Neutral Citation [2015] IEHC 681

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 214 J.R.]**

**BETWEEN**

**BING LENG**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of November, 2015**

1. On 15th January, 2002, the applicant Mr. Leng arrived in Ireland from China, his country of origin, with the benefit of a visa. In February 2002 he was registered with student immigration status ("*Stamp 2*" permission to remain). This permission to remain in the State was renewed from time to time until March, 2011.

2. In January, 2011 he was arrested in respect of a charge under s. 19 of the Misuse of Drugs Act 1977, which related to allowing premises to be used for the cultivation of cannabis. On 31st January, 2014, following a plea of guilty, he was sentenced by the Circuit Court to two years' imprisonment (with one year suspended).

3. The applicant has been unlawfully in the State at all material times following the expiry of his permission to remain in March, 2011.

4. Up to the time of his participation in criminality, the applicant had been involved in a long term relationship that lasted approximately seven years. This relationship broke up around the time of the applicant's offending behaviour.

5. The applicant met his current partner, Ms. Bing-Bing Miao, in late 2011, at a time when he was unlawfully present in the State. They began living in the same premises in March 2012, initially in a flat shared with others. They began cohabitation proper in August 2012. Ms. Miao has two Irish citizen children from a previous marriage. The applicant and Ms. Miao have since married, in August 2015.

6. On 8th January 2014 the applicant's solicitors wrote to the Minister making an application for permission to remain in the State on "*Stamp 4*" terms, that is, with an entitlement to work. At the hearing of the present application, his solicitors very fairly accepted that they were aware of the terms of the Minister's scheme for permissions for *de facto* partnerships and were aware that the applicant did not comply with those terms. Hence they made an essentially *ad hoc* application rather than one that purported to come within the scheme.

7. The application enclosed a letter from Ms. Miao testifying to the relationship (in terms which appear to have overstated the duration of the co-habitation), but did not enclose the sort of documentary evidence of cohabitation envisaged by the Minister's published scheme.

8. The application also enclosed a letter from the HSE to the applicant's former solicitors, which did not make any reference to the relationship with Ms. Miao and stated that the applicant was living with friends.

9. By letter dated 26th February, 2014, the Minister refused the application, notified the applicant's solicitors of that refusal, and enclosed documents setting out the Minister's consideration of the application. That letter set out essentially four grounds of refusal, the first of which was a lack of "evidence" of the relationship with Ms. Miao.

10. Shortly after that letter, the Minister wrote again on 12th March, 2014, notifying the applicant of a proposal to make a deportation order against him. That letter contains an error on its face in that it recites both that the applicant was present in the State without permission, and that he both entered and was present in the State without permission. The reference to entry without permission is not correct, because, as noted above, his initial entry was on foot of a visa.

11. The present application for leave to seek judicial review of the decisions embodied in both of these letters was filed in Central Office on 3rd April, 2014.

**Procedural Matters**

12. Mr. David Leonard, B.L., who appeared for the applicant, has drawn my attention to a typographical error in the notice of motion which as drafted seeks substantive relief rather than leave to apply for judicial review. By agreement of the parties, I will treat the notice of motion as an application for leave, which is what it was intended to be.

13. Mr. Leonard also applied for an extension of time to make the application. Having regard to:

(i) the fact that an explanation for the delay in instituting proceedings is set out on affidavit,

(ii) the lack of objection from the Minister,

(iii) the lack of any prejudice to the Minister, and

(iv) the relatively short period of time involved,

I will make an order extending time.

14. Although I am not holding that either of these matters is a bar to the making of the application, that is not to say that they are entirely without relevance as I will discuss further below.

**The alleged error of fact in the permission refusal**
15. Mr. Leonard complains that in refusing the application for permission, the Minister committed an error of fact, by referring to the proposition that the applicant had not presented "*evidence*" of a long term relationship with Ms. Miao, whereas he had submitted a letter from Ms. Miao attesting to the relationship (although as I have said, that the letter gives the distinct impression that co-habitation began at an earlier point to that now admitted on behalf of the applicant).

16. Ms. Elizabeth Cogan, B.L., for the Minister characterises the letter from Ms. Miao as an "*assertion*" and distinguishes it from "*evidence*". The scheme for *de facto* partners as set out on the Irish Naturalisation and Immigration Service website lists a number of types of documentary evidence which are required to support an application by a partner. In the context of that policy, it seems evident to me that when departmental officials made reference to a lack of "*evidence*", this was a reference to a lack of evidence in the terms required by the published policy, such as utility bills and cognate documents.

17. In interpreting a term such as "evidence" in this correspondence, context is all-important (see comments of Smyth J. in *Baby O. v Minister for Justice, Equality and Law Reform* (Unreported, 20th December 2001)). When viewed in the context of the Minister's policy, which requires documentary evidence and which was the template against which the application would be bound to be assessed, it is perfectly reasonable for the Minister to have stated that the applicant did not produce "evidence" of the relationship. Indeed, it is significant that his solicitors knew that he did not qualify under the published policy (by reason of a lack of a two year period of cohabitation at the time of making the application), and on that basis, they did not attempt to frame the application within the terms of the policy. Such an approach made it all the more likely, if not all but inevitable, that the Minister would find that there was a lack of evidence presented, which is what happened. In short, there was no error in the Minister's letter of refusal because there was no evidence of the relationship as defined by the contours of the policy statement.

**The application was bound to fail independently of the question of whether evidence was presented**
18. Even if it could be said that there was an error in the Minister's decision, which I do not in any way accept, it seems clear to me that this would amount to harmless error for a number of reasons. Firstly, the application did not come close to the guidelines, both by reason of a lack of documentary evidence and because para. 16 of the guidelines makes it clear that the applicant must be of good character, a test which this applicant would not have met given his conviction on indictment for a drugs offence and a consequent custodial sentence which was, in part, actually effective.

19. While the Minister's policy scheme could not be applied in an entirely inflexible manner, I would repeat the point I emphasised in *Li v. Minster for Justice and Equality* (Unreported, 21st October 2015) that such policy schemes have the effect of promoting the similar treatment of similar applications and therefore of promoting equality before the law.

20. Secondly, the Minister's consideration of the application was based not on the lack of evidence alone but on four separate reasons for refusal. Even if the applicant had not failed to supply evidence of the relationship, the other reasons remain valid, namely:-

> (i) A contradiction between the alleged cohabitation and the lack of any reference to cohabitation in a letter from the HSE which was presented to the Minister by the applicant's solicitors setting out his circumstances.
>
> (ii) The fact that the applicant was not of good character.
>
> (iii) The applicant's unlawful presence in the State.

**The alleged failure to "have regard to" the letter from the applicant's partner**
21. The applicant makes a related complaint that the Minister failed to "*have regard to*" the letter from the applicant's partner confirming the existence of the relationship. He also complains that an official in the Department stated only that she "*examined the file*" as opposed that she had read it. I do not think that the particular phraseology adopted by officials can be subjected to this level of microscopic analysis. A statement that a file has been examined should in the absence of anything to the contrary be treated as equivalent to a statement that it has been read. There is nothing on the face of the decision to suggest that the letter from Ms. Miao was not, in fact, considered.

22. More fundamentally, an obligation to have regard to a particular matter does not automatically create an obligation to refer to it in narrative form (see *A.W.S. v. Refugee Appeals Tribunal* (Unreported, High Court, Dunne J., 12th June, 2007, at p. 14 and my decision in *R.A. v. Refugee Appeals Tribunal*, Unreported, 4th November 2015). As long as the decision is not inconsistent with a document supplied, failure to refer to a document that does not automatically give rise to an inference that it has been disregarded. The onus is on the person challenging a decision to show that relevant matter has been disregarded, if the decision by its terms suggests that it was examined (see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418).

**The lack of clarity as to who made the decision**
23. Mr. Leonard suggests that there is a distinct lack of clarity as to what precise official made the decision complained of. This point seems to be well made from the papers that have been put before me. The file was examined by a first official in the Department, Ms. Maria Treacy then passed to Ms. Helen Fogarty, who made what is described as a recommendation in relation to refusal of the application, rather than a decision in that regard. That strongly suggests to me that the file was then passed to some third and as yet unnamed official in the Department who made the actual decision. I would infer that the respondent is probably in possession of some version of this minute with a decision endorsed thereon by this more senior official.

24. It would certainly be more satisfactory if, in such a case, the Minister were to clarify the precise steps by which the decision was arrived at, and she would certainly be obliged to do so if the point were material to the outcome. However, on the basis of the papers as they stand, I infer that whoever made the final decision was acting on the basis of the reasoning as set out on the papers as attached to the letter of refusal dated 26th February, 2014. Therefore no infirmity would attach to the Minister's failure to identify the ultimate decision maker. If for example, the ultimate decision maker had decided to refuse the application on the basis of a different set of considerations to those set out in Ms Treacy's minute, it would have been improper to send that minute to the applicant as representing the considerations involved. In the absence of any real challenge by the applicant to the process sufficient

to cast doubt on the basis for the decision (for example, a letter seeking clarification not having been clearly answered by the respondent) I would not be prepared to assume that the Minister acted on any different basis to that set out by Ms. Treacy.

25. That fact alone would distinguish the case from *G.K.N. v. Minister for Justice* [2014] IEHC 478, where an official did not place full information before the ultimate decision maker, which in that case was the Minister personally. In the present case, it has not been established that the ultimate decision maker did not have all relevant information.

26. While I hold that there is no substance to this complaint, there is in any event the further difficulty that I do not consider that this ground of challenge comes properly within the grounds as pleaded by the applicant.

27. A related complaint that there was a failure to inform the applicant of adverse matters in accordance with the principles of natural justice was pleaded but was abandoned by the applicant at the hearing.

28. A further complaint was made that the Minister should not have fettered her discretion by adopting a guideline that there be two years cohabitation in order to qualify for permission to remain as a *de facto* partner. This point was not adequately pleaded but in any event, to my mind the Minister is entitled to have regard to whatever reasonable criteria she wishes in terms of assessing whether a permission should be granted. This must include the duration of any relationship (see *T.C. v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 109).

**The challenge to the proposal to deport**

29. The second leg of this application relates to a challenge to the proposal to make a deportation order. Following the refusal of permission, the Minister wrote to the applicant on 12th March, 2014, setting out a proposal to make a deportation order against him. The drafting of the letter was affected by an error as to fact, in that it stated that the applicant had entered and been present in the State without the permission of the Minister, whereas the applicant's original entry was lawful. The letter also went on to allege that the applicant was present in the State without the permission of the Minister, so even on its face, a certain production error is evident in the wording of the letter.

30. Mr. Leonard has challenged the explanation put forward for this error by Mr. Ben Ryan, on the grounds that the explanation is hearsay. Mr. Ryan does not state that he prepared the letter himself, and therefore his explanation as to how the error occurred does appear to me to be of a hearsay nature. Ms. Cogan's reply to this complaint is that Mr. Ryan is "*an officer of the Minister*" and that it is "*routine*" that a Civil Servant could take up a file and swear an affidavit as to its contents. She also says that it is open to Mr. Ryan to give his own evidence as to the systems in operation in the Department, from his own knowledge.

31. It seems to me that the hearsay objection is well founded. While Mr. Ryan can, of course, give evidence from his own knowledge as to the systems in the Department, he goes much further than that here and purports to give evidence as to how this particular error occurred without averring as to his means of knowledge or personal involvement. The fact that Civil Servants routinely give evidence as to the contents of files is usually more a convenience to the court and probably the parties in most cases, but if a hearsay objection is made, a court may have to simply forgo such conveniences.

32. Accordingly, I find that Mr. Ryan's explanation as to how this particular error occurred is hearsay and therefore inadmissible in the particular circumstances of this case. But even in the absence of this explanation I infer from the wording of the letter that, as I have already mentioned, some form of production error clearly occurred. Does this fact entitled the applicant to have the letter quashed by way of certiorari?

33. The most fundamental obstacle to any relief being granted is that the letter is merely a proposal to deport. It does not in and of itself infringe any rights of the applicant. In the absence of an infringement of a right, it is hard to see how the applicant can be said to be entitled to seek judicial review of the decision.

34. Mr. Leonard points to s. 5(1)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permits Act 2014, which permits a notification of this kind (under s. 3(3)(a) of the Immigration Act 1999) to be challenged by way of judicial review. However, that provision merely limits the procedure for seeking judicial review of such decisions, and it does not have the consequence that judicial review of such decisions is always, or even normally, appropriate or is in some way to be encouraged.

35. Mr. Leonard identifies the right infringed by the proposal as *"the right to have the applicant's circumstances dealt with in an accurate way"*. Judicial review is not necessary or appropriate to vindicate this right. All it would take to address this error would be the making of representations to the Minister in accordance with the proposal letter.

36. In my the circumstances in which judicial review of a mere proposal to deport an applicant is available must be extremely limited and confined to cases where the Minister had no jurisdiction to make the proposal (see by analogy cases such as *Stefan v. Minister for Justice* [2001] 4 I.R. 203, *G.O. v. Minister for Justice and Equality* [2015] IEHC 646 (MacEochaidh J.). The correct response to such a proposal, if a recipient wishes to challenge it, is to write to the Minister setting out representations and if needs be legal argument as to why the proposal should not be converted into an actual decision. Where the proposal was based on a fundamental error such as to deprive the Minister of any jurisdiction – for example where the applicant was in fact an EU citizen with an entitlement to be present in the State – judicial review would be a legitimate option despite the alternative remedy of making representations. But where the applicant is a person who is *prima facie* liable to having a deportation order made against him or her, as is clearly the case here, judicial review is not an appropriate first response to such a proposal.

37. The second difficulty for the applicant is that the error does not appear to be material. There is no suggestion anywhere else in the papers that the applicant entered the State unlawfully, or that the letter would not have been issued without that statement. The applicant was liable to have the proposal letter issued against him merely by reason of his unlawful presence in the State without his initial entry having been unlawful. Again, we are in the realm of harmless error (see by analogy *S.N. v. Refugee Appeals Tribunal*, Unreported, High Court, Mac Eochaidh J., 6th June, 2013, a case where an error as to a tribal name was held to have had no effect on the decision). In short, this was clearly a mistake, as all other relevant information made clear, and the applicant was not identifiably disadvantaged by that mistake.

38. That second factor is very much related to the first, in the sense that the more appropriate way of dealing with such issues would have been for the applicant to simply make representations to the Minister to clear up the matter. Judicial review is not necessary for that purpose.

**Discretionary Factors**

39. Even if any infirmity had been identified in the decisions sufficient to warrant the grant of *certiorari*, which is not the case, there

are a number of discretionary factors which would militate against the grant of relief to this applicant in this case.

40. One initial consideration is the question of whether the applicant can be held to have failed to comply with procedural requirements himself. I have already adverted to the fact that the applicant's papers for the present application were not filed in a manner that sought the correct relief within the correct time. It cannot be the case that procedural irregularity is a one-way ratchet system which only redounds to the prejudice of the State; or in other words that the applicant can concede as many goals as may be, but, as soon as he scores a single goal, the match is over. Where the complaint being made is of little more than a typographical error in a letter, and where the applicant has similar or more significant error on his side of the equation, that seems to me to be something that can legitimately be considered as part of the discretionary dimension of an application for judicial review. Of course I am not suggesting that such errors should automatically lead to denial of relief; merely that they be put into the balance should there be a need to consider discretionary factors, having regard to the nature of the error identified on the part of the respondent.

41. Another matter going to discretion is the failure of the applicant to issue any pre-action letter between the refusal of the permission and the launch of the proceedings.

42. Ms. Cogan submitted that if the Minister knew the applicant had misunderstood the guidelines as to evidence required, the matter could have been clarified in correspondence.

43. Mr. Leonard submits that to have regard to a lack of a pre-action letter would be equivalent to refusal on the grounds of alternative remedies, a subject on which he submits that settled case law exists. I do not think that the failure to write a pre-action letter must be governed by the authorities on alterative remedies. If the infirmity is one which is capable of being resolved in correspondence (see *Li)*, the issue of such a pre-action letter is normally a prudent and appropriate step. Failure to take such a step where it would have been appropriate to do so can reasonably be held against an applicant. In the present case, the infirmities that are alleged to exist in the Minister's letters were perfectly capable of being clarified in correspondence, correspondence which was of course never issued.

44. A further discretionary factor is the fact that the applicant has been illegally present in the State at all material times since March, 2011 including for the entire duration of the relationship with Ms. Miao on which he relied for his application for permission, as well as at the time of his institution of these proceedings and ever since. I have previously held in *Li* that illegal presence in the State is one factor that may be taken into account in a case where the order challenged does not have "*continuing effects*". I would see a distinction between a challenge to refusal of a visa or permission to be in the State on the one hand, which is inherently time-limited, if not transitory, and the making of a deportation order on the other hand which is, in effect, a permanent bar to presence in the State. The deportation order has "*continuing effects*" in a way that a permission refusal does not, and I would be somewhat more reluctant to take into account illegal presence in the State on the part of an applicant challenging a deportation order. Indeed, Mr. Leonard points out that such an applicant would almost, by definition, be unlawfully present in the State. However, this consideration does not apply to persons applying for visas or other permissions to land or to be in the State. Furthermore, Mr. Leonard's submission assumes that a discretionary factor would be applied in a mechanical or automatic fashion, whereas the more appropriate way of considering such discretionary elements would be firstly to identify if they exist and secondly to examine if they are outweighed by countervailing factors such as objective constitutional interests. I will discuss this further below.

45. Yet another important discretionary factor in this case is the fact that the applicant essentially abused the hospitality of the State by becoming involved in an indictable offence under the Misuse of Drugs Act 1977 at a time when he was a visitor to the State on the basis of a temporary permission. The fact that he served a custodial sentence in this regard would, of itself, render him liable to deportation under s. 3(2)(a) of the Immigration Act 1999, subject to any representations he might make in that regard.

46. To my mind, it would undermine the scheme and purpose of the immigration system if the court were precluded from having regard to the offending conduct of an applicant in the exercise of its discretion. Mr. Leonard argues that the applicant has "*served his time*" and the offence should not carry any "*residual punishment*." However the refusal of permission by the Minister *inter alia* on the grounds of his offending behaviour, and indeed the taking into account of his conviction by the court as a matter of discretion, do not amount to "*punishment*". They are simply civil consequences of the offending behaviour.

47. As I have made clear, the discretion of the court is not an inflexible approach and the identification of possible factors militating against an applicant does not automatically result in a denial of relief. A court should go on to consider what countervailing factors there may be and whether these outweigh the factors suggestive of dismissal of the application.

48. While it is not of course possible to give any exhaustive list of the countervailing questions, the ones that may be particularly relevant to the present case appear to me to be as follows:

> (i) Whether the error identified on the part of the respondent is one of substance rather than form.
>
> (ii) Whether the decision related to a substantive right of the applicant or merely a privilege.
>
> (iii) Whether the decision was made without jurisdiction (see *O'Keeffe v. Connellan* [2009] 3 I.R. 643), as opposed to a decision which was within the jurisdiction of the decision maker but was reached by means of a flawed process.
>
> (iv) Whether the decision had continuing effects (*O'Keeffe v. Connellan* [2009] 3 I.R. 643).
>
> (v) Where there are objective constitutional interests involved (including for example those of minors who cannot be held liable for any acts of the applicant) (*Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53 [2015] 6 JIC 2303).

49. On posing those questions, I find the position to be as follows:

> (i) The error in the letter notifying the applicant of the proposal to make a deportation order was merely an error of form.
>
> (ii) The impugned decision did not infringe any substantive right of the applicant for the simple reason that he had no legal entitlement to be in the State after March, 2011. Insofar as his rights under Article 8 of the European Convention are concerned, virtually no weight attaches to those rights because his relationship with Ms. Miao arose at a time when he was illegally present in the State (see my judgment in *Li*.) For that reason, the consideration of this applicant's family relationships in the context of having sought an extension of his permission to remain (or in the context of whether a deportation order should be made) is essentially an *ad misericordiam* application. In the circumstances of the present case, the weight (if any) which the Minister attaches to his family relationships are entirely a matter for her.

(iii) The Minister undoubtedly had jurisdiction to make the decisions she made.

(iv) A refusal of an extension of permission is not a decision with "continuing effects" in the strong sense in which that expression should be understood. Part of the reasoning of the decision was the lack of evidence presented, and that in itself leaves open to the applicant the possibility of making a further and better supported application. Ultimately the decision was simply that a person who did not have permission to be in the State beyond a given date should not have an extended permission. It was not a permanent bar to presence in the State in the way that a deportation order would be.

(v) For the foregoing reasons it is clear that there are minimal if any objective constitutional interests involved. The refusal of permission will no doubt have an effect on Ms. Miao, his then girlfriend, now wife. However that is a matter that the Minister was entitled to consider as having been insufficiently documented at the time of making of the original application, and in any event as being outweighed by his criminality or illegal status or both. To borrow a term from another area of law, there was voluntary assumption of risk by all concerned in embarking on and subsequently intensifying a relationship at a time when one of the parties had no legal basis for maintaining a presence in the State.

50. Having regard to the foregoing I find that the balance of discretion is very firmly against the applicant in the circumstances of the present case and, even if there was an infirmity in the decisions otherwise warranting judicial review, which I do not accept, I would refuse relief on a discretionary basis alone.

**Order**

51. For the foregoing reasons, I would order as follows:-

(i) that the notice of motion be treated as an application for leave to apply for judicial review;

(ii) that time for making the application for leave be extended up to the date on which it was made;

(iii) that the application for leave to apply for judicial review be refused;

(iv) that any consequential applications be adjourned to a time to be fixed; and

(v) that any party intending to make such application give the other party advance written notice of particulars in that regard.