

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 108 J.R.]

BETWEEN

MUHAMMAD NADEEM

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of May, 2018

1. The applicant is a national of South Africa, born in Pakistan. He arrived in the State in 2010 on the basis of student permissions which lasted up to 2015. On 18th March, 2015 he engaged in what was found to be a marriage of convenience with a Bulgarian national. In the aftermath of that marriage he was granted permission to remain in the State as a family member of an EU citizen. In May, 2016 he returned to Pakistan for a period of time. His "wife" had returned to Bulgaria by this stage. On 30th July, 2016 he was contacted by the GNIB to ask where he and his spouse were. He claimed that she would be back in the State shortly. On returning to the State in July, 2016 he found the locks on his accommodation had been changed, unsurprisingly perhaps since he did not see fit to pay the rent during his absence for a number of months.

2. From 27th October, 2016 onwards the Department of Justice and Equality was in correspondence with the applicant regarding the position of his wife and the status of the marriage. In March, 2017, he went back to Pakistan. On 10th March, 2017, the Minister wrote stating that it had been four months since a request had been made for documentation and that the Department would be proceeding accordingly in the absence of a reply. On 31st March, 2017, the respondent issued a proposal to revoke the applicant's permission to remain on the grounds of him having engaged in a marriage of convenience. On 27th April, 2017, the applicant wrote denying that the marriage was one of convenience. On 10th May, 2017, the Minister made a formal decision finding the applicant to have been involved in a marriage of convenience under reg. 28(2) of the European Communities (Free Movement of Persons) Regulations 2015. The applicant was held to have provided false and misleading information as to material fact and was informed that if he wished to pursue a review he was required to do so under reg. 21 of the 2015 regulations. A fifteen working day time limit was provided for the review.

3. On 22nd May, 2017, the applicant issued a written response, but not in the form of an application for review which is a form entitled EU4. The applicant's then solicitor avers that the form EU4 was prepared and "*left with secretarial staff*" and she assumes it was mislaid. A narrative prepared by the applicant was sent but this did not amount to an application for review.

4. On 24th May, 2017, the Minister replied seeking clarification as to whether the applicant was seeking a review. That letter seems to be missing from the file received by the applicant's current solicitors (which passed through the applicant's hands between solicitors). Astonishingly in the circumstances, the applicant's previous solicitor was not asked to comment on this letter in the course of her affidavit, sworn after this letter was drawn to the attention of the applicant and his solicitors. The applicant himself claims to have known nothing of the letter of 24th May, 2017, but (even assuming that to be true) that is fairly meaningless. If an applicant has to personally understand all legal correspondence, no action could ever lawfully be taken against any applicant. An applicant must be held bound by the acts of his or her solicitor. There was no reply at all to the letter of 24th May, 2017, and no explanation furnished in that regard.

5. On 11th July, 2017, the respondent issued a proposal to deport the applicant. Therefore, not only had the applicant's attention been drawn to the absence of a review by the letter of 24th May, 2017, but the lack of such review was implicit in the proposal to deport that was drawn to the applicant's attention at that point. He would certainly have known at that stage that his apparently hoped-for review of the marriage of convenience determination had not been acted upon. On 28th July, 2017, the applicant submitted representations as to why he should not be deported. On 8th January, 2018 he was notified of the making of a deportation order. On 17th January, 2018 he applied for an extension of time to review the decision that the marriage was one of convenience. On 23rd January, 2018 the Minister wrote indicating that he was unable to supply an undertaking not to deport the applicant. On 6th February, 2018 leave was sought for the present judicial review.

6. I have received helpful submissions from Mr. Anthony Lowry B.L. for the applicant and from Mr. Peter Leonard B.L. for the respondent.

Relief sought

7. Relief D1 was not moved so the only substantive relief being sought is a D2, a declaration that the Minister is obliged to determine the applicant's application under reg. 25(3) to extend time to submit a review of the decision of 10th May, 2017.

Is the applicant entitled to a decision on his application for an extension of time?

8. This is not a challenge to a decision refusing to extend time to review a determination under reg. 25(3). That decision has yet to be made. It seems to me that given that there is a statutory procedure for an application to extend time, an applicant is entitled to a positive, affirmative and explicit determination of that application. Strangely, this seems to be disputed in the present case. Mr. Leonard argues that alternatively either that the Minister is not obliged to give an express decision on the application to extend time or alternatively that the refusal of the undertaking amounts to refusal of the extension of time. I do not think that that submission is well founded.

9. I would read the letter refusing an undertaking at face value. It does not address the application to extend time at all, and I do not think it amounts to an implicit refusal of that application. It does not put an applicant on notice that a positive decision has been made such that an applicant can then consider his or her legal options in that regard. It seems to me that the Minister's belief that he is not required to make an explicit decision on the application for an extension of time is a misunderstanding of law, so I will correct that by granting appropriate relief to the effect that the Minister is required to give an express decision on the application to extend time for the review, by analogy with the entitlement to reasons in order to allow an applicant to consider their legal position, see:

Mallak v. Minister for Justice, Equality and Law Reform [2012] IESC 59 [2012] 3 I.R. 297 [2013] 1 I.L.R.M. 73. The appropriate relief would probably be *mandamus*, although strangely the applicant did not seek that relief, so subject to hearing counsel I will instead grant a declaration in that regard.

Is the applicant entitled to remain in the State pending the outcome of the application to extend time?

10. The impact of a review on a removal order is set out in reg. 25(6) and (7), although its impact on a deportation order is not explicitly addressed in the 2015 regulations. Regulation 25(6) says that a person who makes an application under reg. 25(1) for the review of a removal order may at the same time apply for the suspension of the enforcement of the order and reg. 25(7) says that where such an application for suspension is made, the removal order shall be suspended unless removal is “*based on imperative grounds of public security*”.

11. Barring any statutory provision to the contrary, any right to remain in the State to avail of the statutory procedure, such as one arising from applying the foregoing provisions by analogy to a deportation order, must be conditional on compliance with the time limits provided by the procedure. I do not see how such a right could arise if an applicant fails to comply with the statutory time limits. The principle of equivalence and effectiveness allow national procedures to set out mechanisms such as time limits for the exercise of EU law rights, all other things being equal: see *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017) For these purposes, while one might be prepared to overlook the initial mistake due to the mislaid review form, there does not seem to be any reason to overlook the delay thereafter given that the error was expressly pointed out to the applicant’s solicitors immediately by the Minister and was then impliedly drawn to the applicant’s own attention by the proposal of July, 2017. It seems to me that the relief under this heading insofar as it relates to a stay is not interlocutory relief so the case law and interlocutory injunctions do not really apply. The relief is in form the substantive relief in the proceedings and cannot be launched on a free-standing basis, grounded only on contentions regarding the balance of justice. An applicant has to demonstrate an entitlement to an injunction if he or she is to obtain that as a final order. This entitlement has not been demonstrated. If the Minister allows an extension of time and then allows the review, the applicant can be brought back.

Order

12. For the foregoing reasons I will order as follows:

(i). there will be a declaration in a form to be discussed with counsel, that the Minister is required to make a positive decision on the request for an extension of time for review within a reasonable time, without prejudice to the right of the respondent to have the applicant removed from the State in the meantime; and

(ii). the stay on deportation will be discharged.

13. The final comment which I have made before in similar cases is that if in any given case the Garda Síochana are of opinion that a marriage is one of convenience I would hope that they should make all appropriate supports and help available, through international colleagues if necessary, to the EU national in question in order to ensure that her rights and dignity are protected.

Postscript

14. Having heard counsel on both sides, and having been given a request for a specific time-frame, I will grant a declaration in the form that the respondent should make an express decision on the applicant’s application for an extension of time for a review under reg. 25(3) of the 2015 regulations within three months, having first allowed a period of one month for the applicant to make any additional submissions.