

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 444 J.R.]

BETWEEN

SAID DARWISH MANDOUR ELSHAHBA AND ERIKA OROSZ

APPLICANTS**AND**

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of January, 2020

1. This textbook case of a marriage of convenience requires me to add a little contextualisation. Only in the mysterious world of Irish immigration law could applicants be found to have engaged in a fraudulent transaction and a deceptive statutory application, fail to challenge that finding, wander back into court following a later adverse decision and plead rights *arising from* the fraudulent and deceptive transaction (that element requires emphasis – not rights they have entirely independently of the fraud), and for nobody except possibly the court to see any problem with that. In any other legal context, the applicants would be thrown out *in limine*, the papers would be referred to the prosecuting authorities, and the lawyers might have questions to answer. But I need to make clear that I make no criticisms whatsoever of the applicants' lawyers in this case based on the doctrine in the *Highwaymen's Case, Everet v. Williams* (1725) 2 Pothier on Obligations 3, for the simple reason that the respondent's counsel didn't ask me to. All in a day's work it seems. But if in some future case the State wants the court to look further into the professional obligations arising in this type of situation, the matter can be considered in more detail.
2. According to his counsel, the "husband" in this case claims to have arrived in the State on 1st March, 2014. He has not gone on affidavit to that effect and I will return to that issue later. It is clear, whatever the date, that his entry into, and presence thereafter in, the State was at all times unlawful.
3. The "husband" claims to have met the "wife" online. There was a lengthy process of taking instructions in court as to when this happened, which resulted in my being told that it was in early 2015. That contradicts what the Minister was informed, as set out in the review decision, that the parties had a relationship for two years prior to the "marriage", which would have put the "meeting" in 2013. The applicants later told their solicitor during the hearing that it was 2014 instead, but that is still a different timescale from what the Minister was told, and indeed counsel for the applicants accepted that.
4. The "wife" was asked by an immigration officer where she was working. Her reply to that question was, "*We met on Facebook*": see letter of 2nd September, 2016. It was clear she had little or no English, and I might add that at a number of key junctures on the papers the only mantra she had to fall back on was to repeatedly state, "*We met on Facebook*". Counsel for the applicants was not altogether precise on how exactly one

meets on Facebook, and it doesn't seem to have occurred to the applicants' lawyers to have taken instructions on that point.

5. According to the review decision, the "wife" arrived in Ireland in June, 2015 and the parties "married" four months later on 14th October, 2015. That level of immediacy is, of course, characteristic of marriages of convenience especially bearing in mind the three-month notice period. Obviously, one could add that there are other hallmarks of fraud present here such as apparent linguistic incompatibility.
6. On 24th November, 2015, in the month following the "marriage", an application was made by the first named applicant for a residence card. While that was approved on 11th July, 2016, three days later when he attended to receive the residence card, he was told that the registration would be deferred. On 2nd September, 2016 he was issued with a proposal to revoke the residence card on the grounds of fraud and abuse of rights, and of the marriage being one of convenience. Representations were made on 16th September, 2016 and a decision to revoke the permission was made on 10th November, 2016. The decision noted that the wife, "*answered a number of questions put to her with, 'We met on Facebook'*" and appeared unable to understand any questions relating to her employment.
7. Application was made for a review of that decision on 22nd November, 2016 but the review was refused on 27th July, 2017. That decision was challenged in the applicants' first set of judicial review proceedings [2017 No. 806 JR], and on 24th September, 2018 those proceedings were compromised and struck out with the respondent agreeing to make a fresh decision. That new decision was made on 11th March, 2019 with the same outcome and it was not challenged.
8. The decision made the point that it had not been explained to the Minister's satisfaction how the wife could work in a takeaway without English skills. Her grasp of English was quite poor. It was clear the Minister did not accept the claim that other employees somehow (generously and above and beyond the call of duty, presumably because there were no potential employees available to work in a takeaway that could speak English) helped her to make up for her linguistic incapacity.
9. In a separate letter dated 11th March, 2019 the first named applicant was notified of a proposal to deport him. Representations were made on 2nd April, 2019 and a deportation order made on 8th May, 2019. That was notified to the first named applicant on 31st May, 2019.
10. Perhaps emboldened by the settlement of their first judicial review, a statement of grounds challenging the deportation order was filed on 3rd July, 2019, out of time albeit by a modest period. I granted leave on 8th July, 2019 and I have now received helpful submissions from Mr. Conor Power S.C. (with Mr. Ian Whelan B.L.) for the applicants and from Mr. Anthony Moore B.L. for the respondent.

Ground 1

11. Ground 1 contends as follows: "*Certiorari is sought as the respondent erred manifestly in law and in fact and acted unreasonably and irrationally in reaching a decision on the application without recognising, identifying or evaluating/weighing in the balance any of the rights of the applicants pursuant to the Constitution and in particular Articles 40, 41 and 42 thereof. It is unquestionably the case that the applicants constitute a marital family in the State and therefore the deportation of one of them will be such as to engage constitutional rights. In spite of this there is no assessment at all of any of the constitutional rights which will be engaged by deportation and nowhere in the decision is it acknowledged that constitutional rights are engaged/exist or will be impinged upon by the deportation of the first applicant and the decision is consequently invalid. There is unquestionable family life as between the applicants and where no reasonable decision maker could have found otherwise*".
12. Ground 1 is utterly misconceived. The Minister decided in an unchallenged statutory decision that the marriage is one of convenience. Therefore, no constitutional rights arise for consideration. I would uphold the plea at para. 7 of the statement of opposition that constitutional protections do not extend to marriages of convenience.
13. That is consistent with EU law: see *Secretary of State for the Home Department v. Akrich (Case C-109/01)* [2003] E.C.R. I-9607, ECLI:EU:C:2003:491 at para. 61. Mr. Power says that the marriage remains "*formally valid*" in that it has not been declared invalid by a court of competent jurisdiction and that the Minister's decision under the EU treaty rights regime is "*not self-executing*". But it is not open to a person who has been found in a statutory process to have engaged in fraud to demand that a further process be gone through, if fair procedures have already been afforded to him or her. The unreality of the argument of the contrary has to be seen in the context of the requirement that the onus to show that the deportation order is invalid is on the applicants at all times.
14. Mr. Power claims that the situation was dynamic; that even if there was a basis for a finding of a marriage of convenience in the past, that does not mean it is a marriage of convenience now. Such an argument sounds vaguely plausible but I don't accept it. It is equivalent to an argument in response to an allegation of theft along the lines that, "*Yes, I may have stolen this item originally, but you can't prove I didn't give it back and that the rightful owner then voluntarily gave it to me*". A past finding of a marriage of convenience has to be determinative for future purposes, save perhaps in the most exceptional of circumstances which don't arise here. The onus of proving any such exceptional circumstances rests firmly on the applicants, and the Minister does not have any obligation to go through some sort of separate process to ask whether such a change of circumstances exists. Even if, contrary to my view, he does, I can add that it was well within the Minister's jurisdiction not to accede to that submission on the evidence before him here.

Ground 2

15. Ground 2 contends as follows: "*Certiorari is sought as the respondent erred in law and in fact and acted unreasonably and/or irrationally and breached the principles of fair*

procedures and natural and constitutional justice in his consideration of the effects of deportation on the family life rights of the applicants herein pursuant to the European Convention on Human Rights. It flies in the face of common sense and rationality on a consideration of the facts that were before the respondent to conclude that the decision to deport the first applicant does not constitute an interference with the right to respect for family life under Article 8 (1) of the ECHR. No reason or rationale is provided for this pivotal conclusion and the decision is thereby invalid. In circumstances where the first and second applicants are a married couple in law in the State and where all of the evidence before the respondent was to the effect that they were residing together in the State as a family there was then a requirement on the respondent to recognise that there would be an interference with this family life which would be caused by deportation and to proceed to assess whether the said potential interference with family rights was one which was justified following a proportionality assessment pursuant to Article 8 (2) ECHR and the failure to do this renders the decision to deport invalid”.

16. As one pauses to catch breath from that exercise in verbosity, one sees immediately that such a pleading fails *in limine* because of the lack of any reference to the European Convention on Human Rights Act 2003. The ECHR is not, in itself, justiciable. But even disregarding that threshold problem, this argument fails for similar reasons to Ground 1.
17. If the marriage is determined to be one of convenience in an unchallenged statutory process which has afforded fair procedures, no consideration of Article 8 rights arises or is required: see also *E.B. v. France* (App. No. 43546/02) [2008] 47 E.H.R.R. 21; *Schembri v. Malta* (App. No. 66297/13) (Unreported, European Court of Human Rights, 19th September, 2017). I would thus uphold the plea at para. 15 of the statement of opposition that no ECHR protections for marriage arise out of a marriage of convenience.
18. Insofar as the claim is made that independently of the bogus “marriage” there is a real relationship attracting the protection of Article 8, the previous comments apply. In any event Article 8 is only breached in exceptional circumstances in the case of unsettled migrants, and there is no basis to say it is breached here or that there was any error in the Minister holding that it was not engaged. Even if there was some non-existent duty to discuss Article 8 more narratively here, the fundamental stumbling block for the applicants is that the first named applicant was at all times unsettled. Deportation of unsettled migrants breaches Article 8 only in exceptional circumstances, as has been repeatedly emphasised from Strasbourg down. If anything is settled law in the immigration context, this principle is, although (depressingly for anyone who aspires to an ordered system) that doesn’t seem to deter very many applicants: see, out of many examples, *Costello Roberts v. UK* (App. No. 13134/87) (1993) 19 E.H.R.R. 112; *Rodrigues Da Silva v. The Netherlands* (App. No. 50435/99) (2006) 44 E.H.R.R. 34; *C.I. v. Minister for Justice* [2015] IECA 192, [2015] 3 I.R. 385; *P.O. v. Minister for Justice* [2015] IESC 64, [2015] 3 I.R. 164. Thus there is no actual breach of the applicants’ rights.

Ground 3

19. Ground 3 contends: *"In circumstances where the respondent might contend that his essential finding was that there was no family life in existence in this case as the marriage between the applicants had been deemed a marriage of convenience in the context of the application for a residence card the said decision was one arrived at pursuant to the provisions of the European Communities (Free Movement of Persons) Regulations, 2015 and by virtue of the said Regulations is a finding which applies only in circumstances where the Minister is making his or her determination of any matter relevant to those Regulations. Regulation 28 (1) of the said regulations provides as follows: '28. (1) The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience.'* The said regulations do not and cannot have any bearing on domestic deportation proceedings. *The respondent erred manifestly in essentially determining that there was no lawful marriage and as a consequence no family life in existence as result of the fact that the marriage had in a different context been deemed a marriage of convenience in circumstances where the first and second applicants are validly married in law and where there is unquestionable family life as between the applicants and where no reasonable decision maker could have found otherwise. The respondent was under a duty to consider the case presented to him and has failed to do so".*
20. This argument has already been addressed above. Any given immigration decision can be relied on for the purposes of a later immigration decision. Every day is not a new day, contrary to what applicants would have the court believe, but rather the process builds on what has gone before. It would be totally incorrect to say that the EU treaty rights refusal is a separate process because the person whose EU treaty rights are refused or cancelled is then liable to deportation. I thus uphold the plea at para. 12 of the statement of opposition to the effect that this claim must fail.

Time

21. No real explanation is offered as to why the proceedings were filed out of time, let alone the good and sufficient reason required by O.84 of the Rules of the Superior Courts, so it would not have been appropriate to extend time, even if the applicants counterfactually had a valid legal point. The statement of opposition raises the objection of "delay" in para. 2. The fact that the delay is short is not a basis for an extension. However, this is *obiter* because I am dismissing the claim on its merits.

Discretion

22. Even if counterfactually there had been some valid legal point I would further or alternatively have dismissed the proceedings on the grounds of discretion based on wrongful conduct, lack of candour and abuse of the process of the court as pleaded in para. 2 of the statement of opposition. The unchallenged finding of a marriage of convenience means that the first named applicant has abused the immigration system of the State. That adds to his previous flagrant disregard of the laws of the State in entering illegally and failing to make his presence known to the Minister. The first named applicant's whole presence in the State has been an abuse of Irish law from beginning to

end. There has also been a serious lack of candour to the court. The *ex parte* application involved a statement in his affidavit at para. 3 that he "*arrived as a visitor, but without a valid visa*". That affidavit does not say when he arrived, whether he had an invalid visa or no visa at all. It goes on to say, "*After my arrival in Ireland, I met the second applicant and we formed a relationship*" at para. 4. It does not say that the relationship had been formed online prior to arriving in Ireland and very much suggests the opposite, thus contradicting what the applicant was to later tell the court and what he had previously told the Minister. It does not say that the second named applicant, having met the first named applicant online, then came to Ireland to meet him. These are serious failings in the applicants' *ex parte* disclosure. The first named applicant gave the impression that he met the second named applicant in person and I understood Mr. Power to accept that that was indeed the sense of the affidavit. Mr. Power gamely submitted that these details were not germane, but if the claim is being made that the relationship has reality, the manner of meeting cannot be said not to be germane. It is also clear that the applicants gave the Minister incorrect information regarding the date of meeting. Even disregarding their mutating instructions during the proceedings, they sought immigration permission based on dates that they are not now standing over, namely meeting in 2013 rather than later. I should add postscriptually that, without taking from the general principle that there is a duty on solicitors to make proper inquiries rather than simply regurgitate instructions, on the particular facts here, the applicants are entirely responsible for the shortcomings in the *ex parte* disclosure and their lawyers cannot be faulted at all in the circumstances of this particular case.

Decisions taken pursuant to the lawful operation of immigration control will be proportional in all save a minority of exceptional cases

23. More broadly and independently of the above, even if there had not been fraud or abuse or grounds for the exercise of discretion, the first named applicant has at all times been an illegal immigrant. Feeney J. in *Agbonlahor v. Minister for Justice* [2007] IEHC 166, [2007] 4 I.R. 309 at 324 said, following *R. (Razgar) v. Home Secretary* [2004] 2 A.C. 368 at 390, that decisions taken pursuant to the lawful operation of immigration control of the State will be proportionate in all save a minority of exceptional cases. In cases like this, we do at times need a reality check. Even if there was not an abuse of process, the first named applicant never had any legal right to be here; he entered surreptitiously and has been without status throughout. One can safely disregard the brief period when he was notified of an intention to give him a favourable EU treaty rights decision, because that was never implemented and was cancelled retrospectively. No injustice is done to him by being ordered to leave the State. Only in very limited circumstances of clearly established illegality should the court prevent the deportation of such a person. To do so without such exceptionality is to trespass on the executive domain and to breach the separation of powers. Ultimately Mr. Power had to concede that he was not asserting any legal basis for the first named applicant's presence in the State.

Order

24. The proceedings are dismissed, and the respondent is released from any undertaking not to deport the first named applicant.

Postscript - Leave to Appeal

25. Mr. Power applied for leave to appeal under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and it was agreed that this could be dealt with straight away rather than being adjourned for written submissions. Under the heading of public interest as to why leave to appeal is not appropriate, the first problem is that the proceedings were out of time. Admittedly I am not finding against the applicants on that ground; certainly, comments about that are very much *obiter*. I am dismissing it on the merits instead, but nonetheless the time problem is a factor to take into account in the public interest leg of the leave to appeal test.
26. Secondly, there was on these particular facts wrongful conduct and an abuse of process by the applicants. There was also deception of the Minister and clear failings in the applicants' *ex parte* disclosure to the court. These are not factors that apply to all cases; they are very much fact-specific to these applicants and militate against there being a public interest in allowing an appeal in this particular case. So those factors, combined with the third element of the unchallenged finding of the marriage of convenience, lead me to believe that the public interest leg of the test is not satisfied, even if, assuming for the sake of argument, there was a point of law of public importance.
27. But having said that, there is not any point of law that I can identify that is not already being addressed at the appellate level, so I do not see any great added value in an appeal in this particular case.