THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 3 J.R.]

BETWEEN

H.E. (EGYPT)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of December, 2017

1. The applicant was born in 1986 in Egypt. On the 8th October, 2013, he applied in Abu Dhabi for a visa to enter the U.K. to accompany his employer, a Saudi princess. The stamp on his passport exhibited in the proceedings indicated that he entered the U.K. at Gatwick on 30th October, 2013. His visa expired on 10th April, 2014. He arrived in Ireland, he says, on 1st August, 2014. On 22nd September, 2014, he gave notice of intention to marry a Central European woman. It is notable that he was in a position to get married within only a few weeks of arrival in the State.

2. On 6th October, 2014, he applied for asylum and claimed a risk of persecution in Egypt as a member of the Muslim Brotherhood. His ASY1 form says he is a supporter of President Morsi and a member of the Freedom Party. He did not return the asylum questionnaire and did not attend for interview on the 16th January, 2015. On 18th February, 2015, he was notified of the rejection of his claim and was given the opportunity to apply for subsidiary protection, which he did not take up. On 17th April, 2015, he was sent a letter notifying him that the Minister had refused a declaration of refugee status, and containing a proposal for a deportation order, with the opportunity to make submissions. No submissions were made and the letter was not called for. On 14th May, 2015, he married a Lithuanian woman. Again, it is notable that this woman was back in Lithuania the following month in June, 2015. She then died in a car accident in her home country.

3. On 29th May, 2015, a deportation order was made against the applicant. On 2nd November, 2015, he applied for residence on the basis of an EU marriage. That application was refused.

4. On 1st August, 2016, a Home Office report was published on the situation in Egypt. On 29th September, 2016, the deportation order was notified to the applicant. It has not been made clear why it was not notified for a lengthy period. Correspondence was issued on behalf of the applicant, dated 16th, 26th and 27th September, 2016. The Minister replied on 29th September, 2016, indicating that the correspondence would be treated as a s. 3(11) application, although no decision appears to have actually been made.

5. On 8th December, 2016, the applicant was arrested and detained in Cloverhill Prison. He applied on that date for permission to re-enter the protection process under s. 17(7) of the Refugee Act 1996 and relied on the Home Office report in that regard. On the same date, leave was sought from O'Connor J. in a first set of judicial review proceedings *H.E. v. Minister for Justice and Equality* [2016 No. 950 J.R.] The main relief was a declaration that to remove the applicant from the State while there was a pending s. 17(7) application would be unlawful. An interim injunction was granted. The leave application was opened and adjourned, although the order incorrectly says that leave was granted. On 8th December, 2016, the s. 17(7) application was refused. On 12th December, 2016 the interim injunction came back before the court in the Asylum List. MacEochaidh J. directed that leave be sought on notice and granted an order continuing the interim injunction.

6. On 13th December, 2016, a notice of motion was issued with a return date of 20th December, 2016. On the latter date the leave application came on for hearing on notice and the applicant was given bail. On 21st December, 2016, MacEochaidh J. gave judgment (*H.E. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 758), in which he refused leave because the s. 17(7) application had already been determined at first instance. He expressed disappointment that the relevant authority on the right to reside, namely *S.H.M. v. Minister for Justice and Equality* [2015] IEHC 829 [2015] 12 JIC 2115 had not been opened by Mr. Paul O'Shea B.L. on behalf of the applicant, and had only been drawn to the court's attention by Mr. David Conlan Smyth S.C. for the respondent. He also noted that the applicant had not sought the appropriate reliefs. That dismissal would have brought his bail to an end, but he was granted continuing bail until 23rd December, 2016. On the latter date the matter was relisted at Cloverhill Prison court, despite the fact that the applicant was on bail, for a pre-litigation injunction in anticipation of an intended action by way of a second judicial review. The affidavit for the purposes of the application on that date was not filed and no record number, even an I.A. number, was ever obtained. An undertaking not to deport the applicant until 11th January, 2017 was given and he was given continuing bail in anticipation of the second judicial review, namely the present proceedings.

7. On 3rd January, 2017 the present proceedings were opened *ex parte* before Haughton J. and adjourned to 13th January, 2017, being listed for mention in the meantime on 11th January, 2017. On 13th January, 2017, the leave application and injunction were listed for hearing and were adjourned. They were part heard on 17th January, 2017 by MacEochaidh J., at which point the applicant's counsel said that the applicant wanted a reference to the CJEU. The matter was listed again on 26th January, 2017, when MacEochaidh J. was unavailable. On 22nd February, 2017 the respondents were granted the costs of the application for the injunction in the intended action. The leave hearing in the present application was completed and leave was granted on a limited basis for relief D1, on grounds E1 to E8, on the basis that the wording of the grounds would be revised. Submissions were then exchanged regarding the wording of the requested reference.

8. On 24th March, 2017, MacEochaidh J. gave a further judgment, *H.E. v. Minister for Justice and Equality (No. 2)* (Not circulated, 24th March, 2017), in which he revised the leave order and limited the relief to grounds E1 to E3 after receiving an amended statement of grounds and further submissions. He refused a reference because he held there had been a meaningful assessment of the claim under s. 17(7). He rejected the argument that the applicant could rely on their subsequent EU law points in those circumstances, and he continued the order restraining deportation on the applicant's undertaking to report to the GNIB. The note of the judgment ends by saying that the court is refusing leave, but it is clear from the order that the intention was that leave was only

being refused on certain aspects, having been granted on other aspects.

9. On 25th April, 2017, an amended statement of grounds was delivered. The matter was mentioned again in court on 12th July, 2017, and an amended statement of opposition was filed on 20th July, 2017. The matter was then in the list to fix dates for 30th July, 2017 when a date of 13th October, 2017 was fixed. It now appears that the applicant says that he married a Polish national on 28th September, 2017 in Bray. That is two weeks before the original hearing date for this matter. The witnesses do not appear to include anyone identifiably associated with his spouse. The same situation occurred in the previous marriage, where no witnesses identifiably associated with the previous wife are listed either. It is interesting to note that the applicant is regarded as a good catch where he is not only the subject of a deportation order but also where he is listed as having no occupation. His previous marriage certificate also states that he had no occupation.

10. Mr. Michael Conlon S.C. (with Mr. Paul O'Shea B.L.) for the applicant informed me that the applicant made an appointment in the civil registration office in Bray, and that this office passed him on to the civil registration office in Dublin on 26th June, 2017, where he was asked some questions about his relationship with his intended wife and where he handed in an asylum card which had expired. He was asked about his status and said he was in the asylum system but did not say anything about the present case. Mr. David Conlan Smyth S.C. (with Ms. Sarah-Jane Hillery B.L.) for the respondents, draws attention to the fact that the applicant was in court in the meantime on continuing bail on 12th July, 2017 but the court was not advised of the change in situation. Under s. 15 of the Civil Registration (Amendment) Act 2014 an applicant is required to furnish "*such documents and information as may be specified*" regarding his immigration status. It is hard to see immediately what could have happened in this case given that Mr. Conlan Smyth's instructions are that the GNIB do not seem to have been notified of the intended marriage. But on the face of it the procedures envisaged by the 2014 Act appear to have broken down in this case and the matter certainly warrants investigation and explanation. As it happens the proposed hearing date on 13th October, 2017 could not proceed, and the matter was adjourned to December.

Ground E1 - Failure to give reasons.
11. The change in the régime in Egypt that the applicant is concerned about had already taken place at the time of the original asylum application. Therefore, the re-application is clearly threadbare and no real effort has been made to contend that it contains anything of major new significance. Mr. Conlan Smyth legitimately summarises the applicant's case as saying that "*I am going to condemn your decision-making process having given you nothing to go on*". He submits that the applicant's argument regarding lack of reasons is unstatable "*given the parsimony of the application*". I agree. There are no new elements or findings submitted so even if there is an error in the Minister's reasoning, which is not the case, that would not be fatal. There is merely a new publication (the UK Home Office Report) saying broadly the same thing as the original complaint. The respondent's position on this point is supported by the legislative history of the Procedures Directive (Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection) as noted Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd ed.) (Oxford, 2016) at p. 1368 (Part D IV by Vedsted-Hansen). Speaking of the corresponding provision of art. 40(2) of the recast Procedures Directive, the learned authors note that the Commission wished to ensure that an applicant could "*reapply if his or her circumstances have changed*". The mere publication of a new report, which happens all the time, is not the sort of thing that properly triggers an entitlement to have a re-application accepted. Hailbronner and Thym note the "*need to prevent the potential abuse of rules on subsequent applications"* as a factor in the Commission proposals in this regard (at p. 1368).

12. The Minister's s. 17(7) decision correctly sets out the test in s. 2 of that analysis. The essential reason is that there is no evidence or indication that the applicant was a "*high profile activist*". Mr. Conlon submits that lower profile activists can be targeted. Unfortunately, his own application under s. 17(7) indicates that low-level members are not generally targeted. One cannot roll along into the High Court and make a point radically different to that made to the decision-maker. No decision would be safe if that form of gaslighting of administrative authorities were to be accepted by the court. The implication of the s. 17(7) application as it is worded is that the applicant was a high profile or politically active member. That is not made out and certainly there is no new material to that effect, as the Minister legitimately concludes. It is clear, and indeed accepted on behalf of the applicant, that the broad parameters of what was claimed originally and what is now claimed are the same. The new element is the Home Office report on Egypt but that merely provides further information on a known situation. There is not really new information in any meaningful sense.

Ground E2 - Was it irrational to rely on a newspaper article regarding the situation in 2011?
13. The applicant objects to reliance being placed on an article relating to the situation in 2011 because the difficulties for him, he says, arose in 2013 when President Al-Sisi took office. However, this fact is entirely recognised in the decision, which refers to the deposition of President Morsi. There is no irrationality because the Minister clearly understood the sequence of events in terms of recent Egyptian history. The reference to a newspaper article in 2011 can not be wrenched out of context and must be read in terms of the decision overall. It is merely recording an historical fact as to what happened in the 2011 election. It is hard not to observe in passing that purely from a common sense basis, the applicant's whole story that he is associated with the Muslim Brotherhood seems extremely hard to reconcile with the idea that he would be given a trusted role as a driver to a member of the Saudi royal family. That certainly has not been explained in the papers, and while I am not making any finding on the matter, it is just one of many elements of the applicant's story that comes with a ready-made question mark attached to it.

Ground E3 - Was it irrelevant for the Minister to take into account the level of engagement with the previous application?
14. It seems to me that the applicant's lack of engagement with his original protection claim is not irrelevant because it indicates a lack of basis as to his need for protection. The applicant has clearly not behaved in a manner in which a person with a genuine fear of persecution would behave. Mr. Conlon eventually had to make the entirely necessary concession that it could be a factor, but he said that it should not be a major factor. It seems to me that failure to engage with a protection application is clearly relevant, and potentially significantly so, as to whether there is a basis for a re-application. The decision in this case, however, was not entirely based on the applicant's failure to engage. The situation in Egypt is also considered, as well as whether any new elements were presented.

Alleged breach of fair procedures
15. One final point was sought to be made by the applicant, namely whether there was a failure to disclose an *Irish Times* article in advance of the s. 17(7) decision, but Mr. Conlon agrees that that fair procedures point is not pleaded. It cannot therefore be advanced. In any event, it has no substance. In *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 O'Donnell J in the Supreme Court held that generally known country of origin information does not have to be notified. More obscure information does have to be notified. To generalise for a moment beyond the present case, it seems to be standard practice in the Asylum List that where any point based on domestic law is rejected it is then reformulated as an EU law point. That reformulation does not necessarily improve the point. It is now suggested that EU law requires that all country of origin information must be notified, even generally known information. No particular provision of the EU law is identified in this regard, no authority is identified, and indeed Mr. Conlon accepted ultimately that there was no authority to this effect. *M.M. v. Minister for Justice, Equality and Law Reform* C-277/11 specifically says that an applicant does not have the right to be notified of the draft decision (para. 74). There is no basis to conclude that EU law requires all country information to be notified even if it is generally known. In any event, on the facts of the present case, the *Irish*

Times article of December, 2011 was only relied on for one purpose, namely to state the election results in Egypt. The applicant claimed to be a member of the Freedom Party, and the article noted that it won 40% of the vote. That is all that is relied on. The applicant presumably knows the election results perfectly well. He certainly does not aver otherwise. An election result is a notorious public fact. Even if this question had been pleaded, it has absolutely no substance.

Discretion
16. Even if I am wrong in the foregoing, I would refuse relief on a discretionary basis having regard to the conduct of the applicant, to which I have referred see: *S.M. (Pakistan) v. Minister for Justice and Equality* [2015] IEHC 508, *K.A.S. v. Minister for Justice and Equality* [2016] IEHC 657 relying on *Youssef v. Secretary of State for the Foreign and Commonwealth Office* [2016] UKSC 3 at para. 61 *per* Lord Carnwath.

Status of the applicant's bail
17. The applicant was given bail in the first judicial review. Even though those proceedings were dismissed, the bail order was continued. He was never given an unconditional release from custody as such. It seems to me the only inference one can draw is that the bail was continued. This is agreed by the parties, although they differ slightly as to in which proceedings. Mr. Conlon suggested the bail was renewed in an intended action but no intended action is recorded on the Central Office system. In any event, the intended action does not seem to have got a record number as no proceedings were ever filed. Mr. Conlon submits that as these proceedings are the action which was then intended, the bail is best considered as being in these proceedings. Mr. Conlan Smyth says that bail was stand-alone bail in contemplation of the intended proceedings, but as I say no papers in that intended action were ever filed, so the bail should be deemed to merge with the new judicial review. The case seems to have suffered from a greater than normal degree of procedural mayhem, for which the applicant is primarily responsible, and in the absence of any intended action papers ever having been issued, the bail is best viewed as referable to the current judicial review. The proceedings having failed, the bail now comes to an end.

Conclusion and order
18. This is a case where there is an unchallenged deportation order going back to May, 2015, notified in September, 2016. The applicant has toyed with the immigration system for three years, never having had permission to be here other than the purely temporary permission associated with making an asylum application, which he did not pursue. He has flouted the asylum process, and has made a threadbare, belated re-application. He has become involved in not one but two marriages to young Central European women and put forward a number of implausible matters, and while it is not a matter for me to make findings on all such aspects I can certainly conclude that no illegality has been demonstrated in the Minister's decision and that there is no basis to quash it.

19. The order that follows from the foregoing is:

(i) that the title of the proceedings be amended to rectify the error made by the applicant in the statement of grounds and to provide that the Minister should be referred to by his correct title as Minister for Justice and Equality;

(ii) that the proceedings be dismissed;

(iii) that the applicant's bail be terminated; and

(iv) considering and applying *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, that the injunction against the applicant's deportation be discharged.