**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2017 No. 588 J.R.]**

**BETWEEN**

**ZAIN JAHANGIR**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of February, 2018**

1. The applicant arrived in Ireland unlawfully from the U.K. in 2011. In 2015, he was discovered working illegally in the State by members of the Gardaí. He declined the opportunity to voluntarily leave the State but instead on 2nd October, 2015, made an application pursuant to s. 4 of the Immigration Act 2004. Those representations state he was single, made no mention of a relationship, and stated that he had lived in Limerick since 2011.

2. On 29th September, 2016, he was issued with notice of intention to deport him. On 5th October, 2016, submissions were made on his behalf claiming he had been in a relationship for the previous eighteen months with an Irish citizen, Marie Duff, who has two children. However, it is clear that only skeletal information was provided to the Minister. The submissions did not state that the parties were living together. The applicant gave an address in Inchicore and attached a letter of reference that refers to "*my next door neighbours*". It is suggested that this implies that the parties were living together, but the Minister should not be thrust into the role of amateur detective to infer such a fundamental matter that could easily have been expressly stated. There was no submission from his partner and no documentary proof that the parties were living together. A claim was made that they had a still-born child, although no registration of the still-birth was provided. The representations did not assert constitutionally protected family rights going beyond a point being made regarding the lifelong nature of a deportation order. The sole invocation of the Constitution specifically is Article 40.3, insofar as that relates to the duration of a non-national's expulsion.

3. On 22nd November, 2016, further reference letters were provided, which again did not state that the parties resided together. A deportation order was made on 6th July, 2017. The analysis notes the complaint regarding the lifelong nature of the exclusion, and deals with this relying on *Sivsivadze v. Minister for Justice Equality and Law Reform* [2015] IESC 53 [2016] 2 I.R. 403. The family and domestic circumstances of the applicant are considered under the headings of s. 3(6)(c) of the Immigration Act 1999 and art. 8 of the ECHR. The submission referred to the lack of information as to the applicant's relationship with the partner and her children, and considers that the representations did not disclose a durable relationship akin to marriage.

4. Leave was granted by O'Regan J. on the 24th July, 2017. The applicant's grounding affidavit includes some further detail about the nature of the relationship, particularly with the partner's children, which was never put to the Minister prior to the decision.

5. I have received helpful submissions from Ms. Sunniva McDonagh S.C. (with Mr. Paul O'Shea B.L.) for the applicant and from Ms. Denise Brett S.C. (with Ms. Elizabeth Cogan B.L.) for the respondent.

**Relief sought**

6. The only substantive relief sought is an order of *certiorari* directed to the deportation order. The only substantive ground is an allegation that the Minister acted unlawfully in failing to consider the constitutional rights engaged by the applicant's deportation "*in circumstances where constitutional rights are engaged by the said deportation and where representations in that regard were made to her".*

**A decision cannot be condemned by reference to failure to consider a point that was not put to the decision-maker.**

7. On a number of previous occasions, I have made it clear that it is not open to an applicant to condemn a decision on the basis of a point that has occurred to him or her later, and that was not put to the decision-maker. Indeed, sometimes a completely different point was put, a practice I have described as gaslighting of the decision-maker (see *J.M.N. (a minor) v. Refugee Appeals Tribunal* [2017] IEHC 115 [2017] 2 JIC 2710 (Unreported, High Court, 27th February, 2017), *Igbosonu v. Minister for Justice and Equality (No. 2)* [2017] IEHC 748 [2017] 12 JIC 0503 (Unreported, High Court, 5th December, 2017), *H.E. (Egypt) v. Minister for Justice and Equality (No. 3)* [2017] IEHC 810 [2017] 12 JIC 1304 (Unreported, High Court, 13th December, 2017) and *I.S.O.F. v. Minister for Justice Equality and Law Reform* [2010] IEHC 457 (Unreported, Cooke J., 17th December, 2010). The only mention of constitutional rights in the submission made to the Minister is in the context of the duration of the deportation order, a point addressed by the Minister in a discrete finding that is not specifically challenged. The points now being made were not put, and thus cannot be the basis of a challenge.

**Consideration does not mean a narrative discussion - a decision should not be condemned for lack of the latter.**

8. Even if I am wrong about the foregoing, a decision cannot be condemned because of a lack of a narrative discussion of a point that requires consideration, provided that the point was considered and a reason given. Generally, there is no obligation to discuss the point further. The statement of grounds pleads that the Minister fails to "*consider*" the rights of the applicant. This is elaborated at p. 2 of the written submissions, that as regards "*the personal rights of the applicant and his family under Articles (sic) 40.2.3*[°]" (there is no Article 40.2.3°, possibly 40.3.1° is intended), the Minister failed "*to consider at all the said rights*". Unfortunately, this is simply incorrect on the facts. The Minister stated that she considered all submissions (see p. 4 of the analysis) and there has been no proof that this is incorrect (see *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418, at 426 to 427, *per* Hardiman J.). Absence of further narrative discussion does not mean that the point was not considered. No question of inadequacy of reasons is pleaded.

**Apart from the special case discussed in *Gorry*, there is no obligation on the Minister to expressly and precisely identify the constitutional rights of applicants.**

9. If I am wrong about the foregoing, one turns then to the substance of the complaint that the Minister failed to "*consider*" the applicant's rights. While in *Gorry v. Minister for Justice and Equality* [2017] IECA 282 (Unreported, Court of Appeal, 27th October,

2017) (under appeal), the Court of Appeal was of the view that the Minister should first identify any constitutional rights as between a non-national and an Irish citizen spouse as the primary *locus* of protection, that should not be generalised to mean that the Minister is obligated to identify any and all constitutional rights in respect of any and all applicants. Indeed the judgment in *Gorry* specifically delineated the circumstances to which that decision was to apply (*per* Finlay Geoghegan J. at para. 90 and *per* Hogan J. at para. 5). This is so particularly at a time when the extent of the rights under the Constitution of unmarried persons could be regarded as being in flux, or at the very least subject to debate (see e.g. *G.T. v. K.A.O.* [2008] 3 I.R. 567 (McKechnie J.)). Under those circumstances, it is not reasonable to expect the Minister to achieve a greater level of jurisprudential certainty than is available to judges. Having said that, if one were to apply the *Gorry* approach, one might be of the view that it is best practice for the Minister to consider *proprio motu* the constitutional rights of the applicant and any affected third parties under Articles 40 to 44, as well as any issues under the ECHR (as implemented by the European Convention on Human Rights Act 2003), but departure from best practice is not a basis for granting *certiorari*.

**The applicant's family life was considered, albeit under the heading of the ECHR rather than the Constitution.**
10. Given that I am not prepared to generalise from *Gorry* to cover all claims of breach of constitutional rights, it seems to me that the key issue here is whether the substance of the applicant's rights was considered rather than whether a correct box-ticking exercise was entered into to put this discussion under the constitutional heading rather than the art. 8 heading. That is particularly so in the case of the non-marital family, where no basis has been asserted to suggest that the constitutional rights of non-married couples are wider than their rights under art. 8 of the ECHR.

11. As to whether the constitutional and ECHR rights should be considered separately or together, my own view in *A.B.M. v. Minister for Justice and Equality* [2016] IEHC 489 [2016] 7 JIC 2934 (Unreported, High Court, 29th July, 2016), from which the Court of Appeal obviously differed, had been that there was no huge reason in principle to treat differently ECHR and constitutional rights in this area. In this regard it is noteworthy that the Supreme Court in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 I.R. 795 at 823 para. 85(7) per Denham J., as she then was, stated that "*The Minister should also consider the Convention rights of the applicants … These rights overlap to some extent and may be considered together with the constitutional rights*." It would appear that this specific paragraph may not have been drawn to the attention of the Court of Appeal in *Gorry*.

12. In the present case, the Minister considered the relationship between the parties and took the view that it had not been shown to be durable akin to a marriage. That appears to me to be a lawful finding, even taking it that unmarried partners in a durable relationship are entitled to assert constitutional rights towards each other, or even towards children of the other partner (incorrectly called step-children in the papers). The applicant's family circumstances are considered, albeit under the heading of art. 8, and the Minister essentially relies on "*the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State*". That seems to me to be a lawful finding. More particularly, it seems to me to address the substance of the applicant's rights insofar as they arise under the Constitution as well as art. 8. A decision should not normally be condemned for failure to engage in the correct box-ticking exercise as long as it does not substantively infringe rights.

**Order**
13. For the foregoing reasons the order will be that the application be dismissed.