THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 365 J.R.]

BETWEEN

A.R. (PAKISTAN) AND M.K.

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of December, 2018

1. The first-named applicant claims to have been born in 1993 in Pakistan. In para. 3 of his affidavit he claims to have lived in the U.K on student permissions between June, 2012 and August, 2015, although at other times he appears to have claimed to have arrived in the State in July, 2015, and in that regard has produced three versions of a lease dated 31st July, 2015, signed by him. He never claimed asylum or subsidiary protection in the U.K, which makes the fact he remembered being the subject of persecution and serious harm only after the event, when his UK student visa ran out and after he came to Ireland, one that does not inspire huge confidence.

2. He claims to have met the second-named applicant in the U.K. No date for this alleged meeting is specified in his grounding affidavit. She seems on the papers to have been born in or around August, 1989. In her affidavit in the family law proceedings (challenging the ultimate refusal to solemnise the marriage, papers which the respondents have undertaken to formally put on affidavit in these proceedings), she says that her relationship began on 14th June, 2014, a very specific date given that the first-named applicant's version is that the relationship got going gradually as a result of banter in a shop where he worked. She says that she had little English initially (see her affidavit in the family law proceedings, para. 11). She claims that the parties cohabited since August, 2014. The first-named applicant says he moved to Ireland without lawful permission in August, 2015, although the Department of Justice and Equality records referred to in the review decision say that he entered the State on 26th July, 2015. She claims that she moved to Ireland in September, 2015, although also claims that she had been in Ireland for a short period in August, 2015 before that. The lease of 31st July, 2015, provided in three versions, includes two versions which she signed on a purported date of 31st July, 2015. If she was not present in the State on that date she would therefore appear to have engaged in some form of deception one way or the other.

3. In her affidavit in the family law proceedings, she says came to Ireland for a day on 31st August, 2015, and travelled with the first-named applicant by ferry. She says that the first-named applicant moved to Ireland in or about 26th August, 2015. The story set out in that affidavit is not altogether self-explanatory. Oddly enough, when interviewed later for the purpose of the application to marry, the second-named applicant was unaware of the reason for shifting the centre of operations of the alleged couple from the U.K to Ireland.

4. The first-named applicant made an asylum application on 27th August, 2015, which is still ongoing. That purely precarious basis of being an asylum seeker was the only basis for his presence in this State. Strangely, the second-named applicant avers in her family law affidavit that "*the fact that the first appellant has applied for asylum is coincidental*" (para. 11(j)). In the asylum application, the first-named applicant listed a number of family members, but failed to state that he was in a *de facto* relationship with the second-named applicant, one which on her account had been ongoing for well over a year at that stage. The parties claim that they were engaged in January, 2017, and that they gave immediate notice of intention to marry on 8th February, 2017, to take effect on 11th May, 2017. The second-named applicant is a Hungarian national, although the respondents had stated in written submissions that she was British, but this has been clarified as a typographical error. In July, 2016, the parties went through a non-legally binding Islamic ceremony. They gave notice of intention to marry in Wicklow (for some reason) despite living in Dublin. The applicants had an interview on 24th April, 2017 with the Registrar, and the Minister has noted that "*there were a number of inconsistencies between responses from the applicant and EU citizen when interviewed*", and that on that date, "*both the applicant and the EU citizen made statements as to how and when they both entered the State that are inconsistent, statements made regarding the duration of the relationship with Ms. [K.] are inconsistent. The applicants' account of how they met and their first date are conflicting and when asked about the EU citizen's employment prior to entry into the State, the applicant was not able to answer. This is not indicative of a couple in a durable relationship*".

5. On 17th November, 2016, the asylum claim was refused. On 25th November, 2016, the first-named applicant appealed to the Refugee Appeals Tribunal. What appears to have happened then with the protection claim is that, following the commencement of the International Protection Act 2015, the matter was referred back to the International Protection Office, which was presumably because the first-named applicant must have made a claim for subsidiary protection. On 1st May, 2017, the first-named applicant applied for a residence card. On 24th July, 2017, that application was refused. In the refusal decision, a number of points were noted:

> (i) The tenancy agreement of 31st July, 2015, was in the first-named applicant's name only, at least in one of the versions.
>
> (ii) Letters from utility companies were inconsistent.
>
> (iii) The application for asylum on 27th August, 2015, made no reference to a *de facto* partner.
>
> (iv) The parties submitted an Islamic wedding certificate of 9th July, 2016, but a receipt for a wedding dress nine months later, of 24th April, 2017.
>
> (v) There is no evidence of a joint bank account or shared assets.
>
> (vi) There is no evidence of joint travel or starting a family.

6. On 2nd August, 2017, the applicants' solicitors sought review of the refusal under reg. 25 of the European Union (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015). On 8th August, 2017, the first-named respondent wrote to the first-named applicant's solicitor, acknowledging that application, and also wrote to the applicant pointing out their failure to complete s. 6 of the review form EU 4, and requiring completion of that form within 30 days. That was submitted on 15th August, 2017. On 9th February, 2018, the Minister wrote to the first-named applicant proposing to uphold the first instance decision. The Minister set out a number of concerns:

(i) Inconsistencies between the responses from the applicants.

(ii) When asked about the second-named applicant's employment, the first-named applicant was unable to answer.

(iii) No evidence of the EU citizen's movements prior to 13th August, 2015 was provided.

(iv) The lease agreements indicated the second-named applicant entered the State prior to the date submitted for entry into the State.

(v) The first-named applicant claimed that the second-named applicant accompanied him in July, 2015, whereas she said that he entered first and separately.

(vi) She was unaware of the reason for moving the centre of interest from the U.K. to Ireland.

(vii) The utility bills were inconsistent.

7. That letter was never responded to. Sinead Murphy, on behalf of the respondent, avers at para. 17 of her affidavit that the Minister wrote to the first-named applicant. The first-named applicant contends at para. 9 of the written submissions that he did not get the letter and says it was sent to the solicitor only. That was repeated in oral submissions. However, the first-named applicant's affidavit does not specifically aver that he did not get the letter, only that he did not reply to it. He says his solicitor emailed him a copy of the letter on 14th February, 2018, but claims he only saw the email on 1st March, 2018. He then says he emailed his solicitor looking for an appointment on 1st March, 2018, but *"we did not arrange to meet before the decision issued".*

8. It is strange, if the applicant did not review his emails except on the sort of haphazard basis that would be consistent with his affidavit, that he would have used email to set up this extremely urgent appointment. Even if one accepted the applicant's explanation, which is not at all convincing in the absence of any reason why the applicant would have overlooked this crucial email and why indeed the applicant's solicitors would have used only email to communicate on an urgent matter with someone who only checks their emails on such a disorganised basis, the first-named applicant still had a week to reply. The content of the letter warranted extremely urgent attention given that the 21-day timescale set out in that letter had expired as of the point at which it allegedly came to his attention *via* his solicitors. The letter of 9th February, 2018 also required details of the travel of the parties from 26th July, 2017 onwards. It was perfectly appropriate for the Minister to seek that information in the circumstances. That was not furnished.

9. On 6th March, 2018 (although the dates given in the papers on behalf of the applicant are inconsistent), the superintendent registrar upheld the objection to the proposed marriage as being one of convenience. The applicants have appealed that to the Circuit Court (record number 582/2018, Dublin Circuit), and that remains pending. On 8th March, 2018, the review application was refused. The decision notes that the applicants failed to address the Minister's concerns in relation to the nature of the relationship.

10. On 20th April, 2018, the first-named applicant was interviewed by the IPO in relation to his protection claim.

11. On 14th May, 2018, I granted leave in the present proceedings, the primary relief being *certiorari* of the decision of 8th March, 2018. I have received helpful submissions from Mr. Conor Power S.C. (with Mr. Ian Whelan B.L.) for the applicants and from Mr. David Conlan Smyth S.C. (with Ms. Silvia Martinez Garcia B.L.) for the respondents.

The 2015 regulations

12. The most pertinent provisions of the 2015 regulations are as follows. Regulation 5(1) applies in pertinent part to a person who is the partner with whom a union citizen has a durable relationship. Under reg. 5(2), such a person may submit evidence of their entitlement in that regard and if they do so, para. 5(3) provides that "*upon receipt of the evidence referred to in paragraph (2), and on being satisfied that the applicant is a person to whom paragraph (1) applies, the Minister shall cause to be carried out an extensive examination of the personal circumstances of the applicant in order to decide whether the applicant should be treated for the purposes of these Regulations as a permitted family member of the Union citizen concerned*". Thus the procedure involves two steps:

(i). being satisfied that the applicant is a person to whom reg. 5(1) applies; and

(ii). deciding whether that person should be treated as a permitted family member.

13. Regulation 27(1) provides that the Minister may refuse to grant a decision under reg. 5(3) or a residence card if he decides that any right is being claimed on the basis of fraud or abuse of rights.

Failure to respond to the letter of 9th February, 2018 precludes relief

14. The applicants' complete failure to engage with the review process precludes the grant of relief by judicial review. I would adopt an approach similar to that taken by Murphy J. recently in *Hennessy v. An Bord Pleanála* [2018] IEHC 678 (Unreported, High Court, 27th November, 2018) where she said at para. 44: "*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."* The applicants here had a statutory opportunity to make submissions to the Minister in response to the concerns articulated. That opportunity was not taken up and that failure precludes the grant of relief by way of judicial review. The applicant's excuses for failing to respond to the Minister's correspondence do not begin to stand up. If I am wrong that the applicant's failure in this regard precludes relief, I will go on to consider the challenge on the merits, such as they are.

Ground 1 - lack of reasons

15. Reasons are set out in detail in the review decision. That particularises the Minister's concerns and states they were not addressed. That is entirely a valid approach.

Ground 2 - alleged irrationality or unlawfulness

16. Ground 2 is an omnibus allegation of various unparticularised headings of administrative law challenge, such as irrationality, disproportionality, unlawfulness and so forth. Such a pleading is in breach of O. 84 r. 20(3) and that breach precludes the grant of relief under that heading. Even if I was not so precluded, no unlawfulness, irrationality or irregularity has been made out. The decision is entirely reasonable and lawful. It is also noteworthy, having regard to the nature of the exercise being conducted, that the review decision-maker is not confined to material before the original decision-maker (see reg. 25(5)).

Various points not pleaded
17. A whole battery of further points featured in oral submissions by Mr. Power ranging far beyond the matters pleaded in the statement of grounds. Such an approach is contrary to fundamental judicial review principles and to the respondents' entitlement to fair procedures. If for no other reason, I cannot grant relief on any of these points, but I can nonetheless make some brief observations in that respect.

(i) Non-application of reg. 5(3). The argument was made that because the applicants did not get over the hurdle of reg. 5(1) they did not get to the stage of reg. 5(3), so that therefore reg. 27(1) could not have been lawfully applied to them. However, that is an artificial argument because a finding that a person does not satisfy reg. 5(1) automatically means they do not satisfy reg. 5(3) either. It also overlooks reg. 27(1)(b), which allows the Minister to refuse a residence card on the basis of fraud or abuse of rights. The application actually refused was one made on Form EU1A entitled "*Application for a Residence Card for Permitted Family Member of a Union Citizen*". It was thus an application which comes squarely within reg. 27(1)(b) and was therefore one that could lawfully be refused by reference to reg. 27, which was done in this case.

(ii) Lack of searching examination. A further point was made based on art. 3(2) of directive 2004/58/EC, which provides that "*without prejudice to any right to free movement and residence the persons concerned may have in their own right, those Member States shall, in accordance with its national legislation, facilitate entry in residence for the following persons … (b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."* The regulations correctly transpose the directive in this respect because under art. 3(2) the extensive examination only applies once you are one of "*these people*", that is a partner with a durable relationship duly attested. The decision of the CJEU in Case C-89/17 *Banger v. Secretary of State for the Home Department* (12th July, 2018) does not decide to the contrary, as Mr. Power accepts. Even if I am wrong about that, there was an extensive examination of the personal circumstances of the applicants here. The applicants' submission that "*the decision of the 8th March, 2018 is extremely terse, particulars are not provided*" (para. 40 of written submissions) is simply incorrect.

(iii) Relying on the decision of another organ. A claim is made in written submissions, although not referred to in oral submissions, that the Minster relied on a decision by another organ of State without arriving at a conclusion of his own, and that hearsay or supposition is relied on (para. 41 of written submissions). In principle, there is nothing wrong with the Minister having concerns based in evidence provided to, or findings by, any other body. It is simply inaccurate to say that the Minister did not arrive at conclusions of his own. The Minister is entitled to adopt decisions of other bodies if it is appropriate to do so but here the decision factored in the fact that the first-named applicant failed to address the Minister's concerns.

(iv) Reference to reg. 28. Complaint was made that the review decision made reference to reg. 28(1). It is true that that was not entirely apposite in the sense that reg. 28(1) does not as yet apply to these applicants because they are not legally married, but reg. 28(1) is related to the definition of abuse of rights in reg. 27(4). At worst the reference is surplusage. It is clear from the decision overall that the Minister was well aware that the parties were not as yet legally married. 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. It certainly cannot be regarded as fatal to the decision on the present facts nor did it mislead or prejudice the applicants.

(v) Claim of voidness for uncertainty. There is a postscript argument in the applicants' written submissions at para. 55 that the decision is void for uncertainty, but it is not uncertain. The applicants cannot argue that the decision is void for absence of a necessary legal basis without challenging the legal basis, which they have not in fact done, so the argument made under this heading does not advance matters.

Ground 3 - alleged inadequate transposition of the directive
18. While complaint is made regarding the lack of transposition of the directive, no declaratory reliefs are sought and nor is there any challenge to the 2015 regulations. Failure by an applicant to claim the appropriate relief does not have the consequence that the court is obliged to grant an inappropriate relief. Even if the directive is not transposed properly, that does not give rise to a right of *certiorari* of the decision. The applicants cannot succeed in the case as pleaded here. However, if I am wrong about that I will consider the point on its merits.

19. The applicants claim inadequate transposition of directive 2004/38/EC, and in particular art. 3(2) which provides for a right of entry and residence for "*the partner with whom the union citizen has a durable relationship, duly attested*". That argument simply does not get off the ground on these facts. By definition, a relationship for immigration advantage is not a durable relationship duly attested, so it is a self-cancelling status. Unless the applicants can displace the finding of the Minister in that regard, which they failed to do, they do not have standing to challenge the transposition of the directive on that ground.

20. The fact that a concept is somewhat vague does not mean the state has failed to transpose a directive. "*Attested*" means attested by adequate evidence in the opinion of the decision-maker, which is not the case here. The decision of the CJEU in Case C-83/11 *Rahman and Others* acknowledges that art. 3(2) is "*not sufficiently precise*" to be directly effective. It acknowledges at para. 24 that each Member State "*has a wide discretion as regards the selection of the factors to be taken into account*" in implementing the word "*facilitate*" in art. 3(2). There is, however, a distinction between substantive legal provisions and national machinery to give effect to such substantial provisions, which is what is encompassed by "*facilitate*". Simply because the nature of implementation requires some criteria for facilitation does not mean that there have to be criteria in national legislation to define terms used in the directive, such as what amounts to a "*durable relationship duly attested*". Paragraph 25 of the judgment goes on to refer to whether national legislation "*and its application*" have remained within the limits of the discretion conferred by the directive. For the purpose of this argument, I would follow the judgment of Keane J. in *Safdar v. Minister for Justice and Equality* [2018] IEHC 698 (Unreported, High Court, 7th December, 2018) (paras. 49 – 53) to the effect that adopting the language of the directive itself amounts to effective implementation of it. The logic of the applicants' submission would be that it would have the effect "*of requiring Member States in their transposition to provide express definitions of undefined terms from the Directive*", as correctly submitted at para. 32 of the respondents' written submissions. The respondents correctly submit that "*any such attempt would serve to undermine the harmonisation of the concept of dependence … [T]he logic of the applicants' argument would lead to 28 different regimes applicable under the Directive*".

21. The upshot is 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. Implementation of any powers or duties thereby created is a matter for the officer or body given the appropriate function under the transposing instrument. In any event, it is lawful for a decision-maker who is given a discretion, even one under EU law, to set out guidelines on an administrative basis; and guidance as to the meaning of "durable relationship" has been set out in Form EU1A (PFM). As I said previously in *F.M. (Democratic Republic of Congo) v. Minister for Justice and Equality* [2018] IEHC 274 [2018] 4 JIC 1706 (Unreported, High Court, 17th April, 2018) (para. 7), the obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance. No unlawful failure to transpose or lack of effective implementation has been shown, even if the applicants are entitled to make this point, which they are not. It follows that this is not an appropriate case for a reference to the CJEU as the European points are not necessary for the decision, do not arise on the facts and in any event concern domestic implementation rather than a question of European law as such.

Order

22. The application is dismissed. I should add by way of postscript that, as in all cases where there has been a finding of a marriage or proposed marriage of convenience, I would hope that the Garda authorities would make all appropriate support and assistance available to the EU citizen concerned, given the documented risks to persons in such situations.