

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 742 J.R.]

BETWEEN

M.A. (PAKISTAN)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the day of 15th May, 2018

1. The applicant is a citizen of Pakistan, born in 1984. He claims to have met an EU national, a Ms. K.R., in London in July, 2014. He claims she was on holidays and "we had a chance meeting at a tourist attraction", although he later claimed her English was too inadequate to answer officials' questions. The applicant arrived in the State in January, 2015, travelling unlawfully from the UK. He sought asylum on 18th January, 2015. The Minister stated that in conversation with GNIB officers the applicant was unable to give any details about his relationship with Ms. K.R. other than that they allegedly met in the U.K. at the end of 2014 and became Facebook friends.

2. The information put forward by the Minister regarding Ms. K.R.'s travel was that on 20th April, 2015 she flew from Budapest to Dublin. On 22nd April, 2015, she and the applicant attended a Registrar's office and submitted notice of intention to marry, and she returned to Budapest on the same date. On 22nd July, 2015, the applicant and Ms. K.R. purportedly married. The marriage certificate has been handed in and shows no witness identifiably associated with the "wife". The parties married in Cavan despite being allegedly resident in Dublin. The "wife" was born in April, 1991 and so was just 24 at that point. The applicant was 31, and he was resident only on the precarious basis of having made an asylum claim that was subject to possible transfer to the UK, and indeed was the subject of a decision to transfer to the UK by the Refugee Applications Commissioner on the following day.

3. On 30th July, 2015 the applicant submitted notice of appeal against the transfer decision. In September, 2015 he applied for a residence card. According to the Minister, on 3rd January, 2016, Ms. K.R. flew from Budapest to Dublin and on 8th January, 2016 the applicant and Ms. K.R. attended to process the applicant's permission to remain and she left the State later the same day. On 11th January, 2016, the applicant's appeal was withdrawn. The applicant characterised this as a withdrawal of the application for asylum, but that does not seem to be the case. It was phrased as the withdrawal of the appeal against the transfer decision. That brought the transfer challenge to an end. Thus, the State should have acted on the transfer decision within a six-month period, but failed to do so. That failure meant that on the expiry of the six-month period, the applicant's protection claim if and insofar as it was being pursued, needed to be processed here, but again the State simply failed to put that into motion.

4. On 1st February, 2016, the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) were commenced. According to the State, on 10th March, 2016, Ms. K.R. flew to Dublin and left just six days later. The applicant denied that she left the State in March, 2016 and claimed on the contrary, that she was in Budapest only between December, 2015 and January, 2016, while submitting an invoice for cleaning work that was allegedly carried out by her during the period in which the applicant said she was absent. The bank statements of Ms. K.R. also showed transactions during the periods when she was not present in the State.

5. When this contradiction was identified, the applicant sought to explain by claiming that he was using the "wife's" bank account during that period of time. On 31st May, 2016 the applicant was notified that the Minister had concerns regarding the marriage. On 9th July, 2016, the application for a residence card was refused and the applicant was notified that the Minister had decided that the marriage was one of convenience pursuant to reg. 28(2) of the 2015 regulations. Detailed reasons were set out. A letter indicated that that decision did not interfere with any rights of the applicant under the Constitution or art. 8 of the ECHR (as applied by the European Convention on Human Rights Act 2003), and that such rights would be considered at a later stage.

6. On 3rd August, 2016 the applicant sought a review of the refusal. The letter seeking review is phrased in somewhat general terms and fails to back up its assertions with the level of detail required, in view of the serious concerns expressed in the Minister's decision. On 24th July, 2017, the refusal was affirmed. On 25th July, 2017, a proposal to deport the applicant was issued. Following further correspondence on behalf of the applicant, on 8th August, 2017, the Minister replied indicating that while there was no error in the previous decision to reject the review, the letter had certain shortcomings and was rescinded and it was indicated that there would be a further letter. On 17th August, 2017, a letter with further reasons was issued. On 15th September, 2017, the proposal to deport was withdrawn, seemingly on the basis that the applicant was still in the asylum system. That seems to mean that the Minister's view is that the applicant's asylum application must now be processed here given the failure to transfer him to the U.K. in a timely manner.

7. On 20th September, 2017, the applicant's solicitor claimed that the applicant had withdrawn the transfer appeal "and therefore the application". In submissions, Senior Counsel for the applicant stated at one point that the applicant considered himself as having withdrawn the claim in its totality. It seems to me the applicant needs to clarify that (since he has not formally done so to date), and presumably that can be done by correspondence. On 9th October, 2017, leave in the present proceedings was granted.

8. I have heard helpful submissions from Mr. Mel Andre Christle S.C. (with Mr. Gavin Keogh B.L.) for the applicant and Mr. Mark J. Dunne B.L. for the respondents.

Relief sought

9. The primary relief is *certiorari* of the decision of 24th July, 2017, upholding the finding that the marriage was one of convenience and refusing a residence card.

Do the 2015 regulations apply to pre-2015 marriages?

10. This issue was not pleaded. Therefore, it cannot be the basis of a decision in favour of the applicant. In any event, reg. 31(8) of the 2015 regulations allows for a transitional provision to process applications made before the regulations. Furthermore, the 2015

regulations are not in fact retrospective. The applicant's submission fails to take into account the point made by Barron J. in *O.H. v. O.H.* [1990] 2 I.R. 558 at p. 563: "in considering whether a statute should be construed retrospectively, a distinction is drawn between applying the new law to past events and taking past events into account. To do the latter is not to apply the Act retrospectively". That is the situation that applies here. No pre-existing vested right of the applicant is affected by or interfered with unlawfully by the 2015 regulations. More fundamentally, if directive 2004/58/EC was held not to apply to marriages before its adoption, it would not confer rights on spouses who married pre-the directive. That would fundamentally undermine the objectives of the directive.

Is the Minister's finding a breach of Article 41 of the Constitution?

11. This contention is absurd. Entering into a marriage of convenience is itself a fundamental attack on the institution of marriage and involves a parody of Article 41 of the Constitution. Even if, which I do not accept for a moment, there was some constitutional issue here, art. 35 of Directive 2004/58/EU specifically allows for action against marriages of convenience. Independently of this, I do not accept that a marriage of convenience is valid in law (see *M.K.F.S. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 103 [2018] 2 JIC 0604 (Unreported, High Court, 6th February, 2018)), but whether I am right or wrong about that, such a "marriage" does not create a constitutional right that would assist the applicant here.

Failure to consider art. 8 rights or other rights

12. Refusal of the permission to remain as a family member is a consequence of the finding that the marriage is one of convenience. The question of whether that marriage is one of convenience is simply a finding of fact. In this case, it seems entirely reasonable and indeed impregnable. Article 8 simply does not come into the question of such a finding of fact. There is no analogy with the discretionary situation of renewal of an existing permit such as arose in *Luximon v. Minister for Justice and Equality* [2018] IESC 24 (Unreported, Supreme Court, 24th April, 2018) *per* MacMenamin J. the applicant's art. 8 position will be considered if deportation arises at a future point.

13. In any event, and separately from the foregoing, the applicant is not a settled migrant. Well-established case law confirms that the deportation or removal of an unsettled migrant only breaches art. 8 in exceptional circumstances, which do not arise here. That being the case, a decision of a lesser nature than a removal by definition could not interfere with such art. 8 rights except in exceptional circumstances which again do not apply.

Should the applicant be proceeded against by way of deportation order or removal order?

14. This question no longer arises as the proposal to deport has been withdrawn.

Discretion

15. If I am wrong about all of the foregoing I will consider whether relief should be refused in the exercise of the court's discretion. The Minister has contended that the documentation presented by the applicant is fraudulent. When the applicant put forward the wife's bank statement as evidence of his claims, in the letter of 21st October, 2016, he did not say anything about anyone else using the bank account. His excuse when he was caught with the fact that the wife was absent during a period when transactions were being shown in the bank account was that he was using it. This all-too-convenient assertion was now being presented for the first time and whatever way one looks at it, the applicant has sought to mislead the Minister.

16. The second fraudulent action was submitting an invoice for work in the State by the "wife" carried out on a date on which the wife was absent from the State. While the applicant has denied some details of the wife's movements and suggested some alternative dates, he has failed to back that up in an appropriate documentary manner. It seems to me that the Minister's concerns were never effectively addressed.

17. An applicant cannot abuse and mislead a process and then expect discretionary relief against the outcome of that process. Either or both of the foregoing factors are a basis to dismiss the claim in the discretion of the court; though here the claim fails on the merits in any event.

18. Finally, I might be permitted to observe that given the documented fact of abuse of vulnerable young women in the marriage of convenience context (see *K.P. v. Minister for Justice* [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017) and *M.K.F.S.*) and while obviously I have no information on whether Ms. K.R. in this particular case is in the category of being a vulnerable person, I nonetheless hope that the Garda Síochána will make contact (through international colleagues if necessary) with Ms. K.R, as with any woman in such a situation, to make sure that all appropriate supports and assistance are made available.

Order

19. The application is dismissed.