Neutral Citation [2016] IEHC 489

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 449 J.R.]

BETWEEN

A.B.M. AND B.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. In August, 1999, the first named applicant claims he left Nigeria for Italy, *via* Togo. He left children behind in Nigeria at that point.

2. On 21st September, 2000, the second named applicant applied for asylum in Ireland, having come from Nigeria where she left children of her first marriage behind in the care of her sister.

3. On 16th January, 2001, the second named applicant obtained a divorce from her first husband.

4. On 28th August, 2002, the Refugee Applications Commissioner refused to recommend the asylum claim of the second named applicant.

5. On 13th September, 2006, the first named applicant, having arrived in the State, applied for asylum.

6. On 21st October, 2006 (notably, only a month after the applicants were both located in the State), both applicants entered into what is referred to as a "religious marriage", which is said not to have been legally binding. The second named applicant was unlawfully present in the State at that time. The first named applicant's position was precarious in that he was only present on the basis of an asylum claim.

7. On 8th March, 2007, the Refugee Applications Commissioner recommended refusal of the first named applicant's asylum claim.

8. On 26th June, 2007, the second named applicant was given permission to remain in the State.

9. The first named applicant appealed the refusal of asylum to the Refugee Appeals Tribunal, but this was also refused on 7th September, 2007.

10. On 31st October, 2007, the first named applicant submitted an application for subsidiary protection and made representations under s. 3 of the Immigration Act 1999. The application for subsidiary protection was refused on 8th April, 2008.

11. A deportation order was made on 18th June, 2008, and notified to the first named applicant by letter, dated 24th June, 2008. He was required to present himself to the Garda National Immigration Bureau (G.N.I.B.) on 15th July, 2008. He failed to do so and thereafter became an evader for a lengthy period up to July, 2015.

12. In August, 2013, the second named applicant became an Irish citizen.

13. In December, 2013, the Minister adopted a policy document regarding family reunification for non-EEA nationals.

14. On 9th January, 2014, the first named applicant, while continuing to evade the G.N.I.B., requested the Minister revoke the deportation order under s. 3 (11) of the 1999 Act.

15. On 9th February, 2015, the parties underwent a civil marriage ceremony.

16. On 13th July, 2015, a submission was prepared on behalf of the Minister recommending refusal of the s. 3(11) application. On this same date, the Minister undertook not to deport the first named applicant until the consideration of the application under s. 3(11) had taken place.

17. On 17th July, 2015, the Minister was informed that the second named applicant was pregnant (at that point, she would have been around four months pregnant).

18. The formal decision refusing the s. 3(11) application was issued on 20th July, 2015. The Minister also informed the applicants that the undertaking made on 13th July, 2015 had expired and the second named applicant was requested to attend before G.N.I.B. on 28th July, 2015.

19. The present proceedings were commenced and leave was granted on 27th July, 2015.

20. On 4th August, 2015, Stewart J. refused to grant an injunction restraining deportation, pending the determination of the proceedings. The applicant was then deported on 22nd September, 2015.

21. In December, 2015, the child of the applicants was born.

Did the Minister fail to recognise the nature and strength of the applicants' rights under Article 41?
22. In a very able submission on behalf of the applicants, Mr. Colm O'Dywer S.C. (with Mr. Ian Whelan B.L.), for the applicants, submits that the decision is invalid in law because the Minister's proportionality examination was flawed due to a failure to recognise the nature and strength of the rights of the applicants under Article 41 of the Constitution.

23. He places particular reliance on the decision in *Gorry v. Minister for Justice & Equality* [2014] IEHC 29 (Unreported, High Court, 30th January, 2014), where, at para. 44, Mac Eochaidh J. says that "*[t]he starting point in any consideration where a mixed Irish and non-Irish nationality couple seeks to live in Ireland is that they have a* prima facie *right to do so by virtue of Article 41 of the Constitution*".

24. Mr. O'Dwyer's argument is that this *prima fa*cie right is acknowledged in *Gorry*; the Minister's proportionality analysis fails to begin from a recognition of that *prima facie* right and, accordingly, the analysis is flawed.

25. First of all it is worth emphasising that the point made in *Gorry* was substantially qualified in the later case of *S.A. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 226 (Unreported, High Court, Mac Eochaidh J., 14th April, 2015), where he said at para. 13 that it was not incumbent on the Minister to commence an assessment of the rights of recently married spouses with a recognition of a *prima facie* right to live together in the State.

26. It has been a constant refrain of the European Court of Human Rights that there is no automatic obligation on a State to respect the choice of place of residence decided upon by a particular family: see *Jeunesse v. Netherlands* (Application no. 12738/10, Grand Chamber of the European Court of Human Rights, 3rd October, 2014) at para. 103. The State, in such situations has to be afforded a certain margin of appreciation: see *Jeunesse*, para. 106; *Tuquabo-Tekle v. Netherlands* (Application no. 60665/00, European Court of Human Rights, 1st December, 2005) at para. 42; and also Ahmut v. Netherlands (Application no. 21702/93, European Court of Human Rights, 28th November 1996), at para. 63. There is no logical reason why there should be a significantly different position under Article 41 of the Constitution. It is true, of course, that Article 41 uses somewhat more emphatic language than art. 8 of the ECHR, but neither provision exists in a vacuum. Even Article 41 cannot be interpreted in such a way as to fail to cohere with the overriding objective of an ordered society.

27. It is one thing to say that a married couple, or partners in a domestic relationship, have a legitimate interest in living together, which should be given due regard by the State. It is quite another to assert that they have a "*prima facie* right" in that regard.

28. Voluntary assumption of risk is the key element here. Parties who choose to either get married or become involved in equivalent domestic relationships must be taken to do so in the knowledge of whatever factual and legal obstacles might exist to their living together. Differing nationalities, lack of legal status, liability to imprisonment, extradition, or European Arrest Warrant proceedings, financial difficulties which curtail the practical options for cohabitation, and many other issues are matters that such parties must be taken to have had regard to.

29. In his decision in *X.A. (a minor) v. Minister for Justice, Equality & Law Reform* [2011] IEHC 397 (Unreported, High Court, 25th October, 2011), Hogan J. speaks sternly about the need for the courts to vindicate rights where couples are being forcibly separated by the State (followed in his later judgment in *E.A. v. Minister for Justice and Equality* [2012] IEHC 371 (Unreported, High Court, 7th September, 2012))

30. However, it is not the State that forcibly separates a couple where one of the parties, at all material times, had a precarious immigration status and one does not. It is the parties themselves who have primary responsibility for the situation where they entered into a relationship which is built on such shaky foundations.

31. It would be destructive of any ordered immigration control system if a person could convert his or her *prima facie* illegal status into a *prima facie* legal one merely by the expedient of either getting married or entering into an art. 8 type relationship with a person who has an entitlement to be in the State.

32. I appreciate that *Gorry* was followed by Eagar J. in *Ford v. Minister of Justice & Equality* [2015] IEHC 720 (Unreported, High Court, 19th November, 2015), but that decision seems to be simply an application of *Gorry*, rather than a detailed discussion of it.

33. In *Khan v. Minister for Justice & Equality* [2014] IEHC 533 (Unreported, High Court, 14th November, 2014), Noonan J., while not asked to debate the correctness or otherwise of *Gorry*, nonetheless concluded that "*it is axiomatic that the mere fact of marriage between an Irish citizen and a non-national cannot of itself give rise to any automatic or absolute right for the couple to reside in the State*" (para. 33). Noonan J., in any event, made the point that "*rights do not exist in a vacuum and the court cannot ignore the factual matrix within which such rights are said to arise*" (para. 52) and, on that basis, found the *Gorry* case readily distinguishable.

34. In *G.O. (a minor) v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 19, Birmingham J. in considering similar issues said that a person cannot come to the State on a false basis, as indicated by making an unsubstantiated asylum claim, and then arrange his or her family affairs so as to frustrate the enforcement of immigration control. A precisely similar point applies to the present applicants.

35. The notion of a "*prima facie* right" to reside in Ireland deriving from the very status of marriage itself, as referred to in *Gorry*, needs, I think, slight rephrasing. In my view, there is no such *prima facie* right. Presence in the State which is unlawful cannot be converted into the lawful or *prima facie* lawful merely by a ceremony of marriage. A married couple, one of whom is a citizen, should receive *prima facie* acknowledgement and consideration of their status under Article 41 of the Constitution, but that does not mean either that a deportation decision has to be phrased in any particular way (still less to use terms such as "*prima facie*"), or that such acknowledgment amounts to a right or even a *prima facie* right in any particular case or precludes the deportation of any particular applicant. Cases fall on a spectrum. For example, a sham marriage to an Irish national conducted for immigration purposes confers no rights on an applicant to resist deportation, whether pursuant to Article 41 or otherwise. A last-ditch marriage by an illegal immigrant may confer no rights to resist deportation. A non-national who marries an Irish citizen prior to his or her arrival in the State is arguably in a marginally stronger position, and a settled migrant stronger still.

36. In any event, even if the applicants can assert some form of (in my view, non-existent) *prima facie* right (as opposed to acknowledgement), Mac Eochaidh J. in *Gorry* and *S.A.* and Noonan J. in *Khan* recognised that it can be outweighed by countervailing considerations. Indeed, in *P.S. v. Minister for Justice, Equality & Law Reform* [2011] IEHC 92 (Unreported, High Court, 23rd March, 2011), Hogan J. said at para. 23 that the circumstances in which the interests of immigration control may have to yield to Article 41 rights may perhaps be "*unusual and exceptional*".

Is there an error in the Minister's reasoning?
37. The applicants rely on the discussion in *Gorry* which is critical of a passage in the Minister's analysis which is quoted at para. 43 of that decision, and which includes the phrase that "*there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction*". However, that quotation is part of a longer passage, the earlier part of which is quoted in a separate part of the judgment in *Gorry* at para. 37. This includes the phrase that "*it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted*".

38. Mac Eochaidh J. took the view that the sentence quoted in isolation at para. 43 was in error. As set out above, I do not consider that it was in error, but in any event, if one reads that in the context of the earlier sentence, it is clear that the Minister's analysis is sensitive to the possibility that Article 41 rights exist, although they are not absolute. Where is the error in that reasoning? It is very hard to discern.

39. What appears to be unquestionable is that the State has an entitlement to give effect to the immigration control system. In particular circumstances, applicants may have rights under Article 41 of the Constitution or art. 8 of the ECHR to which the Minister should have regard, where those rights exist. It is for the Minister in the first instance to put those rights into the balance against the State's legitimate entitlement to enforce the immigration control system in a reasonable and proportionate manner. As with any administrative decision, reasonableness and proportionality are, in the first place, a matter for the Minister. The court should only intervene if the Minister's assessment is clearly unlawful.

40. That, to some extent, is a difficulty with decisions such as that of Hogan J. in *X.A.*, where he said that a decision which compels a couple to live more or less permanently apart "*is one which, quite obviously, requires compelling justification*" (at para. 21), quoting his own decision in P.S.

41. An example of the practical ramifications of the *X.A.* approach is the judgment in *Ford*, where Eagar J., at para. 60, quotes the foregoing passage and then asserts that "*it appears to me that in this case the appeals officer did not pay sufficient attention to, or consider appropriately Article 41 of the Constitution*".

42. To my mind, these decisions really raise the question: who is running Ireland's immigration system? Is it the Minister for Justice and Equality or the courts? To quash an immigration decision on the grounds that insufficient compelling reasons have been furnished to override rights of a person married to an Irish citizen is not very far short of telling the Minister to grant the applicant concerned permission to be in the State. Such an order may be justified of course in particular circumstances but would seem to me to require something very tangible to warrant it. First of all, I do not accept the proposition that the Minister requires "*compelling justification*" to require a non-national to leave the State in circumstances where he or she is married to a person who is entitled to be in the State. *A fortiori*, therefore, I would not accept the proposition that the alleged requirement for a "*compelling justification*" is "*quite obvious*". On the contrary, it seems obvious that there is no such necessary requirement. The extent of any rights under Article 41 will depend on the circumstances. At one end of the spectrum, one can take a marriage of convenience, which as the law stood before 2015 was not generally regarded as void. Why should the Minister require "*compelling justification*" to separate a party to a marriage of convenience from the other party? No rational system could tolerate such a requirement. Alternatively, take a situation where a person has entered into in a marriage at a time when his or her immigration status was precarious or unlawful. A rational immigration control system could not function if the mere act of entering into such a marriage gave rise to a requirement on the part of the Minister to come forward with "*compelling justification*" before removing such a person. A person with no right or entitlement to be in the State does not generate such a right merely by going through a ceremony of marriage.

43. By contrast with the foregoing, a settled migrant may well have significantly greater entitlements as a result of entering into a marriage, and compelling justification will frequently be required here for action which has the effect of impacting on the marriage. And indeed there may also be circumstances in which action which may separate family members of non-settled families will also require compelling justification – for example where the Minister intends to grant permission to one member of a precarious couple and refuse it to the other. But a one-size-fits-all rule that "*compelling justification*" is "*quite obviously*" necessary to require spouses to live apart in all cases is not a manifestation of proportionality.

44. In the light of these considerations, I would not accept the description of applicants in this situation as persons "*who have been forcibly separated by State action*" (*X.A.*, para. 33). Applicants who find one partner liable to deportation are generally persons who have voluntarily put themselves in that situation. It is their conduct that has given rise to the situation where there may have to be a parting of ways. To put the whole thing down to "*State action*" is a denial of the dignity and indeed honesty that comes from the individual's own ownership of the situation. If, as Sartre tells us, to be responsible is to be the uncontested author of an event or thing, then seeking to blame the State for a situation one has created oneself is a fundamental denial of responsibility.

45. Ultimately, as Noonan J. in effect considered in *Khan*, voluntary assumption of risk is the key issue: the applicants "*embarked on a relationship which they must have known from the outset was potentially liable to end in permanent separation*" (at para. 58). The approach taken in *Khan* was that irrespective of any infirmity in the overriding of the Minister's analysis, the "*balancing exercise undertaken by the Minister*" was lawful and the Minister was "*still entitled to come to the view that even where Article 41 and Article 8 arose and were engaged, the countervailing interest of the State in maintaining the integrity of the immigration process ought to prevail over those rights*" (para. 60) (see also *B.U. v. Minister for Justice and Equality* [2010] IEHC 371 (Unreported, High Court, Clark J., 29th September, 2010); *M.E.O. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 448 (Unreported, High Court, Cooke J., 2nd November, 2012) at para. 15 and P.S. at paras. 22 and 23).

46. The same situation applies in this case. It is a matter for the Minister to balance the interests involved. She has done so, and the balancing exercise is not unlawful or disproportionate. Article 41 of the Constitution was clearly considered.

47. I would not accept the premise that it is sufficient for a court to determine that the Minister's balancing exercise failed to "*pay sufficient attention to or consider appropriately Article 41*" (*Ford*, para. 60) without some specific and clearly identified unlawfulness being established. No such infirmity has been established here.

Is the decision invalid by reason of the use of an "insurmountable obstacles" test?
48. Mr. O'Dwyer objected to the Minister's analysis because it included the phrase that there were no "*insurmountable obstacles to the applicants' relationship continuing if the deportation was effected*", relying on Mac Eochaidh J.'s decision in *Gorry*, to the effect that there was no "*insurmountable obstacles*" test (para. 31).

49. However, as Ms. Silvia Martinez B.L., for the respondent, correctly points out, this is essentially a semantic issue because Mac Eochaidh J. also recognised at para. 36 that the insurmountable obstacles test is "*derivative language which can only be understood*

in the context of all of the cases from which it is derived". Given that the question of the existence of "*insurmountable obstacles*" has been posed extensively in caselaw, it seems to me that it would not be appropriate to assume that the Minister was not aware of its meaning in connection with such caselaw – the meaning being that it is a legitimate question but not an all-or-nothing pass-or-fail test. It is not for the applicant, or indeed the High Court, to dictate to the Minister how she should phrase her decisions.

50. The insurmountable obstacles question has been set out in numerous decisions of the European Court of Human Rights, and noted with approval in *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595 (Unreported, High Court, 2nd December, 2009) per Clark J. at para. 98 and *Dos Santos v. Minister for Justice* [2014] IEHC 559 (Unreported, High Court, 19th November, 2014) per McDermott J. at paras. 61 to 81. Furthermore, the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 (Denham J.), cited with approval a quotation from Lord Phillips in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, which posed the insurmountable obstacles question (see also: *A.A. v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 564 (Clarke J.)).

51. I agree with Mac Eochaidh J. that there is no "insurmountable obstacles" *test*, in the sense of a determinative bar which an applicant must meet or fail to meet. Rather the question of insurmountable obstacles is just one of a basket of criteria or questions that can be asked as to the overall circumstances. The absence of insurmountable obstacles does not and should not guarantee rejection of a claim.

52. A decision is not invalid simply by referring to insurmountable obstacles. (See also my recent decision in *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 (Unreported, High Court, 24th June, 2016)). Furthermore, the substance of this decision addresses the issue of proportionality and therefore it is not invalid under this heading.

53. Mr. O'Dwyer submits that it would be unreasonable to expect the second named applicant to move to Nigeria, given that she has lived here since 2000. She is an Irish citizen and has a job. These are all factors which would, of course, militate against such a move, but ultimately it is up to the second named applicant to decide whether she values the congeniality of living in the State more than that of living with her husband. That is really a matter for her. Many couples in similar situations have relocated over the millennia; many have not. It is a matter on which each couple must makes its own decision. There is clearly nothing preventing the family from relocating as a family to Nigeria. If the second named applicant would prefer not to do so because she finds life in the State expedient and has managed to secure citizenship here, then that is her privilege.

Is the decision invalid for failure to have regard to the non-EEA family reunification policy document?
54. Mr. O'Dwyer submits that the applicants would appear to qualify for family reunification under the policy document, but the Minister did not rely on the document in her submissions. He says that the policy document does not clearly state that it does not apply to revocation decisions.

55. This point is without substance. The applicants did not make any point in relation to the policy document. In any event, it is perfectly reasonable for the Minister to apply admission policies in general only to persons who properly apply from outside the State (see my decision in *Li v. Minister for Justice and Equality (No. 1)* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015; and the decision of Charleton J. in *Y.O. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 148 (Unreported, High Court, 11th March, 2009) and that of Edwards J. in *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, 5th April, 2011)). The first named applicant does not have any legal entitlement to rely on a policy document which is primarily designed to be addressed to persons who are in compliance with the State's immigration system.

Order
56. For the foregoing reasons, I will order:-

(i) that the application be dismissed; and

(ii) that the proceedings be adjourned to a date to be fixed for the purpose of enabling the applicants to make any application for leave to appeal, subject to furnishing advanced written notice of any question of law involved and written submissions supporting any such application.