrational requirement. A claim of irrationality is subject to a high bar (*D.K. v. The International Protection Appeals Tribunal* [2020] IEHC 14, para. 7). I do not accept that the respondent imposed an irrational requirement in this scheme. The respondent did seek employment and tax documentation but did not state or restrict the time for which they were sought. Had the documentation been sought for the very recent past, this would have constituted a requirement for such documentation from a period of unlawful employment during a period of time that the applicant was not permitted to be in the State. Whilst the Scheme required copies of the last six months' bank statements, its requirement of employment and tax documentation had no such timeframe and could have been satisfied by furnishing such documentation during a time that an applicant's student visa permitted them to work. Therefore the applicant is incorrect in his contention that he was required to produce documentation that it was impossible for him to provide. There is no evidence of irrationality such as was found to exist in the decision of *M.K. v. The Minister for Justice* [2019] IEHC 131.

23. The respondent did require an applicant to have evidence of having worked in the State at some point in time. She was entitled to impose that requirement in her administrative scheme and her decision to do so was not unlawful, capricious, arbitrary or irrational. I find it to have been consistent with what the respondent

contends was the category of persons the scheme was intended to benefit, i.e. those persons who were openly engaging with the State authorities even though they were not lawfully resident in the State.

24. The respondent was entitled to deem the applicant's documentation insufficient as it was not financial documentation of the type the respondent had clearly determined was required for an application to be successful. The documentation furnished by the applicant may have been capable of satisfying a requirement of continued residence in the State but did not satisfy the respondent's requirement that financial documentation should be furnished, a requirement which I find she was entitled to impose.

25. The applicant was furnished with sufficient information in the decision which he seeks to challenge as to why his application for review was unsuccessful (i.e. his failure to produce the documentary evidence required by the respondent) to comply with the respondent's obligation to furnish reasons and to give due consideration to any relevant rights or interests (as per *Mallak v. Minister for Justice* [2012] 3 I.R. 297), such as would enable an applicant to construct a judicial review application.

Decision

26. I am satisfied that the Scheme is an administrative scheme and the respondent is free to impose requirements on applicants for it, as long as she acts lawfully in doing so. I accept the respondent's submission as to the purpose of the Scheme having regard to the type of documentation the respondent decided to require, i.e. that it was put in place to allow persons who were not lawfully resident in the State, having been 'timed out' by the expiration of their student visa, who were openly engaging with the

State authorities and were in a position to furnish financial documentary evidence of their continued residence in the State in the form of tax, employment, education, banking and/or tenancy documentation. I am satisfied that the respondent's consideration of the documentation furnished by the applicant was lawful and within the terms of the Scheme. The decision that the applicant had failed to meet the relevant scheme eligibility criterion in 3.5, that the applicant was living in the State continuously since his arrival and could provide supporting documentary evidence of his continued presence in the State, was a lawful application of the Scheme.

27. If I am incorrect in that, I do not consider it would be appropriate to exercise my discretion to grant the reliefs sought anyway having regard to the requirements of 3.3 of the Scheme, as I consider the evidence before the respondent in the review process was not so clear cut as to enable this Court to be satisfied that the applicant could ever have satisfied the respondent, within that review process, that he satisfied the requirements of 3.3.

28. I therefore refuse the reliefs as sought.

Indicative view on costs

29. My indicative view on costs is that they should follow the cause in accordance with section 169 of the Legal Services Regulation Act 2015, and that the respondent is entitled to a costs order against the applicant. If either party wishes to make further submissions to me on costs or on the final orders to be made, I will consider them at 10 a.m. on 17 June.