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Neutral Citation Number: [2007] IEHC 306

THE HIGH COURT

[2007 No. 765 J.R.]

BETWEEN

L.K. AND F.N.

APPLICANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Birmingham delivered the 20th day of July, 2007.

1. The applicants seek judicial review of the failure of the Minister for Justice, Equality and Law Reform (the Minister/respondent) to halt the implementation of a transfer order pending the consideration of a claim for residency on the part of the first named applicant. On the 10th day of July, 2007, I gave leave to seek judicial review and the substantive hearing came on before me on the 10th July 2007, both parties having expressed the view that they were happy that I should deal with the substantive issue notwithstanding that I had heard the leave application so soon beforehand.

Leave Granted

2. The applicants have been given leave to seek judicial review seeking the following reliefs:

> (a) A Declaration that the removal of the first named applicant from the State is unlawful prior to the determination of the application for residency based on marriage and family and domestic circumstance.
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> (b) An injunction, including an interim injunction, restraining the respondent from taking any steps to remove the first named applicant pursuant to a transfer order and/or to remove her from the State and/or from interfering with her or detaining her for the purposes of transfer or removal pending the outcome of these proceedings and/or without prejudice pending the consideration in accordance with law of the outstanding applications made to the respondent seeking residency in this State based on marriage to an Irish citizen, and revocation/non implementation of the transfer order.

3. It is appropriate to refer briefly to relevant domestic and EU legislation. Council Regulation (EC) No. 343/2003 provides as follows:

> "Article 3.
>
> > (1) Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
> >
> > (2) By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

4. The Regulation goes on to establish what is described as a hierarchy of criteria for determining the Member State responsible. In the current case it is not in dispute that applying these criteria identifies the United Kingdom as the Member State responsible. In these circumstances it is not necessary to say any more about the hierarchy of criteria at this junction.

5. Section 22 of the Refugee Act, 1996 (as amended) empowers the Minister to make orders as appear to him necessary or expedient to give effect to Council Regulation (EC) No. 343/2003. The orders contemplated by s. 22 are contained in the Refugee Act 1996 (Section 22) Order 2003.

6. The provisions of the Statutory Instrument it would seem most relevant are the following:

Determination under Council Regulation

> Article 4(1) Where an application is made under section 8 of the Act, the Commissioner shall determine whether, in accordance with the Council Regulation, the application should be examined in the State.
>
> (2) The Commissioner shall, before making a determination under this Article, take into consideration all relevant matters known to him or her, including any representations by or on behalf of the applicant.

Notice for Intention to transfer applicant to another Council Regulation Country

> Article 7(1) Subject to the subsequent provisions of this Article, the Minister may by order (in this Order refer to as "a transfer order"), in the form set out in Schedule 2 or a form to the like effect, require an applicant, in respect of whom a determination under Article 4 that he or she should be transferred to a Council Regulation country has been made, to leave the State on or before such date and within such period as may be specified in the order and to go to the relevant Council Regulation country.

Background to the applicants

7. The applicants are wife and husband having married, within the State, in February, 2007. The first named applicant states that she is a foreign national. The second named applicant is also a foreign national. He was granted a declaration of refugee status on 16th

April, 2002 and subsequently applied for a certificate of naturalisation, which application was granted on 25th September, 2003 and he has accordingly been issued with an Irish passport.

Background to the application before the court
8. In the course of my judgment on the leave application I have set out the background to the case in some detail.

9. Essentially, the situation is that the first named applicant entered the State on the 20th July, 2006 and made an application for refugee status on the same day. At the time of her entry to the State she was a person who had sought and failed to obtain asylum in Britain, where she had made an application quoting a different name and a different date of birth. She failed to disclose the fact of a prior application to the authorities and instead sought to deceive them by giving a description of having been brutally raped in her country of origin and supported this account with what purported to be a medical report. As I pointed out at the leave stage, she maintained this deception by causing her current solicitor to swear, in good faith, an affidavit which was relied on when an application for an interim injunction was made to McCarthy J. which affidavit referred to the fact that she had entered this State, from her country of origin, to which she had returned from the U.K., whereas the reality is that she came directly to this State when her application for asylum was unsuccessful in Britain.

10. I observed that I was not at all impressed with those lies, nor was I satisfied that even then the full extent of the deception had been revealed. Notwithstanding that the lies told by her were outrageous, I took the view that she had not, certainly at leave stage by her conduct disentitled herself to relief by way of judicial review. I took that view for two reasons. The lies, while outrageous were designed to support an application for asylum and were not directly related to the question with which the court is now concerned, which relates to her marital status. Secondly, this is a case where there are two applicants and the reliefs they seek are inter-dependent and in my view there would be a certain air of unreality in refusing to entertain an application from one applicant and then going on to consider the same issues in the course of the application by the second named applicant. Having regard to these two facts I regarded it as appropriate to consider the application for judicial review on the merits. However the conduct of the first named applicant may still have a relevance when it comes to a consideration of how the court should exercise its discretion.

11. Following her arrival in the State when an analysis of fingerprints established that she had made an earlier unsuccessful application in Britain, the authorities here requested the British Authorities "to take back" the applicant and on 21st August, 2006 the British Home Office agreed "to take back" the applicant for further consideration of her asylum application under Article 16.1.E. of Council Regulation 343/2003.

12. By letter dated August, 2006 she was informed of the determination to transfer the application to the United Kingdom and was told of her entitlement to appeal the decision to the Refugee Appeals Tribunal (RAT). An appeal was submitted to the RAT and that appeal raises further issues about the credibility of the applicant insofar as the notice of appeal states:

> "it would appear from the information given us by the Applicant that she was arrested at an anti-Government demonstration in her country of origin on 30th June, 2005 and held captive for a month and three weeks in Prison."

13. The applicant apparently continues to deny giving such instructions. In any event on 14th September, 2006 the RAT (Mr. James Nicholson, B.L.) affirmed the determination of the Refugee Applications Commissioner and dismissed the appeal. On 31st August, a transfer order was made by an official acting on behalf of the Minister and the applicant was informed of this fact by letter dated the 4th September, 2006. This letter required her to present herself at the offices of the Garda National Immigration Bureau on 11th September, 2006 in order to make arrangements for her removal from the State. Lest there be any confusion in relation to the dates, I should perhaps, explain that the appeal to the Refugee Appeals Tribunal did not operate to stay the transfer order. The notification of the decision of the RAT was sent to her last recorded address and was returned and marked "not called for".

14. There is no real issue in relation to the making of the transfer order and it is not in dispute that it was validly made. The issues in the case relate to what happened subsequently. Despite being instructed to report to the Garda National Immigration Bureau, the applicant failed to report on the 11th September, 2006 as requested and the authorities thereafter have regarded her as an evader.

15. In February, 2007 the applicants married each other and on 2nd April, 2007 an application for residency status in the State was made on behalf of the first named applicant based on her marriage to an Irish citizen, by solicitors who were then acting on her behalf. The first named applicant has indicated that she had been in touch with her then solicitors prior to her marriage, but had been told there was nothing that could be done on her behalf until after the wedding had taken place, advice with which her present solicitors would not fully agree. An official responded to this communication by letter of 3rd May, 2007 indicating that an application for residency based on marriage was taking "ten to twelve months minimum to process". I am satisfied that this letter would not have been written had the official involved been aware of the existence of the transfer order.

16. In the course of this substantive hearing it has been indicated to the court that the time span indicated in that letter is not altered and on that basis one would expect a decision on the residency request somewhere in or around Spring or early Summer of next year.

17. On 21st June, 2007 the first named applicant was arrested and detained at the Dóchas Centre in Mountjoy Prison. On the same day her current solicitors, wrote to the Department of Justice, Equality and Law Reform informing them that the first named applicant was married to an Irish citizen. Reference was also made to the fact that the second named applicant suffers from mental health problems and as such was highly reliant on his spouse for support. The letter asserted that having regard to the circumstances and to the rights of their client and her spouse, including rights pursuant to Article 41 of the Constitution and Article 8 of the European Convention of Human Rights, it would be disproportionate and unreasonable to remove her from the State, thereby sundering her from the family unit with Mr. N., an Irish citizen. The letter went on to suggest that as an absolute minimum, it must be wholly disproportionate and unreasonable to remove her from the State pending the determination of her outstanding application for residency on the basis of her marriage to an Irish national. The letter concluded by seeking confirmation that no steps would be taken to remove their client pending the determination of the application for residency based on marriage to an Irish citizen. If confirmation was not forthcoming, there would be an application to the High Court. The solicitor sent a further letter by fax on the same day indicating that in addition to the request for revocation/non implementation of the transfer order because of the residency request, that in addition a request was being put forward on the basis of the client's family and personal circumstances. Again, there was a request for confirmation that the transfer would not proceed. On the 22nd June, 2007 the solicitor sent a further request, this time applying for family reunification pursuant to s. 18 of the Refugee Act, 1996. I declined to grant leave on this aspect and that issue is no longer relevant. On the same day, the Department responded indicating that the fact of the marriage to an EU national did not alter the situation that another EU Member State was responsible for processing her asylum application. It was pointed out that her transfer would not prejudice her application for residency, the point was made that in the event of her application for residency being accepted, she would of course be entitled to return to the State. For completeness sake I should say that the letter in error refers to

a transfer to the Netherlands. It was accepted all round that this is an error and that the transfer, if it is to take place would be to Britain. For some reason or another there has been a number of mistakes by all sides in this case in relation to nationality. I have pointed out that certain documentation submitted on behalf of the first named applicant had erroneously referred to the Democratic Republic of the Congo. Further, the first correspondence submitted on the first named applicant's behalf by her current solicitor had referred to her as Angolan and here we have this reference to the Netherlands by the authorities.

18. On receipt of the refusal by the authorities to offer any comfort, an application was duly made to the High Court and on 22nd June, 2007 an interim injunction restraining transfer was obtained from McCarthy J. returnable for the 25th June.

19. Thereafter, the applicants were directed to bring their application for leave and for an interlocutory injunction on notice. I heard the application for leave on the 29th day of June, 2007 and on the 10th July granted leave.

The Present Proceedings
20. Mr. John Finlay S.C. on behalf of the applicants has referred me to a number of decisions of the Irish and British Courts and of the European Court of Human Rights designed to establish that immigration and residency decision gives rise to issues involving fundamental human rights that are recognised by both the Constitution and the European Convention on Human Rights. From my part I have no difficulty whatever in accepting that proposition.

The residency application
21. In arguing that there is a right to remain on the part of the applicant pending a decision on the residency application or as a minimum until there has been a specific consideration of whether the applicant can remain pending a decision, the applicant has stressed the fact that fundamental human rights issues arise in immigration cases. In that regard while not challenging the validity of the transfer order that was made, they now seek to challenge its implementation and contend that its implementation is now unlawful having regard to the family and domestic circumstances of the applicants with a particular reference to the fact of their marriage. They contend that they enjoy rights under Article 40 and Article 41 of the Constitution and under Article 8 of the European Convention on Human Rights, and say that while accepting that those rights are not absolute that there is as a minimum, a requirement that should be the subject of consideration.

22. Considerable emphasis was placed on the decision of Finlay Geoghegan J. in *Tatina Malsheva and Another v. The Minister for Justice Equality and Law Reform*, (Unreported, High Court, 25th July 2003). In that case Finlay Geoghegan J. granted leave and an injunction to restrain an interference with re-entry into the State in circumstances where the applicants had married each other during the time between the making of a deportation order and its execution, this in a situation where, as she found to be the case, the respondents were on notice of the fact of the marriage and ought to have considered the marital situation. The circumstances of the instant case are somewhat different in that here, the then solicitor when seeking leave to reside on the basis of her marriage to an Irish citizen, conspicuously failed to make any reference to her status as a person in respect of whom a transfer order had been made, and this notwithstanding the fact that the solicitor and client had it seems been considering the relevance of her then pending marriage to any application that might be made to the Minister. It is also of some significance that the *Malsheva* case involved a deportation order which of course is quite different in its terms and effects to a transfer order.

23. The applicant has also placed reliance on the case of *Makumbi v. Minister for Justice, Equality and Law Reform* (Unreported, 15th November, 2005). This, unlike *Malsheva* was a transfer case. In that case the elements before the court indicated that prima facie there was a real risk of suicide if the transfer order were implemented. The attitude taken by the Minister in that case was that he had no discretion not to implement the transfer order or to revoke it or to consider the applicants application for asylum in this jurisdiction. Finlay Geoghegan J. granted an injunction restraining the respondent from taking any steps to transfer the applicant to the United Kingdom, as well as the declaration that the respondent had discretion not to implement a transfer order and a declaration that constitutional justice required the respondent to determine the request of the applicant not to implement the transfer order made in respect of her. The significance of the position in the context of this case is the clear expression of view by Finlay Geoghegan J. that the Minister did indeed have a discretion not to implement a transfer order.

24. For her part, on behalf of the authorities, Ms. Emily Farrell, B.L. has placed considerable reliance on *Margine v. the Minister for Justice, Equality and Law Reform* a decision of Peart J. on 14th July, 2004. This she points out is a more recent decision than the *Malsheva* decision and, unlike *Malsheva* was a decision on the substantive hearing. Further, it is a decision after the coming into force of the European Convention on Human Rights Act, 2003. In that case the applicant when facing imminent deportation (as in *Malsheva* it was deportation and not transfer that was in issue) sought to halt the process on the basis of being the father of an Irish born child. Peart J. pointed out that the child had been born and indeed conceived after the making of the deportation order. In that regard a certain similarity to the present situation where the marriage took place after the first named applicant had become an evader will be noted.

25. It should be noted that in issue in the *Margine* case was the parent - child relationship and Finlay Geoghegan J. in *Malsheva*, at least left open the possibility that it may be that the right of a spouse who is an Irish citizen to enjoy the company of his or her spouse in Ireland may be different and stronger to children's rights.

26. Mr. Finlay S.C. accepted that it is very difficult indeed to reconcile the approach of Finlay Geoghegan J. in *Malsheva* with the approach of Peart J. in *Margine*. Urging that the *Malsheva* decision should it be the one to be followed, he observes that the *Malsheva* decision is the more closely reasoned and that to some extent in *Margine* the learned judge simply contended himself with endorsing the submissions made by counsel on behalf of the State. In contrast Ms. Farrell seeks to distinguish *Malsheva* or alternatively invites me not to follow the decision.

27. Dealing with the *Makumbi* case, Ms. Farrell lays particular emphasis on the fact that the case turned on its own very specific facts and makes that the point that Finlay Geoghegan J. grounded her judgment firmly in the facts of that case. It is true that Finlay Geoghegan J. referred to the factual context on a number of occasions of her judgment she commented at p. 8:

> "I am satisfied that the medical evidence presented to the respondent on the 28th July and subsequently, prima facie indicates that there is a real and substantial risk of suicide if the transfer order is implemented and in that sense a real and substantial risk to the life of the applicant. It is in the context of this finding of fact that the legal issues must be considered." (emphasis added) And again at page 17 she observes:
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> "I am only considering the existence of such a discretion in the factual circumstances which pertain to this application." (emphasis added).

28. Notwithstanding that, it is the case that the facts in *Makumbi* were very dramatic and indeed very distressing, there is

nonetheless force in the argument put forward by Mr. Finlay S.C. that there is either a discretion to halt implementation or there is not. He argues that if it exists that it must be a general discretion, and cannot be confined to rights of like cases.

29. Mr. Finlay argues that if there is a discretion to halt implementation that it is the right of the applicant to request non implementation and to have that request for non implementation adjudicated upon. If this submission is correct this necessarily has major implications for the efficacy of the system to be put in place by the Regulation.

30. There is no doubt that if the transfer order is implemented it will undoubtedly impact significantly on the applicants as a married couple. Nonetheless, it is not wholly irrelevant that the effect of the transfer order is not to separate this couple irreparably. The second named applicant is the holder of an Irish passport and is perfectly free to join his wife in Britain, should he wish to do so. Equally, if she is obliged to travel onward to her country of origin the second named applicant is in a position to join her or visit her. The evidence before the court suggests that he resided in her country of origin for a period and that he travelled there having achieved Irish citizenship.

31. I also bear in my mind the fact that case law in Ireland, Britain and the case law of the European Court of Human Rights all indicate that where one spouse is aware at the time of entering into a marriage that the other spouse's situation is precarious that this is a relevant consideration. See the judgment of Lord Phillips of Worth Matravers in *R (Mahmood) v. The Secretary of State for the Home Department* [2001] 1 W.L.R. 840 cited with approval of Fennelly J. in the Supreme Court in *Cirpaci (nee McCormack)* and *Cirpaci v. The Minister* (20th June, 2005).

32. In my view the law's authority is not enhanced if it is possible to enter the State on a wholly false basis, in this case, claiming to have travelled from her country of origin where she had been brutally raped to the extent that her life was at risk when she was not in fact even on the continent of Africa at the time and then having engaged with the authorities subsequently disengaged, in effect going underground, if in such a situation the individual can improve his or her situation by taking advantage of his or her presence in the country achieved by deception and illegality to marry and thereby halt procedures which would already have been completed were it not for the action of failing to comply with an order validly made.

33. Mr. Finlay S.C. while invoking rights under a number of headings has accepted that those rights are not absolute and that there may be competing considerations that require to be weighed in the balance. His complaint and criticism is that there was no such weighing and indeed in that regard he is clearly correct. Instead, the Minister took the view in a situation where there was a transfer order in existence the validity of which was not challenged that he was not going to set the transfer order to one side while consideration was given to the residency application. The question is whether he was correct or incorrect in that approach. If he is incorrect then the decision cannot stand because manifestly there was no consideration of competing interest.

34. I do not believe it is consistent with the policy and objectives of the Council Regulation that someone who is an asylum seeker in another Council Regulation state or a fortiori a failed asylum seeker in another Member State should be in a position to frustrate the operation of the structures created by the Council Regulations by applying for non implementation of the transfer order. I do not believe that a request for a non implementation serves to suspend the transfer order. While I am prepared to accept that the Minister may, at least in certain situations, have a discretion to suspend the implementation of a transfer order or indeed not to implement a transfer order, I do not believe that it follows, that carries with it as a corollary, an entitlement on the part of the applicants to seek non implementation and with it an obligation on the Minister to give consideration to every such request, and to defer the implementation while consideration takes place.

35. In all the circumstances I am not prepared to grant the application for judicial review.