THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 328

Appeal No.: 2019/25

Baker J.
Whelan J.
McGovern J.
BETWEEN/

A. R. AND N. K.

APPLICANTS/
APPELLANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Baker delivered on the 19th day of December, 2019

1. This judgment raises an issue regarding the transposition into Irish law of Directive 2004/38/EC On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, O.J. L158/77 30.4.2004 ("the Citizens Directive") by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) ("the 2015 Regulations").

2. The appeal is from an order of Humphreys J. made on 11 December 2018, following delivery of a written judgement, *A. R. (Pakistan) v. The Minister for Justice, Equality and Law Reform* [2018] IEHC 785, refusing to make an order of *certiorari* of the decision of the Minister for Justice and Equality ("the Minister") refusing the first appellant liberty to enter and remain in the State as a permitted family member of the second appellant.

3. This appeal was heard with the case of *Safdar v. Minister for Justice*, appeal record number 2019/28, in which judgment is also given today. The two judgments are to be read together, as the decision in *Safdar v. Minister for Justice* contains a more complete analysis of the transposition argument than the present judgment.

Background facts

4. The first appellant is a Pakistani national and the second appellant a Union citizen from Hungary, and they claim to be parties to a "durable relationship" and that the first appellant is therefore entitled to be treated as "permitted family member" within the meaning of the Citizens Directive and the 2015 Regulations.

5. The appellants met in the United Kingdom in June 2014, and in 2015 they moved to the State, the first appellant in August 2015 and the second appellant in September 2015. They have lived in the State together under the same roof since then. They entered a non-binding and not legally recognised Islamic ceremony of marriage in July 2016.

6. On 2 January 2017, they became engaged to be married and an application was made to the Civil Registration Service for permission to marry in the State. By decision of 6 March 2018, the Civil Registration Service refused them permission to marry on the stated

grounds that the proposed marriage was a marriage of convenience and that therefore an impediment existed sufficient to constitute an impediment to the proposed marriage.

7. That decision of the Civil Registration Service was appealed to the Circuit Court pursuant to the provisions of s. 58(9)(a) of the Civil Registration Act 2004, as amended by the Civil Registration (Amendment) Act 2014, and that appeal has yet to be determined in the Circuit Court. The Circuit Court case remains at a preliminary stage and a motion seeking an extension of time to bring the application has yet to be resolved. It was unclear at the date of the hearing of the present appeal when the substantive hearing might take place, or indeed even when the preliminary jurisdiction point was listed for hearing.

The Citizens Directive

8. The Citizens Directive states in its preamble that it is directed towards the rights of citizens of the Union to move and reside freely within the territory of the Member States. It recites the recognition of the primary and individual right of citizens of the Union to move and reside freely within the territory of the Member States, subject only to limitations and conditions laid down in the Treaty and to any measures adopted to give it effect.

9. The free movement of persons is recited as being one of the fundamental freedoms of the internal market, and the stated purpose of the Citizens Directive was to codify and review then existing law that supported the right of free movement by extending it to family members of Union citizens irrespective of nationality.

10. Recital 8 makes reference to the facilitation of the free movement of family members and recital 6 to the desire of maintaining "the unity of the family in a broader sense" and envisages the extension of the right of movement to those persons who are not included in the definition of "family members" under the Citizens Directive and who do not therefore enjoy an automatic right of entry into or residence in the host Member States. It recognises that those persons should be entitled to apply for the right of entry and residence and that the host Member State should take into consideration their relationship with the Union citizen or other circumstances such as their financial or physical dependence on the Union citizen in the consideration of such application.

11. The present case engages the provisions of article 5 of the Citizens Directive, which provides for the grant to a Union citizen of a right to enter and remain in the host Member State and extends that right to family members who satisfy the requirements of article 7(1)(a), (b) or (c) of the Citizens Directive, all of which relate to requirements that the relevant person be a worker, or have sufficient resources, or be engaged in a course of study or vocational training as the case may be.

12. The Citizens Directive is not directly effective, see the decision of the Court of Justice in *Secretary of State for the Home Department v. Rahman* (Case C-83/11) ECLI:EU:C:2012:519, and was transposed into Irish law by the European Communities (Free Movement of Persons) No. 2 Regulations 2006 (S.I. No. 656/2006), as amended

("the 2006 Regulations"), now revoked and repealed by the 2015 Regulations, those relevant to the present application.

13. By application dated 1 May 2017 made in the statutory form EU1A the first appellant applied for a residence card as a permitted family member of a Union citizen. The application was signed by him and the second appellant on the same day.

14. By letter of 24 July 2017 the application was refused. The Minister expressed himself not satisfied that the documentation established that the first appellant was in a "durable relationship" with the Union citizen and expressly said that the documentary evidence of co-habitation was insufficient. Regard was had to the fact that the tenancy agreement of 31 July 2015 was in the name of the second appellant only, although the tenancy agreement made one year later was in joint names and correspondence from the Residential Tenancies Board identifying a joint tenancy is dated October 2016. It is also noted that utility bills are in the name of the Union citizen. Rubbish collection bills are in joint names.

15. It is also noted that the first appellant made an application for asylum on 27 August 2015 which, from the evidence, appears to have been immediately upon his arrival in the State. What was regarded as important by the Minister was that the application, which did name a number of family members including his parents and siblings, made no reference to his "de facto partner".

16. With regard to the certificate of the Islamic marriage, the Minister noted that the receipt furnished for a wedding dress is dated some nine months after the date of that ceremony.

17. Further note was taken of the fact that no evidence was shown of a joint bank account or shared assets and that this suggested that no durable relationship existed.

18. The Minister suggested that other factors such as joint travel or having started a family might have been suggestive of a durable relationship, but no evidence of that type was adduced.

19. Correspondence was then entered into between the solicitors for the first appellant and the Immigration and Naturalisation Service ("INIS") of the Department of Justice and Equality. The solicitors furnished the letting of 31 July 2015 revised to show it made joint names, explained that the first appellant did not have a bank account in the jurisdiction as he had no residency stamp, and that utility bills were paid by his partner as he had no income. The evidence was that the couple had a new letting agreement, the third in joint names.

20. The explanation for the date of the receipt for the wedding dress was that this was purchased in anticipation of the State wedding, which for reasons explained above has not yet occurred. Flight bookings for the family of the second appellant to attend the proposed wedding in Ireland were also furnished.

21. The first appellant explains that he did not recall being asked for details of his partner when he applied for asylum.

22. It was also stated that the couple did not wish to start a family until the first appellant was in a position to work and support his family.

Decision on statutory review

23. On 2 August 2017, the appellants sought a statutory review of the refusal under r. 25 of the 2015 Regulations. By letter of 9 February 2018 the Minister wrote to the first appellant proposing to uphold the first instance decision. The Minister expressed the clear view that the relationship was one of convenience and stated this using the following formula:

> "[Y]our De Facto partnership may be one of convenience, contracted for the sole purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right."

24. The letter went on to say that the Minister was of the opinion that the documentation provided, and the statements made were "false and misleading as to a material fact." The first appellant was invited to make written representations before a final decision would be made, but he did not do so. That fact formed some part of the decision of Humphreys J. and of the argument on appeal.

25. The decision on review was given by letter of 8 March 2018 which formally refused the application. The reasons were materially similar to those in the letter of February 2018 and the following statement was given in conclusion:

> "Your application for permission to remain is now refused in accordance with the provisions of Regulation 28(1) and (27)(1) of the Regulations. Your EU Treaty Rights application is now closed. It is noted that you have an ongoing appeal for Asylum, therefore your file has now been forwarded to the International Protection Office for further appropriate action."

26. The letter refers to the asylum application and that, when the appellants were both interviewed on 24 April 2017, the first appellant said that he had entered the State via Belfast and had travelled to Dublin by car. The letter identified an inconsistency in the description given about how he and the second appellant separately entered the State, the first appellant stating that they had entered together and the second appellant that they had entered separately, she being the second to come. The letter also noted that descriptions of the appellants' first date are conflicting, and that the first appellant was unable to say what employment the Union citizen had in the United Kingdom. It was noted that the Union citizen had entered into a lease agreement on 31 July 2015, some two weeks before she entered the State on 13 August 2015. The second appellant was unable to offer any explanation of why they had moved their centre of interest from the United Kingdom to Ireland.

Grounds for review

27. *Certiorari* by way of judicial review was sought on three pleaded grounds:

(a) that the Minister had erred in fact and in law, acted unreasonably, irrationally, disproportionately and in breach of the principles of fair procedures and natural and constitutional justice in failing to provide reasons;

(b) that the Minister had erred in fact and in law in failing to have regard to the documentation submitted and representations made by and on behalf of the appellants;

(c) that the respondents breached the principle of effectiveness by failing to adequate transpose the Citizens Directive and in particular to ensure that domestic legislation contains criteria which are consistent with the normal meaning of the word "facilitate" and the words "durable relationship duly attested" used in article 3(2) of the Citizens Directive with the effect that the appellants were unable to ascertain the threshold to be met.

28. The respondents oppose the application for judicial review, plead that the reasons are set out in full at first instance and on review, that there was no irrationality or unreasonableness, fettering of a discretion, or breach of fair procedures, or failure to take account of the relevant evidence. There is a specific plea that the respondents did not accept that the evidence submitted on the application was adequate to establish a durable relationship in accordance with law.

29. It is pleaded that the State has adequately transposed the Citizens Directive and is compliant with the obligations under article 3(2) thereof.

The judgment of the High Court

30. Humphreys J. dismissed the application for judicial review in the exercise of his discretion on account of the fact that the appellants failed to respond to the letter of 9 February 2018 in which the Minister set out a number of specific concerns, and invited a response within 21 days.

31. The first appellant's affidavit does not specifically aver that he did not receive the letter but says that he "did not see it" until 1 March 2018, when he opened an e-mail of 14 February 2018 from his solicitor. He says he then emailed his solicitor to arrange an appointment on that day, but they "did not arrange to meet before the decision issued".

32. Humphreys J. dealt with this sequence of events at para. 7 at *et seq*. of his decision and noted that the decision sought to be reviewed expressly noted that the applicants had failed to address the specific concerns raised in the letter of 9 February 2018.

33. Humphreys J. adopted the approach taken by Murphy J. in *Hennessy v. An Board Pleanála* [2018] IEHC 678 at para 44 that:

"The applicant having failed to participate in the appeal process cannot now seek to impugn that decision by introducing arguments that were never made to the Board."

34. Humphreys J. considered that by failing to avail of the statutory opportunity, the appellants have thereby precluded themselves from obtaining relief by way of judicial review. He did not, on the facts, accept the excuses or explanations given.

The appeal

35. The appeal centres on the question of the conclusion drawn by the Minister and upheld by the decision of Humphreys J. that the appellants could not adduce satisfactory evidence that they were parties to a "durable relationship duly attested".

36. In short, the issues on the appeal are as follows:

(1) whether the Citizens Directive has been properly transposed in the State by the 2015 Regulations in a manner that is sufficiently certain and clear to be effective;

(2) whether the Minister failed to give reasons for his refusal to grant the first appellant a residence card as a permitted family member of the second appellant; and

(3) whether the decision of the Minister was rational and probably flowed from the facts of the case.

Discussion

37. That judicial review is a discretionary remedy is well established, and the failure of an applicant for judicial review to engage with the decision maker can, in the discretion of a court, result in a refusal of relief. The trial judge was perfectly within his discretion to do so, and the grounds on which he did were fully explained and did, in my view, justify his approach. I can see no error in the inferences he drew from the failure to respond nor in the conclusion he drew regarding the lack of credibility in the excuse or explanation for not responding to the letter seeking further information.

38. The exercise of discretion in these circumstances was expressly done in the light of a failure to engage with the statutory opportunity, and therefore, the argument that sometimes justifies bringing an application for judicial review without exhausting an appellate process would carry little force. Had the appellants taken the statutory opportunity to respond to the concerns of the Minister, the taking of that step would not have precluded a judicial review. No reasonable justification was provided for that failure.

39. In my view, this consideration carries some weight in the correct approach to the appeal. An appellate court is slow to overturn the exercise of a discretionary power in circumstances where the decision maker has taken a reasoned and considered approach to the question, and where, as here, the decision made has reflected previous authorities.

40. Whilst as a matter of law, an appellate court will show deference to the exercise by the trial judge of his or her jurisdiction, it retains its own discretion. See the recent

formulation, for example, at paras. 19 and 20 of the judgment of Peart J. in *Tír Na N-Óg Projects (Ireland) Ltd. v. P.J. O'Driscoll & Sons (A Firm)* [2019] IECA 154:

> "19. Before considering the evidence adduced by the respondent by way of *prima facie* evidence of special circumstances, it is helpful to say something about this Court's jurisdiction in relation to an appeal against what is essentially an order of a discretionary nature. This question was comprehe*nsively considered by this Court in* Collins v. Minister for Justice, Equality and Law Reform [2015] IECA 27. The Court considered some diverging authorities but concluded that the true position is that stated by McMenamin J. in *Lismore Builders Ltd (In Receivership) v. Bank of Ireland Finance Ltd* [2013] IESC 6 which 'best accord[s] with the balance of authority and, indeed, with first principles'. In his judgment in *Lismore* McMenamin J. stated in relation to the circumstances in which an appellate court might review an order made by a High Court judge in the exercise of a discretion:
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> > 'Although great deference will normally be granted to the views of the trial judge, this court retains the jurisdiction of exercising its discretion in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in *Desmond v. MGN* [2009] 1 I.R. 737 …'.
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> 20 At para. 79 of this Court's judgment in *Collins*, the Court stated:
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> > '79. For all these reasons, therefore, we consider that the true position is that set out by McMenamin J. in *Lismore Homes [sic*], namely that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great respect to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.'"

41. I would approach this aspect of the appeal by saying that the discretionary factors identified by Humphreys J. did justify the dismissal of the application, and that the failure by the appellants to engage fully with the statutory review procedure precludes the granting of relief.

42. I return later to more fully consider this point in the context of the giving of reasons and the alleged absence of fairness.

Reasons/observations made by the trial judge

43. Humphreys J. went on to make a number of *obiter* findings following his determination that the application for judicial review should be refused on discretionary grounds. He concluded that the pleaded irrationality and unlawfulness was vague or "omnibus" and not sufficiently particularised as required by O. 84, r. 20(3) of the Rules of the Superior Courts, and that relief was precluded under that heading. He also considered that the decision was, in substance, reasonable and lawful.

44. The letter refused the application for a residence permit and permission to remain in accordance with r. 28(1) and r. 27(1) of the 2015 Regulations. Regulation 27(1)(a) of the 2015 Regulations, in its material part, provides as follows:

> "The Minister may revoke, refuse to make or refuse to grant, as the case may be, any of the following where he or she decides, in accordance with this Regulation, that the right, entitlement or status, as the case may be, concerned is being claimed on the basis of fraud or abuse of rights:
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> (a) a decision under Regulation 5(3) that a person be treated as a permitted family member".

45. In response to the argument that the Minister had wrongly purported to make his decision under r. 27(1) and r. 28(1) of the 2015 Regulations, Humphreys J., at para. 17, found no error in the light of the fact that the appellants could not meet the test in r. 5(1) of the 2015 Regulations in that they did not persuade the Minister that they were in a durable relationship and therefore the provisions of r. 27(1) of the 2015 Regulations could not be availed of.

46. Regulation 28(1) of the 2015 Regulations had no application and Humphreys J. was correct that the reference to that regulation was, at worst, "surplusage" and that it was probably the case that the fact that "the parties are purportedly religiously married in an unbinding ceremony possibly provides some explanation for the references by the Minister to spouses and to marriage-related language", at para. 17. Humphreys J. went on to say that "[i]t certainly cannot be regarded as fatal to the decision on the present facts nor did it mislead or prejudice the applicants."

47. These matters on which Humphreys J. made comments and which did not form the basis of his decision, seem to me to be a correct analysis of the facts.

48. The judicial review is made to a large extent on the grounds that the Minister failed to give reasons or acted irrationally or in breach of fairness. I agree with the approach adopted by Humphreys J. that by not engaging fully with the statutory opportunity to clarify the matters which had given rise to the concerns articulated by the Minister, the appellants are precluded from advancing these heads of challenge.

49. For completeness I propose to briefly consider the argument that the reasons were insufficient or that the reasoning was flawed.

50. It could scarcely be said that the Minister had failed to give reasons when his concerns were not further addressed, or that the decision was irrational or unreasonable, where the Minister had not been provided with answers that might have clarified some of the factual concerns raised, or that there was a lack of fairness or transparency when the appellants had failed to themselves engage with the process which contained an in-built opportunity to achieve fairness in a substantive and concrete way.

51. I would dismiss these grounds of appeal.

Transposition

52. The argument that the 2015 Regulations do not correctly or fully transpose the Citizens Directive was made before Humphreys J. and before this Court on appeal and was pleaded in the statement of grounds. Humphreys J. rejected the argument as no challenge was made to the 2015 Regulations and, as he said, "[e]ven if the Directive is not transposed properly, that does not give rise to a right of *certiorari* of the decision" because the pleaded case relied on the 2015 Regulations.

53. However, Humphreys J. went on to make some comments on the transposition point and quoted with approval the judgment of Keane J. in *Safdar v. Minister for Justice and Equality* [2018] IEHC 698, at paras. 49 to 53, with regard to the argument that the Citizens Directive was not properly transposed on account of the fact that the language of the 2015 Regulations adopted the language of the Directive itself. He rejected the argument, as had Keane J., that the language used was imprecise and lacked sufficient detail or clarity.

54. The decision on the appeal from the decision of Keane J. in *Safdar v. Minister for Justice and Equality* has been delivered today, and I refer the reader to the more complete analysis of the transposition issue in that judgment. For the reasons stated there, I consider that the challenge based on the alleged failure to transpose should fail.

55. The comments of Humphreys J. usefully express a broad proposition that it is "normally a legitimate transposition of a directive to simply adopt the language of the directive concerned without seeking to define terms that are undefined in the directive itself", at para. 21.

56. Humphreys J. also noted two other arguments which I consider to be correct, that guidelines as to the meaning of "durable relationship" are, in fact, set out in the Irish form EU1A, and the inclusion of those guidelines for the assistance of the administrative function is legitimate.

57. Finally, Humphreys J. expressed the view, with which I also agree, that "the obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance", at para. 21.

58. Although his comments were *obiter*, the observations and reasoning of Humphreys J. seem to me to be correct as appears more fully in my consideration of the point in the judgment in *Safdar v. Minister for Justice*.

Summary

59. In summary, I am of the view that Humphreys J. correctly exercised his discretionary powers by declining to grant judicial review on account of the failure by the appellants to fully engage with the statutory review process, and to take the opportunity afforded to comment further on the matters expressly identified by the Minister as giving rise to concern.

60. I consider that the failure to fully engage with the opportunity to clarify the matters of fact which had given rise to concern on the part of the Minister makes it untenable for the appellants to now argue that the Minister's decision lacked reasons, was given in breach of the obligations of fairness, and that the Minister's decision was irrational. I do not consider that the remedy of judicial review on these bases should be granted, although I leave to another case the broader question of whether there may be circumstances where failure to engage with the opportunity to further comment might preclude an application for judicial review on jurisdictional grounds.

61. With regard to the other matters of substance considered by Humphreys J. in his judgment, I consider that he was correct in the views he expressed, albeit *obiter*, and in particular in the view he took that the Citizens Directive was correctly transposed by the 2015 Regulations. The comments and findings of Humphreys J. in this regard are *obiter* but usefully considered in the context of the appeal against the judgement of Keane J. in *Safdar v. Minister for Justice* in which the matter is more fully explored.

62. For these reasons, I am of the view that the appeal should be dismissed.