

Between:

DHANWANTEE BUNDHOOA

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 21st December, 2018.

1. Ms Bundhooa is a citizen of Mauritius. She held 'stamp 2' student permission that expired in 2011. Thereafter she was illegally present in Ireland. Then, on 30.07.2015, after marrying an EU national, Ms Bundhooa applied for a residence card under the EC (Free Movement of Persons) (No 2) Regulations 2006. On 05.01.2016, she was granted temporary permission under those Regulations to stay in Ireland on 'stamp 4' conditions. But on 30.04.2016 Ms Bundhooa's residence card application was refused on the basis that the marriage was one of convenience. No review was sought of that decision, so it stands. On 23.05.2016, Ms Bundhooa applied for permission to remain on a 'stamp 4' basis, invoking s.4 of the Immigration Act 2004. By decision of 22.09.2016, the Minister refused to deal with that application. Ms Bundhooa seeks, *inter alia*, an order of *certiorari* in respect of that refusal.

2. The refusal states, *inter alia*, that: "*Because you did not have permission when the application was received, the question of amending or extending it does not arise. Accordingly, your case will not be dealt with under section 4*". This text involves an inexact reference to s.4(7) of the 2004 Act which provides: "*A permission under this section may be renewed or varied [i.e. not 'amended or extended'] by the Minister...*". But administrative decisions do not fall to be construed like statute. What the Minister clearly and correctly seeks to convey is that because Ms Bundhooa does not hold an extant permission under s.4 there can be no "*amending or extending*" ('varying') same: one cannot vary the non-existent.

3. In his pleadings/submissions the Minister has not provided retrospective reasons for his refusal. Even if he had, the court considers that, for the above reasons, his decision offers good reason for refusing to deal with Ms Bundhooa's application. The court sees no breach of the Minister's duty of candour to present.

4. To the extent that the Minister enjoys discretionary executive power, outside s.4, to grant permission to remain, Ms Bundhooa's application was based on s.4; she did not ask the Minister to exercise a discretionary power; nor is there separate obligation on the Minister so to do.

5. Because she is illegally present in Ireland, Ms Bundhooa is exposed to the risk of deportation under s.3(3)(a) of the Immigration Act 1999. Under s.3(3)(b), she may make written representations (admittedly in the deportation context) to the Minister on any matter she considers pertinent. Under s.3(6), the Minister is required to consider all such representations and Ms Bundhooa's family/domestic circumstances. So there is a mechanism whereby Ms Bundhooa will yet get to assert why she should be permitted to remain, when/if the s.3 process proceeds.

6. The court notes that the decision notifies Ms Bundhooa, *inter alia*, that "*If you leave the State voluntarily, then it would be open to you to apply for a D reside visa from outside the State*". This is a statement of fact, not an invitation to leave.

7. The Supreme Court's decision in *Luximon & ors v. Minister for Justice and Equality* [2018] IESC 24 can be distinguished on its facts. In para.12, MacMenamin J. observes of the respondents that "*I consider their status...up to January 2011, could best be characterised as...lawful, long duration residents*". Ms Bundhooa is differently placed: she is an *unlawful*, long duration resident – albeit one who for a brief period of time held a temporary 'stamp 4' permission under an application made under the 2006 Regulations that was tainted by fraud. (The consequences of that fraud are further considered below). In passing, the court notes that this application was for a time, with the consent of Ms Bundhooa, listed on the so-called '*Luximon* List'. However, it still falls to be treated in accordance with applicable law: that law and its consequences are as stated herein.

8. Ms Bundhooa (a) appears to have remained continuously in Ireland since the lapse of her 'stamp 2' student permission, and (b) enjoyed a roughly four-month period of residence here on a temporary 'stamp 4' basis, following on her application under the 2006 Regulations. As to (a), no advantage accrues to Ms Bundhooa by reference to same. As to (b), the Minister found, on 30.04.2016, that Ms Bundhooa entered into a marriage of convenience. No further benefit can accrue to Ms Bundhooa by reference to a residence application tainted by such fraud. (See *MKFS (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 103, para.16).

9. There is no mention in the decision-letter of a decision by the Minister not to renew. But Ms Bundhooa can have no complaint in this regard. Renewal involves a re-issuance/fresh issuance of what duly went before. What Ms Bundhooa has sought under the 2004 Act is 'stamp 4' permission when all she previously enjoyed, outside the ambit of the 2006 Regulations, was a 'stamp 2' student permission, now long expired. One cannot renew what has never gone before; and to the extent that Ms Bundhooa was granted a temporary 'stamp 4' permission in the course of her application under the 2006 Regulations, no further benefit can accrue to her by reference to the granting of same, given that that application was tainted by fraud.

10. For the reasons stated above, the court is coerced as a matter of law to refuse this application.