

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 572 J.R.]

BETWEEN

THABO ASHLEY RAMAABYA

AND

KELETSO KYLA RAMAABYA

(A MINOR SUING BY HER AUNT AND NEXT FRIEND MMONIEMONG RAMAABYA)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of May, 2020

1. The applicants are illegal immigrants who arrived in the State on the basis of a fraudulent story that they intended to stay with an Irish citizen for a short visit. When the fraud was uncovered, the Minister made deportation orders. The applicants now challenge those orders as unlawful and unconstitutional. In any other context, such abuse of rights would be accepted unhesitatingly as disqualifying; but in the asylum and immigration context, such abuses are so widespread as to be almost tolerated resignedly. Such acceptance is not a legally sound approach and certainly doesn't contribute to an ordered society or a rational legal system. The attempt was even sought to be made on their behalf to assert rights based on the limited permission that was obtained by fraud. That is not an acceptable approach in any context.

Facts

2. The applicants are nationals of Botswana. The mother of the first-named applicant has lived in the State since 2009. The second-named applicant was born in November 2002 and is a niece of the first-named applicant's mother, Ms. Mmoniemong Ramaabya.
3. The applicants arrived in Dublin Airport on 14th November, 2018 and presented a letter of sponsorship from an Irish citizen, a Mr. Jer Hayden. That letter is worth quoting from in that it states that "*As a family friend, I promised to invite them in (sic) Ireland when I visited Botswana. I am fulfilling my promise now. During their stay they will be under my responsibility and they will living (sic) in my house*".
4. That was a misrepresentation in that it is clear that there was no intention that the applicants would live with Mr. Hayden. In fact they were to be collected by Ms. Mmoniemong Ramaabya. On foot of this representation, a time-limited permission was given which expired on 2nd January, 2019. Mr. Hayden was later to tell INIS that he met Ms. Mmoniemong Ramaabya on a dating site, that they remained friends, that she had written the letter of sponsorship and posted it to him and that he had then signed it. Ms. Mmoniemong Ramaabya at the time didn't have a subsisting immigration permission, although she currently has a 'Stamp 4S' permission.
5. On 14th January, 2019, the Minister issued a proposal to deport the applicants. Submissions were made on 13th February, 2019 invoking family rights and constitutional rights. Deportation orders were made on 22nd February, 2019 and notified on 25th

March, 2019. The applicants then consulted an entity apparently advertising itself as immigration consultants, THL Legal. That firm, who are not solicitors, purported to institute judicial review proceedings, record number 2019 No. 288 J.R. Once it transpired that those proceedings had been filed by an entity with no authority to do so, I struck out the proceedings on 31st July, 2019 as irregularly constituted, having previously ostensibly granted leave in May 2019 unaware of the difficulty.

6. The applicants then consulted solicitors and filed these proceedings on 2nd August, 2019 which are very similar in substance to the previous bogus proceedings. I granted leave on 14th October, 2019 and extended time in doing so, and very sensibly the respondent has not made any objection based on time. The statement of opposition was filed on 14th January, 2020.
7. The primary relief sought in the proceedings is *certiorari* of what is described as "*the Minister's decision to make deportation orders in respect of the applicants*", although *certiorari* is directed to documents rather than decisions that are not embodied in documents. To be precise about it then, the words "*decision to make*" are inappropriate; *certiorari* in such a case should be directed to the deportation orders themselves rather than some form of amorphous incorporeal decision to make such orders that immediately preceded the written orders (perhaps when the official concerned picked up his or her pen), and likewise for any other written document.
8. I have now received helpful submissions from Mr. Gavin Keogh B.L. for the applicants and from Mr. John P. Gallagher B.L. for the respondent.

Some general considerations

9. It may be helpful to put the present application in the context of some general considerations that apply in challenges of this type.
 - (i). The presumption of validity. Just as a post-Constitution statute enjoys a presumption of constitutionality, similarly a statutory or administrative decision must enjoy a presumption of validity until proven otherwise: see Mark de Blacam, *Judicial Review*, 3rd Ed. (Dublin, Bloomsbury 2017) p. 147: "*The presumption of validity which attaches to public acts generally . . . is necessary in the interests of good order and administration*", citing *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, Finlay P., 5th December, 1977), *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 and *The State (Divito) v. Arklow Urban District Council* [1986] I.L.R.M. 123.
 - (ii). There is a presumption that all material was considered if the decision says so, as stated by Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401. Where a decision states that all material has been considered, there is an onus on an applicant to prove otherwise before he or she can succeed in any challenge based on a lack of due consideration: see also *O.M.A.(Sierra Leone) v. The Refugee Appeals Tribunal* [2018] IEHC 370, [2018] 6 JIC 1206 (Unreported, High Court, 12th June, 2018) at para. 8.

- (iii). The State has a wide discretion in immigration matters . In *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 at paras. 82 and 83, the Supreme Court cited the statement of Costello J. in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 at 599 that "[The] State ... must have very wide powers in the interest of the common good to control aliens, their entry into the state, their departure and their activities within the State"; saying that this "reflects an inherent element of State sovereignty over national territory long recognised in both domestic and international law. For this reason, in the sphere of immigration, its restriction or regulation the non-national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not and in many of its aspects, could not be applied to its citizens."
- (iv). The normal system of applying for permission to be present in the State is from outside the jurisdiction. As put by Hardiman J. in *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at 174, ". . . each of the applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of application for entry into the country, made from outside. There is no reason of policy why they should be enabled to bypass this system simply on the basis that they had made an application for asylum which had failed, or might even have been found "manifestly unfounded". In this context, it is important to reiterate that the "common good" in this context has already been held to include the control of aliens".

10. I turn now to the specific grounds of challenge in this case.

Ground 1 – alleged breach of fair procedures

11. This ground contends that "*the manner and circumstances in which the Minister proceeded to make deportation orders in respect of the applicants is unlawful and breaches fundamental principles of fair procedures and due process*".
12. That is vague boilerplate language, strangely so given that one of the applicants' complaints is that the Minister made a *pro forma* decision. It certainly doesn't specify what breach of fair procedures is alleged and thus is not a proper basis for judicial review. Accordingly, I would uphold the objection at para. 20 of the statement of opposition to that effect. In any event, no breach of fair procedures has been demonstrated.

Ground 2 – alleged premature initiation of the deportation procedure

13. Ground 2 alleges that "*The Minister erred in law in proceeding to initiate deportation proceedings in circumstances where the Applicants had, when those proceedings commenced, been in the State for less than 90 days. While it is accepted that the initial permission to remain granted to them had expired by the time the proposal to make a deportation order issued, it was still open to the Applicants, at that juncture, to seek to have that permission extended. By having been issued with a proposal pursuant to*

section 3 of the Immigration Act, 1999, as amended, the Applicants were consequently deprived of the opportunity to seek such an extension, as would normally be open to people in like situation”.

14. As noted above, this ground seeks to actually assert rights based on a permission that was obtained by fraud. That is not a permissible procedure in any context: see *e.g. Everett v. Williams* (1725) 2 Pothier on Obligations 3 (the “Highwaymen’s Case”), *K.P. v. Minister for Justice and Equality* [2017] IEHC 95, [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017). Furthermore, as drafted, this ground refers to a period of “90 days” which has no statutory significance. What seems to be intended is the three-month period referred to in s. 5 of the Immigration Act 2003.
15. Mr. Gallagher makes a preliminary objection in relation to this ground that this is a jurisdictional complaint and that the applicant did not make that complaint in correspondence before engaging with the process under s. 3 of the Immigration Act 1999. However, this is not a case where that could be seriously called a disqualifying acquiescence. Failure to make this point in correspondence did not cause any harm, detriment or prejudice to the Minister. In addition, it must be borne in mind that if there is any substance to the allegation of lack of jurisdiction, one would need to be somewhat cautious about finding there to have been acquiescence merely by reason of failure to write a letter of objection. There is also the risk of drawing people into premature litigation by upholding an acquiescence point in such circumstances; generally it is much better all round, not only for the parties, but also in the interests of the legal system and other litigants, if parties make their point to the decision-maker and then challenge any adverse decision if there is one, rather than engage in premature and possibly unnecessary litigation to prevent a decision from being made.
16. Turning then to the merits of this point, s. 5(1) of the 2003 Act provides for an accelerated removal procedure for persons who *are* unlawfully here for less than three months without the necessity for the making of a deportation order. Such a procedure makes perfect sense, but it has nothing to do with these applicants who *are* subject to a deportation order. It simply gives the State a more accelerated option for removing illegal immigrants shortly after their arrival. One has to think in terms of *options* because the Minister is still entitled to make a deportation order against such a person under s. 3 of the 1999 Act. There is nothing in s. 5 of the 2003 Act to exclude or eradicate that option. That section doesn’t have either the express or implied effect that the Minister can’t propose the making of a deportation order during the first three months of a person’s unlawful presence in the State.
17. There is a specific problem for the second-named applicant in any event in that s. 5(2)(b) excludes the accelerated procedure from applying to minors. Thus, the Minister’s only option in her case was to proceed by deportation order, so that cannot be unlawful on the basis of any argument based on the three-month period even if that were a good point, which it isn’t.

Ground 3 – allegation of generic consideration

18. Ground 3 contends that *"Having invited representations from the Applicants it is thereafter incumbent upon the Minister to consider those representations. The decision to deport the Applicants has serious and lifelong consequences and ought not to be one which is made lightly or in a generic fashion. It is for this reason that safeguards are provided for by legislation, including, but not limited to, the prohibition on refoulement as well as Ireland's obligations under International Treaties to which it is a signatory. If the consideration which is ultimately given to a proposed deportee's case is so generic as to be, in effect, no more than a template which could be applied to any person from a given country then it loses its relevance insofar as it purports to be a consideration of a specific individual's case and circumstances"*.
19. The nature of a decision dictates the extent of reasons. A person without any entitlement to be present in the State is not entitled to a detailed response or to discursive or narrative reasons. Certainly, no illegality has been demonstrated under this heading. The decision enjoys a presumption of validity as well as a presumption that representations were considered given that the decision says so. That has not been rebutted.
20. To speak in terms of a *"lifelong"* exclusion from the State is something of an overstatement in that one can apply at any time to revoke a deportation order, but the applicants' situation of being excluded from the State arises from their never having had a lawful permission (obviously I disregard for this purpose the permission obtained by fraud), and more fundamentally, from their failure to leave the State as they were legally obliged to do, particularly after the permission fraudulently obtained had expired and particularly in the face of the formal proposal to deport. By remaining in place, refusing the option to leave voluntarily and essentially daring the Minister to do his worst, the applicants brought the deportation orders on themselves. The spurious demand made under this heading is not far removed from the claim for an applicant-dictated procedure that was rejected by the Court of Appeal in *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, Ryan P. (Peart and Hogan JJ. concurring), 26th February, 2016).

Ground 4 – alleged failure to address the applicants' circumstances

21. Ground 4 contends that *"The manner in which the Minister purported to consider the representations made by the Applicants did not address or assess the concerns raised by the Applicants, did not give an individual or meaningful consideration of the Applicants' particular circumstances, and consequently did not comply with the provisions of section 3 of the Immigration Act, 1999, as amended, in either spirit or letter"*.
22. This adds nothing to the discussion under the previous heading. The presumption of validity and the presumption that the representations were considered, given that the decision says they have, have not been rebutted.

Ground 5 – alleged insufficient consideration given the minority of the second-named applicant

23. Ground 5 contends that *"The second named Applicant, as a minor (sic). The manner in which her case was considered falls short of the requisite thresholds. Insufficient consideration was given to her particular circumstances and this is evidenced by the fact that one of the headings under which her case was considered related to her employment prospects, which were found to be "limited." This is not a relevant consideration having regard to the fact that the second named Applicant is a child, and therefore any considerations regarding employment are simply devoid of reality and applicability;"*
24. The fact that someone is a minor doesn't mean that one cannot consider their prospective employment situation. The word used in the decision is "prospects". The applicants' point is self-defeating anyway because if it is correct and if there was nothing to consider because this heading was "devoid of reality and applicability", then the decision cannot be invalid for not giving that point any weight.
25. Some points were made in oral argument about a typographical error and the lack of reference to the best interests of the child. These points are not pleaded so the applicants cannot succeed on them, but even if they had been pleaded, and even overlooking that in fact there is reference in the decision to the best interest of the child, the best interests principle is not a get-out-of-jail-free card. It has no real relevance here, and does not mean that a child who enters by fraud must remain in whatever country his or her guardians choose to nominate. The submission made to the Minister in best interests seem to have majored on Article 42A of the Constitution which does not apply here: see *Dos Santos v. Minister for Justice* [2015] IECA 210, [2015] 3 I.R. 411.

Ground 6 - insurmountable obstacles "test"

26. Ground 6 alleges that *"In assessing both Applicants' cases pursuant to section 3 of the Immigration Act, 1999, as amended, the Minister erred in law in applying a test of there not being any "insurmountable obstacles" to the establishment of a family unit in Botswana".*
27. This tedious argument has been rejected on many occasions. It is not the law that anything the decision-maker says automatically becomes a "test". Reference to insurmountable obstacles is not a test, rather it is a legitimate consideration. It is also a lawful consideration especially seeing as it is one with considerable support in ECHR caselaw.

Discretion

28. There is nothing of substance in the applicants' challenge, but even if there had been, I would have dismissed the proceedings on a discretionary basis as sought at para. 22 of the statement of opposition. The applicants' whole adventure in the State was cradled in deception. It would demean the legal system if the court were to grant relief in respect of a procedure that would never have arisen if the applicants had acted honestly. In saying that, I fully bear in mind the statements of McKechnie J. in *P.N.S. v. The Minister for Justice & Equality* [2020] IESC 11 (Unreported, Supreme Court, (O'Donnell, Dunne and Charleton JJ. concurring), 31st March, 2020), that the jurisdiction to dismiss proceedings

on a discretionary basis exists but should be used with a certain degree of reserve. This is, however, an appropriate case for it, as Mr. Gallagher correctly submits, because the deception goes to the actual basis of the applicants' entry into the State and underlies the very process the outcome of which is now sought to be challenged. I also have regard to the statement of Charleton J. in *B.S. v. The Refugee Appeals Tribunal* [2019] IESC 32 (Unreported, Supreme Court, 22nd May, 2019) at para. 18: "*Judicial review is not granted as of right but by reason of justice. Circumstances such as behaviour of an applicant, or the absence of justice in providing a remedy, can enable a refusal even though there has been an error in administration or in the application of legal rules*". Charleton J. provides the example of where an applicant has given misleading information, an example that certainly has resonance here: see also *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603, *per* MacMenamin J.

Order

29. Accordingly, the proceedings are dismissed.