

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 1014 J.R.]

BETWEEN

M.A. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 9th day of July, 2019

1. The applicant is a 53-year-old citizen of Pakistan who has five children there as well as a wife, who he coincidentally divorced immediately prior to seeking immigration status in Ireland. He was granted a visa in Karachi to visit the State as a tourist to see his brother and sister-in-law. That permitted him to present himself at the frontier of the State during a three-month window from 18th May, 2008 to 18th August, 2008. That did not amount to a permission to stay for that period but simply fixed the date of entry.
2. On 3rd June, 2008, he divorced his wife and on 9th June, 2008 he arrived in Ireland. Permission was granted at the border until 10th July, 2008 and that ephemeral and antique permission is the only positive permission that the applicant has ever had if one discounts the permission that arises automatically as a matter of law in making a protection application.
3. Fifteen days after arriving in the State on 24th June, 2008 he gave notice of intention to marry an Irish teenager. This marriage was then purportedly celebrated on 3rd October, 2008 when the applicant was 43 and the Irish citizen was 19. The applicant was unlawfully present in the State at the time of the marriage so was obviously a good catch.
4. In January, 2009 he applied for residency in the State on the basis of this marriage. I am informed that he provided a copy of his marriage certificate which stated that he was never married. Following further correspondence, it emerged from the visa application that the applicant had in fact been previously married. The Minister then sought a copy of the decree of divorce but the applicant failed to provide that and accordingly the application for permission to remain was refused on 28th May, 2009. A proposal to deport was then issued in response to which the applicant sought permission to remain and made representations on 4th June, 2009.
5. On 16th June, 2009 the divorce decree was eventually submitted to the Minister. The permission to remain application was refused on 2nd July, 2009 and a first deportation order was made against the applicant on 21st July, 2009. In breach of the order, the applicant did not leave the State or present to the GNIB at any time between 18th August, 2009 when required to do so and 28th January, 2016.
6. He appears to have worked illegally during his lengthy period of unlawful residence in the State. During a brief period between 9th February, 2016 and 1st March, 2016 the Minister agreed not to enforce a deportation order due to an application that the applicant made for revocation on 23rd December, 2015. That application was based on the presence of family members in the State. There was no mention of the purported Irish wife and no mention of a proposed protection application. The applicant appears to have failed to present to the GNIB, resulting in the withdrawal of the undertaking not to enforce the deportation order. That in turn was followed fairly promptly by an application for asylum on 24th May, 2016. That ultimately led to the first deportation order being revoked with effect from 19th September, 2017. Correspondence opened to the court indicated this revocation was because of the protection application.
7. In the meantime, due to the commencement of the International Protection Act 2015 the applicant was deemed to have made an application for international protection and submitted a questionnaire in that regard on 13th February, 2017. Tellingly, the questionnaire indicates that under the heading of "*your spouse/partner*" the applicant listed his original wife in Pakistan, no mention being made of the purported Irish wife.
8. One of the limited advantages of having a role in management of the asylum list is that one sees trends across a number of cases rather than having to take each case in isolation. One trend certainly is that the "real wife" is kept in the shadows until residency is established, often on the basis of a marriage of convenience, and once that is done, unhappy differences arise with the pretend wife, and the real wife then re-emerges by way of a family reunification application. I do not need to make any particular findings against the applicant in order to say that all of the hallmarks of such a scheme are present in this case.
9. On 6th December, 2017 the International Protection Office refused permission to remain. The IPO does not appear to have accepted the family relationships claimed because "*it is noted that the brother's names do not match the applicants or each other and there is insufficient evidence to indicate that they are siblings*".
10. The IPO also refused the application for international protection. That was appealed to the IPAT on 17th January, 2018. That appeal was rejected on 20th August, 2018.
11. On 5th September, 2018 the applicant made a submission seeking a review of the permission to remain decision under s. 49(9) of the 2015 Act.
12. On 18th October, 2018 the IPO decided to reject that application and also determined that repatriation of the applicant to Pakistan was not contrary to s. 50 of the 2015 Act.
13. On 8th November, 2018 the applicant was advised that his permission to enter and remain in the State had expired and that the Minister would make a deportation order under s. 51 of the 2015 Act if he did not leave the State voluntarily.
14. The second deportation order against the applicant was signed on 30th November, 2018 and notified to the applicant on 17th December, 2018. In the meantime, the statement of grounds was filed on 4th December, 2018, the primary relief sought being

certiorari of the review decision and of the deportation order when made.

15. I granted leave on 10th December, 2018. On the first return date of 24th January, 2019, the respondent gave an undertaking regarding non-deportation of the applicant up to today. A statement of opposition was filed 5th April, 2019 and I have now received helpful submissions from Mr. Eamonn Doman B.L. for the applicant and from Mr. Alexander Caffrey B.L. for the respondent.

Context

16. An important contextual matter is that this is a review decision. It must be read in the context of the original s. 49 decision which as it happens was unchallenged: see *R.A.(Pakistan) v. Minister for Justice and Equality* [2019] IEHC 319 [2019] 5 JIC 1010 (Unreported, High Court, 10th May, 2019) (para. 17). The Minister is not obliged to revisit everything *ab initio* in the context of a decision that affirms a previous decision: see *A.B. (Albania) v. Minister for Justice and Equality* [2017] IEHC 814 [2017] 12 JIC 2113 (Unreported, High Court, 21st December, 2017).

Ground E-A-1

17. Ground E-A-1 contends that: "*In making the Impugned Decision, the Respondent, his servants and agents, erred in law and/or fettered his discretion and/or engaged in unfairness in the consideration of the private and family rights of the Applicant and in the manner in which the review under Section 49 of the Act was conducted: (i) The Respondent erred in law by failing to make any proper determination in relation to additional documentation submitted under the factors set out at Section 49(3) of the Act, namely, (a) the nature of the applicant's connection with the State, (b) humanitarian considerations (c) the character and conduct of the applicant (d) considerations of national security and public order, and (e) any other considerations of the common good*".

18. The premise of this ground is incorrect. The Minister does not have to make a "*determination in relation to additional documentation submitted*". The only determination required is whether on review the permission to remain decision should be affirmed or set aside. The Minister does not need to engage in narrative discussion of the applicant's submissions: see *A.W.K. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 550 [2018] 9 JIC 2506 (Unreported, High Court, 25th September, 2018). Furthermore, the ground is inadequately pleaded. Failure to make a "*proper determination*" is not a basis for judicial review as such. Indeed, it appears merely to amount to a complaint that determination was not favourable. Grounds in a statement of grounds must specify the precise legal basis as to why a decision was improper and an applicant cannot succeed on a generic plea: see *R.A. (Pakistan) v. Minister for Justice and Equality*. In any event, the documents submitted are recited in the decision. The IPO in the original decision had concerns about the confusion regarding names and inconsistencies in the material provided and in the review decision the Minister considered that the original decision should not be set aside. The applicant has an onus to displace the presumption that all matters submitted were properly considered and he has not done so here: see per 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, *F.Z. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 368 (Unreported, High Court, 12th April, 2019).

Ground E-A-2

19. This ground alleges that "*the respondent erred in failing to consider the Applicant's family rights, in contrast to his private rights, under s. 49(3) of the Act or under Article 8 ECHR*".

20. Leaving aside the fact that the ground incorrectly fails to plead the European Convention on Human Rights Act 2003, the point has been made repetitively in similar cases that s. 49(3) of the 2015 Act goes beyond art. 8 of the ECHR. That is correct but it is insufficient to allow relief to this or any applicant because no one is arguing against that proposition. It is clear that the s. 49 factors were considered and are referred to in the decision itself at p. 3.

21. A presumption of legality applies to any administrative decision and accordingly such a decision should be read in a manner that renders it lawful rather than unlawful if possible; and it is certainly possible here.

Ground E-A-iii

22. This ground contends that "*In finding that there were no 'exceptional circumstances arising' the Respondent erred in law in applying an 'exceptionality test' to the analysis of family and private rights*".

23. The Minister or any decision-maker is entitled to discuss issues and make comments without it being assumed or held that everything he or she says amounts to a legal test. The statement that there were no exceptional circumstances is a view taken by the Minister, not a legal test. It was certainly open to the Minister to refuse permission on the basis that there were no exceptional circumstances even if the Minister would have been entitled to give permission irrespective of whether exceptional circumstances existed or not. The lack of exceptional circumstances can thus be seen as essentially a statement of the reasoning of the Minister, namely that there was not any particular compelling and therefore exceptional basis as to why the original decision should be set aside on review.

Ground E-A-iv

24. This ground contends that "*the Respondent erred in fact and/or law in finding that '...there has been no material change in the applicant's personal circumstances under the heading set out above...'*".

25. But there *has* been no change in the applicant's material circumstances. All that has happened is some further information has been submitted on review which probably could have been submitted originally. This statement by the Minister reads naturally in any event as a finding that the Minister is simply unpersuaded that there are any changes in circumstances such as to warrant reversing the decision on review.

Ground E-B-i

26. This ground contends that "*The Respondent erred in law, including Article 41 of Bunreacht na hÉireann, and/or Article 8(1) ECHR, and/or fettered his discretion, in finding that refusal of permission does not breach the Applicant's family rights; (i) The Respondent failed to give due regard or proper regard to the rights under Article 41.1.1° and/or Article 8 ECHR rights of the Applicant's brothers, sister-in-law, and nephew, who are all Irish citizens resident in the State.*"

27. One can note briefly that again the ground fails to plead the 2003 Act which is necessary given that the ECHR is not directly justiciable. Secondly, the applicant is not permitted to advance the rights of third parties in the High Court and this ground appears to be a *jus tertii*. Perhaps more fundamentally, the applicant did not make any submission under Article 41 of the Constitution so he cannot reasonably expect to succeed in judicial review on a point based on that premise. And perhaps more fundamentally still, this was a review decision and the real issue was the infirmity in the materials provided establishing the true nature of the family relationships. The Minister's decision on review has to be read as a finding that the applicant has not displaced the Minister's concerns and that was a finding that was perfectly open to the Minister. Coming to that conclusion does not amount to a breach of

either Article 41 of the Constitution or art. 8 of the ECHR, as applied by the 2003 Act.

Ground E-B-ii

28. This ground contends that "*The Respondent acted unfairly and/or fettered his discretion in the assessment of the additional documentation furnished in support of the Applicant's application for permission to remain.*"

29. No unfairness or fettering of discretion has been demonstrated. On the contrary, the material submitted was clearly considered.

Discretion

30. As the application fails on its merits it is not necessary to decide the proceedings on the question of discretion, but even if some error had been demonstrated I would have refused relief on a discretionary basis. Each of the three grounds relied on by the respondents are a basis independently, and certainly cumulatively, for such an approach, namely that the applicant overstayed the very limited permission that was granted to him, that he failed to remove himself after the deportation order of July, 2009 or otherwise comply with that order and that he worked unlawfully during his illegal presence in the State.

31. The applicant has abused the very immigration system the outcome of which he now seeks to challenge. He is not entitled to discretionary relief in such circumstances and no injustice to the applicant has been demonstrated: see *B.S. v. Refugee Appeals Tribunal* [2019] IESC 32 (Unreported, Supreme Court, 22nd May, 2019) *per* Charleton J. concurring 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. gave the example of misleading information given by an applicant. See also *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 *per* MacMenamin J. at para. 28 where reference is made to the conduct and credit of an applicant being relevant in the judicial review context. What I should perhaps say for clarity is that I am basing those *obiter* remarks purely on the three matters as to discretion that were pleaded by the State and I do not have to take into account the question of the reality or otherwise of the applicant's "*marriage*" in Ireland.

Order

32. Nonetheless, the case presents a depressing situation. An applicant goes through the legal procedure of divorcing his wife six days before coming to Ireland. He then arrives on a tourist visa and fifteen days later gives notice of intention to marry an Irish teenager. He then overstays unlawfully. When that approach fails to achieve immigration status, he goes underground, works in breach of the criminal law and evades for many years. He fails to remove himself on foot of a deportation order. The best part of a decade after arrival, after an application for permission based on family members does not appear to be gaining ground, he realises that he is in fear of persecution and makes a protection claim for the first time. That is rejected as is an application for leave to remain. An appeal is rejected, as is a review application. He is now on his second deportation order and into his twelfth year in the State during which time his only permissions were a fleeting tourist permission for thirty days and the technical deemed permission arising by operation of the law during the currency of his unfounded protection claim. If the immigration system cannot be permitted to deport an applicant such as this, it hardly deserves to be described as a system.

33. The proceedings are dismissed and the respondent is released from any undertaking not to deport the applicant.