THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 450 J.R.]

IN THE MATTER OF SECTION 5 OF THE

ILLEGAL IMMIGRANTS (TRAFFICKING) ACT (2000) (AS AMENDED)

BETWEEN

M.A.K.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of July, 2017

1. The applicant is seeking leave by way of *ex parte* docket for an order of *certiorari* quashing the decision of the respondent notified to the applicant by letter of 9th May, 2017 to issue a deportation order under s. 3 of the Immigration Act 1999 (as amended), a declaration that the process by which the respondent determined that the applicant and his wife entered a marriage of convenience is unreasonable, a declaration that an order by way of the removal order as opposed to a deportation order would be the correct procedure together with a declaration that the examination of the file grounding the impugned deportation order contains a number of fundamental errors in law and in fact.

2. The application is governed by s. 5 of the 2000 Act and therefore as was held by Carroll J. in *MacNamara v. An Bord Pleanála* [1995] 2 IRLM 125, and subsequently approved by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 the threshold is that the grounds must be reasonable arguable and weighty. The grounds must not be trivial or tenuous and must not be grounds that do not stand any chance of being sustained. Because of the nature of the reliefs sought and the fact that it is a s. 5 application the application was made ultimately on notice to the respondent and came before this court on 26th June, 2017. At the hearing of the matter on notice the applicant withdrew that portion of his claim that sought a declaration that the finding that his marriage with his wife was one of convenience – this position was adopted because the applicant was advised in a letter of 1st June, 2016 of such finding however did not subsequently challenge same although in correspondence did assert that this was an erroneous finding.

3. Insofar as the issue concerning whether the applicant might be removed from the country by way of a removal order or a deportation order the applicant relies on the judgment of Hogan J. in *Iguma v. Governor of Wheatfield Prison* [2014] IEHC 218. It was held that an applicant who is within the regulation process (that is Regulation and/or Directive 2004/38/EC) is the subject matter of a removal order as opposed to a deportation order. The applicant suggests that he does not come within the ambit of the judgment of Humphreys J. in *K.P. v. Minister for Justice, Equality and Law Reform* being a judgment delivered on 20th February, 2017. This asserted distinction is because the applicant argues that he is not making any collateral attack on the deportation order. However it appears to me that the within applicant is particularly similar to the applicant considered in the judgment of Humphreys J. aforesaid in that the respondent proposed to make a deportation order against that applicant on 13th July, 2016 and no representations were made. A subsequent deportation order was made in September, 2016 and received by the applicant on 20th October, 2016. The leave application first came before the Court on 28th November, 2016. In these circumstances I cannot see how it is arguable that the applicant can validly distinguish himself from the applicant in the judgment of Humphreys J. That case also concerned a situation where there was a finding of a marriage of convenience, this fact is a substantially distinguishing feature from the facts that came before Hogan J. in the *Iguma* decision. Humphreys J. held that legal action designed to enforce rights derived from a marriage of convenience is an affront to the Court and the Court will not entertain an action founded or a wrongful act. Significantly, also, in that decision at para. 18 the Court identified that discretion is not simply a matter for the substantial stage and remains relevant even at the leave stage as emphasised Finlay C.J. in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. In accordance with the judgment therefore of Humphreys J. in K.P. the within applicant's rights have been withdrawn due to a finding of a marriage of convenience and therefore substantial grounds have not been shown to suggest that a person is validly exercising EU Treaty Rights so as to suggest that a deportation order is an invalid procedure.

4. Insofar as the argument that the deportation order is grounded on a flawed examination of file is concerned this argument is raised because it is suggested that in the letter of 18th July, 2016 where the respondent indicated that the respondent is proposing to issue a deportation order it is argued that this letter merely refers to the fact that the applicant had no current permission to be in the State. I find this argument by the representatives for the applicant, who are particularly familiar with the asylum process, disingenuous. The letter of 18th July, 2016 is a standard form letter issued by the Minister in all situations where she is considering making a deportation order. The letter also encloses a form on which the applicant might make representations against the making of a deportation order. At several previous occasions this Court has noted that this firm of solicitors have availed of this form to make very substantial and lengthy arguments as to why a deportation order should not be made. In the instant circumstances although further communications were entertained between the applicant's solicitors and the respondent the only argument raised by the applicant was to the effect that the deportation order was an invalid procedure.

5. A further error identified by the applicant in the examination of file was to the effect that the marriage was genuine and the respondent erroneously stated that the applicant did not request a review of the decision to revoke his resident card. I am satisfied that the statements made in this regard in the examination of file were correct and for example the correspondence of the 4th August, 2016 from the applicant's solicitors was not for a review of file but rather a demand that the Minister would withdraw the proposal to deport as otherwise judicial review proceedings would be processed. Significantly judicial review proceedings were not processed notwithstanding that the response to that letter of 4th August, 2016 was a letter by the respondent of 9th August, 2016 where it was clear that the respondent intended to continue to act on the proposal to deport. The finding of a marriage of convenience was made by letter of 30th March, 2016 and was not challenged.

6. The final argument in this regard is the suggestion that the applicant's Article 8 rights were not properly considered as the examination of file suggests that the applicant was always present in this State on a precarious basis rather than as a settled

migrant. The applicant relies upon this Court's judgment in *W.S. v. Minister for Justice, Equality and Law Reform* a judgment delivered on 23rd February, 2017. In relying on that judgment the applicant ignores the fact that in that case although it was held that the applicant had acquired private life rights for the period for which he had student permission nevertheless these private life rights were considered without a proportionality test and in the circumstances that was a permissible approach to adopt by the respondent having regard to para. 43 of the ECtHR decision in *Balogun* (application no. 60286/09) in (2013) 56 EHRR 3 and para. 59 of the judgment of the Court of Appeal in *Luximon v. Minister for Justice, Equality and Law Reform* a judgment delivered on 15th December, 2016.

7. The European Court on Human Rights in *Balogun* at para. 43 recognises that not all settled migrants had equally strong family or social ties and the comparative strength and weakness of those ties in the majority of cases would more appropriately be considered in assessing the proportionality of the applicant's deportation under Article 8 (2).

8. In para. 59 of the *Luximon* decision aforesaid Finlay Geoghegan J. stated:

> "the question as to whether or not on the particular facts of the application, a decision not to renew the permission would have consequences of such gravity for Ms. Luximon and her daughter in relation to their alleged rights to family or private life such that Article 8 is engaged in the sense that term is used in the *Razgar C.I.* and *Dos Santos* judgments is a matter for determination by the Minister subject only to judicial review by the courts".

9. Further at para. 27 of the *Luximon* judgment the Court indicated that it appears correct a matter of principle that Minister in an applicant under s. 4 (7) of the 2004 Act is only obliged to consider and take into account matters which have been raised on behalf of the applicants or which objectively may be considered as having been brought to the Minister's attention or matters of which the Minister should be aware.

10. No Article 8 rights were identified by the applicant to the respondent.

11. In oral submissions on the 26th June, 2017, notwithstanding a lack of reference to same in correspondence, written submissions or anywhere within the statement of grounds, the applicant argues that in the letter of the 1st June, 2016 from the I.N.I.S (advising that permission to remain is revoked) the applicant's file has been referred to the removal's unit for consideration under Regulation 20 of E.U. (Free Movement of Persons) Regulations, 2015 and this binds the respondent to the removals procedure rather than the deportation order procedure. However no estoppel can arise as there is no suggestion that applicant relied on the same to his detriment. Further the appropriate time to raise any issue in respect thereof would have been immediately following receipt of the respondent's letter of the 18th June, 2016 advising of the Minister's proposal to make a deportation order.

12. Although therefore in the examination of file it is suggested that the applicant was at all times present in the State on a precarious basis nevertheless I am satisfied that having regard to the fact that the applicant for his own reason chose not to engage with the Minister other than to suggest that the deportation order was the wrong format the applicant does not have a reasonable chance of successfully arguing that:-

> 1) The Minister was irrational or unreasonable in weighing and considering the facts of the case as set out therein and known to the Minister and;
>
> 2) Such potential interference with private life or family life rights of the applicant by the making of the deportation order would have consequences of such gravity as to potentially engage the operation of Article 8.

13. This argument now raised on behalf of the applicant appears to me to be a collateral attack on the deportation order in circumstances where the applicant was afforded ample opportunity to raise Article 8 issues prior to the making of the deportation order but for his own reasons choose not to at a time when he was legally represented by solicitors who are particularly conversant with the immigration law process.

14. Having regard to the foregoing and the discretion which is vested in the Court at this time the application for leave is refused.