THE COURT OF APPEAL

CIVIL

Neutral Citation: [2023] IECA 277
Court of Appeal Record Number: 2023/56

Power J.
Butler J.
Meenan J.

BETWEEN/

S.S.A.

APPELLANT

- AND -

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 13th day of November 2023

Introduction:-

1. This is an appeal against the judgment and order of the High Court (Bolger J.) refusing the appellant an order of *certiorari* quashing the decision of the respondent to revoke the appellant's residence card. The basis for the decision was that the appellant was a party to a *"marriage of convenience".* The appellant is a national of Egypt and arrived in the State in 2008 as a visitor. Some three years later, in or about December 2011, the appellant met an EU citizen who was present in the State exercising her rights of free movement under EU

law. They were married in June 2012, and the appellant asserts that the marriage ended in or about January 2018.

2. On its face, the appellant and his then wife were married for a period of some five and a half years. What was striking was, that when the respondent raised the issue of the appellant's marriage being a *"marriage of convenience"* there was a complete absence of any concrete information from the appellant. Apart from documentation concerning his spouse's employment (limited to the first year of the marriage) he was unable to produce any photographs of any family events or holidays, cards, or indeed any evidence that his wife was in this country after 2013, much less that they were enjoying a shared life together.

Background

3. The trial judge set out, in some detail, the background to these proceedings. The appellant stated that in December 2011 he met the EU citizen, who he claimed had been in the State since August 2011. However, the respondent had available information to the effect that the EU citizen only applied for a PPS number on 20 February 2012. In March 2012 they gave notice of their intention to get married. The appellant applied for residence based on his marriage to an EU citizen in June 2012 furnishing a lease agreement, a bank statement in joint names, and employment details of his spouse including two pay slips for June 2012. The appellant was granted permission to remain in the State for a period from 10 January 2013 to 10 January 2018. However, the Executive Officer who approved the application noted:-

> *"I have requested a six-month check from EUTR Investigations."*

4. By letter dated 4 July 2013 the respondent wrote to the appellant seeking, *inter alia*, "evidence of current activities of both you and your EU spouse, - in the State". In response, the solicitor for the appellant furnished payslips, a letter on unheaded note paper from an employer, a P60 dated 7 January 2013, a certificate of tax credits dated 10 December 2012

and a utility bill. This documentation was acknowledged in a letter from the respondent dated 20 September 2013 which, *inter alia,* sought confirmation that the EU citizen remained employed with her stated employers. By letter dated 30 September 2013, the solicitor for the appellant stated that the EU citizen remained in employment.

5. The next contact between the appellant and the respondent was by way of a letter dated 21 December 2017 from the appellant's solicitor seeking further permission for the appellant to remain in the State, stating that he could not renew his permission on the basis of derived EU Treaty rights as *"he and his wife are estranged".* By letter dated 22 October 2018, the respondent replied to the appellant's application for a residence card. This letter raised a number of issues:-

(i) The appellant had stated that the EU citizen first entered the State in August 2011. Information available to the respondent showed that she obtained a PPS number on 20 February 2012. As a PPS number is essential for employment and access to State services and in the absence of any documentation evidencing the EU citizen's presence in the State prior to 20 February 2012 the respondent was of the opinion that the EU citizen first entered the State on or shortly before the date on which her PPS number was allocated.

(ii) The appellant and the EU citizen were married on 25 June 2012. Taking into consideration that a three month notice period was required when intending to marry in the State, such notice would have had to been served no later than 25 March 2012, which was approximately one month after the EU citizen entered the State. This raised concerns about the relationship between the appellant and the EU citizen given the short time between entry into the State, the date of notice, the date of marriage and the appellant's submission of a residence application.

(iii) The respondent referred to documentation which had been submitted in August 2013, indicating that the EU citizen was in employment in July 2013. However, information available to the respondent showed that the EU citizen had ceased employment on 1 February 2013 and had not held employment since. The respondent stated:-

"..This is of concern to the Minister that the payslips and the letter confirming employment provided are false and misleading as to a material fact. You knowingly submitted false documentation to this office to receive a right of residence you would otherwise not enjoy."

(iv) The respondent had significant concerns that the appellant's marriage was a marriage of convenience.

(v) The respondent revoked the appellant's permission to remain in the State and invited the appellant to provide "comprehensive representations" to the respondent within 21 days setting out why permission to remain should not be revoked. The letter further stated:-

"Any representations should also include a detailed immigration history of the EU citizen including dates of travel to and from the State in the period from January 2013 to present and state the purpose of such travel. A detailed relationship history should also be provided along with any other information/ documentary evidence you may wish to provide as to why your application for permission to remain in the State should not be revoked."

6. By letter dated 21 November 2018, the solicitors for the appellant responded by enclosing a "personal letter" dated 19 November 2018 from the appellant. This letter referred to the following:-

(i) That he met the EU citizen in December 2011 after she had arrived in the State in August 2011.

(ii) That for religious reasons he could not have a girlfriend and so the EU citizen agreed to marry him.

(iii) The EU citizen commenced employment on 11 June 2012.

(iv) The appellant and the EU citizen wished to start a family together, so he went to his own GP and underwent a test for fertility. The appellant stated, "a copy of this report is attached". There was no fertility report attached to the personal letter and, surprisingly, the appellant's solicitor does not have a copy of same.

(v) The appellant stated, "we had been living together as a normal happy couple." However, the relationship broke down and in January 2018 the EU citizen decided to separate from him.

(vi) Attached to the letter was a "travel history" for the EU citizen and screen shots of what appear to be text messages. However, these text messages are undated and, in fact, do not identify between whom they were sent. It is notable that the text messages are fairly generic and do not include the more humdrum but specific exchanges that might be expected between a couple who had been married for a number of years.

7. The Deciding Officer issued a decision on 10 December 2018 which confirmed the decision of the respondent, as was set out in the letter of 22 October 2018. The appellant's solicitor applied for a review on 22 December 2018, furnishing a written legal submission and argued that the issues raised by the respondent all related to matters that were known when the appellant was granted a residence card in 2013. It was argued that the now absence of the EU citizen from the State disadvantaged the appellant as she was a "potentially crucial

witness". It would appear that the "personal letter" was not before the Deciding Officer but, in any event, was before the officer who reviewed the decision of 10 December 2018.

8. The review decision was set out in a letter dated 1 December 2021. This letter stated:-

> *"There is little information or documentation on file in respect of your relationship with the EU citizen in this case. Certainly, there is nothing to suggest that you made any financial commitments to each other, had any joint assets or liabilities, travelled or lived together for any length of time outside the State, or lived together for any significant length of time in the State. Nor is there any useful information or documentation on file in respect of your relationship prior to your marriage or, indeed, after your marriage."*

Having quoted from the "Commissions Handbook on Marriages of Convenience" the letter continued:-

> *".. The Minister invited you, in correspondence of 22/10/2018 to respond and make representations as to why your residence card should not be revoked. It is noted, however, that you did not respond to this correspondence and, therefore, failed to provide any evidence to dispel the concerns of the Minister that your marriage was one of convenience. Such evidence should easily be accessible to any person who has engaged in a genuine marriage.*
>
> *Having considered all of the information, documentation, and submissions on all of your files, the Minister finds that you have failed to establish that the Deciding Officer erred in fact or law when revoking your residence card as a family member of an EU citizen. The appropriate procedures were used, and the correct interpretation of the Regulations and Directive was applied. In making her determination, the Decision maker in this case, considered all the information and documents available to her and provided you with an ample opportunity to respond to the issues arising."*

The respondent concluded that the appellant's marriage *"was never genuine"* and was a *"a marriage of convenience."*

Application for Judicial Review:-

9. By order dated 28 February 2022 the High Court granted the appellant leave to seek the following reliefs by way of judicial review:-

(a) An order of *certiorari* quashing the respondent's decision of 1 December 2021 to uphold on review the respondent's first instance decision to revoke the appellant's residence card.

(b) In the alternative an order of *certiorari* quashing that part of the respondent's decision of 8 November 2021 to the effect that the applicant's marriage was one of convenience.

Judgment of the High Court

10. The trial judge considered, in some detail, the evidence that was before the respondent, in particular, the *"personal letter"* of the appellant. The trial judge considered what evidence there was of the relationship between the appellant and the EU citizen both before and after their marriage:-

> *"27. There is no evidence that the Minister ignored the personal letter or of any infirmity in her conclusion that the absence of verifiable evidence of the development of a relationship prior to marriage raised concerns about the relationship given the short time between his spouse's entry to the State, their marriage, and his submission of a residence application".*

11. The trial judge did not accept the contention of the appellant that he was as at a disadvantage given the absence of his spouse:-

> *"29. - - - However, the applicant gave no account of any attempts he made to contact his spouse or any explanation why such contact was not possible. Neither did he give*

any detail about what he knew of her work arrangements during the marriage or any details or opinion of their marital relationship prior to their separation in December 2017 or January 2018. Even if he was correct in saying that his spouse was no longer available to him to give her account of the marital relationship (for reasons not cited by him), he could still have given his account of their marriage. …"

12. The appellant submitted that by not furnishing to him the documentary evidence concerning his then spouse's employment, the respondent was in breach of fair procedures. In considering this issue, the trial judge observed that the appellant *"made no attempt to explain that inconsistency to the Minister other than what he said in his personal letter..."* (para. 28) The trial judge further stated:-

"32. The applicant was critical of the Minister's failure to share that information with him and submitted he should have been afforded an opportunity to inspect the documentation to see if contained any errors. I accept that such documentation could conceivably contain errors and it may be a breach of fair procedures to prevent a party to the decision an opportunity to review the documentation to assess its accuracy, but only where some reasonable basis has been established for the possibility of such errors existing therein."

And, referring to the personal letter:-

"33. The tax documentation related to the applicant's spouse since February 2013. Until at least December 2017, it was the applicant's case that he was living with her in a subsisting marital relationship. It is reasonable to expect that he would have been familiar with her work history during that time. Whilst he said in his personal letter that she stopped working at some point after the marriage, he does not say when that was. He says he is confused why the Minister will not accept a letter from his spouse's employer (which was not on headed note paper) confirming that she was employed

three days per week from 1 July 2013. That indicates he is standing over the content of that letter. He does not share any information about her work situation over the four years since July 2013 that he says they were living together as husband and wife. A suggestion that there may be an error in his spouse's tax documentation is insufficient to ground an entitlement to examine documentation relating to a time he says he was living with his spouse and could therefore be assumed to have personal knowledge of her work activities, which he has chosen not to share with the Minister."

13. On the issue of where the burden of proof lies, the trial judge stated that it rested in the first instance on the respondent. However, the trial judge noted:-

"39. --- This does not entitle the applicant to sit back and do nothing, akin to the right of silence of an accused person in a criminal trial.."

The trial judge stated that the respondent was entitled to seek further evidence from a couple where there is a well-founded suspicion as to the genuineness of their marriage.

14. The trial judge concluded that the impugned decision was reasoned and set out the basis for the conclusions reached. The trial judge stated:-

"41. - - - The decision clearly identifies:-

(i) The basis for the conclusion that the EU spouse arrived in the State only a short period before the parties decided to get married.

(ii) The absence of verifiable evidence of the development of a pre-marital relationship and the concerns this caused about the genuineness of the marriage.

(iii) The spouse's tax information available to the Minister and the inconsistency between it and the documentation furnished by the applicant in July 2013.

(iv) An explanation for why the Minister decided that the spouse's employment record indicated the marriage was a contrived activity.

(v) An explanation of all the factors that led the Minister to conclude the marriage was one of convenience.

(vi) The absence in the documentation and information furnished by the applicant of his relationship with his spouse over a purported four years of marriage including financial commitments to each other, joint assets or liabilities, or living together in the State for any significant length of time.

(vii) An assessment of the applicant's submissions on the burden of proof and why the Minister considered that burden had been properly discharged."

15. In the court below the appellant made submissions on a number of other issues. Firstly, the appellant sought to rely on principles of estoppel and legitimate expectation in asserting that the respondent could not reach a different conclusion in 2021 than had been arrived at in January 2013. The trial judge considered this and concluded:-

> *"34… The absence of evidence of a detriment means that an essential element to this aspect of his case is missing. In any event, I am satisfied that the Minister was exercising a statutory power which cannot be fettered by estoppel or any legitimate expectation, an approach that is in accordance with the requirements of EU law…"*

Secondly, the appellant raised the issue of the right to an oral hearing and a claim that determining a marriage of convenience involved an administration of justice. In respect of these submissions the trial judge stated that neither of these issues were pleaded and thus not properly before the Court.

Notice of Appeal: -

16. The Notice of Appeal set out some 15 grounds of appeal, including appealing against issues that had not been pleaded.

17. The appellant appealed against a number of findings of the trial judge namely that the respondent had considered all relevant information, that the appellant had furnished false

and misleading documentation and that there was no breach of fair procedures leading to the respondent's finding that the appellant had entered into a marriage of convenience.

18. The appellant also appeals the trial judge's ruling concerning the absence of an oral hearing, the burden of proof and the issue of legitimate expectation/estoppel.

19. The Notice of Appeal states that the trial judge erred in failing to follow or distinguish the decision of Ferriter J. in *RA v Minister for Justice* [2022] IEHC 378 to the effect that if fraud is found against an individual then the reasons for such finding must be clear and concise.

Consideration of appeal: -

20. These are judicial review proceedings, not a rehearing of the decision taken by the respondent. The role of the court is to decide whether, having applied the correct legal principles, the decision of the respondent was rational and reasonable and based on the evidence. Further, where an issue has not been pleaded and thus leave has not been granted in respect of it, a trial judge is perfectly entitled not to consider the issue.

21. The appellant criticised the absence of an oral hearing and relied on the judgment of Phelan J. in *ZK v Minister for Justice and Equality and Ors* [2022] IEHC 272. As this issue was not pleaded nor, indeed, asserted in his application for a review of the decision by the respondent, the trial judge was correct in not ruling on the matter. In any event, the appellant failed to identify anything that could have arisen or been established in an oral hearing that was not referred to or dealt with in correspondence.

22. In her judgment the trial judge set out the relevant contents of the correspondence that passed between the appellant the respondent. The trial judge correctly identified the evidence that was before the respondent and, more particularly, the evidence that ought to have been there but was not. Here, I am referring to the complete absence of evidence of a relationship between the appellant and the EU citizen both pre and post marriage. Apart from undated

and unidentified text messages and a utility bill, the only documentation that the appellant submitted was limited documentation on the EU's citizen's employment status. Thus, the trial judge was correct in holding that it was rational for the respondent to conclude that the appellant was a party to a marriage of convenience.

23. Although a decision must be rational and based on an analysis of the evidence it does not follow, as the trial judge observed, that every point raised by an applicant must be addressed. Indeed, in the instant case, although the appellant maintains that the respondent did not address every point he raised, he failed to identify any relevant piece of information which, had it been considered, would or could have led to a different outcome.

24. The trial judge accepted the burden of proof, in the first instance, rests on the respondent. However, after the respondent raised a number of issues concerning the appellant's marriage, it fell to the appellant to produce evidence to the contrary. As the trial judge observed, the appellant was not entitled when faced with legitimate queries, *"to sit back and do nothing, akin to the right of silence of an accused person in a criminal trial"* (Para. 39 Judgment of High Court).

25. The appellant's case on fair procedures was that the respondent did not furnish to him documentation which showed that the EU citizen had ceased employment on 1 February 2013, which was contrary to the information supplied to the respondent by the appellant. The appellant maintained that he ought to have been afforded an opportunity to inspect the documentation to check its accuracy. The trial judge, at para. 32 of her judgment, accepted that there could have been a breach of fair procedures had some reasonable basis been established for the possibility of such errors. In my view, the trial judge was correct in this but could have added that this was an example of the failure of the appellant to provide any information, other than limited documentation, concerning the circumstances of his then spouse's employment.

26. In his Notice of Appeal the appellant sought to rely on the decision of Ferriter J. in *RA v Minister for Justice* [2022] IEHC 378. This case does have some parallels with the instant case but is different in two crucial respects. Firstly, Ferriter J. considered the documentation that was before the Minister. Unlike the instant case, in *RA* there was not a clear conflict in the documentation being considered. Secondly, Ferriter J. was critical of the Minister's failure *"to properly engage with the evidence and submissions advanced on the question of marriage of convenience .."*. This was not the case here, the respondent did engage with the appellant, gave detailed reasons for her decision which were set out at para. 41 of the judgment of the High Court, referred to at para. 14 above.

27. The appellant seems to have proceeded on the basis that, having secured a five-year residence card on the basis of his marriage to an EU national in January 2013, the respondent was precluded from revisiting the earlier acceptance of that marriage at a later stage. The appellant is clearly incorrect in this. Regulation 27(1) of the European Communities (Free Movement of Persons) Regulations, 2015 (S.I. No. 548 of 2015) (the Regulations of 2015) provides: -

> *"Cessation of entitlement*
>
> *27(1) Minister may revoke, refuse to make or refuse to grant, as the case may be, any of the following where he or she decides, in accordance with this regulation, that the right, entitlement or status, as the case may be, concerned is being claimed on the basis of fraud or abuse of rights:*
>
> *(a) ---*
>
> *(b) a residence card ---"*
>
> *"and 28(2) where the Minister, in taking into account a marriage for the purposes of making a determination of any matter relevant to these regulations, has reasonable grounds for considering that the marriage is a marriage of convenience, he or she may*

send a notice to the parties to the marriage requiring the persons concerned to provide, within the time limit specified in the notice, such information as is reasonably necessary, either in writing or in person, to satisfy the Minister that the marriage is not a marriage of convenience."

28. Thus, even though estoppel is not pleaded, it does not arise where there is a statutory power to, in effect, keep a person's entitlement to a residence card under review. The respondent was clearly exercising a statutory power which cannot be fettered by estoppel or any legitimate expectation, as was found by the trial judge.

29. In the course of submissions to this court counsel for the appellant cited the recent decision of the Court of Appeal in *SR/LA v The Minister for Justice* [2023] IECA 227. These proceedings concerned judicial review of decisions to refuse to grant the appellant's permission under the Special Student Scheme to remain in the State. The relevant point for the purposes of this appeal was referred to by Faherty J. giving the majority judgment of the court, as follows:-

"122 … I agree with the applicant's submission that what was required on the face of the reviewed decisions, was unambiguous evidence that the review decision-maker had engaged in any real way with the arguments and materials advanced by the applicants in their review applications, together with some indication that the review decision-maker had engaged on the requisite weighing exercise. That does not mean that there had to be an overly discursive analysis. .."

30. It was submitted in the instant case that the respondent, though stating that she had considered all information and documentation, in fact had not done so as evidenced by a failure to give a point-by-point analysis of the appellant's *"personal letter"*. This issue was addressed by the trial judge as follows: -

"23. The decision-maker confirmed that all information, documentation and submissions on his files were considered. In accordance with the decision of Hardiman J. in GK v Minister for Justice [2002] 2 IR 418, that averment must be accepted unless there is a basis to believe otherwise. I do not accept the applicant's contention that the absence of any reference or narrative discussion of the contents of the letter provides such a basis. Certainly, a decision must be a reasonable and reasoned analysis of the relevant evidence (a point to which I return below) but that does not mean that the decision-maker has to expressly address every point made, particularly where such points are made in a personal (and inevitably subjective) account of their version of events rather than by way of a presentation of objectively verified facts."

The trial judge was correct in this approach. At para. 41 of her judgment the trial judge set out the reasons for the impugned decision. These seven clear reasons could not have been arrived at by the respondent unless the information, documentation and submissions made by the appellant had been considered.

31. The trial judge was correct in holding that the appellant's submission to the effect that determining a marriage of convenience involved an administration of justice was not properly before the court. Such an issue would be a challenge to the Regulations of 2015 which would, at the very least, require the joinder of additional parties to these proceedings.

Conclusion: -

32. By reason of the foregoing the appeal will be dismissed. On the issue of costs, as the respondent has been "entirely successful" in opposing the appeal the provisional view of the court is that an order for costs ought to be made against the appellant. If the appellant wishes to contest this, I will allow 14 days for the purposes of filing written submissions (not to

exceed 1,000 words) and a further 14 days for the respondent's submissions (also not to exceed 1,000 words) in reply.

33. As this judgment is being delivered electronically, Power and Butler J.J. have authorised me to say that they agree with it.