Court of Appeal

(Inferior Jurisdiction)

Appeal number: 39/2017

Tanya Mihedova

Vs

Director of Department for Citizenship and Expatriate Affairs

19th February, 2018.

1. **Facts.**

i. Tanya Mihedova (respondent) is a Belarussian citizen, and mother of two minor children who are Maltese citizens.

ii. She applied for the grant of a single permit under Subsidiary Legislation 217.17 which in regulation 1(3) provides that the objective of the regulation is, *"… to determine (a) a single application procedure for* ***issuing a single permit for third country nationals to reside for the purpose of work in Malta*** *in order to simplify the procedures for their admission and to facilitate the control of their status; and (b)* ***a common set of rights to third-country workers legally residing in Malta, irrespective of the purposes for which they were initially admitted in Malta****, based on equal treatment with Maltese nationals as provided for in Part III of these Regulations"*.

iii. By letter dated 7th February, 2017 she was informed that her application was refused, *"… as it transpired that you have inconsistencies in the CV provided. The documentation submitted is not bona fide"*.

iv. By letter dated 13th February, 2017 she filed an appeal before the Immigration Appeals Board.

v. By letter dated 27th February, 2017 addressed to the Immigration Appeals Board, she explained that she has been living in Malta for over twelve (12) years, has two minor children who are Maltese citizens and she is seeking employment to have a means of income to contributed towards the upbringing of the children. Furthermore, she claims that the inconsistencies in her *curriculum vitae* were due to a typing error (vide also her affidavit wherein she explained the mistake).

vi. In her CV, which is not signed, and which forms part of the acts of the Board, it is claimed that she worked as a shop manager *'Kurchanov and Co'* in Vitebsk, Belarus between the 1st September 1999 and 1st August 2004 and as a part-time administrative secretary between the 1st August 2001 and 5th September 2004 with *'Manufacturing Enterprise Vitebchanka, Vitebsk (Belarus)'*.

vii. On the 31st July 2017 the Board delivered a decision stating:

"In the relative appeal, it was claimed that amongst other things, the appellant is the mother of two minor children and needs to work in order to support herself and her minor children. It is however observed that other than unauthenticated copies of the relative passport pages showing her children's photographs, no documentation was submitted in support of the appeal.

In these circumstances and after having seen the relative appeal as well as the entirety of the records of the appeal, the Board notes that there exists sufficient reason for it to see a humanitarian, dimension to the case in the sense that the appellant would be seriously prejudicing herself as well as her children were she not to be allowed to work in Malta.

Therefore the Board accepts the appeal".

2. On the 18th August, 2017 the Director of the Department for Citizenship and Expatriate Affairs appealed the decision. In his appeal he contends that:

   i. This court has jurisdiction to consider his appeal in terms of article 25A(5) of the Immigration Act (Chapter 217 of the Laws of Malta).
   ii. The Board acted *ultra vires* since he ignored the requisites imposed by Subsidiary Legislation 217.17 (*Single Application Procedure for a Single Permit as Regards Residence and Work and a Common set of Rights for Those Third-Country Workers Legally Residing in Malta Regulations*). The applicant declared that she worked in Malta as a trainee however she does not have work permits relative to that period. The Board had an obligation to apply the Subsidiary Regulation and not decide the matter on a matter over which he has no jurisdiction.

3. On the 26th January, 2018 the party's legal counsel made verbal submissions.

4. In the relative file there is no information concerning:

   i. The date when respondent arrived in Malta and took up her residence in Malta;
   ii. The purpose of her entry in Malta;
   iii. Whether a resident permit had been issued at any point in time, although in her appeal she claims that *"... she has never had any problems with the local authorities"*.

5. The respondent referred to the judgment delivered by the European Court of Justice (Grand Chamber) on the 8th March, 2011 in the case ***Gerardo Ruiz Zambrano vs Office nationale de l-emploi***. The applicant, a Colombian,

was the father of child who had acquired Belgian nationality. The referring court asked:

"whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European citizens, are dependant, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State".

6. The court's answer was:

"41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82; Garcia Avello, paragraph 22; Zhu and Chen, paragraph 25; and Rottmann, paragraph 43).

42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42).

43. A refusal to grant a right of residence to ***a third country national with dependent minor children in the Member State*** *where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.*

44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the terrritory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, ***are dependent****, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of"*.

7. The Treaty on the Functioning of the European Union establishes citizenship of the Union (article 20) and provides that a person holding the nationality of a Member State shall be a citizen of the Union. Furthermore, citizens of the Union enjoy various rights amongst which is the right of free movement and residence within the territory of Member States. Therefore it is evident that in such circumstances the right of residence of the third country national is a **derivative right** from the fact that the parent has children that are EU citizens.

8. In a judgment delivered by the same court on the 10th May, 2017 (**H.C. Chavez-Vilchez et**, C-133/15) it was held:-

"68 …….it must be recalled that, in the judgment of 6 December 2012, O and Others (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 51 and 56), the Court held that factors of relevance, for the purposes of determining whether a refusal to grant a right of residence to a third-country national parent of a child who is a Union citizen means that ***that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status, include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent****.*

69 As regards the second factor, the Court has stated that it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since ***it is that dependency that would lead to the Union citizen being obliged, in practice, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal*** *(see, to that effect, judgments of 8 March 2011, Ruiz Zambrano, C-34/09, EU:C:2011:124, paragraphs 43 and 45; of 15 November 2011, Dereci and Others, C-256/11, EU:C:2011:734, paragraphs 65 to 67; and of 6 December 2012, O and Others, C-356/11 and C-357/11, EU:C:2012:776, paragraph 56).*

70 In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, ***in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter****.*

71 For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.

72 In the light of the foregoing, the answer to the first and second questions is that Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a Union citizen would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights

conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium".

9. Irrespective of whether the respondent has a right to apply for a single permit for residence and work in terms of Subsidiary Legislation 217.17 or some other permit in terms of the law, it is an undisputed fact that the European Court of Justice has acknowledged that parents from a third country have a right to reside and work in the Member State of residence and nationality of their child. This is not a matter of humanitarian consideration but a right. The Member State has an obligation to ensure that the parent is not hindered in his/her right to reside and work in the particular Member State. Obviously subject to the requirements explained in the above judgments. In this particular case the court does not have adequate information to decide on whether or not the respondent has a right to reside and work in Malta on the basis of Article 20 of the TFEU, and this was certainly not the issue when the respondent filed her application for the issue of a single permit as her application was filed under a local legislation which is not based on Article 20 of the TFEU.

10. The Immigration Appeals Board briefly said that the respondent's appeal was upheld because of *'humanitarian dimension'* without:-

    i. Considering whether the decision delivered by the Department for Citizenship based on the reason mentioned in the letter dated 7th February, 2017, was justified;
    ii. Taking into account how respondent entered Malta, how long she has been residing in Malta, whether there was any period during which she was no longer residing in Malta, who is the primary carer of the children and other relevant matters;
    iii. Hearing any of the parties, and without giving an opportunity to the appellant to make submissions with regards to the so called *'humanitarian dimension'*.

    The Court also notes that the Immigration Appeals Board is bound by the principles of good administrative behaviour listed in Part II of the Administrative Justice Act (Chapter 490).

11. In his appeal the appellant claims that this court has jurisdiction to hear and decide this case in terms of Article 25A(5) of Chapter 217, that provision of the law is referring to the Board and not to this court.

12. In terms of article 25A(8) of the Immigration Act (Chapter 217):

> *"(8) The decisions of the Board shall be final except with respect to points of law decided by the Board regarding decisions affecting* ***persons as are mentioned in Part III****, from which an appeal shall lie within ten days to the Court of Appeal (Inferior Jurisdiction). The Rule Making Board established under article 29 of the Code of Organization and Civil Procedure may make rules governing any such appeal".*

13. It does not result that the respondent qualifies as a person mentioned in Part III (vide also judgment delivered by this court on the 26th June, 2009 **Daham Al Hamed vs Ufficjal Principali tal-Immigrazzjoni**. This issue was raised *ex officio* by the court during the sitting of the 26th January, 2018. Therefore, there is no right of appeal from the decision delivered by the Immigration Appeals Board. In a note filed on the 29th January, 2018 the appellant referred to the judgment delivered on the 21st February, 2017 in the names ***Fazia Algwairi vs Direttur Dipartiment tac-Cittadinanza u Expatriate Affairs***. In that appeal no issue arose as to whether an appeal could be filed in terms of Article 25A(8) of the principal act. Therefore, it is not relevant to the issue whether the appellant had a right of appeal in terms of Article 25A(8) of Chapter 217.

For this reason the court declares null the appeal filed by the appellant on the 18th August, 2017. Costs are at the charge of the appellant.

Anthony Ellul.