THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 659 J.R.]

BETWEEN

M.K.F.S. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 16th day of April, 2018

1. In *M.K.F.S. (Pakistan) v. Minister for Justice and Equality (No. 1)* [2018] IEHC 103 [2018] 2 JIC 0604 (Unreported, High Court, 6th February, 2018) I dismissed the applicant's application for judicial review. Mr. Mel Andre Christle S.C. (with Mr. Ian Whelan B.L.) for the applicant now applies for leave to appeal and I have received helpful submissions from the applicant's side and from Mr. Anthony Moore B.L. for the respondent.

2. I have had regard to the principles regarding leave to appeal as set out by Clarke J. (as he then was) in *Arklow Holidays v. An Bord Pleanála* (Unreported, High Court, 11th January, 2008) and MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, 13th November, 2006). I have considered these principles in cases such as *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) para. 2, and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) at para. 72.

Proposed question of exceptional public importance

3. The question proposed on behalf of the applicant as set out in his written submissions is: "*is a marriage entered into in the State pursuant to the provisions of the Civil Registration Act 2004 as amended rendered a nullity at law as a result of the decision reached by the executive after the marriage has taken place so the marriage is one of convenience or may rights still emanate from the marriage depending on the facts and circumstances of the individual case*". It suggested that there is a conflict in High Court jurisprudence which warrants leave to appeal to the Court of Appeal, in line with what was suggested in *R.A. v. Refugee Appeals Tribunal (No. 2)* [2015] IEHC 830 [2015] 12 JIC 2119 (Unreported, High Court, 21st December, 2015).

4. First of all, it may be observed that the form of the question is tendentious, in the sense that it is not a decision reached by the executive that renders the marriage a nullity. The situation is that the executive has been given a statutory power to make a determination that the marriage is one of convenience, and it is the applicant's failure to challenge that in a timely and successful manner that precludes him from contending in subsequent proceedings that the marriage is not one of convenience.

5. The conflict of jurisprudence arises because I found myself disagreeing with the conclusion of Hogan J. in *Izmailovic v. Commissioner of An Garda Síochána & Ors*. [2011] IEHC 32 [2011] 2 I.R. 522 [2011] 2 I.L.R.M. 442. I held that that decision unfortunately could not be followed for a number of reasons:

(i). For the reasons set out in the *M.K.F.S. (No. 1)* judgment I respectfully concluded that *Izmailovic* misread the Supreme Court decision in *H. v. S*. [1992] 4 JIC 03021 (Unreported, Supreme Court, 3rd April, 1992).

(ii). I respectfully took the view that *Izmailovic* did not have regard to the previous decision of Barron J. in *Kelly v. Ireland* [1996] 3 I.R. 537 [1996] 2 I.L.R.M. 364.

(iii). For the reasons set out in the No. 1 judgment, I respectfully took the view that *Izmailovic* did not have regard to the principle that a statutory process such as civil marriage should not be used as a mechanism of fraud; that it would undermine the constitutional precepts of an ordered society and the natural rights of the family for the law to acknowledge the validity of a sham marriage; and that the damaging consequences of such an approach were not factored into the *Izmailovic* judgment.

6. Apart from the tendentious nature of the question posed, there are two other fundamental difficulties with the present application for leave to appeal. First of all, the conflict of jurisprudence is not much of a conflict in the sense that I respectfully disagreed with Hogan J. because I took the view that he did not take into account previous jurisprudence either at all, in the case of Barron J.'s judgment, or correctly, in the case of the Supreme Court decision, in the sense that *Izmailovic* mis-states pivotal facts as found by the High Court in that case. That is a very different situation from a conflict-of-view situation where a judgment has taken into account all relevant jurisprudence and produces a conclusion which is at odds with a view of the law taken in another case on a review of all relevant material by another judge.

7. The second difficulty is that even assuming for the sake of argument that I am incorrect on the question of a marriage of convenience being a nullity in law, that is not a decisive point and therefore is not a point suitable for leave to appeal (as discussed in *S.A. v. Minister for Justice and Equality*). Even if I am entirely wrong on this issue, the applicant's case fails anyway because firstly I found that one cannot assert constitutional rights based on a marriage of convenience even if somehow the marriage is valid, and secondly because I also rejected the application in the exercise of the discretion that arises in the judicial review context. Those two points are independent of whether the marriage is a nullity in law and of whether I am right or wrong in respectfully taking a different view to Hogan J.

Order

8. On that basis the application for leave to appeal is dismissed.