THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 659 J.R.]

BETWEEN

M.K.F.S. (PAKISTAN) AND A.F. AND N.F.J. (AN INFANT SUING BY AND THROUGH HIS MOTHER AND NEXT FRIEND A.F.)
APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of February, 2018

1. The first named applicant applied for an Irish visa to travel to the State from Pakistan on 10th August, 2005. This was refused. He appealed that refusal successfully. Any ensuing visit appears to have passed without incident. Having returned to Pakistan he then applied for another Irish visa on 18th March, 2009. That application was granted. In the application he stated that he was married. He arrived from Pakistan on 12th June, 2009. It seems to be accepted that he arrived on a visitor's permission, which presumably would have expired in September, 2009. On 9th February, 2010, three days before he got married, he applied for asylum. In a s. 8 interview under the Refugee Act 1996 he states that his wife died on 1st March, 2009. This contradiction with his visa application is the first tangible piece of toying with the immigration system on the part of the first named applicant. It is also interesting to note in passing how his actual wife, who would now be an obstacle to his getting married to an EU national, is conveniently disposed of by the claim made in the asylum application.

2. On 12th February, 2010, the first and second named applicants purportedly married in the State. The second named applicant is a citizen of Latvia. That "marriage" took place with extraordinary rapidity given that the three month notice required would have involved notice in December, 2009, six months after the first named applicant's arrival in the State. She was at that time a 22 year old young woman, and the applicant was a 35 year old man with a wife in Pakistan, allegedly suddenly dead, and children there. He found an EU national prepared to marry him within six months of his arrival despite his arrival having been on a time limited visa, and despite having been unlawfully there at the time of the "engagement". He only became lawfully present three days before the "marriage" by reason of the asylum claim, which was not pursued. One certainly wonders whether the only purpose of the asylum claim was so that he could later assert that he was lawfully present at the time of the marriage.

3. On 27th April, 2010, the first named applicant made an application for a residence card under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006). He was given permission to remain for five years, commencing on 22nd October, 2010, on foot of the marriage. That permission noted that the onus was on the applicant to keep the Minister informed of changes of circumstances, and that it was established that if rights were required by fraudulent means he would cease to enjoy them immediately.

4. On 14th February, 2011, the Minister refused a declaration of refugee status, as the application for asylum was deemed to be withdrawn. This was by reason of the first named applicant's failure to complete the asylum questionnaire and his failure to attend for interview by the Refugee Applications Commissioner, a further piece of toying with the immigration system. He claims that in March, 2011, the parties separated, relatively shortly after the EU permission was obtained. He never notified the Department of Justice and Equality of this change in circumstances. The second named applicant then gave birth to the third named applicant by a different father, a man who later died. The first named applicant says that, as it is put in the papers, *"following discussions between the first and second applicants the couple reunited in April 2015".* That is a somewhat strange and bloodless formulation, but in any event the first named applicant claims that the parties have been living together since mid-2015.

5. On 21st October, 2015, he applied again for residency but failed to notify the Department at the time that the parties had been separated for a substantial period, which can only be construed as an attempt to mislead the Department. Furthermore, child benefit is being claimed by the second named applicant from an office in Dundalk despite the first named applicant's claim that the parties were allegedly living together in Dublin. The first named applicant was given a temporary permission to remain until 20th May, 2016.

6. On 4th May, 2016, he was given notice of the Minister's view that the marriage was one of convenience and given an opportunity to make submissions, which he did.

7. On 9th July, 2016, the Minister formally decided that the marriage was one of convenience under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015). Regulation 28 of the 2015 Regulations allows the Minister to disregard any marriage as being one of convenience and provides for notice to a party of an intention to so decide and for a formal decision by the Minister deeming the marriage to be one of convenience. Notice of that decision was duly given.

8. On 29th July, 2016, the first named applicant made submissions regarding a review of that decision. On 3rd October, 2016 the District Court purportedly made an order appointing the first named applicant as a guardian of the third named applicant. The order states that it is an order appointing the "*father*" as a guardian; but the first named applicant is not the father. Section 6A of the Guardianship of Infants Act 1964, under which the order is purportedly made, appears to relate to the appointment of a natural father of the child as a guardian. No other basis for the order appears from its terms. The original application by the first named applicant has not been made available but the order as produced to me does not appear to be a valid order. The District Court then made a further order providing for joint custody. That order is predicated on the prior guardianship order which refers to the first named applicant as the father. Consequently the custody order does not appear to be valid either for the reason I have outlined.

9. On 20th March, 2017, the Minister's decision that the marriage was one of convenience was upheld on review and the first named applicant was refused a permission under the 2015 Regulations. No proceedings were taken challenging that decision.

10. A proposal to deport the first named applicant was issued on the same day. The first named applicant made submissions relying *inter alia* on family rights under Article 41 of the Constitution and art. 8 of the ECHR. A deportation order was made on 30th June, 2017, and was notified to the first named applicant on 7th July, 2017.

11. The proceedings were issued on 8th August, 2017, and an *ex parte* injunction was granted by Noonan J. on 14th August, 2017.

12. I have received helpful submissions from Mr. Mel André Christle S.C. (with Mr. Ian Whelan B.L.) for the applicants and from Mr. Anthony Moore B.L. for the respondent.

There is no obligation on an administrative decision-maker to go back and review previous decisions when a later decision is made in the process.

13. Mr. Christle submitted that the decision deeming the marriage to be one of convenience was "*nothing got to do with*" the deportation legislation and "*the Minister should have revisited all the facts*". This is an unsustainable submission. It would push any administrative decision into some sort of provisional zone whereby it was liable to be set aside at will at any time into the future if some further step had to be taken. No administrative system could work if there was some sort of free-floating obligation to revisit any formal and unchallenged decision merely because a further step in the process predicated on that decision had to be taken. The point made is wholly without substance. It is suggested that the passage of time and the death of the father of the third named applicant meant that there was an obligation to reconsider the question of marriage of convenience. There is no such obligation. A decision- maker is entitled to act on the premise that a course of action taken for fraudulent purposes remains fraudulent notwithstanding the passage of time.

Where an unchallenged determination is made that the marriage is one of convenience, it is not open to a party to challenge that in later proceedings.

14. Order 84 r. 21(1) of the Rules of the Superior Courts is clear that time runs from when grounds for judicial review first arise. Or course, if there is an appeal or review process, the grounds only arise when that process is completed because otherwise an alternative remedy would be available to the applicant. It would be absurd and oppressive for a respondent to cry foul against an applicant for taking action *without* availing of an alternative remedy, while also complaining that an application would be out of time if that remedy was availed of. That is a classic Catch-22, or what I called in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* [2016] IEHC 300 [2016] 5 JIC 3008 (Unreported, High Court, 12th May, 2016) para. 134, a "*double bind*". Advocate General Bobek commented on this type of "*unpredictability for litigants*" at para. 90 of his opinion in the latter case, saying "*There is indeed the (I understand originally German) saying that 'in court and on the high seas, one is in the hands of God'. ['Vor Gericht und auf hoher See ist man in Gottes Hand.'] But I would assume that the effort of this Court, as, for that matter, of any other court, is to prove that saying wrong, not to confirm it*" (Case C-470/16, *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála*, Opinion of Advocate General, 19th October, 2017). There must be a clear route for applicants to court. Ultimately this was accepted by Mr. Moore on behalf of the respondent.

15. The Minister made a formal finding, affirmed on review, that the marriage is one of convenience and that was not challenged. I would hold that time runs from when the review is completed, but that time having expired without challenge it is not open to the applicants to contest the finding of a marriage of convenience at this stage or in these proceedings. Otherwise the rules of court, and indeed any orderly administrative system, would be frustrated (see *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017), para. 18).

Where a marriage is one of convenience no rights arising out of the relationship can be asserted.

16. As regards the contention that the rights of the parties were disregarded, any ministerial or administrative decision-making process is not a safe haven for fraudulent applicants. Where it is determined that the applicants' relationship is based on fraud, no "rights" can arise from such a relationship; and an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such "rights" (see also *Schembri v. Malta* (Application no. 42583/06, European Court of Human Rights, 10 November 2009). Likewise the court is not a no-questions-asked saloon for any and all propositions. It is not open to parties to put forward a case based on fraud (see *Everet v. Williams* (1725) 2 Pothier on Obligations 3; (1893) 9 L.Q.R. 197; and *K.P. v. Minister for Justice and Equality*). To do so is an abuse of the process and a hoax on the court (see also *Fay v. Tegral Pipes Ltd* [2005] 2 I.R. 261 *per* McCracken J. at p. 266 "*The courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes…*".) This application, it seems to me, is clearly an abuse of process.

17. Given the finding that the marriage was a fraud on the immigration system, the finding of an abuse of process is so whether or not the "marriage" is technically valid in law. But if I am wrong about that I will go on to consider the question of whether a marriage of convenience is a nullity in law.

18. Finally under this heading, in the context of a marriage of convenience it must be assumed that the relationship between the non-EU party and any child of the EU party is part of the overall fraud, but if I am wrong about that insofar as the issue of the relationship between the first and third named applicant is concerned, this was considered by the Minister at p. 5 of the analysis and held to be of insufficient weight.

A marriage of convenience is a nullity in law.

19. The Civil Registration (Amendment) Act 2014 provides that a marriage of convenience is a nullity. That provision was commenced by S.I. No. 357 of 2015 on 18th August, 2005. That legislation was necessitated by the troubling consequences of the decision of Hogan J. in *Izmailovic v. Commissioner of An Garda Síochána & Ors*. [2011] IEHC 32 [2011] 2 I.R. 522 [2011] 2 I.L.R.M. 442 to the effect that a marriage of convenience was valid in law. But as in any context where the law is changed or clarified, such a statutory amendment is not a concession on behalf of the legislature or the executive that the previous law was as contended for or as found, nor is it a statutory recognition of the correctness of any previous judicial decisions.

20. In the present case, the State has launched a direct attack on the correctness of Hogan J.'s decision in *Izmailovic*, and I am now dealing with that contention. It is clear that the primary factor in Hogan J.'s analysis (see paras. 27 to 30) was that he felt bound by the Supreme Court decision in *H. v. S.* [1992] 4 JIC 0302 (Unreported, Supreme Court, 3rd April 1992). A secondary factor was that he appears to have been heavily influenced by English law.

21. The second factor can be disposed of rapidly. English law has to suffer from the absence of a supra-legal written constitution. The Irish Constitution, on the other hand, sets out overarching principles of prudence, justice and charity. It is founded on principles of social order; and in an ordered society, rights are situated in an implied context of fundamental duties with roles assigned to executive and judicial institutions that must be made to work. The Constitution cherishes rights of individuals, including the unenumerated right to private life, and specifically acknowledges the natural rights of the family as the fundamental unit group of society. It would make a mockery of these constitutional precepts and of the institutional and social order established by the Constitution for the law to acknowledge the validity of a sham marriage, gestated in fraud and sprung as a hoax on the immigration system and the courts. Unfortunately these essential precepts are not considered in any meaningful way in *Izmailovic*.

22. Hogan J.'s primary reason then is his reliance on the Supreme Court decision in *H. v. S.*, but unfortunately that decision clearly relates to a totally different situation. As stated in the judgment of Carroll J., as quoted in the judgment of Finlay C.J., "*While the case was made in court that they married only to get divorced when he came to the States I do not believe that it can be reduced to such simplistic terms"*. Rather Carroll J. held that the intention was that they would get divorced "*if it did not work out*". Unfortunately, or realistically depending on your point of view, many people get married on that basis. Thus, it is beyond doubt that Hogan J. was fundamentally incorrect when he states in para. 27 of *Izmailovic* that in *H. v. S.* "*They agreed to marry on the understanding that they would later divorce once the parties arrived in the United States*." This in fact is the direct opposite of what Carroll J. expressly held. Thus it appears that his decision was based on a fundamental misreading of *H. v. S*. While there is a passing reference at the end of the judgment of McCarthy J. to parties who marry with the reservation that they do not intend it as a marriage at all, that is clearly *obiter* and in the context of a very different factual situation. Therefore, it seems that there is no basis whatsoever to give recognition to the validity of a marriage based on fraud on the immigration system.

23. There is another fundamental difficulty with the decision in *Izmailovic*. The authorities relied on by Hogan J. (*Vervaeke v. Smith* [1983] A.C. 145 and *H. v. S*) had been previously discussed by Barron J. in *Kelly v. Ireland* [1996] 3 I.R. 537 [1996] 2 I.L.R.M. 364. Unfortunately, that detailed and important analysis by Barron J. is not referred to in any way in the judgment in *Izmailovic*. In reviewing the authorities, Barron J. at p. 545 said that there "*are essentially two views of marriage. The first is that if the parties have a capacity to enter into valid marriage and participate in a ceremony of marriage, that is sufficient to establish the marriage. The second is that the circumstances surrounding the marriage may be looked to, to determine whether the apparent consent is a true consent or whether the ceremony is a sham to achieve some other end.*" It seems clear from the judgment overall that Barron J.'s preference was for the latter interpretation. Indeed, he concludes the judgment by saying that the onus was on the respondents to "*establish that the marriage was a sham*" and that this had not been done. That statement implies that the result could have been different if they had so established.

24. Separately and more widely, I would accept Mr. Moore's submission that a statutory process such as civil marriage should not be used as a mechanism of fraud. As it was put by Carroll J. in *Kavanagh v. Delicato* [1996] 12 JIC 2005 (Unreported, High Court, 20th December, 1996) *"A statute should not be made an instrument of fraud*" (see also *Dorothy v. Gallagher* (Unreported, Finlay P., 9th June, 1975) p. 13). So I would respectfully consider the view of Hogan J. that there is no doctrine of abuse of rights to be a considerable overstatement and oversimplification. The principle that rights should not be abused features in various areas of law.

25. More fundamentally still, *Izmailovic* seems to me to pay little attention to the damaging consequences that were going to be unleashed by the decision, and rather seems to presuppose a view that judges should not dirty their hands with undue consideration of practical matters such as consequences, which must be left to legislatures in considering how to resolve the issue (see *Izmailovic* paras. 34, 72) (as if declining to fashion a pragmatic solution from general principles in order to resolve a case not covered by clear statutory or constitutional language was not itself a form of policy choice, occasionally justified but normally a misconceived one).

26. It seems to me that if there is a view that the legislature is waiting patiently for the judiciary to simply pass the baton so that they may be called to immediately rectify any problems of legal or statutory interpretation, such a view is of limited practicality. The immense pressures on the legislative process, in my mind, mean that the more empirically validated view is that legal questions should be considered on the assumption that there is no legislative cavalry poised and ready to spring into action to solve any problems that the interpreter fails to solve. It seems to me that in dealing with either judge-made rules or questions of textual interpretation, where multiple interpretations are legitimately available, the court should have appropriate and significant regard to the consequences of its decision.

27. Posner J.'s position was that "*Judges who don't insist that a legalistic algorithm will decide every case are what I call* 'pragmatists*,' not in some pretentious philosophical sense but in the sense of an approach to decision making that emphasizes consequences over doctrine*." (Richard A. Posner, "The Rise and Fall of Judicial Self-Restraint", 100 Calif. L. Rev. 519, 539 (2012)). As noted by Posner J., "*A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences. Reading is not a form of deduction; understanding requires a consideration of consequences*." (Richard A. Posner, *Overcoming Law* (Harvard University Press, 1995)). Furthermore, an approach which prioritises consequences also supports democratic functionality, as underscored by Breyer J., speaking in a constitutional context: "*By understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively and thereby better achieve the Constitution's basic objective of creating a workable democratic government*." (Stephen Breyer, *America's Supreme Court: Making Democracy Work*, (Oxford, 2010), p. 74). Sedley L.J. commented that "*arguments from consequences have a very real place in the debate, because the venality of much legal reasoning means that principle, when deployed by the powerful and unscrupulous before a sympathetic court, can be used to legitimise almost anything"* (Stephen Sedley, *Ashes and Sparks; Essays on Law and Justice* (Cambridge, 2011) p. 291).

28. For the foregoing reasons, I must very respectfully differ from the conclusions reached by Hogan J. In my view a marriage of convenience is void *ab initio*, even prior to the 2014 Act. But even if I am wrong about that, it does not affect the result because it would be absurd to regard the Minister as being required to submit to the hoax being perpetrated by the applicants by requiring him to consider any alleged "*rights*" arising from such a fraudulent marriage.

Discretion

29. If I am wrong in relation to any of the foregoing, I would uphold the proposition advanced by the respondent's deponent Alan King at para. 24 that the applicants "*have been guilty of an egregious lack of candour and wrongful conduct in their interactions with the respondent*" and would refuse relief on a discretionary basis (see *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 *per* Lord Carnwath, *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102 (Unreported, High Court, 21st October, 2015)).

30. Responsibility for this primarily lies with the first named applicant. It is certainly not possible for the court to determine in any individual case that proceeds by way of judicial review whether the EU spouse's motivation is entirely voluntary and mercenary or whether on the other hand there is any element of coercion, and I would certainly hope that the Garda authorities would be in a position to make contact with the second named applicant, and indeed any EU national in this type of situation, to ensure that all appropriate support be made available, and that similar support would be put in place for women in any other such case.

31. Every profession has its own cant, and in that spirit judges sometimes talk about being coerced or constrained into a particular result; but judges really know very little about coercion or constraint. Decisions that unleash particularly troubling consequences are sometimes accompanied by a disclaimer such as that the court is unfortunately coerced by "*the law*" into the particular result - as if the law was some objective, monolithic certainty - formal, self-referential, autonomous - around which we all stand in awed and reverential observation. While not all women who enter marriages of convenience are doing so as a result of abuse or trafficking there

is no doubt that some are. Coercion is what has happened to those real victims of trafficking for the purposes of marriages of convenience. The breaches of human rights of the women trafficked in the wake of the *Izmailovic* decision have been documented, as noted in *K.P.* at para. 41, which refers to a report that *"A high court decision which found that gardaí could not stop people having marriages of convenience has "reopened the flood gates" for trafficking women into Ireland for this purpose, according to the Latvian ambassador. Peteris Karlis Elferts said his embassy intervened in 89 cases last year where women were "most likely trafficked" into Ireland to participate in sham marriages. He added that these included some "horrific cases" in which women had been sexually exploited or beaten. … Mr Elferts said that in many cases, the women were promised work in Ireland only to have their passports and phones taken on arrival. At this point they would be offered the alternative of entering into a sham marriage. "Quite often they can't leave the premises they are being held in and . . . they don't have a command of the English language," he said. "They're really targeting the most vulnerable groups," which includes women coming from orphanages or boarding schools, from poor, rural or large families, and young women between the ages of 18 and 20. Before a 2011 High Court ruling, Mr Elferts added, which found that gardaí had no power to stop non-EU citizens entering into a marriage of convenience for immigration purposes, the number of women involved in such marriages had reduced. He said it was on the rise again following the High Court decision*." (Pamela Duncan, "'Sham marriage' ruling sees rise in trafficked women", *The Irish Times*, 18th April, 2012). Such consequences, in my very respectful view, support an interpretation of the law of nullity of marriage that firmly closes the door on such an abuse of human rights, of the institution of marriage, of the immigration system and of the legal process.

Order

32. Accordingly I will order;

(i). that the action be dismissed; and

(ii). considering and applying *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 [2012] 3 I.R. 152 that the injunction restraining the first named applicant's deportation be discharged.