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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **04/12/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY FLAVIUS-VIEOREL GOLDIS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY VALERIA NEGRU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Ex tempore ruling on interim relief applications

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John Larkin KC and Richard McLean (instructed by Phoenix Law) for the Applicants
Tony McGleenan KC and Aidan Sands KC (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] These two applicants seek leave to apply for judicial review to challenge the immigration rules insofar as they preclude them from exercising EU Treaty rights in Northern Ireland. They arrived in this jurisdiction after the specified date of 31 December 2020, and they seek to challenge the rules on the basis of Article 2 of the Windsor Framework and the protection of civil rights which is referred to therein. The proposed respondent is the Secretary of State for the Home Department.

[2] They also seek to mount a challenge on Article 3 of the Windsor Framework which recognises the Common Travel Area between the UK and Ireland. It is argued that the protocol seeks to ensure that there is no hard border but that the manner in which these applicants have been treated breaches that principle. I say nothing about the merits of those challenges for two reasons. One is that there are cases pending before the Court of Appeal which will address some, if not all, of the Windsor

Framework issues regarding immigration law. Secondly, because the proposed respondent accepts that in these cases and for these purposes there is a serious issue to be tried.

Interim relief

[3] The applications before me today are for interim relief seeking a form of interim declaration that these applicants be permitted to work pending the determination of their judicial review applications. They are grounded on affidavits from each of the applicants which reveal that they were released on immigration bail in November 2023. In May of this year each of them sought permission to work pending the determination of their cases and this was declined by the proposed respondent on 31 May 2024.

[4] As a result the applicants are relying on the kindness of friends and handouts, they are not able to work, and they face inevitable delay in their cases being processed because of the appeal cases which I referred to earlier. They cannot apply to the First Tier Tribunal for permission to work given that bail has been granted by the Secretary of State. It is accepted by the parties that the Secretary of State does enjoy discretion to permit individuals in the positions of the applicants to work but that in the prevailing circumstances that has been refused.

[5] It is also not in dispute that the law in this area regarding interim relief is based on a variant of the *American Cyanamid* principles whereby the court has to consider, once a serious issue to be tried has been established, the balance of convenience between the parties factoring in the relevant public interest. In private law these matters are often a weighing up of the prejudice or harm caused by an interim order to the respective parties to the litigation, in judicial review it is triangulated to include the more general public interest.

[6] The contentions put forward by the applications are that they seek to exercise what is a fundamental human right to work and to contribute to the state by the payment of tax and national insurance, that the relief sought is not in any way intrusive nor would it interfere with the mechanics of government, it would merely be an interim declaratory relief that would issue from the court relating to the right to work. They stress that the applicants are fit and able to work and wish to do so but are being prevented by the approach taken by the Secretary of State.

[7] The responses of the respondent are that effectively the applicants should not be permitted to create for themselves a right to work which would not have otherwise been available to them simply by the issuing of these proceedings, the reliance on the Windsor Framework and the claim for interim relief.

The principles

[8] These applications are not common, but there are examples of the courts dealing with interim relief in cases involving asylum seekers. Recently in a Scottish case, *Bakushev v The Secretary of State for the Home Department* [2022] CSOH 67, Lord Ericht considered whether or not to grant interim relief to an asylum seeker whose fresh claims application under the rules had been refused and he had sought judicial review. It was held that there was an inherent power in the court to grant such interim relief based on the balance of convenience. In that case the court found in favour of the petitioner and granted the interim order because if it had not done so, the petitioner for judicial review would have lost his employment and therefore his home. It would have forced him into asylum seeker accommodation and even if the judicial review was ultimately successful it would have been very difficult to restore him to his previous position. There was no harm to the public interest as the applicant would only be proceeding to continue to work which he had been doing for many years in the care sector. Stress was placed on the shortage of care workers and the delay that had been solely the responsibility of the respondent in dealing with the asylum claim.

[9] Instructively in that case, the judge referred to *R (Rostami) v The Secretary of State for the Home Department* [2013] EWHC 1494, a judgment of Hickenbottom J in which the relevant policy factors were considered. The judge stated:

> "It is common ground between the parties (and uncontroversial) that, as a matter of domestic law, a State has the power and right to determine which foreign nationals should be allowed to work in its territory, and conditions upon which such employment will be allowed. Decisions in exercise of that power involve various competing policy issues such as the need to protect the domestic labour market and the interests of those with a right to seek employment in it; and the benefits of introducing into that market workers with skills in respect of which there may be a shortage. In addition, in the case of an asylum seeker (who cannot leave or be required to leave the UK whilst his application is being determined), they include the potential burden on public finances in terms of welfare benefits if the applicant does not work whilst his application is being determined; the need to avoid encouraging asylum applications from economic migrants; and, not least, the rights and interests of the applicant. Some of these policy issues become even more pointed if employment is scarce, or where the availability of public funds is particularly limited; and some become more acute where there are very significant delays in ultimately determining the refugee status of an applicant. The public interest factors have to be balanced, with the rights and interests of relevant individuals, in a

> sophisticated exercise of judgment quintessentially for the executive of the relevant state." (para [23])

[10] Such decisions therefore involve the balancing of competing policy issues such as public finances, labour shortages and the rights of applicants and they require a sophisticated exercise of judgment quintessentially for the executive of the relevant state.

Consideration

[11] In this case I have considerable sympathy for the applicants in their current situation. I have no doubt that they do wish to work and do wish to contribute more broadly to society. It is unfortunate that the state of flux around immigration law and the Windsor Framework is such that it may take some time for their claims to be heard and determined. However, that sympathy cannot, I think, serve to trump the rights of the Home Secretary to set policy in this area. I am conscious that these applicants are not asylum seekers but economic migrants and whether or not such economic migrants should be permitted to work and, if so, when and in what circumstances and in what areas, are matters properly for Ministers. The courts should only intervene, in my view, in this territory where there are exceptional circumstances calling for interim relief. These cases do not, in my view, give rise to such exceptional circumstances.

[12] As I say, whilst one may have sympathy, these applicants are in a position which many economic migrants will find themselves pending either their applications for the right to remain in the United Kingdom on whatever basis or for judicial review of extant decisions.

[13] In those circumstances, I have determined that the balance of convenience falls in favour of the proposed respondent and therefore, the applications for interim relief are refused.