

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 1017 J.R.]

BETWEEN

RAIS AKHTAR

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of December, 2018

1. The applicant entered the State from the U.K. on 2nd May, 2015. On 1st September, 2015, he applied for permission to remain under the European Union (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) as a dependant of his U.K. citizen brother. He was granted a temporary stamp 4 permission from 19th November, 2015 to 31st March, 2016. The permission under the 2015 regulations was refused on 15th June, 2016, as he failed to satisfy the Minister that he was a permitted family member within the meaning of the regulations. On 12th October, 2016 he was issued with notice of the Minister's proposal to make a deportation order under s. 3 of the Immigration Act 1999. Having sought further time to do so, on 6th December, 2016 he made representations under s. 3. In those representations he did not say anything about a proposed marriage. The material provided was sparse, and under family and domestic circumstances the only connection to Ireland was one family member in Ireland, with the rest of the family being elsewhere. On 14th December, 2016 he applied again as a permitted family member and was informed he could seek an extension of time to request a review. On 29th May, 2017 he availed of an extension of time and requested such a review.

2. On 27th July, 2017 he was informed that the Minister considered that some documentation submitted was false and misleading, and was invited to make submissions. He submitted further material and representations. He was not able to assuage the Minister's concerns and on 29th March, 2018 withdrew the review application, and sought to make an application under s.4 of the Immigration Act 2004. On 20th April, 2018, the s. 4 application was refused.

3. On 27th August, 2018 he went through an Islamic ceremony of marriage with a Canadian citizen, Ms. Zahira Khan. She then returned to Canada. On 6th October, 2018 she came back to Ireland but was refused leave to land. She advised the GNIB that the purpose of the trip was to prepare with the applicant for the civil registration of the marriage and that their objective was to obtain the necessary documentation. She was detained on foot of the refusal of leave to land and on 7th October, 2018 she applied for release under Article 40.4. In proceedings entitled *Khan v. Governor of the Dóchas Centre* [2018 No. 1242 S.S.], Donnelly J. made an order for an inquiry and on 8th October, 2018, Ms. Khan was released by consent. I am informed on behalf of the respondent that this was, from their point of view, due to an incorrect box having been ticked on the face of the order for arrest and detention as to the basis for the arrest. On 9th October, 2018 the application for review of the refusal of permission under the 2015 regulations was itself refused.

4. A deportation order was made on 26th October, 2018 and the applicant was so notified on 13th November, 2018. He is due to present for deportation tomorrow on 19th December, 2018. Had he been allowed to remain in Ireland, the parties had intended to marry here on 3rd January, 2019. Ms. Khan has already left the State and is currently back in Canada.

5. I have received helpful submissions from Mr. Eamonn Dorman B.L. for the applicant and Mr. John P. Gallagher B.L. for the respondent.

6. The primary relief sought in the proceedings is *certiorari* of the deportation order. Two essential grounds are set out in that regard; breach of the right to marry and breach of family rights. I should note that an affidavit of Stephen Bannon filed on behalf of the applicant incorrectly refers to an asylum application and a proposed transfer to the U.K. Neither feature arises in this case and those references are simply erroneous.

The applicant failed to make these points to the Minister.

7. The applicant's family situation only came to the Minister's attention after the arrest of the applicant's partner. He did not make a submission to the Minister under s. 3 of the 1999 Act in the deportation context regarding these family rights. Thus, he cannot challenge the deportation order on that basis. The deportation decision can only take into account what was made known to the Minister. Thus the applicant's proceedings end there, but if I am wrong I will comment on the other points nonetheless.

Alleged breach of the right to marry

8. The gist of the applicant's case under this heading is at para. 33 of the written submissions that "*it is submitted that the State's interference with the applicant's attempt to register his religious marriage by way of registration in the State is an "attack" on the institution of marriage*". That is a misconception. The applicant is entitled to marry Ms. Khan under international human rights law, including art. 16 of the Universal Declaration of Human Rights, which is reflected in Irish law: see *O'Shea v. Ireland* [2006] IEHC 305 [2007] 2 I.R. 313. He is just not entitled to do so in Ireland because neither party has lawful permission to be in the State. It is not relevant that the applicant is stating that he intends to leave the State after getting married. There is no legal basis to enforce such an intention. The punchline is that a person who does not otherwise have an entitlement to be in the State does not have an entitlement to remain here simply to avail of constitutional or statutory rights: see *K.R.A. and B.M.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017).

Alleged breach of family rights

9. Insofar as the decision claims that there was a breach of family rights and a failure to respect the right to marry under the ECHR, as applied by the European Convention on Human Rights Act 2003, or other family rights, the decision itself does not deprive the applicant of the right to marry under the ECHR. Rather, it precludes him marrying in Ireland. Even if the applicant was married, that does not create a right to remain in Ireland in itself and does not render the deportation unlawful. *A fortiori*, a proposed marriage does not render a proposed deportation unlawful. To that extent, I would follow the judgment of Hogan J. in *McHugh v. Minister for Justice and Equality* [2012] IEHC 110 (Unreported, High Court, 9th March, 2012), although I do not necessarily accept, as suggested by that

case, that a different rule automatically applies if the proposed spouse is an EU national. I might observe that any family rights or private life rights the applicant has in this connection were formed during a period when he was either unlawfully present in the State or here on a purely temporary permission.

Discretion

10. Even if I am wrong in relation to all the above, I would uphold the plea at para. 16 of the statement of opposition that "*given that the applicant has pursued his various immigration claims in a fraudulent manner and by the fraudulent presentation of facts and supporting documentation the court should refuse relief on discretionary grounds also*". It is well- established that discretion is not confined to matters occurring during the proceedings itself. Indeed, in *G. v. D.P.P.* [1994] I.R. 374 refusal of leave on discretionary grounds was acknowledged as a feature of the process, which by definition cannot relate to matters that arose during the proceedings themselves. The examination of file sets out details of the applicant's frauds, including providing documents from an alleged employer that never operated from the stated address, an inability to provide the address at which the applicant himself resided and inability to give the business address of his alleged employers.

Injunction

11. As the proceedings are being dismissed, the injunction does not arise in the form sought, but in any event an application of the *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152 principles weighs against the applicant. The criteria of giving all appropriate weight to the orderly implementation of matters which are *prima facie* valid and the orderly operation of relevant schemes, as well as the public interest concerns involved, all weigh against an injunction. Insofar as all due weight to the consequences for the applicant of being required to comply with the measure under challenge are concerned, the applicant is not precluded from marrying but he will simply have to marry elsewhere. The limited nature of his relationship with the State and the fact that he only ever had a temporary permission to remain here also dilute any considerations under this heading. Finally, insofar as the court, placing all due weight on the strengths or weaknesses of the applicant's case as concerned, having rejected that case the applicant is not in the strongest position anyway under that heading, but this is not a borderline case. It is clear there is no basis to impugn the deportation order.

Order

12. The proceedings are dismissed and the application for an injunction is refused.