SUMMARY

2010/36: Workers' rights and free movement of people (IR)

<p>The Irish High Court holds that the Europe Agreement does not require existing Member States to open their labour markets to Romanian workers or to dictate the residence entitlements or conditions applied under national law to Romanian workers in their territories.</p>

Summary

The Irish High Court holds that the Europe Agreement[1] does not require existing Member States to open their labour markets to Romanian workers or to dictate the residence entitlements or conditions applied under national law to Romanian workers in their territories.

Facts

The applicant was a Romanian national who came to Ireland in August, 1999. He applied unsuccessfully for asylum, but from October 2000 had permission to reside in Ireland and held a work permit which enabled him to obtain employment. In 2002 he was joined here by his wife and children. In November 2007, having resided here for over five years, he applied for a permanent residence certificate under the European Communities (Freedom of Movement of Persons) (No 2) Regulations 2006[2] (the "2006 Regulations"). The 2006 Regulations are the Irish transposition of Directive 2004/38/EC. Article 16(1) of this Directive provides that "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there". Article 2 defines "Union citizen" as any person having the nationality of a Member State. Regulation 12(1) of the Irish 2006 Regulations provides that "a person to whom these Regulations apply who has resided in the State in conformity with the Regulations for a continuous period of five years may remain permanently in the State". In March 2008, the application was rejected by the

Department for Justice Equality and Law Reform on the basis that the applicant did not qualify for a permanent residence certificate, as he had not resided in Ireland continuously for a five year period. In May 2008, the applicant's solicitors queried the Minister's involvement and refusal, and pointed out that since Romania had become a Member State of the European Union on 1 January 2007, the applicant no longer required the permission of the Minister, as he had in excess of five years lawful residence in the State where he continued to be gainfully employed. The solicitors asked the Minister to reconsider the refusal, but in June 2008 the refusal was reaffirmed citing that the application had to be made by a person who has been resident in the State for more than five years as a Union citizen. As Romania only became a member of the EU on 1 January 2007, he was not eligible to make an application until 1 January 2012. The applicant brought judicial review proceedings contesting the legality of the Minister's decision on an interpretation of Regulation 12 (1) of the 2006 Regulations. The question raised was whether, in the applicant's case, a period of five years continuous residence in the State required by the Regulations can be calculated so as to include the years of the applicant's residence here prior to 1st January, 2007 or did it, as the Minister contended, require that the full five years continuous residence in the State be subsequent to the accession of Romania to the EU on 1 January 2007? The applicant argued that the Minister had erred in his decision in disregarding the applicant's years of lawful residence in the State since he was granted a work permit in 2000 and therefore had resided in the State “in conformity with” the 2006 Regulations. In particular, the applicant relied on the provision of Article 16 of the 2004 Directive, arguing that Article 16 is unconditional and sufficiently precise such that it has (vertical) "direct effect" and could therefore be relied upon against the Minister.

Judgment

The High Court considered that the applicant's invocation of the doctrine of direct effect was misplaced. At the date of making of the application for the certificate of residence (i.e. 2007), the 2004 Directive had been fully transposed into Irish law so that reliance on the Directive as conferring rights missing from national law was unnecessary. However, the Court noted that a national law transposing a directive must be construed as much as possible by reference to the provisions of the Directive. The Court held that the expression “in conformity with these Regulations” correctly reflected the wording “in compliance with the conditions of this Directive” as it appears in the 17th recital to the Directive, which provides, "A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State ***in compliance with*** the conditions laid down in this Directive during a continuous period of five years [...]" [emphasis added]. Prior to 1 January 2007, the applicant was not an EU citizen and his presence in the State, while lawful under national law, was not residence *“in compliance with the conditions”* of the Directive or of

Community law as such. His presence was lawful by virtue of a purely domestic authorisation granted to a non-EU national. What was at issue was the applicant's entitlement to permanent residence in the State on the basis of Regulation 12 (1) and Article 16 (1) of the Directive. Neither the terms nor the continuation of the applicant's existing employment were in question. However, the Court felt compelled to comment on the employment law aspects. The Court stated that whilst it did not accept that the provisions of Article 38 (1) of the Europe Agreement[3] altered the position of the applicant so far as concerned the interpretation and application of the 2004 Directive or the 2006 Regulations, it was undoubtedly the case that the applicant, as a Romanian national legally employed in the State in the years prior to January 2007, was protected by that provision from discrimination by reference to his Romanian nationality, as compared with Irish nationals employed in the State. However, the scope of that protection was limited to employment as such and to working conditions, remuneration and terms of dismissal in particular. So for example, if workers in a particular industry were entitled by national law to a certain number of weeks paid leave per annum, an employment contract with a Romanian national which purported to grant a lesser number of weeks paid leave, could be declared unlawful by reference to that provision. Prior to 1 January, 2007 the applicant would have been entitled to invoke Article 38 of the Europe Agreement had he, as a Romanian working here, been threatened with discriminatory treatment of the kind which it prohibits. The issue was whether under the Europe Agreement the applicant, by virtue of his presence and employment in the State had, in effect, accrued rights of residence under the Europe Agreement or otherwise, which must be translated by virtue of the Accession Act 2005 into an entitlement which counts towards fulfilling the residence conditions of the 2006 Regulations and of the Directive. The Court rejected the applicant's arguments based on the analogy with the Accession Treaty and the Europe Agreement, because of the explicit margin of discretion reserved to the Member States in applying the derogation agreed in relation to the opening of the labour markets, and as a result, in applying the associated rights of entry and residence which had been consolidated in the 2004 Directive prior to 1 January 2007. The Court considered that were the provisions of the Regulations (and of the Directive) to be applied in the manner contended for by the applicant, by reference to the suggested analogous effect of the Accession Act 2005, it would necessarily lead to a discriminatory implementation of the Directive for Romanian nationals. It would mean, for example, that Romanian nationals in circumstances similar to those of the applicant, but who had taken up employment prior to January 2007 in France, Germany or any other existing Member State, would be treated differently in the application of the Directive after that date by virtue of the different national rules agreed bilaterally by those Member States with Romania in earlier years. The Court concluded that such a result would clearly be incompatible with the Directive's objective of introducing uniform rules and standards. The application to reverse the Minister's decision

was therefore rejected. Commentary Whilst the focus of this judgement is on residency requirements rather than a right to work in Ireland, the judgement pertaining to the free movement of persons and the employment law aspects is interesting. The judgement highlights the protection against discrimination in the workplace which is afforded to all Accession States citizens in Ireland and the EU. Unlike Ireland, many labour markets in the older Member States had not been opened to Romanian workers. The judge pointed out that were he to accept the applicant's position that pre-2007 residence qualifies as residence in the meaning of Regulation 12(1) and Article 16(1) of the Directive, it would in fact lead to discriminatory (namely more favourable) implementation of the Directive for Romanian workers resident and working in Ireland as compared to other EU Member States prior to 2007. Since 1 January 2009, the Irish Government has continued to allow access, but with restrictions, to the Irish labour market for nationals of Bulgaria and Romania. Accordingly, nationals from both states still require an employment permit to take up employment in Ireland and the job vacancy continues to be subject to a labour market needs test[4]. These employment permit requirements apply only to the first continuous 12 months of employment. At the end of an "uninterrupted"[5] 12 month period a Bulgarian or Romanian national will be free to work in Ireland without any further need for an employment permit. The Government's decision to continue restrictions is under on-going review and is to be assessed before the end of 2011. In the current economic climate, it is unlikely that these restrictions will be lifted any time soon. Comments from other jurisdictions Germany (Elisabeth Hšller): All citizens of the states which have joined the European Union as of 1 May 2004 and 1 January 2007 respectively, still need a work permit for a transitional period. This is the so-called "EU work permit" under Section 284 of the Social Security Code III ("Sozialgesetzbuch III") which operates in connection with Section 12a of the Statutory Regulation on Work Permits ("Arbeitsgenehmigungsverordnung"). An exemption is only made for Malta and Cyprus, since both countries already enjoy unrestricted freedom of movement. All citizens of the new EU member states are permitted to enter Germany without a visa. Nor do they require any residence permit. However, for a transitional period until 31 December 2013 Romanian citizens do require an EU work permit, which they may apply for at the competent Employment Agency. They may only apply for an unrestricted and unlimited EU work permit if they have been allowed to work in Germany for a continuous period of a minimum of 12 months, calculated from the date of joining the EU, which for Romanian citizens is 1 January 2007. Since in this case the applicant had not had permission to work in Germany for a period of 12 months as at the date of filing of the application in November 2007, the German Employment Agency would also have rejected the application.

Footnotes

1 The Europe Agreements constituted the legal framework of relations between the European Union and the Central and Eastern European countries. These

agreements were adapted to the specific situation of each partner state while setting common political, economic and commercial objectives. In the context of accession to the European Union, they formed the framework for implementation of the accession process. At present, only Bulgaria and Romania still have Europe Agreements. (See Europa website http://ec.europa.eu/enlargement/glossary/terms.) The original Europe Agreement with Romania was concluded on 19 December 1994 and came into force on 1 February 1995.

2 The 2006 Regulations, enacted through Statutory Instrument 656 of 2006, gave effect to Directive 2004/38/EC. They replaced a previous version of the Regulations (SI 226 of 2006) in connection with the enlargement of the EU on 1 January 2007.

3 Title IV, Chapter 1- Movement of Workers.

4 http://www.entemp.ie/publications/labour/2007/guideworkpermits.pdf: A vacancy, in respect of which an application for a work permit is being made, must be advertised with the FçS/EURES employment network and additionally in local and national newspapers, for three days, to ensure that, in the first instance a national of the EEA or Switzerland, or in the second instance a national of Bulgaria or Romania, cannot be found to fill the vacancy. Evidence that this has been done must be included with the application.

5 Irish Department of Enterprise Trade and Employment: http://www.entemp.ie/labour/workpermits/bulgariaromania.htm

Subject: Worker and residence permit

Parties: IB (applicant) - v - Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (respondents)

Court: High Court of the Republic of Ireland

Date: 15 October 2009

Case number: 2008 no 1079 JR; [2009] IEHC 447

Hardcopy publication: Not yet available

Internet publication: www.courts.ie/judgments.nsf

Creator: The High Court
Verdict at: 2009-10-15
Case number: 2008 no 1079 JR; [2009] IEHC 447